

# COLORADO REVISED STATUTES



TITLES 13-15

2012





# Colorado Revised Statutes 2011

Titles 13-15  
Courts and Court Procedure  
Domestic Matters  
Probate, Trusts, and Fiduciaries



Edited, Collated, Revised,  
Annotated, and Indexed  
Under the Supervision and Direction of the

COMMITTEE ON LEGAL SERVICES

by

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*Reenacted by the General Assembly as the  
Positive Statutory Law of Colorado of a General and Permanent Nature  
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COLORADO REVISED STATUTES**

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**CERTIFICATION  
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The Committee on Legal Services hereby certifies that the 2012 Colorado Revised Statutes includes all the laws of a general and permanent nature of the state of Colorado as revised and reenacted in Colorado Revised Statutes 1973, together with all of the laws of a general and permanent nature enacted by the General Assembly subsequent to 1973, as corrected, collated, and revised as authorized by and in conformity with Article 5 of Title 2, Colorado Revised Statutes.

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## Source Note Information

A source note shows the legislative history of a C.R.S. section and is located immediately after the text of the section. The source note for each section indicates the year the section was added, each year it was amended, and the page of the Session Laws and the section of the bill where the amendment can be found. The source note includes the number of the section in prior codifications when applicable. For amendments made after 1973, information on each specific provision of the section that has been changed by a bill, the specific change to the provision (i.e. added, added with relocations, amended, amended with relocations, repealed, repealed and reenacted, or recreated and reenacted), and the effective date of the bill are shown.

The legislative history is arranged by year of passage; if the section was amended by two or more acts in the same year, the order of the information for that year is determined by the effective dates of the acts. The effective date in the source note indicates the date the act or portion of the act takes effect even if the text of the amendment indicates a different date. If the year is not included with the month and day, the provision is effective the year of passage. Additional information to assist the user in researching C.R.S. sections can be found beginning on page vii.

The following provides a further explanation of the information found in a source note:

“L.” is the symbol for “Session Laws” and will be followed by a number indicating the year when the C.R.S. section was changed by an act generally either creating new law, amending existing law, or repealing existing law; except that, in the constitution, “L.” also means constitutional measures referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election.

“Ex. Sess.” is the symbol for “Extraordinary Session”. If this symbol follows the year, the amended provision can be found in the Session Laws for an extraordinary session for that year and not in the Session Laws for the regular session of the General Assembly for that year (S, S2 in the Red Book).

“p.” is the symbol for “page” and will be followed by a number indicating the page of the Session Laws where the amendment to the C.R.S. section can be found.

“§” is the symbol for “section” and will be followed by a number indicating the section of the act where the amendment to the C.R.S. section can be found.

“IP” is the symbol for the “introductory portion” to a section, subsection, paragraph, or subparagraph.

“Added” means the provision was newly enacted by the act (N in the Red Book).

“Added with relocations” means the provision in existing law was relocated from one title, article, part, or section to another title, article, part, or section with amendments by the act.

“Amended” means the provision in existing law was amended by the act (A in the Red Book).

“Amended with relocations” means the provision in existing law was amended to reorganize an entire title, article, part, or section by the act.

“Repealed” means the provision was deleted from the existing law by the act through the use of a repeal provision (R in the Red Book).

“R&RE” is the symbol for “Repealed and Reenacted” and means the provision in existing law was repealed and reenacted by the act (RE in the Red Book).

“RC&RE” is the symbol for “Recreated and Reenacted” and means a previously repealed provision has been recreated by the act (RC in the Red Book).

“Added by revision” means a provision providing for the repeal of a statutory provision on a specified date has been added by the Revisor of Statutes as a C.R.S. provision. Adding the provision is necessary because a separate section of the act provided for the repeal of the provision with a future effective date.

“Initiated” means a provision that was amended by means of an initiated petition approved by a vote of the people of Colorado at a general or an odd-year election.

“Referred” means a provision that was amended by a measure referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election; except that, in the constitution, a referred measure is indicated by “L.” and also means constitutional measures referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election.

Starting in 2009, references to the bill number and chapter number have been included in the source note. If you are conducting a search on-line, the bill number reference within the source note links directly to the bill itself.

## **Colorado Statutory Research**

Legislative history is not already written. It must be compiled by the researcher from many different sources and materials. The following information is a helpful starting point in identifying information you wish to research. Consult the red book table distributed with the session laws, the softbound editions of Colorado Revised Statutes beginning in 1997, the comparative tables located in the back of the C.R.S. index, C.R.S. 1963 and subsequent cumulative supplements thereto through 1971, and C.R.S. 1973 and annual cumulative supplements thereto through 1996.

Prior to 1921, enacted laws were not compiled into a comparative table, thereby making it more difficult to track the legislative history. Determining the subject matter in the statutory index is the only choice for tracking the history of a statute since a statute did not retain its original number. The General Statutes of 1883 arranged laws into numbered chapters, alphabetically entitled, collated, and arranged by sections. This became the foundation and

model for compiling the statutes until the codification of C.R.S. 1973. (See Revised Statutes of Colorado 1908, An Act Providing For the Compilation, Publication, and Distribution of all the general statutes of the state.)

References in some source notes throughout the Colorado Revised Statutes to “Code 08”, “Code 21”, and “Code 35” are to the Revised Statutes of Colorado 1908, the Compiled Laws of Colorado 1921, and the Colorado Statutes Annotated 1935, respectively. Each of these volumes set forth the general statutes of the state of Colorado, including the Code of Civil Procedure and, in 1935, the Colorado Supreme Court Rules. On January 6, 1941, the Colorado Supreme Court adopted the new Rules of Civil Procedure, which became effective on April 6, 1941, resulting in the publication of a replacement volume. Thereafter, the publication of the Colorado Court Rules, although a continuing part of the Colorado Revised Statutes, contained a combination of the Federal Rules and the Colorado Code of Civil Procedure and, in addition, included some provisions that were entirely distinct from both the Federal Rules and the Colorado Code of Civil Procedure, as adopted or amended by the Supreme Court of Colorado.

To research a statute as it existed in previous years, the following is a chronological list of C.R.S. publications and the correct citation for each publication.

Revised Statutes of Colorado	(1868)	R.S.
General Laws of Colorado	(1877)	G.L.
General Statutes of Colorado	(1883)	G.S.
Revised Statutes of Colorado	(1908)	R.S. 08
Compiled Laws of Colorado	(1921)	C.L.
Colorado Statutes Annotated	(1935)	CSA
Colorado Revised Statutes 1953	(1953)	CRS 53
Colorado Revised Statutes 1963	(1963)	C.R.S. 1963
Colorado Revised Statutes	(1973)	C.R.S.

**Comparative Tables:**

- R.S. 08 to C.L. 1921 - located in the front of the C.L. 1921
- C.L. 1921 to CSA 1935 - located in the back of the Index to CSA 1935
- CSA 1935 to CRS 1953 - located in the front of the Index to CRS 1953
- CRS 1953 to C.R.S. 1963 - located in the front of the Index to C.R.S. 1963
- C.R.S. 1963 to C.R.S. - located in the back of the Index to C.R.S.

**Supplements to C.R.S. 1963 include:**

- 1965 hardbound supplement containing laws enacted in 1964 and 1965
- 1967 hardbound supplement containing laws enacted in 1966 and 1967
- 1969 hardbound supplement containing laws enacted in 1968 and 1969
- 1971 hardbound supplement containing laws enacted in 1970 and 1971

The softbound publication of the “Official Report of the Committee on Legal Services” was not intended as an official publication of our office. Copies were distributed to the members of the General Assembly for the purpose of certifying the laws enacted in the 1972 and 1973 Sessions for inclusion in the compilation of the 1973 C.R.S., which was not available until 1974. To find the 1972 or 1973 amended language, refer to the session laws of either 1972 or 1973.



**Supplements and Replacement Volumes to C.R.S. 1973 and, on and after 1983, to Colorado Revised Statutes**

<b>Titles</b>	<b>Supplements to C.R.S. 1973 and, on and after 1983, to Colorado Revised Statutes</b>	<b>Replacement Volumes and Supplements to Replacement Volumes</b>
Titles 13 to 15	1975-86 Supplements	<b>1987 Replacement Volume</b> 1988-96 Supplements <b>Vol. 6A</b> - Title 13 1988-96 Supplements <b>Vol. 6B</b> - Titles 14 & 15 1988-96 Supplements

**Starting in 1997**, annual softbound volumes are published each year.

For additional information on researching legislative history, see [www.leg.state.co.us](http://www.leg.state.co.us), Services Agencies, and select Legislative Legal Services. Choose Legal Topics and click on Researching Legislative History.

**Bills Enacted Without A Safety Clause  
Explanation of Effective Date**

If a bill is enacted without a safety clause and an effective date is not indicated in the bill, the effective date is the day following the expiration of the ninety-day period after final adjournment of the General Assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state Constitution unless a referendum petition is filed against the act within such time period. If a referendum petition is filed, the act, if approved by the people, will take effect on the date of the official declaration of the vote thereon by proclamation of the Governor or the date indicated in the act if it is later than the Governor’s proclamation. The source note for a provision contained in such an act will indicate the actual date following the ninety-day period or the date set out in the act. If a referendum petition is filed, the date in the source note will be adjusted accordingly in the next publication following the election where the referendum petition is considered.

**Annotations**

Beginning in 2012, the annotations for Colorado state appellate court decisions include both public domain and regional reporter case cites. In preparing annotations to court decisions, we endeavor to include the most recent decisions. Occasionally, this may result in the inclusion of a decision before it becomes finalized and published in an official reporter. In such instances, the case cite will contain blank spaces for the volume and page number of the reporter. The volume and page number will be substituted for the blank spaces in subsequent publications of the statutes.



## **TITLE 13**

# **COURTS AND COURT PROCEDURE**

# THE 18

THE 18

# **TITLE 13**

## **COURTS AND COURT PROCEDURE**

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## COURTS OF RECORD

### ARTICLE 1

#### General Provisions

**Cross references:** For the disposition of fines and fees levied and collected in state courts, see § 30-10-102 (2); for the disposition of fines, penalties, or forfeitures collected pursuant to title 42, see § 42-1-217.

**Law reviews:** For a discussion of Tenth Circuit decisions dealing with courts and procedure, see 66 Den. U. L. Rev. 739 (1989); for a discussion of Tenth Circuit decisions dealing with courts and procedure, see 67 Den. U. L. Rev. 675 (1990).

#### PART 1

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##### COURT SECURITY CASH FUND COMMISSION

## PART 1

## ADMINISTRATIVE PROVISIONS

**13-1-101. Clerks shall keep record books.** The clerks of the courts of record in this state shall keep in their respective offices suitable books for indexing the records of their said offices, one to be known as the direct index and one as the inverse index.

**Source:** L. 1889: p. 107, § 1. **R.S. 08:** § 1392. **C.L.** § 5610. **CSA:** C. 46, § 1. **CRS 53:** § 37-1-1. **C.R.S. 1963:** § 37-1-1.

## ANNOTATION

**Books of court are admissible as evidence.** If the county court permits one of the books of its office to be taken into another court as evidence, the objection that the original, and not a

certified copy, is produced is not tenable. *McAllister v. People ex rel. Brisbane*, 28 Colo. 156, 63 P. 308 (1900).

**13-1-102. Entries in records.** In said indexes, the clerks shall properly enter the title of each cause or matter instituted in said courts and the case number references to the various orders, rulings, judgments, papers, and other proceedings of the court in such cause or matter. Any case number reference may be to a file jacket, page in a record book, microfilm record, or computer record.

**Source:** L. 1889: p. 107, § 2. **R.S. 08:** § 1393. **C.L.** § 5611. **CSA:** C. 46, § 2. **CRS 53:** § 37-1-2. **C.R.S. 1963:** § 37-1-2. **L. 79:** Entire section amended, p. 596, § 1, effective July 1.

**13-1-103. Lost or destroyed records.** When the record of any judgment, or decree, or other proceeding of any judicial court of this state, or any part of the record of any judicial proceeding has been lost or destroyed, any party or person interested therein, on application by complaint in writing under oath to such court and on showing to the satisfaction of such court that the same has been lost or destroyed without fault or negligence of the party or person making such application, may obtain an order from such court authorizing the defect to be supplied by a duly certified copy of the original record, where the same can be obtained, which certificate shall thereafter have the same effect as the original record would have had in all respects.

**Source:** L. 1889: p. 108, § 1. **R.S. 08:** § 1396. **C.L.** § 5614. **CSA:** C. 46, § 5. **CRS 53:** § 37-1-4. **C.R.S. 1963:** § 37-1-4.

**13-1-104. Application for new order or record.** When the loss or destruction of any record or part thereof has happened, and such defects cannot be supplied as provided in section 13-1-103, any party or person interested therein may make a written application to the court to which such record belonged, verified by affidavit, showing the loss or destruction thereof, and that certified copies thereof cannot be obtained by the party or person making such application, and the substance of the record so lost or destroyed, and that the loss or destruction occurred without the fault or negligence of the party or person making such application, and that the loss or destruction of the record, unless supplied, will or may result in damage to the party or person making such application. The court shall cause said application to be entered of record in said court, and due notice of said application shall be given by personal service of summons or by publication as in other cases; except that, in cases in which publication is required, the court may direct by order, to be entered of record, the form of the notice, and designate the newspaper in which the same shall be published. If, upon such hearing, said court is satisfied that the statements contained in said application are true, the court shall make an order embracing the substance



and effect of the lost or destroyed record, which order shall be entered of record in said court and have the same effect which the original record would have had if the same had not been lost or destroyed insofar as concerns the party or person making such application and the persons who had been notified, as provided for in this section. The record in all cases where the proceeding was in rem and no personal service was had may be supplied upon like notice, as nearly as may be, as in the original proceeding.

**Source:** L. 1889: p. 108, § 2. R.S. 08: § 1397. C.L. § 5615. CSA: C. 46, § 6. CRS 53: § 37-1-5. C.R.S. 1963: § 37-1-5.

**13-1-105. Procedure where probate records destroyed.** In case of the destruction by fire or otherwise of the records, or a part thereof, of any court having probate jurisdiction, the court may proceed, upon its own motion or upon the application in writing of any party in interest, to restore the records, papers, and proceedings of the court relating to the estate of deceased persons, including recorded wills and wills probated or filed for probate in said court. The power of restoration granted in this section shall also extend to the records, papers, proceedings, and documents of any previous court of probate which are or should be in the custody of a probate or district court. For the purpose of restoring said records, wills, papers, or proceedings, or any part thereof, the court may cause citations to be issued to all parties to be designated by it and may compel the attendance in court of any witness whose testimony may be necessary to establish any such record, or part thereof, and the production of any and all written and documentary evidence which it deems necessary in determining the true import and effect of the original record, will, paper, or other document belonging to the files of the court, and may make such orders and decrees establishing such original record, will, paper, document, or proceeding, or the substance thereof, as to it seems just and proper. The court may make all such rules and regulations governing the proceedings for the restoration of the record, will, paper, document, and proceeding pertaining to the court as in its judgment will best secure the rights and protect the interests of all parties concerned.

**Source:** L. 1889: p. 109, § 3. R.S. 08: § 1398. C.L. § 5616. CSA: C. 46, § 7. CRS 53: § 37-1-6. C.R.S. 1963: § 37-1-6. L. 64: p. 224, § 56.

**13-1-106. Certified copy of record in supreme court or court of appeals.** In all causes which have been removed to the supreme court of this state or to the court of appeals, a duly certified copy of the record of such cause remaining in the supreme court or the court of appeals may be filed in the court from which said cause was removed, on motion of any party or person claiming to be interested therein, and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.

**Source:** L. 1889: p. 110, § 4. R.S. 08: § 1399. C.L. § 5617. CSA: C. 46, § 8. CRS 53: § 37-1-7. C.R.S. 1963: § 37-1-7. L. 69: p. 269, § 3.

**13-1-107. Costs of replacement.** The person making the application for the restoration of records shall pay all the costs thereof.

**Source:** L. 1897: p. 151, § 1. R.S. 08: § 1400. C.L. § 5621. CSA: C. 46, § 9. CRS 53: § 37-1-8. C.R.S. 1963: § 37-1-8.

**13-1-108. Judge may order adjournment.** When in the opinion of the judge of any district or county court it is unnecessary or inadvisable to hold or convene any term of court fixed by statute, he may by an order in writing signed by him and filed with the clerk of such court adjourn the same sine die, or to a day certain, and the judges of said courts respectively have power to adjourn said courts, from time to time as may seem advisable, by written order signed and filed with the clerk of the court which may be so adjourned.

**Source:** L. 1897: p. 151, § 1. R.S. 08: § 1407. C.L. § 5621. CSA: C. 46, § 12. CRS 53: § 37-1-9. C.R.S. 1963: § 37-1-9.

**13-1-109. Court may appoint trustee.** In all actions in any court of record of this state wherein any defendant is not found within the jurisdiction of the court and constructive service alone is had, and which is brought for the enforcement of an express, implied, or resulting trust, or for the removal of cloud from title to real estate, or for specific performance, or for the establishment of a lost or destroyed deed, conveyance, or instrument in writing, or for the establishment and proof of any conveyance, deed, or instrument in writing not properly proved and acknowledged, or in any other proceeding in rem, or affecting only specific property, where, according to the usual practice in courts of chancery, the court, if the defendant had been personally served, might direct or decree any act to be done or performed by the defendant in favor of plaintiff, the court may appoint a trustee for such defendant to do and perform in the place and stead of and for such defendant the acts required by the decree rendered in any such cause. Any act lawfully done by such trustee, under and in pursuance of any such decree, shall be as binding and effectual for all purposes as if done and performed by the defendant in pursuance of such decree.

**Source:** L. 1887: p. 254, § 1. R.S. 08: § 1408. C.L. § 5622. CSA: C. 46, § 13. CRS 53: § 37-1-10. C.R.S. 1963: § 37-1-10.

#### ANNOTATION

**Law reviews.** For note, "Decrees in Rem Under the New Rules", see 13 Rocky Mt. L. Rev. 140 (1941). For article, "A Decade of

Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951).

**13-1-110. Appeal bond defective or insufficient.** If, at any time pending an appeal in any action, suit, or other proceeding, it appears to the appellate court that the appeal bond or undertaking is defective or insufficient or that any surety thereon has died, or has removed or is about to remove from this state, or has become or is likely to become insolvent, such appellate court shall order another appeal bond or undertaking, or such other and further security as to the appellate court seems proper, if the appellant or his attorney of record has been served with at least twenty-four hours' written notice of an application of the appellee for such order. If the appellant fails to comply with said order within ten days after the making of the same, the appeal shall be dismissed.

**Source:** L. 19: p. 113, § 1. C.L. § 5623. CSA: C. 46, § 14. CRS 53: § 37-1-11. C.R.S. 1963: § 37-1-11. L. 87: Entire section amended, p. 1575, § 11, effective July 10.

#### ANNOTATION

**The appellate court has full powers of determining the sufficiency of appeal bonds.** Brown v. Ohman, 93 Colo. 561, 27 P.2d 588 (1933).

**An objection to the sufficiency of an appeal bond in a lower court cannot be raised for first time on review.** Brown v. Ohman, 93 Colo. 561, 27 P.2d 588 (1933).

**In effect this section abolishes motions to dismiss appeals for insufficient bond, and substitutes a motion for new bond, and where no such motion is filed, a motion to dismiss for defective bond is properly overruled.** Peters v. Peters, 82 Colo. 503, 261 P. 874 (1927).

**Powers of appellate court.** The appellate court can set the amount of an appeal bond,

order an additional surety, or approve the signature of a new surety on an old bond. Brown v. Ohman, 93 Colo. 561, 27 P.2d 588 (1933).

Court can provide for addition of new sureties. If, after the approval of an appeal bond, it is found that a surety is insufficient, this section provides for the addition of new sureties, even after appeal. Zimmerman v. Combs, 91 Colo. 313, 14 P.2d 693 (1932).

**The fact that a new surety signed the first bond instead of new one is immaterial.** Where on appeal the surety on the bond died and another was procured, the fact that the latter, through inadvertence, signed the first instead of the new bond, was held immaterial, where the bond signed had endorsed thereon the approval



of the court clerk. *Brown v. Ohman*, 93 Colo. 561, 27 P.2d 588 (1933).

**Filing appeal bond without order fixing amount does not nullify appeal.** Where on appeal from county to district court, the county judge entered an order reciting the filing of an appeal bond and its approval, the mere fact that

there was no order fixing the amount of the bond did not nullify the appeal. *Brown v. Ohman*, 93 Colo. 561, 27 P.2d 588 (1933).

**Appeal bond as used in this statute means the cost bond** described by C.A.R. 7 and not a supersedeas bond. *Hart v. Schwab*, 990 P. 2d 1131 (Colo. App. 1999).

**13-1-111. Courts of record.** (1) Each of the following courts shall have a seal and shall be a court of record:

- (a) The supreme court;
- (b) The district courts;
- (c) The county courts;
- (d) The juvenile court in the city and county of Denver;
- (e) The probate court in the city and county of Denver;
- (f) Any court established by law and expressly denominated a court of record;
- (g) Repealed.
- (h) The court of appeals.

**Source:** L. 1887: p. 212, § 412. **Code 08:** § 447. **Code 21:** § 449. **Code 35:** § 449. **CRS 53:** § 37-1-12. **C.R.S. 1963:** § 37-1-12. **L. 64:** p. 224, § 57. **L. 72:** p. 590, § 53. **L. 77:** (1)(h) added, p. 279, § 24, effective June 29. **L. 79:** IP(1) amended, p. 596, § 2, effective July 1. **L. 85:** (1)(g) repealed, p. 572, § 12, effective November 14, 1986.

#### ANNOTATION

**The acts of a court of record are known by its records.** Judicial records are not only necessary but indispensable to the administration of justice. The court judgments can be evidenced only by its records. The acts of a court of record

are known by its records alone and cannot be established by parol testimony. The court speaks only through its records, and the judge speaks only through the court. *Herren v. People*, 147 Colo. 442, 363 P.2d 1044 (1961).

**13-1-112. Clerk to keep seal.** The clerk of each court of record shall keep the seal thereof.

**Source:** L. 1887: p. 212, § 413. **Code 08:** § 448. **Code 21:** § 450. **Code 35:** § 450. **CRS 53:** § 37-1-13. **C.R.S. 1963:** § 37-1-13.

**13-1-113. Seal - how attached.** (1) A seal of a court or public officer, when required on any writ, process, or proceeding or to authenticate a copy of any record or document, may be impressed with wax, wafer, or any other substance and then attached to the writ, process, or proceeding or to the copy of the record or document, or it may be impressed on the paper alone or electronically attached to or logically associated with an electronic record or document. When jury summonses, subpoenas, or subpoenas duces tecum are prepared by means of mechanical reproduction, the seal of the summoning court may be printed thereon instead of being impressed.

(2) A seal may also consist of a rubber stamp with a facsimile affixed thereon of the seal required to be used and may be placed or stamped upon the document requiring the seal with indelible ink.

**Source:** L. 1887: p. 198, § 362. **Code 08:** § 396. **Code 21:** § 397. **Code 35:** § 397. **CRS 53:** § 37-1-14. **C.R.S. 1963:** § 37-1-14. **L. 67:** p. 70, § 1. **L. 75:** Entire section R&RE, p. 489, § 4, effective July 14. **L. 80:** (1) amended, p. 506, § 1, effective March 25. **L. 2011:** (1) amended, (HB 11-1018), ch. 18, p. 46, § 1, effective March 11.

**13-1-114. Powers of court.** (1) Every court has power:

- (a) To preserve and enforce order in its immediate presence;
- (b) To enforce order in the proceedings before it or before a person empowered to conduct a judicial investigation under its authority;
- (c) To compel obedience to its lawful judgments, orders, and process and to the lawful orders of its judge out of court in action or proceeding pending therein;
- (d) To control, in furtherance of justice, the conduct of its ministerial officers.

(2) Any judge of any court, when he reasonably believes that there is a risk of violence in the court, shall immediately advise the law enforcement agency designated to provide security for the court, and the law enforcement agency shall determine and provide appropriate security measures consistent with the degree of risk present. For the purpose of this subsection (2), a district or county judge shall have the assistance of the county sheriff, and a municipal judge shall have the assistance of the municipal police department. The court shall have discretion to assess all or part of the expense incurred in implementing such security measures as costs to be paid by the party or parties or other person or persons determined by the court to have necessitated such security measures.

(3) Any county sheriff or municipal peace officer providing security for persons involved in judicial proceedings in courts pursuant to subsection (2) of this section shall be immune from civil liability for damages except for gross negligence or reckless, wanton, or intentional misconduct.

**Source:** L. 1887: p. 216, § 428. **Code 08:** § 463. **Code 21:** § 464. **Code 35:** § 464. **CRS 53:** § 37-1-15. **C.R.S. 1963:** § 37-1-15. **L. 86:** (2) and (3) added, p. 673, § 1, effective July 1.

**ANNOTATION**

**A county's duties under subsection (2) may not be reduced or ended pursuant to art. X, § 20(9) of the state constitution.** State v. Bd. of County Comm'rs, Mesa County, 897 P.2d 788 (Colo. 1995).

**Applied** in Campbell v. District Court, 304 Colo. 195, 577 P.2d 1096 (1978).

**13-1-115. Courts may issue proper writs.** The courts have power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of this state. The district courts have authority in ne exeat proceedings according to the usual practice in such cases in courts of chancery.

**Source:** L. 1887: p. 217, § 434. **L. 1891:** p. 85, § 1. **Code 08:** § 469. **Code 21:** § 470. **Code 35:** § 470. **CRS 53:** § 37-1-16. **C.R.S. 1963:** § 37-1-16.

**ANNOTATION**

**The court, in a civil action, has authority to issue a writ of ne exeat** to protect the interests of a litigant. Struble v. Hicks, 123 Colo. 16, 224 P.2d 932 (1950) (decided under repealed § 31 of appendix B, R.C.P. Colo., CSA, 1935, which was similar to this section).

**C.R.C.P. 106 merely abolished the form and not the substance of the remedial writs**

**such as the writ of ne exeat.** A district court still possesses the authority to issue a writ in the nature of ne exeat, which is designed to prevent a person from leaving the court's jurisdiction. In re People ex rel. B.C., 981 P.2d 145 (Colo. 1999).

**13-1-116. Courts sit at county seat.** Every court of record shall sit at the county seat of the county in which it is held, except as may be otherwise provided by law.

**Source:** L. 1887: p. 214, § 418. **Code 08:** § 453. **Code 21:** § 455. **Code 35:** § 455. **CRS 53:** § 37-1-18. **C.R.S. 1963:** § 37-1-18.



## ANNOTATION

**A district court can be in session only in its own county.** *State Bank v. Plummer*, 46 Colo. 71, 102 P. 1082 (1909) (decided under repealed provisions antecedent to § 25 of appendix B, R.C.P. Colo., CSA, 1935).

**Moving trial to hospital to hear closing arguments, give instructions to jury, and allow jury to deliberate** because of a seriously ill

juror did not deprive court of jurisdiction and retrial will not constitute double jeopardy. *People v. Higa*, 735 P.2d 203 (Colo. App. 1987).

**Section 13-5-119 (2) is an exception to the county seat requirement in this section.** *City of Littleton v. County Comm'rs*, 787 P.2d 158 (Colo. 1990).

**13-1-117. Juridical days.** The courts of justice may be held and judicial business may be transacted on any day except as provided in section 13-1-118.

**Source: L. 1887:** p. 213, § 415. **Code 08:** § 450. **Code 21:** § 452. **Code 35:** § 452. **CRS 53:** § 37-1-19. **C.R.S. 1963:** § 37-1-19.

## ANNOTATION

**There can be no exceptions to statutory days of judicial business.** When the law has prescribed a time and place at which the judicial business of the county must be transacted, there can be no exception to the provision, unless it is expressly made by statute. *State Bank v.*

*Plummer*, 46 Colo. 71, 102 P. 1082 (1909); *Scott v. Stutheit*, 21 Colo. App. 28, 121 P. 151 (1912) (decided under repealed provisions antecedent to § 25 of appendix B, R.C.P. Colo., CSA, 1935).

**13-1-118. Judicial holidays.** (1) No court shall be opened nor shall any judicial business be transacted on Sunday or any legal holiday except for the following purposes:

- (a) To give, upon their request, instruction to a jury then deliberating on their verdict;
- (b) To receive a verdict or discharge a jury;
- (c) For the exercise of the powers of a judge in a criminal action or in a proceeding of a criminal nature;
- (d) When it appears by the affidavit of the plaintiff, or someone in his behalf, in cases for the recovery of specific personal property, that the defendant is about to conceal, dispose of, or remove such property out of the jurisdiction of the court, an order for taking possession of the same may be issued and the writ or process executed on any day;
- (e) When an application for writ of attachment is made, if it shall appear by the affidavit of the plaintiff, or someone in his behalf, that the defendant is about to dispose of, conceal, or remove property subject to execution or attachment out of the jurisdiction of the court, a writ of attachment may be issued and executed on any day.
- (2) When the day fixed for the opening of a court falls on any of the days mentioned in this section, the court shall stand adjourned until the next succeeding day.

**Source: L. 1887:** p. 213, § 416. **Code 08:** § 451. **Code 21:** §§ 451, 453. **Code 35:** § 453. **CRS 53:** § 37-1-20. **C.R.S. 1963:** § 37-1-20.

## ANNOTATION

**Verdicts may be received on a judicial holiday.** Receiving a verdict is a ministerial act performed for the jury in a judicial proceeding. The weight of authority is to the end that verdicts, the result of trials started and concluded before Sunday, may be received on Sunday and statutory holidays. *Carr v. People*, 99 Colo. 477, 63 P.2d 1221 (1936) (decided under repealed § 23 of appendix B, R.C.P. Colo., CSA, 1935, which was similar to this section).

**Judgment entered on legal holiday not void** and becomes effective next business day. Subsection (1) does not provide that any judicial business transacted in violation of its provisions is void. Rather, the statute is silent as to the effect of any order entered or other judicial business transacted in violation of its prohibitions. Subsection (2) provides that the effect of having a day fixed for the opening of a court that falls on a prohibited day is that "the court shall

stand adjourned until the next succeeding day.” Thus, the effect of the trial court’s entry of an order reviving judgment on a legal holiday was not to invalidate the order but, rather, merely to

postpone its effective date until the next day the courts were open. *Arvada 1st Indus. Bank v. Hutchison*, 15 P.3d 292 (Colo. App. 2000).

**13-1-119. Judgment record and register of actions open for inspection.** The judgment record and register of actions shall be open at all times during office hours for the inspection of the public without charge, and it is the duty of the clerk to arrange the several records kept by him in such manner as to facilitate their inspection. In addition to paper records, such information may also be presented on microfilm or computer terminal.

**Source:** L. 1887: p. 166, § 231. **Code 08:** § 250. **Code 21:** § 251. **Code 35:** § 251. **CRS 53:** § 37-1-21. **C.R.S. 1963:** § 37-1-21. **L. 79:** Entire section amended, p. 596, § 3, effective July 1.

#### ANNOTATION

The court did not err by taking judicial notice of defendant’s probation status after determining the status from the state computer system. Since this section and Crim. P. 55 expressly approve of records kept and main-

tained in a state computer system, the court may take judicial notice of the court records contained in the system. *People v. Linares-Guzman*, 195 P.3d 1130 (Colo. App. 2008).

**13-1-119.5. Electronic access to name index and register of actions.** (1) Statewide electronic read-only access to the name index and register of actions of public case types shall be made available to the following agencies or attorneys appointed by the court:

(a) County departments as defined in section 19-1-103 (32), C.R.S., and attorneys who represent the county departments as county attorneys, as defined in section 19-1-103 (31.5), C.R.S., as it relates to the attorneys’ work representing the county;

(b) The office of the state public defender, created in section 21-1-101, C.R.S.;

(c) Guardians ad litem under contract with the office of the child’s representative, created in section 13-91-104, or authorized by the office of the child’s representative to act as a guardian ad litem, as it relates to a case in which they are appointed by the court;

(d) Attorneys under contract with the office of the alternate defense counsel, created in section 21-2-101, C.R.S., as it relates to a case in which they are appointed by the court;

(e) Respondent parent counsel appointed by the court and paid by the judicial department as it relates to a case in which they are appointed by the court; and

(f) Criminal justice agencies as described in section 24-72-302 (3), C.R.S.

(2) The supreme court may adopt rules regarding access to the name index and register of actions, including rules identifying confidential information maintained in the system and state requirements for using the confidential information. All agencies with access pursuant to subsection (1) of this section shall ensure that individuals who use the system receive training on appropriate usage and confidentiality of register of action information. Additionally, the state court administrator may monitor the use of the system and information through audits and the review of ad hoc queries or reports.

**Source:** L. 2008: Entire section added, p. 1240, § 1, effective August 5.

**13-1-120. Proceedings in English - abbreviations.** Every written proceeding in a court of justice in this state, or before a judicial officer, shall be in the English language, but such abbreviations as are now commonly used in that language may be used, and numbers expressed by figures or numerals in the customary manner.

**Source:** L. 1887: p. 212, § 411. **Code 08:** § 446. **Code 21:** § 448. **Code 35:** § 448. **CRS 53:** § 37-1-22. **C.R.S. 1963:** § 37-1-22.



## ANNOTATION

**The translation of instructions into Spanish for the use and instruction of a juror** understanding that language alone would not be inhibited by the spirit of this section. The object of the provision is to secure a record in English,

and this would in nowise be defeated. *Trinidad v. Simpson*, 5 Colo. 65 (1879) (decided under repealed provisions antecedent to § 18 of appendix B, R.C.P. Colo., CSA, 1935).

**13-1-121. Action not affected by vacancy.** No action or proceeding in a court of justice in this state shall be affected by a vacancy in the office of any of the judges, or by failure of a term thereof.

**Source:** L. 1887: p. 212, § 410. **Code 08:** § 445. **Code 21:** § 447. **Code 35:** § 447. **CRS 53:** § 37-1-23. **C.R.S. 1963:** § 37-1-23.

**13-1-122. When judge shall not act unless by consent.** A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity in the third degree; or when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all parties to the action.

**Source:** L. 1887: p. 216, § 429. **Code 08:** § 464. **Code 21:** § 465. **Code 35:** § 465. **CRS 53:** § 37-1-24. **C.R.S. 1963:** § 37-1-24.

## ANNOTATION

**Annotator's note.** Since § 13-1-122 is similar to repealed provisions antecedent to § 28 of appendix B, R.C.P. Colo., CSA, 1935, relevant cases construing those provisions have been included in the annotations to this section.

**A judge must disqualify himself if he has a private interest.** Any personal or private interest within this statute or rule would disqualify the county judge as the trial judge, and his refusal to remove himself as the trial judge would be grounds for reversal. Any action involving a situation where the trial judge may benefit in a pecuniary way depending upon his decision would be a prime example of a situation in which a trial judge would have no alternative other than to disqualify himself. *Russell v. Wheeler*, 165 Colo. 296, 439 P.2d 43 (1968).

**Generally, a judge has a discretionary prerogative in the area of public interest.** In the area of public interest, a judge upon being challenged, may in his discretionary prerogative remove himself, but if he refuses, his decision will not be reversed unless it is shown convincingly that his interest was so intense that a probability existed that his decision would be tainted. *Russell v. Wheeler*, 165 Colo. 296, 439 P.2d 43 (1968).

**A differentiation must be made between a judge's private and public interest.** In considering the trial court's purported interest in the subject and outcome of the school bond election contest, it is necessary to differentiate between a "private" interest and a "public" interest in the controversy and the outcome. *Russell v. Wheeler*, 165 Colo. 296, 439 P.2d 43 (1968).

**Public interest as a citizen is not grounds for disqualification.** An interest which a judge may have as a citizen in a public question or issue is no basis per se for his removal as the trial judge in an action contesting an election determinative of the public question or issue. *Russell v. Wheeler*, 165 Colo. 296, 439 P.2d 43 (1968).

**A public interest is an interest shared by citizens generally** in the affairs of local, state, or national government, and is not the same character of interest which compels disqualification as would a private interest. *Russell v. Wheeler*, 165 Colo. 296, 439 P.2d 43 (1968).

**Interest in bond election may be so great so as to make it private interest.** The attached affidavits and exhibits are insufficient to show that the county judge who was a qualified tax-paying elector, and who voted for and publicly approved the new school and bond issue, had such an interest in the bond election contest, or that he was so prejudiced against the contest action that he should have as a matter of law disqualified himself. *Russell v. Wheeler*, 165 Colo. 296, 439 P.2d 43 (1968).

**Generally, obligations as taxpayer are not grounds for disqualification.** The personal effect upon the trial judge, who as the owner of property would be charged with the obligation of the school bonds, is a pecuniary advantage or disadvantage so contingent, speculative, and remote as to be of no consequence. Public improvements, like new school buildings, may have the effect of increasing the tax obligation

on real property but they also result in increasing the value of the property so that it is therefore next to impossible to state as a matter of certainty that a public improvement will be a disadvantage or advantage to any given piece of property. *Russell v. Wheeler*, 165 Colo. 296, 439 P.2d 43 (1968).

**Whether to disqualify himself in a civil case is a question within the discretion of the trial judge**, and the judge's ruling on that issue will not be disturbed on appeal absent a showing of an abuse of that discretion. *Colo. State Bd. of Agriculture v. First Nat'l Bank*, 671 P.2d 1331 (Colo. App. 1983).

**A judge, having been of counsel for either party in the previous trial of the action, is**

under this section clearly disqualified from acting as judge in the trial of the case, and, where the disqualification is not waived by consent of the party he represented as counsel, has no authority to act judicially therein. *O'Connell v. Gavett*, 7 Colo. 40, 1 P. 902 (1883).

**He must by his own motion certify this to the district court.** Under this section, a county judge who has acted as counsel in behalf of either litigant is not only disqualified from hearing motions to set aside judgments, but it is his duty on his own motion to certify the matters to the district court. *People ex rel. Brown v. District Court*, 26 Colo. 226, 56 P. 1115 (1899).

**Applied** in *Zoline v. Telluride Lodge Ass'n*, 732 P.2d 635 (Colo. 1987).

**13-1-123. Transfer of civil actions.** When in any civil action pending in any court of record, whether filed as a special statutory proceeding, or otherwise, if for any reason the proceedings could be more expeditiously continued in another county, with the express consent of all parties, the court may order the cause transferred to any other county wherein the court finds the proceedings could be more expeditiously continued. No additional docket fee shall be required. Upon such a transfer being ordered, the clerk shall transfer all files, books, and records of the cause, or, if that is not practicable, he shall make, at the expense of the parties, and send to the clerk of the court to which the cause is transferred a certified copy of all records in the cause which are necessary for the continuation of the proceedings in the court to which such cause is transferred, and the cause shall continue in the court to which it is transferred with the same effect and force as though such cause were originally docketed in such court.

**Source:** L. 59: p. 349, § 1. CRS 53: § 37-1-25. C.R.S. 1963: § 37-1-25.

**Cross references:** For venue and change of venue generally, see C.R.C.P. 98.

**13-1-123.5. Transfer of venue - actions involving related persons.** In addition to the authority to change venue granted by sections 19-2-105 and 19-3-201, C.R.S., for good cause shown, a court, on its own motion, on the motion of another court in this state, or on the motion of a party or guardian ad litem, may order the transfer of a pending action brought under title 14 or title 19, C.R.S., or rule 365 of the Colorado rules of county court civil procedure to a court in another county when there is an action pending in the other county that names the parent, guardian, or legal custodian of a child who is the subject of the action brought under title 14 or title 19, C.R.S. The county to which the action is being transferred must be one in which venue is proper. Upon an order for such transfer, the transferring court shall notify all parties of the transfer and transmit all documents to the receiving court. The transferred action shall continue in the court to which it is transferred with the same force and effect as though originally docketed in the receiving court.

**Source:** L. 95: Entire section added, p. 46, § 1, effective January 1, 1996. L. 96: Entire section amended, p. 1687, § 13, effective January 1, 1997.

**13-1-124. Jurisdiction of courts.** (1) Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person and, if a natural person, such person's personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state;
- (c) The ownership, use, or possession of any real property situated in this state;



(d) Contracting to insure any person, property, or risk residing or located within this state at the time of contracting;

(e) The maintenance of a matrimonial domicile within this state with respect to all issues relating to obligations for support to children and spouse in any action for dissolution of marriage, legal separation, declaration of invalidity of marriage, or support of children if one of the parties of the marriage continues without interruption to be domiciled within the state;

(f) The engaging of sexual intercourse in this state as to an action brought under article 4 or article 6 of title 19, C.R.S., with respect to a child who may have been conceived by that act of intercourse, as set forth in verified petition; or

(g) The entering into of an agreement pursuant to part 2 or 5 of article 22 of this title.

**Source:** L. 65: p. 472, § 1. C.R.S. 1963: § 37-1-26. L. 82: (1)(c) and (1)(d) amended and (1)(e) added, p. 280, § 1, effective April 2. L. 91: (1)(f) added, p. 248, § 2, effective July 1. L. 93: Entire section amended, p. 359, § 1, effective July 1.

## ANNOTATION

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### I. GENERAL CONSIDERATION.

#### A. In General.

**Law reviews.** For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965). For comment discussing the impact of *Shaffer v. Heitner* (433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed.2d 683 (1977)) on state long arm statute, see 55 Den. L.J. 365 (1978). For article, "Federal Practice and Procedure", see 56 Den. L.J. 491 (1979). For article, "Jurisdiction and Service of Process Beyond Colorado Boundaries", see 11 Colo. Law. 648 (1982). For article, "Legislative Activities in Family Law", see 11 Colo. Law. 1560 (1982). For article, "Federal Practice and Procedure", which discusses a recent Tenth Circuit decision dealing with in personam jurisdiction, see 62 Den. U. L. Rev. 219 (1985).

**This section and § 13-1-125 are sometimes referred to as the "long arm" or "single act" statute.** *Hoen v. District Court*, 159 Colo. 451, 412 P.2d 428 (1966); *Cox v. District Court*, 160 Colo. 437, 417 P.2d 792 (1966); *Geer Co. v. District Court*, 172 Colo. 48, 469 P.2d 734 (1970).

**Section is procedural, not substantive.** This statute, an example of "long arm" statutes, is "procedural" rather than "substantive" and may operate retrospectively. Its effect is not to create a right or liability where none existed before; its only effect is to broaden the procedure whereby one seeking redress against an alleged tortfeasor may compel him to answer in the forum initially determined by the plaintiff to be the most convenient. *Smith v. Putnam*, 250 F. Supp. 1017 (D. Colo. 1965).

**Section merely establishes a new mode of obtaining jurisdiction of the person of the defendant in order to secure existing rights.** *Smith v. Putnam*, 250 F. Supp. 1017 (D. Colo. 1965).

**Section was passed by the general assembly in order to extend rather than to limit the jurisdiction of the courts of the state.** *White-Rodgers Co. v. District Court*, 160 Colo. 491, 418 P.2d 527 (1966).

**Due process inquiry is all that is necessary.** By extending jurisdiction to the maximum limits permissible under the United States and Colorado Constitutions, the general assembly obviated the need for further statutory analysis. *New Frontier Media, Inc. v. Freeman*, 85 P.3d 611 (Colo. App. 2003).

**Federal court's jurisdiction in diversity cases.** In diversity cases, the federal district court's jurisdiction is coextensive with the state court's. *Ruggieri v. Gen. Well Serv., Inc.*, 535 F. Supp. 525 (D. Colo. 1982).

**Jurisdiction based on facts at time of complaint.** An amendment of a pleading to justify long arm jurisdiction must be based on facts existing at the time the complaint was filed. *Jenkins v. Glen & Helen Aircraft, Inc.*, 42 Colo. App. 118, 590 P.2d 983 (1979).

**Personal jurisdiction and venue distinguished.** Personal jurisdiction is a question of the court's power to exercise control over defendants while venue is primarily a matter of

choosing a convenient forum. *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

Resolution of personal jurisdiction generally takes precedence over the determination of the propriety of venue. *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

**Resolution of jurisdictional issues under section frequently involves** an ad hoc analysis of the facts. *Waterval v. District Court*, 620 P.2d 5 (Colo. 1980), cert. denied, 452 U.S. 960, 101 S. Ct. 3108, 69 L. Ed.2d 971 (1981).

**Privilege defenses such as lack of personal jurisdiction or improper venue may be lost by** failure to assert them seasonably, by formal submission in a cause, or by submission through conduct. *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

**Mere filing of or participation in motion does not necessarily entail waiver to defenses** of lack of personal jurisdiction or improper venue. *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

**Request for award of attorney fees, as part of motion to dismiss for lack of personal jurisdiction, does not constitute a general appearance and does not waive defense of lack of personal jurisdiction.** Defendants did not seek affirmative relief; rather, they only defended against plaintiff's claims. *Gognat v. Ellsworth*, 224 P.3d 1039 (Colo. App. 2009), aff'd on other grounds, 259 P.3d 497 (Colo. 2011).

**For discussion of conspiracy theory of personal jurisdiction**, see *Bennett Waites Corp. v. Piedmont Aviation, Inc.*, 563 F. Supp. 810 (D. Colo. 1983).

**Section need not be relied on when service is made inside Colorado.** It is not necessary to rely on "long arm" statute to sustain jurisdiction of district court over foreign corporation where service of process was not made outside of state, but was made upon agent of foreign corporation in the state. *White-Rodgers Co. v. District Court*, 160 Colo. 491, 418 P.2d 527 (1966).

**Jurisdiction over foreign corporation where personal service effected in state.** Colorado state courts have jurisdiction over a foreign corporation qualified to do business in the state where personal service on the foreign corporation is effected within the state, regardless of the fact that the cause of action does not arise out of the foreign corporation's business activity within the state, but, to the contrary, arises out of a transaction occurring in another state. *Budde v. Kentron Hawaii, Ltd.*, 565 F.2d 1145 (10th Cir. 1977).

**Burden imposed upon one who seeks remedy under long arm statute is to allege in complaint** sufficient facts to support reasonable inference that defendants engaged in conduct described in statute which subjects them to in personam jurisdiction. *Texair Flyers, Inc. v. Dis-*

*trict Court*, 180 Colo. 432, 506 P.2d 367 (1973); *Jenkins v. Glen & Helen Aircraft, Inc.*, 42 Colo. App. 118, 590 P.2d 983 (1979); *Shon v. District Court*, 199 Colo. 90, 605 P.2d 472 (1980).

**This section requires purposeful acts performed within forum state by defendant** in relation to the contract. *Weyrich v. Lively*, 361 F. Supp. 1147 (D. Colo. 1973).

**Prima facie showing of threshold jurisdiction is sufficient** and may be determined from allegations of complaint. *Texair Flyers, Inc. v. District Court*, 180 Colo. 432, 506 P.2d 367 (1973).

A plaintiff need only make a prima facie showing of threshold jurisdiction, which may be determined from the allegations of the complaint, to withstand defendant's motion to dismiss under, C.R.C.P. 12(b)(2). *Pioneer Astro Indus., Inc. v. District Court*, 193 Colo. 409, 566 P.2d 1067 (1977).

In determining whether a prima facie showing has been established, it is appropriate to consider the allegations of the complaint as well as any other evidence adduced at the hearing on the motion to dismiss. *Fleet Leasing, Inc. v. District Court*, 649 P.2d 1074 (Colo. 1982).

A party may make the required prima facie showing of threshold jurisdiction by alleging jurisdictional facts in the complaint, by submitting affidavits, or presenting evidence at the hearing on the motion to dismiss or to quash service of process. *Panos Inv. Co. v. District Court*, 662 P.2d 180 (Colo. 1983).

The allegations of the complaint, as well as any evidence introduced by the parties at any hearing conducted to determine the jurisdictional issue, may be considered to determine whether the plaintiff has established such prima facie showing of jurisdiction. *Scheuer v. District Court*, 684 P.2d 249 (Colo. 1984).

**Prima facie showing required.** A party asserting personal jurisdiction over a defendant under the long arm statute must make a prima facie showing of threshold jurisdiction. *Fleet Leasing, Inc. v. District Court*, 649 P.2d 1074 (Colo. 1982).

**When defendant asserts permissive claim, long arm jurisdiction becomes general in personam.** By the assertion of a permissive counter-claim and a cross-claim, claimant was invoking of the jurisdiction of the court in its own behalf, and expanded the limited in personam jurisdiction originally acquired under the long arm statute into general in personam jurisdiction. *T.L. Smith Co. v. District Court*, 163 Colo. 444, 431 P.2d 454 (1967).

**Where a defendant in a civil action files various cross-claims and third-party claims,** the jurisdiction of the court is invoked and the defendant waives any objection to the issue of a personam jurisdiction. *Fagerberg v. Webb*, 678 P.2d 544 (Colo. App. 1983).



**Finding that long-arm statute cannot be properly invoked is a final determination** that defendants are not subject to the court's jurisdiction and an appeal can be taken therefrom. *Wilbourn v. Hagan*, 716 P.2d 485 (Colo. App. 1986).

**In general, the activities of a non-resident subject him to long-arm jurisdiction** if the quality, nature, and frequency of his conduct in Colorado is such that the non-resident should reasonably anticipate being haled into the Colorado courts. *Von Palffy-Erdoed v. Bugescu*, 708 P.2d 816 (Colo. App. 1985); *Pub. Warranty Corp. v. Mullins*, 757 P.2d 1140 (Colo. App. 1988).

**Trial court had personal jurisdiction over estate** after plaintiffs amended complaint to name estate and estate's special administrator as defendants instead of deceased, non-existent defendant before any answer had been filed in the case. This cured the defect in personal jurisdiction contained in the original complaint. *Currier v. Sutherland*, 218 P.3d 709 (Colo. 2009).

**Distinction between subject-matter jurisdiction and personal jurisdiction.** This section, together with defendant's note submitting to jurisdiction of Colorado courts for purposes of enforcement, conferred subject-matter jurisdiction. However, in absence of valid service of process under § 13-1-125 and C.R.C.P. 4 court lacked personal jurisdiction and judgment was void. *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473 (Colo. App. 1992).

**A party's lack of capacity to sue or be sued has no bearing upon a court's subject matter jurisdiction over the case.** *Currier v. Sutherland*, 218 P.3d 709 (Colo. 2009).

A deceased defendant's lack of capacity to be sued does not divest a court of subject matter jurisdiction over the case. Subject matter jurisdiction involves a court's power to hear a particular type of case or grant a specific type of relief. *Currier v. Sutherland*, 218 P.3d 709 (Colo. 2009).

**Applied in Nations Enters., Inc. v. Process Equip. Co.**, 40 Colo. App. 390, 579 P.2d 655 (1978); *Adolph Coors Co. v. A. Genderson & Sons*, 486 F. Supp. 131 (D. Colo. 1980); *Goldenhersh v. Febrey*, 711 P.2d 717 (Colo. App. 1985); *Rogers v. Clipper Cruise Lines, Inc.*, 650 F. Supp. 143 (D. Colo. 1986); *In re Ness*, 759 P.2d 844 (Colo. App. 1988).

#### B. Constitutionality.

**Jurisdiction to extend to constitutional limits.** The Colorado general assembly, in enacting this section, intended to extend the jurisdiction of the courts to the fullest extent permitted by the due process clause of the fourteenth amendment to the United States Constitution. *Jenner & Block v. District Court*, 197 Colo. 184, 590 P.2d 964 (1979); *Halliburton Co. v. Texana Oil Co.*,

471 F. Supp. 1017 (D. Colo. 1979); *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980); *Waterval v. District Court*, 620 P.2d 5 (Colo. 1980), cert. denied, 452 U.S. 960, 101 S. Ct. 3108, 69 L. Ed.2d 971 (1981); *Fleet Leasing, Inc. v. District Court*, 649 P.2d 1074 (Colo. 1982); *Panos Inv. Co. v. District Court*, 662 P.2d 180 (Colo. 1983); *Beckman v. Carlson*, 553 F. Supp. 1049 (D. Colo. 1983); *Scheuer v. District Court*, 684 P.2d 249 (Colo. 1984); *Pub. Warranty Corp. v. Mullins*, 757 P.2d 1140 (Colo. App. 1988).

This statute confers jurisdiction, limited only by the bounds of the fourteenth amendment, consistent with the standards of due process enunciated in *Int'l Shoe Co. v. Washington* and subsequent cases. *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358 (10th Cir. 1979), cert. denied, 446 U.S. 909, 100 S. Ct. 1836, 64 L. Ed.2d 261 (1980).

The general assembly did not intend that this section be construed to permit jurisdiction to be asserted where to do so would violate due process of law. *Le Manufacture Francaise Des Pneumatiques Michelin v. District Court*, 620 P.2d 1040 (Colo. 1980).

**Constitutionality depends upon its application to the facts.** The constitutionality of any state long arm statute depends on the manner of its particular application to the facts presented. *Circle A Drilling Co. v. Sheehan*, 251 F. Supp. 242 (D. Colo. 1966).

**This section meets the due process test of** *Int'l Shoe Co. v. State of Washington* (326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)), i.e., that the activity of the defendant "establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligation which appellant has incurred there". *Zerr v. Norwood*, 250 F. Supp. 1021 (D. Colo. 1966).

**It does not offend notions of fair play and substantial justice.** Due process requires only that in order to subject a defendant to a judgment in personam, if he is not present within the territory of the forum, he must have certain minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *White-Rodgers Co. v. District Court*, 160 Colo. 491, 418 P.2d 527 (1966); *Safari Outfitters, Inc. v. Superior Court*, 167 Colo. 456, 448 P.2d 783 (1968); *People ex rel. Jeffers v. Gibson*, 181 Colo. 4, 508 P.2d 374 (1973).

**Quality and nature of activity must be considered in determining jurisdiction.** In order to assure fairness and justice, the trial court must look at the quality and nature of the defendant's activity in determining whether the assertion of jurisdiction complies with due process.

Marquest Med. Prods., Inc. v. Emide Corp., 496 F. Supp. 1242 (D. Colo. 1980).

**The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy** the requirement of contact with a forum state. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Safari Outfitters, Inc. v. Superior Court*, 167 Colo. 456, 448 P.2d 783 (1968).

**Convenience alone insufficient for judgment against nonresident.** Due process of law does not contemplate that a state may make a binding judgment in personam against a nonresident defendant merely out of considerations of convenience. *Fleet Leasing, Inc. v. District Court*, 649 P.2d 1074 (Colo. 1982).

**An assertion of personal jurisdiction over an out-of-state defendant** must satisfy both the requirements of the Colorado long-arm statute and the requirements of due process of law. *Marquest Med. Prods., Inc. v. Daniel, McKee & Co.*, 791 P.2d 14 (Colo. App. 1990).

**Determination of jurisdiction involves a two-tiered inquiry.** Court must first determine whether the statute provides a basis for the exercise of jurisdiction, and then must consider whether exercise of jurisdiction would violate federal due process principles. *Schocket v. Classic Auto Sales, Inc.*, 817 P.2d 561 (Colo. App. 1991), *aff'd*, 832 P.2d 233 (Colo. 1992).

### C. Procedure.

**When evidentiary hearing appropriate.** In its discretion, a court may address a motion to dismiss for lack of personal jurisdiction on documentary evidence alone or by holding an evidentiary hearing. An evidentiary hearing may be appropriate when the proffered evidence is conflicting or when the plaintiff's affidavits are incredible. However, if the jurisdictional facts are inextricably intertwined with the merits of the case, caution is advised to avoid endangering the substantive right to a jury trial. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005); *Goettman v. North Fork Valley Rest.*, 176 P.3d 60 (Colo. 2007).

**If the issue is to be resolved on documentary evidence alone, plaintiff needs only make a prima facie showing** of personal jurisdiction to defeat the motion to dismiss. Allegations in the complaint must be accepted as true to the extent they are not contradicted by defendant's competent evidence. *Goettman v. North Fork Valley Rest.*, 176 P.3d 60 (Colo. 2007).

**The court may not resolve disputed material issues of jurisdictional fact without a hearing.** *Goettman v. North Fork Valley Rest.*, 176 P.3d 60 (Colo. 2007).

**Purpose of inquiry** is to screen out cases in which personal jurisdiction is obviously lacking and those in which the jurisdictional challenge is patently bogus. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005); *Goettman v. North Fork Valley Rest.*, 176 P.3d 60 (Colo. 2007).

## II. TRANSACTING BUSINESS.

### A. In General.

**Law reviews.** For comment on *White-Rodgers Co. v. District Court*, appearing below, see 39 U. Colo. L. Rev. 443 (1967). For note, "Doing Business in Colorado for Foreign Corporations: Service of Process, Qualification, Taxation", see 49 Den. L.J. 529 (1973). For article, "Constitutional Law", which discusses a recent Tenth Circuit decision dealing with minimum contacts, see 64 Den. U. L. Rev. 209 (1987). For article, "Civil Procedure", which discusses recent Tenth Circuit decisions dealing with jurisdiction, see 65 Den. U. L. Rev. 405 (1988).

**No jurisdiction unless defendant "present" in state.** Unless the level of a defendant's activity is sufficient to make him "present" in the forum state, there is no jurisdiction where the cause of action is unrelated to the forum state activities. *Automated Quill, Inc. v. Chernow*, 455 F. Supp. 428 (D. Colo. 1978).

**Substantial connection rather than physical presence required.** Although it is not necessary that the defendant be physically present in the state for purposes of transacting business, there must be a substantial connection between the business transacted and the forum state. *Weyrich v. Lively*, 361 F. Supp. 1147 (D. Colo. 1973); *Custom Vinyl Compounding v. Bushart & Assoc.*, 810 F. Supp. 285 (D. Colo. 1992).

**"Substantial contacts" with Colorado held not present.** *Beckman v. Carlson*, 553 F. Supp. 1049 (D. Colo. 1983); *Vickery v. Amarillo Freightliner Sales, Inc.*, 695 P.2d 306 (Colo. App. 1984); *Behagen v. Amateur Basketball Assn. of U.S.A.*, 744 F.2d 731 (10th Cir. 1984), *cert. denied*, 471 U.S. 1010, 105 S. Ct. 1879, 85 L. Ed.2d 171 (1985); *Sands v. Victor Equip. Co.*, 616 F. Supp. 1532 (D. Colo. 1985); *GCI 1985-1 LTD. v. Murray Props. P'ship*, 770 F. Supp. 585 (D. Colo. 1991).

### B. Minimum Contacts Principle.

**Law reviews.** For article, "A New Litany of Personal Jurisdiction", see 60 U. Colo. L. Rev. 5 (1989).

**This section codifies minimum contacts principles.** The question of when a state can obtain in personam jurisdiction over a nonresident by service of process outside the state is basically governed by the "minimum contacts"



test enunciated in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

In order for the nonresident defendant to be subject to the state's personal jurisdiction, "he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'". The Colorado "long arm" statute was designed to codify the "minimum contacts" principle. *Lichina v. Futura, Inc.*, 260 F. Supp. 252 (D. Colo. 1966); *Jenner & Block v. District Court*, 197 Colo. 184, 590 P.2d 964 (1979); *Premier Corp. v. Newsom*, 620 F.2d 219 (10th Cir. 1980); *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

**Minimal contacts are necessary for the operation of this section.** *Cox v. District Court*, 160 Colo. 437, 417 P.2d 792 (1966).

**Minimal contacts are necessary to satisfy due process requirements.** It is clear that this section is based on certain minimum contacts which must satisfy requisites of due process in accord with the test of *Int'l Shoe Co. v. Washington*. *Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co.*, 323 F. Supp. 996 (D. Colo.), *aff'd*, 449 F.2d 775 (10th Cir. 1971).

For jurisdiction to attach under subsection (1)(b), certain "minimum contacts" between the forum state and the defendant are necessary in order not to offend traditional notions of due process, fair play, and substantial justice. *E.R. Callender Printing Co. v. District Court*, 182 Colo. 25, 510 P.2d 889 (1973).

**The essential requirement of the "minimum contacts" rule is that** "the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws". *Lichina v. Futura, Inc.*, 260 F. Supp. 252 (D. Colo. 1966).

**The minimum amount of contacts required to exercise personal jurisdiction depends on whether the plaintiff has alleged general or specific jurisdiction.** A court has general jurisdiction over a defendant if the defendant conducted continuous and systematic activities that are of a general business nature in the forum state. A court has specific jurisdiction over a defendant if the injuries triggering the litigation arise out of and are related to activities that are significant and purposefully directed by the defendant at the residents of the forum state. *Found. for Knowledge in Dev. v. Interactive Design Consultants*, 234 P.3d 673 (Colo. 2010).

**Test for determining if courts may exercise jurisdiction over a non-resident** is whether the exercise of extra-territorial jurisdiction is authorized by statute, and, if so, whether such exercise is consistent with constitutional requirements of due process. *Vickery v. Amarillo Freightliner Sales, Inc.*, 695 P.2d 306 (Colo. App. 1984).

**The test to determine whether the exercise of personal jurisdiction over a nonresident defendant would offend traditional notions of fair play and substantial justice** requires that (1) the defendant must purposely avail himself of the privilege of acting in Colorado or of causing important consequences here; (2) the cause of action must arise from the consequences in Colorado of the defendant's activities; (3) the activities of the defendant or the consequences of those activities must have a substantial enough connection with Colorado to make the exercise of jurisdiction over the defendant reasonable. *Duckworth v. M.M. Cole Publ'g Co.*, 38 Colo. App. 33, 552 P.2d 520 (1976); *Automated Quill, Inc. v. Chernow*, 455 F. Supp. 428 (D. Colo. 1978); *Associated Inns & Restaurant Co. of Am. v. Dev. Assocs.*, 516 F. Supp. 1023 (D. Colo. 1981); *H2O Eng'g, Inc. v. Leidy's, Inc.*, 799 P.2d 432 (Colo. App. 1990), *rev'd on other grounds*, 811 P.2d 38 (Colo. 1991); *RAF Fin. v. Resurgens*, 127 Bankr. 458 (Bankr. D. Colo. 1991); *Alameda Nat. Bank v. Kanchanapoom*, 752 F. Supp. 367 (D. Colo. 1990); *Plus Sys., Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992); *F.D.I.C. v. First Interstate Bank of Denver, N.A.*, 937 F. Supp. 1461 (D. Colo. 1996); *Gwynn v. Transcor Am., Inc.*, 26 F. Supp.2d 1256 (D. Colo. 1998).

**Unfairness factor in determining sufficient contacts.** While fairness is not an affirmative basis for granting jurisdiction, unfairness may become a factor in determining whether certain contacts are sufficient. *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358 (10th Cir. 1979), *cert. denied*, 446 U.S. 909, 100 S. Ct. 1836, 64 L. Ed.2d 261 (1980).

**Court applied the U.S. supreme court "stream of commerce plus" test articulated in Asahi Metal Indus. Co. v. Superior Court**, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), to conclude minimum contacts established. *Etchieson v. Cent. Purchasing LLC*, 232 P.3d 301 (Colo. App. 2010).

**Each case must be decided on its own facts.** On the question of "doing business" every case must be decided solely on its own facts. The complete test is one of total impact. The corporation must have certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Elliot v. Edwards Eng'g Corp.*, 257 F. Supp. 537 (D. Colo. 1965).

Whether in a particular case a nonresident defendant, who is served outside the forum state, has sufficient minimum contacts with the forum state to warrant the latter in exercising in personam jurisdiction over the person of such nonresident necessarily depends on the facts of the case at hand. *Premier Corp. v. Newsom*, 620 F.2d 219 (10th Cir. 1980).

**Even single contact is sufficient to sustain jurisdiction** where the cause of action arose out

of that contact. *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

**Single act does not uniformly result in the exercise of jurisdiction** when that act is not substantial enough to make the defendant "present". *Trans-Continent Refrigerator Co. v. A Little Bit of Swed., Inc.*, 658 P.2d 271 (Colo. App. 1982).

**One meeting constituting sole contact insufficient.** Where the only contact the defendant had with Colorado was an initial meeting with the plaintiff, this one meeting did not constitute the minimum contacts requirement. *Weyrich v. Lively*, 361 F. Supp. 1147 (D. Colo. 1973).

**Quantity of contact cannot be measured by dollar value alone.** *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

**No minimal contact if cause arose outside state and no control over representative.** Plaintiff's claim did not arise out of any dealing the company had in Colorado. This important factor, combined with almost a complete absence of control over representative, requires that the motion to quash the summons be granted. *Elliott v. Edwards Eng'g Corp.*, 257 F. Supp. 537 (D. Colo. 1965).

**The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.** *Circle A Drilling Co. v. Sheehan*, 251 F. Supp. 242 (D. Colo. 1966); *Knight v. District Court*, 162 Colo. 14, 424 P.2d 110 (1967).

**The mere existence of a contract executed by a Colorado resident, is not sufficient** to confer personal jurisdiction over an absent nonresident defendant. To hold otherwise would offend traditional notions of fair play and substantial justice. *Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co.*, 323 F. Supp. 996 (D. Colo.), *aff'd*, 449 F.2d 775 (10th Cir. 1971).

**Nonresident attorney's relationship with client provided sufficient connection for jurisdiction.** A professional relationship of substantial duration and a client's claimed reliance upon her nonresident attorney's advice with respect to the client's financial interests, the attorney's failure to communicate with the client or to take any action in regard to the client's interests may be productive of adverse consequences to the client in this state so as to provide a sufficient connection and render reasonable the exercise of in personam jurisdiction over the nonresident. *Waterval v. District Court*, 620 P.2d 5 (Colo. 1980), *cert. denied*, 452 U.S. 960, 101 S. Ct. 3108, 69 L. Ed.2d 971 (1981); *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267 (Colo. 2002).

Agreement by nonresident defendant attorney to represent a Colorado corporation and the attorney's subsequent conduct were acts by

which the defendant purposefully availed himself of the privilege of conducting activities in Colorado and thus was reasonably subject to Colorado's long arm statute jurisdiction. *Scheuer v. District Court*, 684 P.2d 249 (Colo. 1984).

**Sales, promotional and distributional channels reveal minimal contacts.** The affidavit does reveal "minimal contact" in Colorado as required by due process because it clearly reflects that defendant set up channels of sales promotion and distribution in Colorado for the purpose of selling its products in Colorado. *Vandermece v. District Court*, 164 Colo. 117, 433 P.2d 335 (1967).

Manufacturer's promotional activities and solicitation of customers while in Colorado, together with actual sales, was sufficient to invoke long-arm jurisdiction. *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

**Contacts were sufficient to find jurisdiction over manufacturer of medical syringe.** *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

**Contacts found insufficient where sale took place outside of Colorado and issues of tort concerned creation of contract and terms.** *Vickery v. Amarillo Freightliner Sales, Inc.*, 695 P.2d 306 (Colo. App. 1984).

**Jurisdiction not proper.** Jurisdiction is not proper merely because the defendants received a check drawn on a Colorado bank or because the defendants wrote several letters regarding the contract to the plaintiff in Colorado. *Ruggieri v. Gen. Well Serv., Inc.*, 535 F. Supp. 525 (D. Colo. 1982).

Jurisdiction is not proper in Colorado merely because one of the parties to a contract is a Colorado resident. *Ruggieri v. Gen. Well Serv., Inc.*, 535 F. Supp. 525 (D. Colo. 1982); *SGI Air Holdings II LLC v. Novartis Int'l, AG*, 192 F. Supp.2d 1195 (D. Colo. 2002).

**Minimum contacts sufficient.** In executing a contract of guarantee in another state of payment of rent and performance of lease covenants, where petitioner induced lessors to furnish their consent for the assignment of a lease of Colorado real property, the facts amply justify long-arm jurisdiction over the person of petitioner. *Giger v. District Court*, 189 Colo. 305, 540 P.2d 329 (1975).

An out-of-state bank, which issued letter of credit in connection with Colorado real estate transaction, inducing reliance by purchaser's agent, had sufficient connection with Colorado to permit exercise of jurisdiction under this section in agent's action against bank for consequences resulting from cancellation of letter. *Van Schaack & Co. v. District Court*, 189 Colo. 145, 538 P.2d 425 (1975).

Nonresident publishing company had sufficient contacts with the state of Colorado for the



assumption of in personam jurisdiction where it initiated the contract with the plaintiff at his residence in Colorado and solicited the resultant contract, and the parties intended the plaintiff prepare the manuscripts at home in Colorado and submit them to the company's offices in Chicago for publication. *Duckworth v. M.M. Cole Publ'g Co.*, 38 Colo. App. 33, 552 P.2d 520 (1976).

Where a New York resident contracted to have brochures mailed throughout the United States, including Colorado, and where said New York resident opened a checking account in Colorado to receive the money generated by the mailing, there were sufficient contacts to allow in personam jurisdiction by Colorado courts. At *Home Magazine v. District Court*, 194 Colo. 331, 572 P.2d 476 (1977).

It is not unreasonable to subject a guarantor to the jurisdiction of courts in the very state where an obligation is specifically payable when the makers fail to perform their obligations and the guarantee becomes operable. *Panos Inv. Co. v. District Court*, 662 P.2d 180 (Colo. 1983).

Negotiating and signing an agreement in this state to personally guarantee a portion of a corporation's debts constitutes sufficient contacts for a court of this state to exercise personal jurisdiction over such a person. *Mr. Steak, Inc. v. District Court*, 194 Colo. 519, 574 P.2d 95 (1978).

Execution of promissory notes, given in conjunction with and as part and parcel of the contract for purchase of Colorado real property, constituted sufficient acts to meet the minimum contacts test. *Brownlow v. Aman*, 740 F.2d 1476 (10th Cir. 1984).

Where president of defendant corporation came to Colorado and, in the course of various business negotiations, orally agreed to the terms of an oil development contract under which the defendant corporation was obligated to send payment to plaintiff corporation in Colorado for the performance of supervisory and managerial functions under the contract and defendant corporation reasonably could have anticipated that plaintiff corporation's duties under the contract would be largely performed at their headquarters in Colorado, defendant corporation had sufficient contacts with Colorado to meet the test of due process. *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358 (10th Cir. 1979), cert. denied, 446 U.S. 909, 100 S. Ct. 1836, 64 L. Ed.2d 261 (1980).

Communication with buyer, acceptance of payments, and attempted repossession in Colorado by agent constitute minimum contacts for personal jurisdiction. *Von Palffy-Erdoed v. Bugescu*, 708 P.2d 816 (Colo. App. 1985).

Phone calls, letters, facsimiles, and e-mails in addition to a contract, although unsigned, provide evidence that foreign defendant pursued a continuing business relationship sufficient to

meet the minimum contacts requirement. *AST Sports Science, Inc. v. CLF Distribution Ltd.*, 514 F.3d 1054 (10th Cir. 2008).

**For other examples of satisfaction of minimum contacts requirements**, see *Lichina v. Futura, Inc.*, 260 F. Supp. 252 (D. Colo. 1966).

**Contact with Colorado through actions of agent may be sufficient to bring defendant within jurisdiction.** *H2O Eng'g, Inc. v. Leidy's, Inc.*, 799 P.2d 432 (Colo. App. 1990), rev'd on other grounds, 811 P.2d 38 (Colo. 1991).

**Minimum contacts insufficient.** Requisite minimum contacts did not exist as between foreign manufacturer and Colorado. *Ferrari, S.p.A. SEFAC v. District Court*, 185 Colo. 136, 522 P.2d 105 (1974), overruled in part in *Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233 (Colo. 1992).

Where corporate buyer's only contact with Colorado was to place an order in Kansas City for the purchase of goods and merchandise from a Colorado seller, the minimum contacts necessary to satisfy the requirements of due process are absent, and, therefore, in personam jurisdiction over the corporate buyer cannot be obtained by means of the long-arm statute. *E.R. Callender Printing Co. v. District Court*, 185 Colo. 25, 510 P.2d 889 (1973).

Execution, in California, of contract executed in Colorado by another, by guarantor, who was California resident, does not provide that quantum of minimum contact with Colorado such that the maintenance of a suit against the guarantor to recover on the contract would not offend traditional notions of due process. *D.E.B. Adjustment Co. v. Dillard*, 32 Colo. App. 184, 508 P.2d 420 (1973).

The mere planting of fish in Utah, which fish "entered" Colorado and caused injury, did not constitute sufficient contacts with Colorado to subject those planting the fish to personal jurisdiction in Colorado. *Colo. River Water Conservation v. Andrus*, 476 F. Supp. 966 (D. Colo. 1979).

Where an out-of-state bank's only connection to Colorado was its probable knowledge that the letter of credit it issued was going to be used in the sale of Colorado property to a Colorado corporation, this slight connection does not meet the "minimum contacts" standard, and the assertion of jurisdiction in a Colorado forum violates the out-of-state bank's right to due process. *Leney v. Plum Grove Bank*, 670 F.2d 878 (10th Cir. 1982).

Since British asbestos manufacturer did not distribute or market its product in Colorado, there was not sufficient contact between the manufacturer and Colorado to establish personal jurisdiction. *Ward v. Armstrong World Indus., Inc.*, 677 F. Supp. 1092 (D. Colo. 1988).

Individuals who transported an inmate from Oregon to Colorado under a contract for extra-

dition transportation between their employer and the Colorado department of corrections availed themselves of the privilege of acting in Colorado, committed tortious acts in Colorado, and caused important consequences in Colorado, making the exercise of jurisdiction over them reasonable, where one individual allegedly sexually assaulted the inmate and the other failed to report the assaults. *Gwynn v. Transcor Am., Inc.*, 26 F. Supp.2d 1256 (D. Colo. 1998).

**Alleged patent infringer's activities in Colorado were too tenuous to establish that it purposely availed itself of the forum.** Although the company advertised its product in national magazines that reach Colorado, no evidence was presented demonstrating that the company made deliberative efforts, either direct or indirect, to serve the Colorado market. The fact that the advertisements resulted in telephone inquiries about the product was insufficient to establish that the company took advantage of the Colorado market or its laws. Also, no sales of the product occurred in Colorado. Therefore, the company did not have sufficient contact with the state to justify the exercise of personal jurisdiction. *Dart Intern., Inc. v. Interactive Target Sys.*, 877 F. Supp. 541 (D. Colo. 1995).

**Defendant lacks sufficient contacts with Colorado for Colorado courts to exercise jurisdiction** over defendant where contracts regarding purchase of defendant's interest were signed out of state, defendant did not travel to Colorado regarding the purchase or the interest, and did not conduct any business in Colorado. *Sender v. Powell*, 902 P.2d 947 (Colo. App. 1995).

**Activities of the partnership satisfy the minimum-contacts test as to individual partners.** Through the instrumentality of the partnership, individual partners purposely availed themselves of the privilege of conducting business activities and invoked the benefits and protections of the law. *Intercontinental Leasing, Inc. v. Anderson*, 410 F.2d 303 (10th Cir. 1969); *Resolution Trust Corp. v. Deloitte & Touche*, 822 F. Supp 1512 (D. Colo. 1993).

**Where damaged product was brought into Colorado by purchaser from another state, and defendant's only contact amounted to less than one-half of one percent of annual sales, (which did not include this particular damaged item), there was not sufficient business contact to warrant exercise of personal jurisdiction.** *Day v. Snowmass Stables, Inc.*, 810 F. Supp. 289 (D. Colo. 1993).

**Rigid "last event" test rejected.** While appropriate in conflict-of-laws analysis, for purposes of application of long-arm statute it is not flexible enough to give Colorado courts jurisdiction to the fullest extent permitted by the due process clause. *Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233 (Colo. 1992).

## C. What Constitutes Transacting Business.

**What constitutes doing business is a matter of state law.** So long as the dictates of federal due process are met, what constitutes doing business within a state is a matter of state law. *White-Rodgers Co. v. District Court*, 160 Colo. 491, 418 P.2d 527 (1966).

**Whether claim arose out of business transacted in Colorado is a factor.** While whether a claim arose out of business done in this state is one factor that may be considered, the supreme court has, in promulgating state law on this subject, clearly indicated that this is not necessarily the controlling element in determining whether the corporation has sufficient contacts in this state to subject it to the jurisdiction of the courts of this state when service is made within the state. *White-Rodgers Co. v. District Court*, 160 Colo. 491, 418 P.2d 527 (1966).

**Transaction of business test is a case by case determination.** The standards for considering whether or not jurisdiction attaches under the statute on the basis of transaction of business within the state are those of a case by case analysis considering, among other things, regular and systematic activity, continuity of contacts, promotion and utilization of channels of interstate commerce, benefits and protections afforded by the state, casualness of presence, and an estimate of inconveniences. *People ex rel. Jeffers v. Gibson*, 181 Colo. 4, 508 P.2d 374 (1973).

**Ongoing and continuous business relationship.** Where defendants actively solicited plaintiff's business in Colorado and had an ongoing and continuous business relationship for a period of close to two years, defendants have purposely availed themselves of the privilege of conducting business in Colorado. *Combs Airways, Inc. v. Trans-Air Supply Co.*, 560 F. Supp. 865 (D. Colo. 1983).

**Execution of contract within state.** If a non-resident comes to Colorado and, within the boundaries of this state, executes a contract and receives earnest money, the defendant is within the purview of the Colorado long arm statute, and it does not offend traditional notions of fair play to require the defendant to appear in a federal district court in Colorado when a dispute arises over the return of the earnest money. *East Vail Townhomes, Inc. v. Eurasian Dev. D.A., Inc.*, 716 F.2d 1346 (10th Cir. 1983).

**Contract negotiations, plus Colorado is place of "entering into", are sufficient.** Where negotiations leading to the contract upon which this action is brought were conducted in Colorado, and the contract itself provided that Colorado is the place of "entering into" the agreement, nondomiciliary defendant's contracts were constitutionally sufficient to support service under long arm statute. *Clinic Masters, Inc. v. McCollar*, 269 F. Supp. 395 (D. Colo. 1967).



Even though the “last act”, such as the signing of a contract, may have occurred outside the geographical confines of the forum state, nevertheless, the statutory test of a claim arising out of the transaction of any business within the state may still be met by the showing of other “purposeful acts”, performed within the forum state by the defendant in relation to the contract, even though such acts were preliminary, or even subsequent, to the execution of the contract itself. *Knight v. District Court*, 162 Colo. 14, 424 P.2d 110 (1967); *Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233 (Colo. 1992).

**Contract for the transport of inmates from other states to Colorado constitutes the transaction of business** within the state and establishes the general jurisdiction requirement that contacts with the forum state are systematic and continuous. *Gwynn v. Transcor Am., Inc.*, 26 F. Supp.2d 1256 (D. Colo. 1998).

**Activity in furtherance of a contract is sufficient to give the court long arm jurisdiction.** If the defendant purposefully avails himself of the privilege of conducting business in the forum state, this is enough to give the court jurisdiction. It is not even necessary that defendant or his agent be physically present in the state for the purpose of transacting business. *Colorado-Florida Living, Inc. v. Deltona Corp.*, 338 F. Supp. 880 (D. Colo. 1972).

**A conditional sales interest indicates business transaction.** The fact that defendant retained a conditional sale interest and could have enforced its right to repossess the ski lift in the Colorado courts was a sufficient contact. Defendant was enjoying the benefits and protections of Colorado law, and was willing to service the lift. This is a further indication of the continuing nature of the defendant’s business transactions in Colorado. *Lichina v. Futura, Inc.*, 260 F. Supp. 252 (D. Colo. 1966).

**Contract negotiations by mail do not constitute transacting business.** Major negotiations and execution of the agreement were conducted by an exchange of correspondence and documents between the parties or their representatives in Kansas and Colorado respectively. None of the crucial steps took place wholly within the state of Colorado. Plaintiff’s contention that a one-day trip to Colorado and defendants’ tour of its plant in Eaton, Colorado, are sufficient business contacts to confer in personam jurisdiction on this court is erroneous. Since neither defendant came to Colorado to “sell” plaintiff a license agreement and since no negotiations were conducted here, their obvious purpose was not to avail themselves of the privilege of conducting business here. In these circumstances, the minimum contacts necessary for an exercise of personal jurisdiction do not exist. *Hydraulics Unlimited Mfg. Co. v. B/J*

*Mfg. Co.*, 323 F. Supp. 996 (D. Colo.), *aff’d*, 449 F.2d 775 (10th Cir. 1971).

**Defendants’ mere execution of a contract with plaintiff**, a Colorado corporation, did not constitute doing business in Colorado for purposes of this section. *New Frontier Media, Inc. v. Freeman*, 85 P.3d 611 (Colo. App. 2003).

**Phone conversations and in-state negotiations deemed “doing business”.** Where the transaction forming the basis of the action was shaped by negotiations in Denver between defendant A and plaintiff as well as telephone conversations between defendant A in Colorado and defendant B in Texas and where an agreement to execute a note and personal guaranties was entered into in Colorado, by having engaged in these telephone conversations, defendant B transacted business within Colorado and caused important business consequences in this state, within the test set forth by the Colorado Supreme Court in *Van Schaack & Co. v. District Court*, 189 Colo. 145, 538 P.2d 425 (1975), sufficient and substantial enough so that the assertion of personal jurisdiction was both fair and reasonable. *Halliburton Co. v. Texana Oil Co.*, 471 F. Supp. 1017 (D. Colo. 1979).

**Plaintiff established prima facie case of specific jurisdiction over defendant under subsection (1)(a)** by alleging that defendant came to Colorado to talk about forming a joint venture with plaintiff involving use of plaintiff’s trade secrets and that the parties agreed to such joint venture during these meetings. *Gognat v. Ellsworth*, 224 P.3d 1039 (Colo. App. 2009), *aff’d* on other grounds, 259 P.3d 497 (Colo. 2011).

**Subjecting defendant to the jurisdiction of Colorado courts is consistent with due process since defendant purposefully availed himself of the privilege of conducting activities in Colorado.** Defendant allegedly negotiated and entered into a joint venture while in Colorado with a Colorado resident and regularly communicated with that resident about the joint venture while in Colorado and by telephone and email. *Gognat v. Ellsworth*, 224 P.3d 1039 (Colo. App. 2009), *aff’d* on other grounds, 259 P.3d 497 (Colo. 2011).

**The asserted sale of goods by the defendants in Colorado is too speculative** to provide the requisite jurisdictional contacts since solicitations were made from Kansas and since the defendants maintain no sales or service personnel here. There has been no showing of the volume or extent of the defendants’ sales or the relation of those sales to the license agreement. For personal jurisdiction purposes, the quality and nature of that activity is too indirect and remote from the license agreement upon which plaintiff has brought suit. *Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co.*, 323 F. Supp. 996 (D. Colo.), *aff’d*, 449 F.2d 775 (10th Cir. 1971).

**An out-of-state seller whose agents never enter Colorado is not subject to long arm jurisdiction.** If an out-of-state milk handler has no outlets in Colorado, none of his employees come into the state, and the handler is divested of ownership of the milk before it enters Colorado, then the handler is not doing business in Colorado and the Colorado courts do not have jurisdiction over the handler under the Colorado long arm statute and do not have authority to grant injunctions against him under the Colorado marketing act. *People ex rel. Jeffers v. Gibson*, 181 Colo. 4, 508 P.2d 374 (1973).

**Corporate visit plus sending sales materials is a transaction of business.** The visit of the assistant general sales manager of a Delaware corporation to Colorado in connection with franchise negotiations and the receipt of customer's lists, contracts, and other sales materials at plaintiff's offices in Denver constitute the transaction of business within the state of Colorado, which would authorize service of process upon the defendant outside the state of Colorado when the cause of action arises from that transaction and the failure to grant the franchise. *Colorado-Florida Living, Inc. v. Deltona Corp.*, 338 F. Supp. 880 (D. Colo. 1972).

**Manufacturer who assembles in Colorado subject to long arm.** This section grants jurisdiction under "long arm" to Colorado courts in an action against a North Carolina manufacturer of products assembled and sold in Colorado. *Czarnick v. District Court*, 175 Colo. 482, 488 P.2d 562 (1971).

**Where the parent and its subsidiary maintain separate identities and charge each other for service performed, as reinsurance, the corporations will be treated as separate entities for the purpose of determining personal jurisdiction.** *Perlman v. Great States Life Ins. Co.*, 164 Colo. 493, 436 P.2d 124 (1968).

**A nonpresent parent corporation is not "doing business" because of mere presence of subsidiary.** Although a corporation is totally owned by another corporation, the mere presence in Colorado of the wholly-owned subsidiary, standing alone, does not in and of itself subject the nonpresent parent corporation to the state's jurisdiction where the two companies are operated as distinct entities. *Bolger v. Dial-A-Style Leasing Corp.*, 159 Colo. 44, 409 P.2d 517 (1966); *SGI Air Holdings II LLC v. Novartis Int'l, AG*, 192 F. Supp.2d 1195 (D. Colo. 2002).

**The relationship of a holding company and the subsidiaries of which the holding company owns stock is not of a nature to support an agency relationship, or consequently, personal jurisdiction over the holding company or its day-to-day managing company.** *SGI Air Holdings II LLC v. Novartis Int'l, AG*, 192 F. Supp.2d 1195 (D. Colo. 2002).

**Stock ownership of subsidiary is not doing business.** Neither does stock ownership in a

domestic company nor common directors establish that defendant was doing business in Colorado. *Perlman v. Great States Life Ins. Co.*, 164 Colo. 493, 436 P.2d 124 (1968).

**It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.** *Circle A Drilling Co. v. Sheehan*, 251 F. Supp. 242 (D. Colo. 1966); *Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co.*, 449 F.2d 775 (10th Cir.), *aff'd*, 323 F. Supp. 996 (D. Colo. 1971).

**Jurisdiction will attach if the defendant purposely initiates or acquiesces in activity conducted within the forum state on its behalf.** It must also avail itself of the protection of the forum state's law. Once that activity has been initiated, a single incident, substantial in nature, which gives rise to the plaintiff's claim will suffice to confer personal jurisdiction upon the courts of the forum state. *Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co.*, 323 F. Supp. 996 (D. Colo.), *aff'd*, 449 F.2d 775 (10th Cir. 1971).

**Phone conversations, correspondence, and receipt of check are not purposeful acts.** The interstate telephone conversations, correspondence, and the receipt in Illinois by petitioner of checks drawn on a Denver bank by respondent do not constitute acts by which the petitioner purposefully availed himself of the privilege of conducting activities within Colorado, thus invoking the benefits of its laws. *Safari Outfitters, Inc. v. Superior Court*, 167 Colo. 456, 448 P.2d 783 (1968).

**Nor does advertising in national magazines distributed within the forum state alone constitute a transaction of business within that state.** Such a contact is simply too tenuous upon which to found a claim of jurisdiction. *Safari Outfitters, Inc. v. Superior Court*, 167 Colo. 456, 448 P.2d 783 (1968).

**An advertisement in a national magazine is not in itself sufficient to establish contacts in Colorado.** *Marquest Med. Prods., Inc. v. Emide Corp.*, 496 F. Supp. 1242 (D. Colo. 1980).

**Transactions carried on in a state wholly by mail may be sufficient to constitute a doing of business within the state sufficient to enable the state to exercise in personam jurisdiction over the corporation.** *White-Rodgers Co. v. District Court*, 160 Colo. 491, 418 P.2d 527 (1966).

**Even the activities of even a single salesman certainly may be sufficient to constitute the doing of business within a state even though those activities do not involve the actual concluding of contracts but involve only solicitation of orders and service calls.** *White-Rodgers Co. v. District Court*, 160 Colo. 491, 418 P.2d 527 (1966).

**When the activities of the agent are a continuous course of dealing.** While it is clear that casual or intermittent presence of the corpora-



tion's agent within the state is not enough to support in personam jurisdiction based upon service on an agent, the United States supreme court has held that when the activities of the agent are such as to constitute a continuous course of dealings within the state, due process is not denied by the exercise of in personam jurisdiction through service on the agent in the state. *White-Rodgers Co. v. District Court*, 160 Colo. 491, 418 P.2d 527 (1966).

**Corporation's control over its representative.** The amount of control the corporation exerted over its representative in the state and the fact that the representative maintains a listing in the Denver telephone directory are factors which point toward "doing business". *Elliott v. Edwards Eng'g Corp.*, 257 F. Supp. 537 (D. Colo. 1965).

**The payment of congressional salaries by merely transferring money to banks in Colorado does not establish minimum contacts with Colorado.** Thus the clerk of the U.S. house of representatives and the secretary of the U.S. senate could not be reached by Colorado's long-arm statute and the court could not exercise personal jurisdiction over them. *Shaffer v. Clinton*, 54 F. Supp.2d 1014 (D. Colo. 1999).

**Negotiation, execution, and delivery of a note in Colorado is transacting business.** The negotiation of a loan from a Colorado bank, in Colorado, with the execution and delivery to the bank of a promissory note is transacting business within this state within the meaning of the statute. *Knight v. District Court*, 162 Colo. 14, 424 P.2d 110 (1967).

**Mere fact that part of consideration for note is Colorado contract is not sufficient.** The note was executed in Montana. Presumably all negotiations took place there. The only contact with Colorado is the fact that part of the consideration was a contract executed in Colorado. Such contact does not satisfy "traditional notions of fair play and substantial justice". *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *Circle A Drilling Co. v. Sheehan*, 251 F. Supp. 242 (D. Colo. 1966).

**A note is a specialty and is not to be regarded as the same transaction as that which gave rise to the debt.** The note stands alone. *Circle A Drilling Co. v. Sheehan*, 251 F. Supp. 242 (D. Colo. 1966).

**Demand for payment of note executed outside state insufficient.** Where a promissory note was executed and delivered outside of Colorado and, later, one of the parties relocated in Colorado and mailed a letter out of state demanding payment of the note, the contacts within the state are not sufficient for in personam jurisdiction. *Associated Inns & Restaurant Co. of Am. v. Dev. Assocs.*, 516 F. Supp. 1023 (D. Colo. 1981).

**Where foreign note is merely a renewal of a Colorado loan transacting of business con-**

**tinues.** Though the petitioners admittedly executed the renewal note in Utah, they had each nonetheless performed in Colorado several "purposeful acts" relative thereto, but for the original loan in Colorado, there never would have been a renewal note. *Knight v. District Court*, 162 Colo. 14, 424 P.2d 110 (1967).

**Actions of internal revenue officials insufficient.** Officials who were out-of-state residents and who at no time worked in, or traveled in connection with work, in this state had not transacted business for purposes of this section. *First Western Govern. Sec., Inc. v. U.S.*, 578 F. Supp. 212 (D. Colo. 1984).

**A nonresident who filed a required claim in a probate proceeding does not constitute the transaction of business** by the nonresident for purposes of Colorado's long-arm statute. *Harman v. Stillwell*, 944 P.2d 665 (Colo. App. 1997).

**Economic injury in Colorado insufficient.** Where defendant welded a pipe in Italy which was subsequently used by the plaintiff Colorado corporation in Texas, where the weld failed, allegedly causing economic injury in Colorado, the defendant is not subject to the jurisdiction of the court under this section. *Res. Inv. Corp. v. Hughes Tool Co.*, 561 F. Supp. 1236 (D. Colo. 1983).

**Plaintiff failed to make a prima facie showing of personal jurisdiction under the transaction of business subsection where his complaint failed to allege any facts in support of his conclusory statement that "defendants transacted business" in Colorado and his affidavit and response to motion to dismiss did not contain any additional facts that would sufficiently support jurisdiction.** *Wenz v. Memory Crystal*, 55 F.3d 1503 (10th Cir. 1995).

**Defendant's continuing contractual relationship with plaintiff was insufficient to allow personal jurisdiction over it in Colorado.** Trial court did not err in determining that defendant did not purposefully avail itself of the privilege of conducting business activities within Colorado. *Archangel Diamond Corp. v. Arkhangelskgeoldobycha*, 94 P.3d 1208 (Colo. App. 2004), *aff'd in part and rev'd in part* on other grounds, 123 P.3d 1187 (Colo. 2005).

**Defendant's contacts to the state were necessitated by virtue of the plaintiff's moving its principal place of business to Colorado.** Contacts that are necessitated by the plaintiff's unilateral move are given much less weight. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005).

**The continuous presence of four employees of the defendant non-resident corporation in Colorado who are employed for the purpose of soliciting orders on behalf of such corporation constitutes sufficient contact in the forum for personal jurisdiction over the corporation.**

Schlesinger v. Merrill Pub. Co., 675 F. Supp. 591 (D. Colo. 1987).

**An individual who has become an officer or a director of a Colorado corporation** has sufficiently transacted business within the state to subject himself to the jurisdiction of its courts with respect to claims made by the corporation or by others on behalf of the corporation arising out of the individual's duties as an officer or director. Pub. Warranty Corp. v. Mullins, 757 P.2d 1140 (Colo. App. 1988).

**Execution of note.** When a person executes a note outside of this state but the note expressly obligates him to pay money to a resident of this state, he may be properly sued in Colorado. The single act of executing the note constituted a substantial enough connection to render exercise of jurisdiction reasonable under the circumstances. Kingston v. Brussat, 698 F. Supp. 215 (D. Colo. 1988); Alameda Nat. Bank v. Kanchanapoom, 752 F. Supp. 367 (D. Colo. 1990).

**Defendants who induced plaintiff to rely on defendants' representations** resulting in extension of more than two million dollars in credit and shipment of more than two million dollars worth of products from Colorado to defendants' clients are subject to personal jurisdiction in Colorado. Contacts which included seven face-to-face meetings in two states, one mailing, and twenty-eight phone calls over a four-month period were sufficient to satisfy both transaction-of-business standards and due process requirements. Marquest Med. Prods., Inc. v. Daniel, McKee & Co., 791 P.2d 14 (Colo. App. 1990).

**Because its promotional efforts were directed towards Colorado residents through local media advertising in Colorado,** defendant purposefully availed itself of the privilege of conducting business in this state and should reasonably have anticipated being subject to the jurisdiction of the Colorado courts. Martinez v. Farmington Motors, Inc., 931 P.2d 546 (Colo. App. 1996).

**Purported father found to have transacted business in state.** Purported father's sending of letter agreeing to pay support that father knew would be relied upon by Colorado authorities for purpose of determining eligibility for public assistance constituted transacting business in this state. In re Parental Responsibilities of H.Z.G., 77 P.3d 848 (Colo. App. 2003).

#### D. Agency Theory.

**Agency theory explained.** Under Colorado's long-arm statute, a nonresident defendant may be subject to personal jurisdiction in Colorado based on the imputed contacts of defendant's agent. To establish this agency theory, jurisdictional facts must connect the actions of the agent to the principal by either "the transaction of any business" or "the commission of a tortious act."

Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007).

**Jurisdiction and liability separate issues.** A court's determination of agency for the purpose of personal jurisdiction is a separate determination from, and is not dispositive of, the substantive issue of defendant's liability for the actions of the agent. For jurisdictional purposes, plaintiff needs only make a prima facie showing of the connection between the actions of the agent and the principal. Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007).

**Due process requires** that jurisdictional facts be examined to determine whether either general or specific jurisdiction exists and, if so, whether it is reasonable for the court to exercise that jurisdiction. Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187 (Colo. 2005); Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007).

**Australian corporation was properly subject to personal jurisdiction** because, although general jurisdiction was lacking due to the corporation's absence of business contacts with Colorado, plaintiff made a prima facie showing of specific jurisdiction based on documentary evidence showing the corporation sent its agent on a business trip to various states, including Colorado, during the course of which trip the agent went to a restaurant with a coworker, became intoxicated, and caused an automobile accident that killed the coworker. Further, under the circumstances, it was held reasonable to require the corporation to defend in Colorado due to the legitimate interests of Colorado in protecting the safety of its roads and providing a forum for the plaintiff. Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007).

### III. COMMISSION OF TORT.

**Law reviews.** For comment on Vandermee v. District Court, appearing below, see 40 U. Colo. L. Rev. 471 (1968).

**Section is constitutional.** The new "long arm" statute, insofar as it permits the assertion of in personam jurisdiction over nonresidents who commit a tortious act within the state of Colorado is not unconstitutional. Zerr v. Norwood, 250 F. Supp. 1021 (D. Colo. 1966).

**Where tortious act is committed within state, there need not be additional minimum contacts in state** to meet constitutional requirements of due process. Texair Flyers, Inc. v. District Court, 180 Colo. 432, 506 P.2d 367 (1973).

**Tortious act.** The noun "act" implies a single occurrence, a specific event, one happening. The adjective "tortious" implies an act with an attending injury proximately related to that act. The use of the term "tortious act" implies the total act embodying the cause and the effect through the continuum of time. Vandermee v.



District Court, 164 Colo. 117, 433 P.2d 335 (1967).

**Our long arm statute grants Colorado courts jurisdiction over persons who commit tortious acts within this state.** Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972).

**Colorado residents have local forum for damages inflicted on them by nonresidents.** The legislative purpose, which inspired the adoption of the long arm statute, was the expansion of our court's jurisdiction within constitutional limitations in order to provide a local forum for Colorado residents who suffer damages in Colorado as a result of tortious acts of nonresidents. Vandermeer v. District Court, 164 Colo. 117, 433 P.2d 335 (1967).

**Court has jurisdiction over nonresident motorist in Colorado accident.** A nonresident motorist who is involved in an automobile accident in a particular state has established a sufficient contact with that state to warrant its courts in asserting in personam jurisdiction over him to determine the merits of any controversy that may happen to arise out of that accident. Zerr v. Norwood, 250 F. Supp. 1021 (D. Colo. 1966).

**Foreign corporation may be summoned based on tortious act of its agent within Colorado** although "transacting business" standard may not be met. Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007).

**"Tortious act" is to be liberally construed but not to create a new tort.** Although our supreme court has said that the term, "tortious act", is to be liberally construed to carry out the intent of the general assembly, it cannot be so liberally construed as to create a tort. People in Interest of D.R.B., 30 Colo. App. 603, 498 P.2d 1166 (1972), aff'd sub nom., A.R.B. v. G.L.P., 180 Colo. 439, 507 P.2d 468 (1973).

**The fathering of an illegitimate child in and of itself is not a "tortious act".** People in Interest of D.R.B., 30 Colo. App. 603, 498 P.2d 1166 (1972), aff'd sub nom. A.R.B. v. G.L.P., 180 Colo. 439, 507 P.2d 468 (1973).

**Fact that person dies in Colorado does not constitute tortious act.** Ferrari, S.p.A. SEFAC v. District Court, 185 Colo. 136, 522 P.2d 105 (1974), overruled in part in Classic Auto Sales, Inc. v. Schocket, 832 P.2d 233 (Colo. 1992).

**Disclosure of internal revenue agent's report concerning Colorado resident, in place other than Colorado, did not give rise to a tort in this state.** First Western Govern. Sec., Inc. v. U.S., 578 F.Supp. 212 (D. Colo. 1984).

**Injury must result from intended or foreseeable use.** An additional requirement to be met before subjecting an alien manufacturer to personal jurisdiction is that the injury complained of must have resulted from a use intended or foreseeable by the manufacturer. Al-

liance Clothing, Ltd. v. District Court, 187 Colo. 400, 532 P.2d 351 (1975).

**Use of foreign product in United States or state must be foreseen.** In all the tort cases subjecting alien manufacturers to personal jurisdiction by long-arm statutes, the courts noted that the manufacturer could reasonably foresee that his product would be used in the United States or in the state in question. Alliance Clothing, Ltd. v. District Court, 187 Colo. 400, 532 P.2d 351 (1975).

**Misrepresentations inducing reliance justify jurisdiction.** Where the defendants make an affirmative misrepresentation intending to induce, and actually inducing, justifiable reliance by the plaintiff in Colorado, which causes him damages in Colorado, the defendants purposefully avail themselves of Colorado by proximately causing tort damage in Colorado. Ruggieri v. Gen. Well Serv., Inc., 535 F. Supp. 525 (D. Colo. 1982).

**Telephone conversations which are nothing more than informational are inadequate** to support a finding of personal jurisdiction. Bennett Waites Corp. v. Piedmont Aviation, Inc., 563 F. Supp. 810 (D. Colo. 1983).

**Two letters, an electronic presentation, and a conference call were sufficient contacts** to establish prima facie showing that Colorado court has personal jurisdiction over defendant. First Horizon Merch. Servs., Inc. v. Wellspring Capital Mgmt., LLC, 166 P.3d 166 (Colo. App. 2007).

**Participation in conference calls and failure to correct material omissions established a prima facie case of personal jurisdiction.** Although contacts were limited, the exercise of jurisdiction would be consistent with due process. First Horizon Merch. Servs., Inc. v. Wellspring Capital Mgmt., LLC, 166 P.3d 166 (Colo. App. 2007).

**Out-of-state repair of motor vehicle insufficient.** Where the defendant truck stop's sole contact with Colorado was its allegedly negligent repair of the brakes on the truck driven in Colorado by the plaintiff, and it could not be proven that the truck stop had conducted any other activity in the state, the district court's exercise of jurisdiction violates due process. Fleet Leasing, Inc. v. District Court, 649 P.2d 1074 (Colo. 1982).

**As a general proposition, if a corporation elects to sell its products for ultimate use in another state, it is not unjust to hold it answerable there for any damage caused by defects in those products.** Vandermeer v. District Court, 164 Colo. 117, 433 P.2d 335 (1967); Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972).

**Corporation must by some act avail itself of privilege of doing business in forum state.** It is essential in each case "that there be some act by which the defendant purposefully avails

itself of the privilege of conducting activities within the forum state". Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972).

**This test has been generalized to mean that the defendant must have taken voluntary action** calculated to have an effect in the forum state. Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972).

**Statute does not apply to tortious act outside of state.** The statute clearly provides that personal jurisdiction can only be grounded on the commission of a tortious act within the state, and the general assembly did not include tortious acts committed without the state which gave rise to injuries within the state. Had that been the legislative intent it could have been accomplished by specific language to that effect. Before this statute has any effect, both the asserted negligent act or acts of the nonresident defendant, as well as the injury they produce, must occur within the state of Colorado. Lichina v. Futura, Inc., 260 F. Supp. 252 (D. Colo. 1966). But see Vandermeer v. District Court, 164 Colo. 117, 433 P.2d 335 (1967).

But a tortious act committed outside the state may come within this section once it causes injury or damage within this state. Pace v. D & D Fuller CATV Const., Inc., 748 P.2d 1314 (Colo. App. 1987), *aff'd*, 780 P.2d 520 (Colo. 1989); Schocket v. Classic Auto Sales, Inc., 817 P.2d 561 (Colo. App. 1991), *aff'd*, 832 P.2d 233 (Colo. 1992).

For the purposes of subsection (1)(b), allegations of tortious conduct in another state which causes injury in Colorado have been held to constitute a *prima facie* showing of a tortious act within Colorado. Marquest Med. Prods., Inc. v. Daniel, McKee & Co., 791 P.2d 14 (Colo. App. 1990); Schocket v. Classic Auto Sales, Inc., 817 P.2d 561 (Colo. App. 1991), *aff'd*, 832 P.2d 233 (Colo. 1992).

**Negligent conduct initiated in foreign state which proximately results in injury incurred in Colorado constitutes tortious conduct** within the meaning of long arm statute. Texair Flyers, Inc. v. District Court, 180 Colo. 432, 506 P.2d 367 (1973); Scheuer v. District Court, 684 P.2d 249 (Colo. 1984); Found. for Knowledge in Dev. v. Interactive Design Consultants, 234 P.3d 673 (Colo. 2010).

To bring one under the jurisdiction of the Colorado court by use of the tort section of this section, sufficient facts need be alleged to support a claim that the alleged tortfeasor was negligent and that the negligent conduct proximately resulted in injury that occurred in Colorado, even if that conduct was initiated in a foreign state. Shaw v. Aurora Mobile Homes & Real Estate, Inc., 36 Colo. App. 321, 539 P.2d 1366 (1975).

**Section may be relied on even if tort committed prior to effective date.** This section and

§ 13-1-125 may be constitutionally applied where the complaint is filed after the effective date of the statute, though the tortious act complained of occurred before the effective date of the statute. Hoen v. District Court, 159 Colo. 451, 412 P.2d 428 (1966).

**Retrospective application of this section is in accord with sound public policy.** At the time of the accident, the defendant was a resident of Colorado. This fact, in itself, in addition to providing a sufficient contact with the state to satisfy the requirement of due process, makes it reasonable to conclude that the defendant might have expected to be subject to suit in Colorado for torts that she may have committed here during that period. Smith v. Putnam, 250 F. Supp. 1017 (D. Colo. 1965).

**Generally, courts of one state do not have jurisdiction over foreign administrator or executor** and should not interfere with administration of decedent's estate in foreign jurisdiction. However, rule must give way to legislative enactments in appropriate circumstances, such as where administrator's decedent has committed tort in state of forum. Texair Flyers, Inc. v. District Court, 180 Colo. 432, 506 P.2d 367 (1973).

**In personam jurisdiction may be obtained over personal representative of deceased non-resident tortfeasor.** Texair Flyers, Inc. v. District Court, 180 Colo. 432, 506 P.2d 367 (1973).

**Plaintiff need not prove merits of action** — commission of tort within state — to initially establish in personam jurisdiction. Texair Flyers, Inc. v. District Court, 180 Colo. 432, 506 P.2d 367 (1973); Jenner & Block v. District Court, 197 Colo. 184, 590 P.2d 964 (1979).

**Facts constituting commission of a tortious act within this state.** Jenner & Block v. District Court, 197 Colo. 184, 590 P.2d 964 (1979).

**Contact insufficient to justify personal jurisdiction.** C.F.H. Enters., Inc. v. Heatcool, 538 F. Supp. 774 (D. Colo. 1982).

**"Effects" test,** as established by U.S. supreme court, specifies that where a defendant's intentional actions, taken outside the forum, are expressly directed at causing a harmful effect within the forum state, such actions are sufficient to satisfy due process in the context of an intentional tort. D & D Fuller CATV Const., Inc. v. Pace, 780 P.2d 520 (Colo. 1989).

**Defendant's alleged tortious acts that have an effect in Colorado, without other contacts with Colorado, did not support a reasonable inference that defendant engaged in conduct subjecting it to personal jurisdiction.** Archangel Diamond Corp. v. Arkhangelskgeoldobycha, 94 P.3d 1208 (Colo. App. 2004), *aff'd* in part and *rev'd* in part on other grounds, 123 P.3d 1187 (Colo. 2005).

**Jurisdiction over nonresident tortfeasor requires that the injury itself occur in Colorado, even if the negligent act occurs in an-**



**other state.** *McAvoy v. District Court*, 757 P.2d 633 (Colo. 1988); *AST Sports Science, Inc. v. CLF Distribution Ltd.*, 514 F.3d 1054 (10th Cir. 2008).

Where Colorado resident was injured in an accident with a Washington resident in Washington due to alleged negligent actions which occurred in Washington, the allegations of subsequent treatment for the injury in Colorado, and effects of the accident which were manifest in Colorado, were not sufficient to confer jurisdiction on the Colorado court under the long-arm statute. *McAvoy v. District Court*, 757 P.2d 633 (Colo. 1988).

**In order to satisfy the statutory standard for assertion of long arm jurisdiction**, it is not necessary that both the tortious conduct constituting the cause and the injury constituting the effect take place in Colorado. However, the injury in the forum state must be direct, not consequential or remote. *F.D.I.C. v. First Interstate Bank of Denver, N.A.*, 937 F. Supp. 1461 (D. Colo. 1996).

**Plaintiff's allegation of a tort caused by unauthorized disbursements from a London account failed to allege that defendants engaged in any tortious conduct in Colorado.** *Wenz v. Memery Crystal*, 55 F.3d 1503 (10th Cir. 1995).

**Plaintiff failed to allege an injury in Colorado sufficient to invoke personal jurisdiction under subsection (1)(b) where alleged unauthorized disbursements occurred in London and were from a London account.** That plaintiff may have been economically affected in Colorado simply because he lived here is insufficient to establish personal jurisdiction under subsection (1)(b). *Wenz v. Memery Crystal*, 55 F.3d 1503 (10th Cir. 1995).

**The loss of profits in the state of plaintiff's domicile is insufficient to sustain long-arm jurisdiction over a nonresident defendant.** The injury in the forum state must be direct, not consequential or remote. When both the tortious conduct and the injury occur in another state, the fact that the plaintiff resides in Colorado and experiences some economic consequences here is insufficient to confer jurisdiction on a Colorado court. *AMAX Potash Corp. v. Trans-Resources, Inc.*, 817 P.2d 598 (Colo. App. 1991); *Gognat v. Ellsworth*, 224 P.3d 1039 (Colo. App. 2009), *aff'd* on other grounds, 259 P.3d 497 (Colo. 2011).

**A person's conduct causes a minor child to leave a custodial parent**, when the parent does not consent, or prevents a child's return to such parent, such conduct constitutes a tortious act. *D & D Fuller CATV Const., Inc. v. Pace*, 780 P.2d 520 (Colo. 1989).

**Defendant's allegedly tortious action in collecting upon a voided wage assignment was expressly directed at causing a harmful effect within the forum state and thus created a**

sufficient nexus between defendant and the forum state so as to satisfy due process. *Vogan v. County of San Diego*, 193 P.3d 336 (Colo. App. 2008).

**Tortious conduct in a foreign state which causes injury in Colorado** may be deemed to be an act committed in Colorado so as to satisfy the long-arm statute. *Ranger v. Fortune Ins. Co.*, 817 P.2d 600 (Colo. App. 1991).

**Tort claims of intentional and negligent misrepresentations directed into Colorado during the course of telephone conversations from outside the state into the state are sufficient to constitute tortious acts within the state under this section.** *Broadview Fin., Inc. v. Entech Mgmt. Servs. Corp.*, 859 F. Supp. 444 (D. Colo. 1994).

**Personal jurisdiction existed over nonresident attorney and his law firm which, in addressing two letters to plaintiff in Colorado, purposely directed their activities toward Colorado and plaintiff's injuries relate to that contact with Colorado.** *First Entm't, Inc. v. Firth*, 885 F. Supp. 216 (D. Colo. 1995).

**Exercise of jurisdiction held proper** where defendants, in connection with sale of sports car through Nebraska dealership, placed ad in national magazine, made allegedly fraudulent representations via telephone to Colorado plaintiff, and knew that car would be transported to and used in Colorado. *Schocket v. Classic Auto Sales, Inc.*, 817 P.2d 561 (Colo. App. 1991), *aff'd*, 832 P.2d 233 (Colo. 1992).

#### IV. REAL PROPERTY IN COLORADO.

**Transaction involving Colorado property gives long arm jurisdiction.** This section commonly referred to as the long arm statute specifically provides that a person who transacts business in the state of Colorado or owns real property in the state of Colorado submits himself to the jurisdiction of the courts of Colorado in any action arising from the transaction of such business or the ownership of such property. *McHenry F.S., Inc., v. Clausen*, 30 Colo. App. 253, 491 P.2d 592 (1971).

**Being the state with greatest interest in transaction, jurisdiction in Colorado not offensive.** Where a contract to purchase land was signed by both parties outside the state of Colorado but the defendant came to Colorado to view the property and employed a Colorado firm of consulting engineers to conduct a survey of the property, and the contract to purchase the property was prepared in Colorado, and the real estate broker and the vendor of the property were both Colorado residents, and the subject matter of the contract, the real estate, was located in Colorado thereby making Colorado the state with the greatest interest in the transaction, the defendant's purposeful acts in this state were significant, and the jurisdiction of the district

court obtained through the long arm statute did not offend traditional notions of fair play and substantial justice. *Dwyer v. District Court*, 188 Colo. 41, 532 P.2d 725 (1975).

**Once defendants are personally served, court acquires in personam jurisdiction.** Where the claims asserted against the defendants arose out of their title to certain real property and their transfer of that property to a company, and the defendants were personally served with process in the state of Illinois pursuant to the provisions of this section, consequently, the trial court obtained in personam jurisdiction over them. *McHenry F.S., Inc. v. Clausen*, 30 Colo. App. 253, 491 P.2d 592 (1971).

**Nonresidency of all parties does not defeat long arm jurisdiction.** The argument that since both the plaintiff and the defendants were residents of Illinois, the long arm statute was not available is without merit. *McHenry F.S., Inc. v. Clausen*, 30 Colo. App. 253, 491 P.2d 592 (1971).

## V. CONTRACTS OF INSURANCE.

**Reinsurance contract subject to law of state where made.** The negotiation and execution outside the state of a contract of reinsurance is not doing business in the state where the insured property is situated and the original risk was assumed. Reinsurance effected under a contract made in one state does not constitute doing business in another, although the risks covered by the reinsurance agreement were in the latter state and were covered by the reinsurance contract. *Perlman v. Great States Life Ins. Co.*, 164 Colo. 493, 436 P.2d 124 (1968).

**Plaintiff must prove reinsurance treaty was executed in Colorado.** As to the reinsurance treaties, the record fails to show that these were executed in Colorado. Plaintiff has the burden of proof in regard to this essential assertion of

jurisdiction. *Perlman v. Great States Life Ins. Co.*, 164 Colo. 493, 436 P.2d 124 (1968).

**Mere fact that certain individuals who live in Colorado were parties to a reinsurance contract** is insufficient to meet the minimum contacts test. *Union Pac. R.R. Co. v. Equitas Ltd.*, 987 P.2d 954 (Colo. App. 1999).

**Insurance company and liquidator subject to jurisdiction.** Where an insurance company solicited and did substantial business in Colorado, the company, and its liquidator in case the company is insolvent, is subject to jurisdiction under the provisions of this section. *Insurance Affiliates, Inc. v. O'Connor*, 522 F. Supp. 703 (D. Colo. 1981).

## VI. MAINTENANCE OF MATRIMONIAL DOMICILE.

**Trial court held to have acquired personal jurisdiction over husband for purposes of dividing marital property.** *In re Booker*, 833 P.2d 734 (Colo. 1992).

**A spouse's affidavit that the spouse has resided and continues to reside in Colorado is sufficient** for a Colorado court to exercise long arm jurisdiction over the husband under subsection (1)(e). *In re Akins*, 932 P.2d 863 (Colo. App. 1997).

**Entry of foreign decree that determined only the status of the marriage** without addressing the division of marital property did not deprive the Colorado court of the power to divide property exclusive of husband's military pension and to award maintenance and child support. *In re Akins*, 932 P.2d 863 (Colo. App. 1997).

**Federal act preempts state rules regarding jurisdiction over a military pension.** Under the supremacy clause, the terms of the federal Uniformed Services Former Spouse's Protection Act preempt state rules with respect to a court's jurisdiction to consider the military pension as a marital asset. *In re Akins*, 932 P.2d 863 (Colo. App. 1997).

**13-1-125. Service of process.** (1) Service of process upon any person subject to the jurisdiction of the courts of Colorado may be made by personally serving the summons upon the defendant or respondent outside this state, in the manner prescribed by the Colorado rules of civil procedure, with the same force and effect as if the summons had been personally served within this state.

(2) No service of any summons or other process upon any corporation shall be made outside the state in the manner provided in subsection (1) of this section when such corporation maintains an agent for process upon whom service may be made as provided in rule 4 of the Colorado rules of civil procedure.

(3) Nothing in this section shall limit or affect the right to serve any process as prescribed by the Colorado rules of civil procedure.

**Source:** L. 65: p. 472, § 2. C.R.S. 1963: § 37-1-27. L. 82: p. 280, § 2.

**Cross references:** For the manner of service, see C.R.C.P. 4.



## ANNOTATION

I. General Consideration.

II. Proper Service.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Jurisdiction and Service of Process Beyond Colorado Boundaries", see 11 Colo. Law. 748 (1982). For article, "Legislative Activities in Family Law", see 11 Colo. Law. 1560 (1982).

**This section and § 13-1-124 are sometimes referred to as the "long arm" or "single act" statute.** Hoen v. District Court, 159 Colo. 451, 412 P.2d 428 (1966); Cox v. District Court, 160 Colo. 437, 417 P.2d 792 (1966).

**Purpose of sections was to extend the court's jurisdiction.** These sections were passed by the general assembly in order to extend, rather than to limit the jurisdiction of the courts of the state. White-Rodgers Co. v. District Court, 160 Colo. 491, 418 P.2d 527 (1966).

**Section may be used even when cause arose before effective date.** This section and § 13-1-124 may be constitutionally applied where the complaint is filed after the effective date of the statute, though the tortious act complained of occurred before the effective date of the statute. Hoen v. District Court, 159 Colo. 451, 412 P.2d 428 (1966); Cox v. District Court, 160 Colo. 437, 417 P.2d 792 (1966).

**Retrospective application of this section is in accord with sound public policy.** Smith v. Putnam, 250 F. Supp. 1017 (D. Colo. 1965).

**For discussion of conspiracy theory of personal jurisdiction,** see Bennett Waites Corp. v. Piedmont Aviation, Inc., 563 F. Supp. 810 (D. Colo. 1983).

**Applied in Nations Enters, Inc. v. Process Equip. Co.,** 40 Colo. App. 390, 579 P.2d 655 (1978); Adolph Coors Co. v. A. Genderson & Sons, 486 F. Supp. 131 (D. Colo. 1980); Beckman v. Carlson, 553 F. Supp. 1049 (D. Colo. 1983).

### II. PROPER SERVICE.

**Transacting of business may not be proved unless process is properly served.** Since re-

spondents did not serve process on a foreign corporation by personal service as required by the "long arm" statute, its provisions concerning contacts sufficient to establish doing business are inapplicable under § 7-9-119. Geer Co. v. District Court, 172 Colo. 48, 469 P.2d 734 (1970).

**It is improper to dismiss a complaint because of improper or invalid service of process.** Hoen v. District Court, 159 Colo. 451, 412 P.2d 428 (1966).

**Quashing of process is not reviewable by writ of error.** An order quashing a purported service of process is not tantamount to a judgment of dismissal and under our rules is not such an order as is subject to review by writ of error. Hoen v. District Court, 159 Colo. 451, 412 P.2d 428 (1966).

**Process must be served on defendant at usual place of abode.** The fact that the serviceman's usual place of abode was not the place of service is sufficient as a matter of law to overcome the prima facie showing made by the sheriff's return and that the service must therefore be set aside. Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

**Term "usual place of abode" is not necessarily synonymous with domicile.** The term "usual place of abode" has generally been construed to mean the place where that person is actually living at the time service is attempted. It is not necessarily synonymous with "domicile". Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

**For necessity of process being served by proper person,** see Martin v. Denver Juvenile Court, 177 Colo. 261, 493 P.2d 1093 (1972).

**Process will not be quashed for lack of jurisdiction if plaintiff makes prima facie showing.** Where plaintiff makes prima facie showing of threshold jurisdiction in complaint, process is not vulnerable to motion to quash based upon lack of jurisdiction. Texair Flyers, Inc. v. District Court, 180 Colo. 432, 506 P.2d 367 (1973).

**13-1-126. Documents in court proceedings - designation by clerk of representative to attend court proceedings.** Documents from the office of the clerk of any court of record to be used as evidence in court proceedings shall be acknowledged, exemplified, verified, or attested to in a manner which shall make unnecessary the personal appearance of such clerk in court proceedings to acknowledge, exemplify, verify, or attest to the validity of such documents. The clerk of any court of record may designate a representative to attend court proceedings if the clerk is subpoenaed for the purpose of acknowledging, exemplifying, verifying, or attesting to the validity of documents furnished by the clerk's office.

**Source: L. 79:** Entire section added, p. 596, § 4, effective July 1.

**13-1-127. Entities - school districts - legislative declaration - representation.**

(1) As used in this section, unless the context otherwise requires:

(a) "Closely held entity" means an entity, as defined in section 7-90-102 (20), C.R.S., with no more than three owners.

(a.2) "Cooperative" shall have the same meaning as set forth in section 7-90-102 (9), C.R.S.

(a.5) "Corporate licensed child placement agency" means an entity that places, or arranges for placement of, the care of any child with any family, person, or institution other than persons related to said child and that is licensed by the department of human services pursuant to section 26-6-104, C.R.S., as a child placement agency.

(b) "Corporation" shall have the same meaning as set forth in section 7-90-102 (10), C.R.S.

(c) "Entity" shall have the same meaning as set forth in section 7-90-102 (20), C.R.S.

(d) "Limited liability company" shall have the same meaning as set forth in section 7-90-102 (32), C.R.S.

(e) "Limited partnership" shall have the same meaning as set forth in section 7-90-102 (34), C.R.S.

(f) "Limited partnership association" shall have the same meaning as set forth in section 7-90-102 (35), C.R.S.

(g) "Nonprofit association" shall have the same meaning as set forth in section 7-90-102 (38), C.R.S.

(h) "Nonprofit corporation" shall have the same meaning as set forth in section 7-90-102 (39), C.R.S.

(i) "Officer" means a person generally or specifically authorized by an entity to take any action contemplated by this section.

(j) "Owner" shall have the same meaning as set forth in section 7-90-102 (43), C.R.S.

(k) "School district" means a school district organized and existing pursuant to law but does not include a junior college district.

(l) "Truancy proceedings" means judicial proceedings for the enforcement of the "School Attendance Law of 1963", article 33 of title 22, C.R.S., brought pursuant to section 22-33-108, C.R.S.

(2) Except as otherwise provided in section 13-6-407, a closely held entity may be represented before any court of record or any administrative agency by an officer of such closely held entity if:

(a) The amount at issue in the controversy or matter before the court or agency does not exceed ten thousand dollars, exclusive of costs, interest, or statutory penalties, on and after January 1, 1991; and

(b) The officer provides the court or agency, at or prior to the trial or hearing, with evidence satisfactory to the court or agency of the authority of the officer to appear on behalf of the closely held entity in all matters within the jurisdictional limits set forth in this section.

(2.3) For the purposes of this section, each of the following persons shall be presumed to have the authority to appear on behalf of the closely held entity upon providing evidence of the person's holding the specified office or status:

(a) An officer of a cooperative, corporation, or nonprofit corporation;

(b) A general partner of a partnership or of a limited partnership;

(c) A person in whom the management of a limited liability company is vested or reserved; and

(d) A member of a limited partnership association.

(2.5) (a) The general assembly hereby finds and determines that the practice of law should not include the representation of a corporation in workers' compensation proceedings by an authorized employee of such corporation. While the general assembly respectfully recognizes the jurisdiction of the supreme court with respect to the regulation of the practice of law, it hereby finds and declares that the representation of a corporation in workers' compensation cases by an authorized employee of that corporation does not constitute the unauthorized practice of law. The general assembly has determined that the decision of a president or secretary of a corporation to have a corporate employee represent



the corporation in a workers' compensation case is a business decision made voluntarily and knowingly by persons who are qualified and accustomed to making business decisions. The general assembly has further determined that allowing such representation will not hamper the orderly and proper disposition of workers' compensation cases and may expedite and facilitate such disposition. An employee of a defendant corporation with experience in the operations of such corporation and knowledge of the necessary facts and law can afford a defendant corporation with representation which is the substantial equivalent to, and may in some cases, be more effective than, a licensed attorney. The general assembly hereby declares that the protections afforded by the restrictions set forth by the supreme court with respect to the unauthorized practice of law are unnecessary for the described form of representation because the general public is not likely to be harmed by such representation. Further, the general assembly respectfully recommends that the supreme court adopt rules which permit and regulate such representation in which event the general assembly may choose to repeal this statute in deference to the supreme court's rules.

(b) Notwithstanding the provisions of paragraph (a) of subsection (2) of this section concerning the amount at issue, any corporation which is in compliance with the requirements otherwise imposed on corporations by law may be represented by any employee of the corporation who is so authorized by the president or secretary of such corporation, in proceedings authorized under the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, C.R.S., exclusive of proceedings before the industrial claim appeals office under part 3 of article 43 of title 8, C.R.S., appeals to the court of appeals under section 8-43-307, C.R.S., and summary reviews by the supreme court under section 8-43-313, C.R.S.

(3) The court may rely upon a written resolution of a closely held entity that allows a named officer to appear in the closely held entity's behalf.

(4) A closely held entity's exercise of the option authorized by this section to be represented by an officer shall not alone be construed to establish personal liability of the representing officer or any other officer, director, owner, or shareholder for action taken by that closely held entity.

(5) A corporate licensed child placement agency, as defined in paragraph (a.5) of subsection (1) of this section, that is in compliance with the requirements otherwise imposed on closely held entities by law, may be represented by any named officer or designated agent of the agency in any proceeding involving the termination of the parent-child relationship pursuant to the "Colorado Children's Code", title 19, C.R.S., or in any proceeding involving a petition for adoption pursuant to section 19-5-208, C.R.S.

(6) Nothing in this section shall be interpreted to restrict the classes of persons who, or circumstances in which persons, may be represented by other persons, or may appear in person, before Colorado courts or administrative agencies.

(7) (a) A school district board of education may authorize, by resolution, one or more employees of the school district to represent the school district in truancy proceedings in any court of competent jurisdiction; except that the authorization of the board of education shall not extend to representation of the school district before a court of appeals or before the Colorado supreme court.

(b) A court may rely on the written resolution of the school district board of education that authorizes the named employee to represent the school district in truancy proceedings.

(c) An authorized employee who represents a school district in truancy proceedings pursuant to the provisions of this subsection (7) shall not be subject to the provisions of section 12-5-112, C.R.S.

(d) A school district board of education's exercise of the option authorized by this section to be represented in truancy proceedings by an employee shall not alone be construed to establish personal liability of the representing employee or any other employee or a school director of the school district for action taken by the school district.

**Source:** **L. 83:** Entire section added, p. 598, § 1, effective May 25. **L. 84:** (1)(c) amended, p. 450, § 1, effective March 16. **L. 90:** IP(2) and (2)(a) amended, p. 849, § 3, effective May 31; (2)(a) amended, p. 854, § 1, effective July 1. **L. 91:** (2.5) added, p. 1285, § 1, effective April 14. **L. 92:** (1)(a.5) and (5) added, pp. 179, 180, §§ 2, 3, effective



March 20; (2.5) amended, p. 276, § 1, effective April 14. **L. 94:** (1)(a.5) amended, p. 2639, § 85, effective July 1. **L. 98:** (1), (2), (3), (4), and (5) amended and (2.3) and (6) added, p. 489, § 1, effective February 1, 1999. **L. 2007:** (1)(k), (1)(l), and (7) added, pp. 165, 164, §§ 2, 1, effective March 22.

**Cross references:** (1) For representation of corporations in the small claims division of county court, see § 13-6-407.

(2) For the legislative declaration contained in the 1990 act amending the introductory portion to subsection (2) and subsection (2)(a), see section 1 of chapter 100, Session Laws of Colorado 1990. For the legislative declaration contained in the 1994 act amending subsection (1)(a.5), see section 1 of chapter 345, Session Laws of Colorado 1994.

## ANNOTATION

**Assuming that defendant church existed as a de facto corporation, if the pastor were recognized as a corporate officer, the pastor could represent the defendant in court.** Where there was no showing that the pastor was a corporate officer, however, the pastor could not represent the defendant church. *People v. LaPorte Church of Christ*, 830 P.2d 1150 (Colo. App. 1992).

**Trial court erred in permitting non-attorney manager to represent limited liability**

**company (LLC) since LLC could not satisfy the amount in controversy requirement of the statutory exception in subsection (2).** *Weston v. T&T, LLC*, \_\_ P.3d \_\_ (Colo. App. 2011).

**LLC not entitled to a new trial, however, because any error in permitting non-attorney manager to represent LLC was invited by LLC.** *Weston v. T&T, LLC*, \_\_ P.3d \_\_ (Colo. App. 2011).

**Applied in** *Keller Corp. v. Kelley*, 187 P.3d 1133 (Colo. App. 2008).

### 13-1-128. Confidentiality of decisions of courts of record - violations - penalties.

(1) Each decision of a court of record shall be confidential until publicly announced.

(2) (a) If it appears that the provisions of subsection (1) of this section have been violated, petition shall be made to the chief judge of the district court for the city and county of Denver for the appointment of a special prosecutor and the convening of a grand jury.

(b) The chief judge, for good cause shown, shall appoint the special prosecutor and shall order the impaneling of a grand jury in accordance with the provisions of article 73 of this title. Any special prosecutor appointed pursuant to this section shall be compensated as provided in section 20-1-308, C.R.S.

(3) An action for violation of subsection (1) of this section may only be commenced by the return of an indictment by a grand jury notwithstanding any provision of section 16-5-101, C.R.S., to the contrary.

(4) Any person who knowingly violates the provisions of subsection (1) of this section commits a class 6 felony and, upon conviction thereof, shall be punished as provided in section 18-1.3-401, C.R.S.

**Source:** **L. 87:** Entire section added, p. 539, § 1, effective July 1. **L. 89:** (4) amended, p. 827, § 31, effective July 1. **L. 2002:** (4) amended, p. 1487, § 120, effective October 1.

**Cross references:** For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002.

**13-1-129. Preferential trial dates.** (1) In any civil action filed in any court of record in this state, the court shall grant a motion for a preferential trial date which is accompanied by clear and convincing medical evidence concluding that a party suffers from an illness or condition raising substantial medical doubt of survival of that party beyond one year and which satisfies the court that the interests of justice will be served by granting such motion for a preferential trial date.

(2) In any civil action filed in any court of record in this state, the court may grant a motion for a preferential trial date upon the motion of a party who is a natural person at least seventy years of age and a finding by the court that such claim is meritorious, unless the court finds that such party does not have a substantial interest in the case as a whole.

(3) A motion under this section may be filed and served at any time when the case is at issue and a party meets the requirements of subsection (1) or (2) of this section.

(4) Upon the granting of a motion for a preferential trial date, the court shall set the case for trial not more than one hundred nineteen days from the date the motion was filed. The court shall establish an accelerated discovery schedule in all such cases. No continuance shall be granted beyond the one-hundred-nineteen-day period except for physical or mental disability of a party or a party's attorney or upon a showing of other good cause. Any such continuance shall be for no more than one hundred nineteen days, and only one such continuance shall be granted to a party.

**Source:** L. 90: Entire section added, p. 858, § 1, effective July 1. L. 2012: (4) amended, (SB 12-175), ch. 208, p. 822, § 1, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (4) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**13-1-130. Reports of convictions to department of education.** When a person is convicted of, pleads nolo contendere to, or receives a deferred sentence for a felony and the court knows the person is a current or former employee of a school district or a charter school in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

**Source:** L. 90: Entire section added, p. 1025, § 4, effective July 1. L. 2000: Entire section amended, p. 1843, § 22, effective August 2. L. 2003: Entire section amended, p. 2514, § 1, effective June 5.

**13-1-131. Speedy trial option in civil actions.** If a trial date has not been fixed by the court in any civil action within ninety days from the date the case is at issue, upon agreement of all the parties, the parties may elect to have the matter heard by a master, appointed by the court in accordance with the Colorado rules of civil procedure. When such a trial is held before a master, the parties shall pay the costs of such trial, as allocated fairly among the parties by the master. The master shall have all the powers of a judge.

**Source:** L. 90: Entire section added, p. 851, § 11, effective May 31.

**Cross references:** For the legislative declaration contained in the 1990 act enacting this section, see section 1 of chapter 100, Session Laws of Colorado 1990.

**13-1-132. Use of interactive audiovisual devices in court proceedings.** (1) Except for trials, when the appearance of any person is required in any court of this state, such appearance may be made by the use of an interactive audiovisual device. An interactive audiovisual device shall operate so as to enable the person and the judge or magistrate to view and converse with each other simultaneously.

(2) Notwithstanding any provision of this section, a judge or magistrate may order a person to appear in court.

(3) A full record of such proceeding shall be made.

(4) The supreme court may prescribe rules of procedure pursuant to section 13-2-109 to implement this section.

**Source:** L. 92: Entire section added, p. 318, § 1, effective April 29.

**13-1-133. Use of recycled paper.** (1) The general assembly finds and declares that there is a need to expand upon existing laws which foster the effective and efficient management of solid waste by requiring that certain documents submitted by attorneys-at-law to state courts of record be submitted on recycled paper. The general assembly further



finds that such expansion will protect and enhance the environment and the health and safety of the citizens of Colorado.

(2) (a) (I) Except as provided in paragraph (b) of this subsection (2), no document shall be submitted by an attorney to a court of record after January 1, 1994, unless such document is submitted on recycled paper. The provisions of this section shall apply to all papers appended to each such document.

(II) (A) Procedures adopted to implement the provisions of this section shall not impede the conduct of court business nor create grounds for an additional cause of action or sanction.

(B) No document shall be refused by a court of record solely because it was not submitted on recycled paper.

(b) Nothing in this section shall be construed to apply to:

(I) Photographs;

(II) An original document that was prepared or printed prior to January 1, 1994;

(III) A document that was not created at the direction or under the control of the submitting attorney;

(IV) Facsimile copies otherwise permitted to be filed with a court of record in lieu of the original document; however, if the original is also required to be filed, such original shall be submitted in compliance with this section;

(V) Existing stocks of nonrecycled paper and preprinted forms acquired or printed prior to January 1, 1994.

(3) The provisions of this section shall not be applicable if recycled paper is not readily available.

(4) For purposes of this section, unless the context requires otherwise:

(a) "Attorney" means an attorney-at-law admitted to practice law before any court of record in this state.

(b) "Courts of record" shall have the same meaning as set forth in section 13-1-111.

(c) "Document" means any pleading or any other paper submitted as an appendix to such pleading by an attorney, which document is required or permitted to be filed with a clerk of court concerning any action to be commenced or which is pending before a court of record.

(d) "Recycled paper" means paper with not less than fifty percent of its total weight consisting of secondary and postconsumer waste and with not less than ten percent of such total weight consisting of postconsumer waste.

**Source:** L. 93: Entire section added, p. 622, § 2, effective July 1.

**Cross references:** For further provisions concerning the purchase of recycled paper and recycled products, see §§ 24-103-207, 25-16.5-102, and 30-11-109.5.

**13-1-134. Court automation system - juvenile or domestic actions.** (1) The general assembly hereby finds, determines, and declares that the accurate and efficient exchange of information between the courts and state family service agencies is beneficial in providing aid to families in need in Colorado. Further, the general assembly declares that the use of a computer automation system to link the courts with each other and with state family service agencies for the purpose of the exchange of information regarding families would aid in identifying and providing services to families in need. It is for this reason that the general assembly has adopted this section.

(2) (a) On or before January 15, 1996, the state court administrator shall establish and administer a program for automation of the court computer technology systems in order to link the juvenile courts and district courts involved in domestic actions around the state with each other and with state family service agencies, including, but not limited to, the department of human services, the juvenile probation department, law enforcement offices, and any other agency involved in the investigation, evaluation, or provision of services to families involved in domestic actions pursuant to title 19, C.R.S., and articles 4 and 10 of title 14, C.R.S. Said automation system shall provide those parties linked to the system with automatic access to information obtained by any one of the parties in regard to a family or



family member involved in said domestic actions; except that said automation system shall not include information which is required to be kept confidential under any state or federal law.

(b) Repealed.

(3) The provisions of this section shall not affect the confidentiality of juvenile records.

**Source:** **L. 93:** Entire section added, p. 931, § 1, effective May 28. **L. 94:** (2) amended, p. 2639, § 86, effective July 1. **L. 96:** (2)(b) repealed, p. 1264, § 175, effective August 7.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (2), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 1996 act repealing subsection (2)(b), see section 1 of chapter 237, Session Laws of Colorado 1996.

### **13-1-135. Family courts - implementation report. (Repealed)**

**Source:** **L. 93:** Entire section added, p. 1256, § 1, effective June 6. **L. 96:** (1) repealed, p. 1264, § 176, effective August 7. **L. 98:** (2) repealed, p. 818, § 13, effective August 5.

**13-1-136. Civil protection orders - single set of forms.** (1) The general assembly hereby finds that the statutes provide for the issuance of several types of civil protection orders to protect the public, but that many of these protection orders have many elements in common. The general assembly also finds that consolidating the various forms for issuing and verifying service of civil protection orders and creating, to the extent possible, a standardized set of forms that will be applicable to the issuance and service of civil protection orders will simplify the procedures for issuing these protection orders and enhance the efficient use of the courts' and citizens' time and resources.

(2) On or before July 1, 2003, the state court administrator, pursuant to the rule-making authority of the Colorado supreme court, shall design and make available to the courts copies of a standardized set of forms that shall be used in the issuance and verification of service of civil protection orders issued pursuant to article 14 of this title or section 14-10-108, C.R.S., or rule 365 of the Colorado rules of county court civil procedure. The state court administrator shall design the standardized set of forms in such a manner as to make the forms easy to understand and use and in such a manner as will facilitate and improve the procedure for requesting, issuing, and enforcing civil protection orders.

(3) In developing the standardized set of forms for the issuance and verification of service of civil protection orders pursuant to this section, the state court administrator shall work with representatives of municipal, county, and district court judges, law enforcement, a member of the Colorado bar association, and representatives of other interested groups.

**Source:** **L. 98:** Entire section added, p. 243, § 1, effective April 13. **L. 99:** (2) amended, p. 501, § 3, effective July 1. **L. 2002:** Entire section amended, p. 493, § 2, effective July 1. **L. 2003:** Entire section amended, p. 1002, § 3, effective July 1.

### **ANNOTATION**

**Standard form of order not necessary under this section** in probate court guardianship case where restraining order was entered as part

of a broader order concerning parenting time. People ex rel. A.R.D., 43 P.3d 632 (Colo. App. 2001).

### **PART 2**

### **COURT SECURITY CASH FUND COMMISSION**

**13-1-201. Legislative declaration.** (1) The general assembly hereby finds that:

(a) Ensuring the safety of employees and users of state court facilities is a significant component of ensuring access to justice for the people of the state of Colorado;

(b) Responsibility for providing security for state court facilities lies with the county governments; and

(c) Colorado is a geographically, demographically, and economically diverse state and this diversity affects the funding and services of individual counties. Although the provision of security for state court facilities is a county responsibility, the variation in funds available to individual counties may not allow fundamental security measures to be met in each county.

(2) The general assembly, therefore, determines and declares that:

(a) The creation of the court security cash fund commission and the court security cash fund will be beneficial to, and in the best interests of, the people of the state of Colorado; and

(b) The goals of the commission and the cash fund shall be to:

(I) Provide supplemental funding for ongoing security staffing in the counties with the most limited financial resources; and

(II) Provide moneys to counties for court security equipment costs, training of local security teams on issues of state court security, and emergency needs related to court security.

**Source: L. 2007:** Entire part added, p. 1264, § 1, effective May 25.

**13-1-202. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Commission" means the court security cash fund commission created in section 13-1-203.

(2) "Fund" means the court security cash fund created in section 13-1-204.

(3) "Local security team" means a group of individuals from a county that oversees issues of court security for the county and that includes, at a minimum, the chief judge of the district court in the county or his or her designee, the sheriff or his or her designee, and a county commissioner or county manager or his or her designee.

**Source: L. 2007:** Entire part added, p. 1265, § 1, effective May 25.

**13-1-203. Court security cash fund commission - creation - membership.**

(1) There is hereby created in the judicial department the court security cash fund commission to evaluate grant applications received pursuant to this part 2 and make recommendations to the state court administrator for awarding grants from the court security cash fund. The commission shall be appointed no later than July 1, 2007.

(2) (a) The commission shall be composed of seven members, as follows:

(I) Two representatives of an association that represents county commissioners who are recommended by the association and who are appointed by the governor;

(II) Two representatives of an association that represents county sheriffs who are recommended by the association and who are appointed by governor;

(III) Two members of the judicial branch who are appointed by the chief justice; and

(IV) One member of the general public who is appointed by the chief justice.

(b) The commission membership described in paragraph (a) of this subsection (2) shall include, at all times, at least one representative from a county in which the population is above the median population for the state of Colorado, as determined by the most recent data published by the department of local affairs, and at least one representative from a county in which the population is below the median population for the state of Colorado, as determined by the most recent data published by the department of local affairs.

(3) The term of office of each member of the commission shall be three years; except that, of those members first appointed, one member representing each entity shall be appointed for a one-year term and one member representing each entity shall be appointed for a two-year term. A vacancy shall be filled by the respective appointing authority for the unexpired term only.



(4) Members of the commission shall serve without compensation and without reimbursement for expenses.

**Source: L. 2007:** Entire part added, p. 1265, § 1, effective May 25.

**13-1-204. Court security cash fund - creation - grants - regulations.** (1) (a) There is hereby created in the state treasury the court security cash fund. The moneys in the fund shall be subject to annual appropriation by the general assembly for the implementation of this part 2. The state court administrator is authorized to accept gifts, grants, or donations from any private or public source for the purpose of implementing this part 2. All private and public moneys received by the state court administrator from gifts, grants, or donations shall be transmitted to the state treasurer, who shall credit the same to the fund in addition to any moneys that may be appropriated to the fund directly by the general assembly.

(b) A five-dollar surcharge shall be assessed and collected as provided by law on docket fees and jury fees for specified civil actions filed on and after July 1, 2007, on docket fees for criminal convictions entered on and after July 1, 2007, on filing fees for specified probate filings made on and after July 1, 2007, on docket fees for specified special proceeding filings made on and after July 1, 2007, on fees for specified filings in water matters initiated on and after July 1, 2007, and on docket fees for specified traffic infraction penalties assessed on and after July 1, 2007. The surcharge shall be transmitted to the state treasurer, who shall credit the surcharge to the fund.

(c) (I) All investment earnings derived from the deposit and investment of moneys in the fund shall remain in the fund and shall not be transferred or revert to the general fund at the end of any fiscal year. Any unexpended and unencumbered moneys remaining in the fund at the end of any fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or any other fund.

(II) Notwithstanding any provision of subparagraph (I) of this paragraph (c) to the contrary, on April 20, 2009, the state treasurer shall deduct one million five hundred thousand dollars from the court security cash fund and transfer such sum to the general fund.

(III) Notwithstanding any provision of subparagraph (I) of this paragraph (c) to the contrary, on July 1, 2009, the state treasurer shall deduct five hundred thousand dollars from the court security cash fund and transfer such sum to the general fund.

(2) Moneys from the fund that are distributed to counties pursuant to this part 2 shall be used to supplement existing county funding for purposes related to security of facilities containing a state court or probation office and shall not be used to supplant moneys already allocated by the county for such purposes.

(3) All moneys credited to the fund shall be available for grants awarded by the state court administrator, based on recommendations of the commission, to counties for the purposes described in this part 2; except that the state court administrator may use up to ten percent of the moneys annually appropriated from the fund for administrative costs incurred through the implementation of this part 2. The state court administrator, subject to annual appropriation by the general assembly, is hereby authorized to expend moneys appropriated from the fund pursuant to this part 2.

(4) In accordance with the principles set out in section 13-1-205, the commission shall adopt guidelines prescribing the procedures to be followed in making, filing, and evaluating grant applications, the criteria for evaluation, and other guidelines necessary for administering the fund.

**Source: L. 2007:** Entire part added, p. 1266, § 1, effective May 25. **L. 2009:** (1)(c) amended, (SB 09-208), ch. 149, p. 619, § 7, effective April 20; (1)(c)(III) added, (SB 09-279), ch. 367, p. 1925, § 3, effective June 1.

**13-1-205. Grant applications - duties of counties.** (1) To be eligible for moneys from the fund, a local security team shall apply to the commission through the state court administrator for moneys to be used as specified in this part 2 and in accordance with the



timelines and guidelines adopted by the commission and using the application form provided by the commission. For the commission to consider a grant application, the application shall be signed by the administrative authority of each entity that is represented on the local security team.

(2) Grants from the fund shall be used to fund counties that meet the criteria specified in subsection (4) of this section for:

(a) The provision of court security staffing at a facility containing a state court or probation office;

(b) The purchase of security equipment or related structural improvements for a facility containing a state court or probation office;

(c) The provision of training on issues of court security; or

(d) Miscellaneous funding needs associated with issues of court security or security equipment.

(3) Moneys credited to the fund that are available for grant distribution shall be awarded based on the following priority schedule:

(a) Requests from counties that meet the criteria specified in subsection (4) of this section shall have the highest priority; and

(b) Requests for moneys for personnel costs shall be given subsequent priority.

(4) Counties that meet at least two of the following criteria shall be given the highest priority for need-based grants for court security personnel services pursuant to this part 2:

(a) Counties in which the total population is below the state median, as determined by the most recent data published by the department of local affairs;

(b) Counties in which the per capita income is below the state median, as determined by the most recent data published by the department of local affairs;

(c) Counties in which property tax revenues are below the state median, as determined by the most recent data published by the department of local affairs; or

(d) Counties in which the total county population living below the federal poverty line is greater than the state median, as determined by the most recent census published by the United States bureau of the census.

**Source:** L. 2007: Entire part added, p. 1267, § 1, effective May 25. L. 2010: (4)(d) amended, (HB 10-1422), ch. 419, p. 2068, § 21, effective August 11.

**13-1-206. Repeal of part.** (1) This part 2 is repealed, effective July 1, 2017.

(2) Prior to repeal, the court security cash fund commission shall be reviewed as provided in section 2-3-1203, C.R.S.

**Source:** L. 2007: Entire part added, p. 1268, § 1, effective May 25.

## ARTICLE 1.5

### Uniform Transboundary Pollution Reciprocal Access Act

13-1.5-101.	Short title.	13-1.5-107.	Right additional to other
13-1.5-102.	Definitions.		rights.
13-1.5-103.	Forum.	13-1.5-108.	Waiver of sovereign immu-
13-1.5-104.	Right to relief.		nity.
13-1.5-105.	Applicable law.	13-1.5-109.	Uniformity of application and
13-1.5-106.	Equality of rights.		construction.

**13-1.5-101. Short title.** This article may be cited as the “Uniform Transboundary Pollution Reciprocal Access Act”.

**Source:** L. 84: Entire article added, p. 451, § 1, effective July 1.

**13-1.5-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Reciprocating jurisdiction” means a state of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States of America, or a province or territory of Canada, which has enacted this article or provides substantially equivalent access to its courts and administrative agencies.

(2) “Person” means an individual person, a corporation, a business trust, an estate, a trust, a partnership, an association, a joint venture, a government in its private or public capacity, a governmental subdivision or agency, or any other legal entity.

**Source: L. 84:** Entire article added, p. 451, § 1, effective July 1.

**13-1.5-103. Forum.** An action or other proceeding for injury or threatened injury to property or person in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction may be brought in this jurisdiction.

**Source: L. 84:** Entire article added, p. 451, § 1, effective July 1.

**13-1.5-104. Right to relief.** A person who suffers, or is threatened with, injury to his person or property in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction has the same rights to relief with respect to the injury or threatened injury and may enforce those rights in this jurisdiction as if the injury or threatened injury occurred in this jurisdiction.

**Source: L. 84:** Entire article added, p. 452, § 1, effective July 1.

**13-1.5-105. Applicable law.** The law to be applied in an action or other proceeding brought pursuant to this article, including what constitutes pollution, is the law of this jurisdiction excluding choice of law rules.

**Source: L. 84:** Entire article added, p. 452, § 1, effective July 1.

**13-1.5-106. Equality of rights.** This article does not accord a person injured or threatened with injury in another jurisdiction any rights superior to those that the person would have if injured or threatened with injury in this jurisdiction.

**Source: L. 84:** Entire article added, p. 452, § 1, effective July 1.

**13-1.5-107. Right additional to other rights.** The right provided in this article is in addition to and not in derogation of any other rights.

**Source: L. 84:** Entire article added, p. 452, § 1, effective July 1.

**13-1.5-108. Waiver of sovereign immunity.** The defense of sovereign immunity is applicable in any action or other proceeding brought pursuant to this article only to the extent that it would apply to a person injured or threatened with injury in this jurisdiction.

**Source: L. 84:** Entire article added, p. 452, § 1, effective July 1.

**13-1.5-109. Uniformity of application and construction.** This article shall be applied and construed to carry out its general purpose to make uniform the law with respect to the subject of this article among jurisdictions enacting it.

**Source: L. 84:** Entire article added, p. 452, § 1, effective July 1.

## ARTICLE 2

### Supreme Court

**Cross references:** For procedural rules adopted by the supreme court, see C.A.R. 1 to 58.

13-2-101.	Terms of supreme court.	13-2-115.	Pensions of supreme court judges.
13-2-102.	Special terms.	13-2-116.	Disposition of law books.
13-2-103.	Open sessions - oral arguments.	13-2-117.	Librarian to have charge of library.
13-2-104.	Quorum - adjournment.	13-2-118.	Duties of librarian.
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**13-2-101. Terms of supreme court.** In each year there shall be three terms of the supreme court: One beginning on the second Monday in September, another beginning on the second Monday in January, and another beginning on the second Monday in April.

**Source:** L. 1889: p. 443, § 1. R.S. 08: § 1409. C.L. § 5624. CSA: C. 46, § 15. CRS 53: § 37-2-1. C.R.S. 1963: § 37-2-1.

**13-2-102. Special terms.** Special terms of said court may be called under such general rules and regulations as may be adopted by the court.

**Source:** G.L. § 2614. G.S. § 3235. R.S. 08: § 1410. C.L. § 5625. CSA: C. 46, § 16. CRS 53: § 37-2-2. C.R.S. 1963: § 37-2-2.

**13-2-103. Open sessions - oral arguments.** The court shall be in open session as often as practicable during each of its terms to hear and determine matters and causes which may come before it, and, at the discretion of the court, oral arguments may be allowed on final hearing in any cause on the request of any party thereto.

**Source:** L. 1889: p. 443, § 2. R.S. 08: § 1411. C.L. § 5626. CSA: C. 46, § 17. CRS 53: § 37-2-3. C.R.S. 1963: § 37-2-3. L. 85: Entire section amended, p. 568, § 1, effective May 31.

#### ANNOTATION

**Oral arguments in the supreme court when requested are a matter of right**, but they are subject to reasonable regulation by the court, and failure to request constitutes a waiver. In re Morrish's Estate, 105 Colo. 349, 97 P.2d 442 (1939).

**Oral arguments must be requested and may be regulated.** Oral arguments are granted

only on request, and are subject to reasonable regulation by the court. Brown v. Maier, 96 Colo. 1, 38 P.2d 905 (1934).

**Failure to request privilege of oral argument on application for supersedeas is a waiver**, in case the court should render final judgment on such application. Brown v. Maier, 96 Colo. 1, 38 P.2d 905 (1934).



**13-2-104. Quorum - adjournment.** If a quorum of the justices of the supreme court is not present on the first day of any term, the court shall stand adjourned from day to day until a quorum attends; and said court, if a quorum is present, may adjourn to any day specified, as may be deemed advisable.

**Source:** G.L. § 2602. G.S. § 3225. R.S. 08: § 1412. C.L. § 5627. CSA: C. 46, § 18. CRS 53: § 37-2-4. C.R.S. 1963: § 37-2-4.

#### ANNOTATION

**Quorum means the majority of the entire body.** This section clearly determines, that which is necessarily implied in § 5 of art. VI, Colo. Const., that a quorum of the justices may transact business and decide cases. This section does not define a quorum. The word, therefore,

must be held to be used in its ordinary meaning, and that meaning is a majority of the entire body. Snider v. Rinehart, 18 Colo. 18, 31 P. 716 (1892); Mountain States Tel. & Tel. Co. v. People ex rel. Wilson, 68 Colo. 487, 190 P. 513 (1920).

**13-2-105. Continuance of causes.** All matters, suits, and causes undisposed of at any term of the supreme court shall stand continued to the next succeeding term.

**Source:** G.L. § 2607. G.S. § 3229. R.S. 08: § 1413. C.L. § 5628. CSA: C. 46, § 19. CRS 53: § 37-2-5. C.R.S. 1963: § 37-2-5.

**13-2-106. Process from supreme court.** All process issued out of the supreme court shall bear teste in the name of the chief justice, be signed by the clerk of the court, sealed with its seal, and made returnable according to law or the rules and orders of the court and shall be executed by the officer to whom the same is directed.

**Source:** G.L. § 2603. G.S. § 3226. R.S. 08: § 1416. C.L. § 5629. CSA: C. 46, § 20. CRS 53: § 37-2-6. C.R.S. 1963: § 37-2-6.

#### ANNOTATION

**Scire facias must be directed to sheriff of county where defendant resides.** A scire facias or summons to hear errors issued by the clerk of the supreme court must be directed to the sheriff of the county where the defendant in error resides or may be found, and no other person than

such sheriff or his authorized deputy has authority to serve such summons. An attempted service of such summons made by a person not authorized by law to make such service is a nullity. Wellington v. Beck, 29 Colo. 73, 66 P. 881 (1901).

**13-2-107. Judge shall not act as attorney.** No justice of the supreme court shall practice as an attorney-at-law in any of the courts of the state, nor give advice touching any cause pending or to be brought therein.

**Source:** G.L. § 2608. G.S. § 3230. R.S. 08: § 1419. C.L. § 5631. CSA: C. 46, § 22. CRS 53: § 37-2-7. C.R.S. 1963: § 37-2-7.

**13-2-108. Rules of civil procedure.** The supreme court has the power to prescribe, by general rules, for the courts of record in the state of Colorado the practice and procedure in civil actions and all forms in connection therewith; except that no rules shall be made by the supreme court permitting or allowing trial judges to comment to the jury on the evidence given on the trial. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants. The supreme court shall fix the dates when such rules take effect and the extent to which they apply to proceedings then pending, and thereafter all laws in conflict therewith shall be of no further force or effect.

**Source:** L. 39: p. 264, § 1. CSA: omitted. CRS 53: § 37-2-8. C.R.S. 1963: § 37-2-8. L. 79: Entire section amended, p. 597, § 5, effective July 1.

### ANNOTATION

There reposes in the supreme court the power to adopt rules for the regulation of practice and conduct of the business of courts of record in this state. *People ex rel. Mijares v. Kniss*, 144 Colo. 551, 357 P.2d 352 (1960).

It may not diminish federal jurisdiction. This section authorizing the supreme court to prescribe rules of civil procedure in civil actions gave it no authority to modify, abridge, or enlarge or diminish the jurisdiction of federal courts. *People ex rel. Mijares v. Kniss*, 144 Colo. 551, 357 P.2d 352 (1960).

Nor abridge, modify, or enlarge substantive rights. The supreme court had no power to give legal effect to modifications which unquestionably would "abridge", "enlarge", or "modify" substantive rights of litigants. *People ex rel. Mijares v. Kniss*, 144 Colo. 551, 357 P.2d 352 (1960).

What is procedural and what is substantive

is frequently a question of great difficulty. *People ex rel. Mijares v. Kniss*, 144 Colo. 551, 357 P.2d 352 (1960).

The supreme court by rule cannot invest trial courts with an expanded jurisdiction. *People ex rel. Mijares v. Kniss*, 144 Colo. 551, 357 P.2d 352 (1960).

Where there is a conflict between a statute and a rule, the former must govern; rules of court can neither abridge, enlarge, nor modify substantive rights of a litigant. *Sherman v. Colo. Springs Planning Comm'n*, 729 P.2d 1014 (Colo. App. 1986), *aff'd*, 763 P.2d 292 (Colo. 1988); *Herstam v. Bd. of Dirs.*, 895 P.2d 1131 (Colo. App. 1995).

Applied in *Inwood Indus., Inc. v. Priestley*, 37 Colo. App. 78, 545 P.2d 732 (1975); *Zimmerman v. Mozer*, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

**13-2-109. Rules of criminal procedure.** (1) The supreme court has the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to all proceedings in all criminal cases in all courts of the state of Colorado.

(2) The supreme court shall fix the dates when such rules take effect and the extent to which they apply to proceedings then pending.

**Source:** L. 60: p. 118, § 1. CRS 53: § 37-2-34. C.R.S. 1963: § 37-2-27.

**Cross references:** For the Colorado rules of criminal procedure, see chapter 29 of the Colorado court rules.

### ANNOTATION

**Law reviews.** For article, "Colorado Criminal Procedure — Does It Meet Minimum Standards?", see 28 *Dicta* 14 (1951). For article, "One Year Review of Criminal Law and Procedure", see 39 *Dicta* 81 (1962). For article, "The

Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client", see 59 *Den. L.J.* 75 (1981).

**13-2-110. Court to prescribe rules and forms.** The supreme court from time to time may institute rules of practice, and prescribe forms of process to be used, and regulations for the keeping of the records and proceedings of the court, not inconsistent with the constitution or laws of this state.

**Source:** G.L. § 2604. G.S. § 3227. R.S. 08: § 1418. C.L. § 5630. CSA: C. 46, § 21. CRS 53: § 37-2-9. C.R.S. 1963: § 37-2-9.

### ANNOTATION

Power to make rules is the constitutional right of the supreme court, aside from any common-law right or statutory grant. *Kolkman v. People*, 89 Colo. 8, 300 P. 575 (1931).

The word "rules" is synonymous with practice, procedure, custom, method, and system. *Kolkman v. People*, 89 Colo. 8, 300 P. 575 (1931).



**Rules must not be inconsistent with the constitution or statute laws of the state.** There is no statute giving costs to a defendant in case of a reversal of a criminal case, and the supreme court cannot award them under the guise of a power to prescribe rules of practice. *Boykin v. People*, 23 Colo. 183, 46 P. 635 (1896).

**The court seriously questions the power of the general assembly to make any rules or to enact any laws relative to procedure in courts.** It is doubtful if the general assembly could have enacted any law with reference to procedure in courts of record unless that power had been expressly or tacitly surrendered to it by the

judiciary. *Walton v. Walton*, 86 Colo. 1, 278 P. 780 (1929).

**Courts always have regulated their own practice and procedure.** The act of the general assembly granting the supreme court the power to prescribe rules was not a delegation of legislative power, for the court has always regulated its own practice and procedure. *Ernst v. Lamb*, 73 Colo. 132, 213 P. 994 (1923).

**The general assembly may not attempt to regulate the court's discretionary** granting of a final decree in a divorce action for this is a procedural matter. *Walton v. Walton*, 86 Colo. 1, 278 P. 780 (1929).

**13-2-111. Employees - compensation.** (1) The supreme court may appoint one clerk, two deputy clerks, one librarian of the supreme court library, one reporter and an assistant reporter of its decisions, two bailiffs, and such additional clerical assistants as may be necessary.

(2) Each justice of the supreme court may appoint one or more law clerks and such clerical personnel as may be necessary to assist him in fulfilling the duties of his office.

(3) All employees appointed under the provisions of subsections (1) and (2) of this section shall be appointed and compensated pursuant to the provisions of section 13-3-105.

**Source:** L. 1891: p. 368, § 1. L. 05: p. 357, § 1. R.S. 08: § 1420. L. 11: p. 610, § 1. L. 17: p. 514, § 1. C.L. § 5632. L. 23: p. 614, § 2. L. 27: p. 677, § 1. CSA: C. 46, §§ 23, 24. L. 37: p. 497, § 3. L. 49: p. 402, § 1. L. 53: p. 295, § 1. CRS 53: § 37-2-10. L. 59: p. 350, § 1. C.R.S. 1963: § 37-2-10. L. 79: (1) and (3) amended, p. 597, § 6, effective July 1. L. 81: (2) R&RE, p. 874, § 1, effective June 18.

**Cross references:** For the reporter of decisions in the court of appeals, see § 13-4-111 (1).

**13-2-112. Duties of bailiff.** (1) The bailiff appointed shall attend upon the court and the judges thereof. It is the duty of the bailiff to assist the librarian of the supreme court, when not otherwise engaged.

(2) In case of the absence of the bailiff, the court or judges may appoint some suitable person to act in his stead, and the person so appointed shall perform like services and shall receive the same salary as the bailiff.

**Source:** L. 1891: p. 368, §§ 2, 3. R.S. 08: §§ 1423, 1424. C.L. §§ 5635, 5636. CSA: C. 46, §§ 28, 29. CRS 53: § 37-2-13. C.R.S. 1963: § 37-2-11.

**13-2-113. Fees of clerk of supreme court.** Except for the court of appeals docket fees, the supreme court is authorized to fix such fees for the services of the clerk of said court, in causes pending therein, as to the court seems proper, such fees to be paid by the parties to a cause pursuant to law and the order of the court.

**Source:** G.L. § 1162. G.S. § 1417. R.S. 08: § 1425. C.L. § 5637. CSA: C. 46, § 30. CRS 53: § 37-2-14. C.R.S. 1963: § 37-2-12. L. 82: Entire section amended, p. 285, § 1, effective July 1.

**Cross references:** For fees payable upon appeal and procedure for waiver thereof, see C.A.R. 12.

**13-2-114. Seal of supreme court.** The seal of the supreme court shall be one and three-quarter inches in diameter, with a device inscribed thereon as follows: Upon a ground of white the figure of justice sitting faced to the left, but with body and face inclined to the front, arms outstretched, and holding in her left hand the scales and in her right the sword



of justice. Upon the left, and just above the ground, shall appear the rising sun, with golden rays proceeding therefrom. On the right, and resting upon the ground, a shield, having inscribed thereon the coat of arms of the state of Colorado, the upper part of the shield leaning upon the figure of justice; upon the right of the shield a vine extending from the ground to the top of the shield; above the inscription and around the edge of the seal shall be the words "supreme court"; below the inscription and around the edge of the seal shall be the words, "State of Colorado", engraved thereon.

**Source:** G.L. § 2618. G.S. § 3238. R.S. 08: § 1427. C.L. § 5639. CSA: C. 46, § 32. CRS 53: § 37-2-15. C.R.S. 1963: § 37-2-13.

**13-2-115. Pensions of supreme court judges.** (1) Any person who has served as a judge of the supreme court of Colorado for not less than ten years, who has ceased to hold said office, and who has reached the age of sixty-five years is entitled to receive an annual pension during the remainder of his life in the amount of one-fourth of the annual salary of an associate judge of the supreme court. If such judge has served twenty years or more and has attained the age of seventy-two years, the annual pension shall be one-third of the annual salary of an associate judge of the supreme court. All pensions due under this section shall be paid monthly out of the general fund of this state.

(2) Upon the death of any judge, eligible to receive an annual pension pursuant to this section, who leaves a surviving spouse of at least sixty-five years of age to whom he has been married for at least twenty years, such spouse is entitled to receive a pension during the remainder of such spouse's life, or as long as such spouse remains unmarried, in the amount of seven thousand dollars per year, payable monthly from the general fund of this state.

(3) It is the intent of this section to limit the benefits payable under this section to persons, or their widows, who have terminated their service on the supreme court prior to May 16, 1974, or whose election or appointment to the supreme court took place prior to May 16, 1974. The retirement benefits payable to judges of the supreme court who are appointed subsequent to May 16, 1974, shall be as otherwise provided by law.

**Source:** L. 25: p. 504, § 1. CSA: C. 46, § 33. L. 39: p. 317, § 1. L. 53: p. 238, § 1. CRS 53: § 37-2-16. L. 55: p. 262, § 1. C.R.S. 1963: § 37-2-14. L. 67: p. 452, § 1. L. 69: p. 242, § 1. L. 74: Entire section amended, p. 233, § 1, effective May 16. L. 77: (2) amended, p. 295, § 4, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "New Supreme Court Rule", see 24 Dicta 161 (1947).

**Nowhere are pensions mentioned in the constitution of Colorado.** Unless the granting of them is expressly prohibited, or language is used that by necessary implication must be construed as a prohibition, the power to grant them exists as a residual power of the state. *Bedford v. White*, 106 Colo. 439, 106 P.2d 469 (1940).

**This section is not unconstitutional.** *Bedford v. White*, 106 Colo. 439, 106 P.2d 469 (1940).

**Judges ceasing to serve prior to enactment.** Judges of the supreme court of this state are eligible to receive pensions under this section even though they have ceased to serve in that capacity when this section became law. *Bedford v. White*, 106 Colo. 439, 106 P.2d 469 (1940).

**13-2-116. Disposition of law books.** (1) The state librarian and all other officers who receive for public use from any other state or territory, or any officer thereof, or any other person any books of judicial reports or public statutes or any other books of law shall forthwith cause one copy of such books or statutes, and all of such books of reports, and other books of law to be deposited in the library of the supreme court, there to remain.

(2) The supreme court librarian shall furnish the supreme court annually, as the court may direct, a report designating any such copies of judicial reports, statutes, or books of law which, in the librarian's opinion, can be properly removed from the supreme court library and disposed of.

(3) The supreme court may take action pursuant to such report by ordering any copies of such judicial reports, statutes, or books of law designated therein disposed of in such manner as it shall determine.

**Source:** G.L. § 2623. G.S. § 3242. R.S. 08: § 1428. L. 11: p. 488, § 1. C.L. § 5640. CSA: C. 46, § 34. CRS 53: § 37-2-17. L. 57: p. 317, § 1. C.R.S. 1963: § 37-2-15.

**13-2-117. Librarian to have charge of library.** The librarian of the supreme court, under the direction of the court, shall have custody of the books pertaining to the library of the supreme court.

**Source:** G.L. § 2621. G.S. § 3240. R.S. 08: omitted. C.L. § 5641. CSA: C. 46, § 35. L. 37: p. 495, § 1. CRS 53: § 37-2-18. C.R.S. 1963: § 37-2-16.

**13-2-118. Duties of librarian.** It is the duty of the librarian to keep his office open every day in the year, Saturdays, Sundays, and holidays excepted, from 8:30 a.m. until 5 p.m. of each day, so that the public may have access to the library, under such rules and regulations as the supreme court may prescribe.

**Source:** G.L. § 2622. G.S. § 3241. R.S. 08: § 1429. C.L. § 5642. CSA: C. 46, § 36. CRS 53: § 37-2-19. C.R.S. 1963: § 37-2-17.

**13-2-119. Disposition of fees.** (1) At the end of each month, all fees collected by the clerk of the supreme court during said month, except fees for admission to the bar and attorney registration fees, shall be deposited by the clerk with the state treasurer, by whom the same shall be kept separate and apart from all other funds in the state treasurer's hands.

(2) (Deleted by amendment, L. 98, p. 685, § 1, effective July 1, 1998.)

**Source:** L. 07: p. 594, § 1. R.S. 08: § 1430. L. 19: p. 680, § 1. C.L. § 5643. CSA: C. 46, § 37. CRS 53: § 37-2-20. C.R.S. 1963: § 37-2-18. L. 79: Entire section amended, p. 597, § 7, effective July 1. L. 82: Entire section amended, p. 285, § 2, effective July 1. L. 98: Entire section amended, p. 685, § 1, effective July 1.

**13-2-120. Supreme court library fund.** The funds so set apart, together with the balance of the fund now in the state treasurer's hands and designated as the "supreme court library fund", shall be known as the "supreme court library fund", and the supreme court is authorized to use said fund for the purchase of books for the supreme court library, for paying the expenses of binding briefs and other documents for use in said library, for the purchase and maintenance of bookcases, catalogues, furniture, fixtures, and other equipment for said library, and for such other library service expenses as the chief justice deems necessary.

**Source:** L. 07: p. 594, § 1. R.S. 08: § 1430. L. 19: p. 680, § 2. C.L. § 5644. CSA: C. 46, § 38. CRS 53: § 37-2-21. C.R.S. 1963: § 37-2-19. L. 87: Entire section amended, p. 541, § 1, effective April 6.

**13-2-121. Manner of disbursement.** The state controller is authorized to draw warrants upon said fund, from time to time upon certificate, of the sums required for the purposes specified in section 13-2-120 under the signature of the chief justice or a majority of the judges of the supreme court, and the state treasurer is directed to pay the same out of said fund.

**Source:** L. 07: p. 594, § 1. R.S. 08: § 1430. L. 19: p. 680, § 3. C.L. § 5645. CSA: C. 46, § 39. CRS 53: § 37-2-22. C.R.S. 1963: § 37-2-20.



**13-2-122. Supreme court and court of appeals opinions published.** The opinions of the supreme court of the state of Colorado and of the court of appeals shall be published in volumes of the size, as nearly as may be, as present volumes of the Colorado reports, and containing not less than six hundred fifty pages each.

**Source:** L. 1891: p. 369, § 1. R.S. 08: § 1431. C.L. § 5646. CSA: C. 46, § 40. CRS 53: § 37-2-23. C.R.S. 1963: § 37-2-21. L. 69: p. 269, § 4.

#### ANNOTATION

The publication of the opinions of the supreme court is not the publication of "department reports", within the meaning of § 29 of art. V, Colo. Const., which requires the printing,

binding, and distribution of department reports to be performed under contract to be given to the lowest responsible bidder. Gillette v. Peabody, 19 Colo. App. 356, 75 P. 18 (1904).

**13-2-123. Duty of reporter.** It is the duty of the reporter of the decisions of said courts, within four months after a sufficient number of opinions to constitute a volume of the prescribed size have been delivered to him, to compile and prepare the same for publication, together with such other proceedings of the supreme court as the justices thereof may designate for insertion in such volume, with syllabi, title pages, digest, and table of cases reported.

**Source:** L. 1891: p. 370, § 2. R.S. 08: § 1434. C.L. § 5649. CSA: C. 46, § 43. CRS 53: § 37-2-26. L. 63: p. 268, § 1. C.R.S. 1963: § 37-2-22. L. 69: p. 269, § 5.

**13-2-124. Publication of reports.** (1) In lieu of the publication of the opinions of the supreme court and the court of appeals as provided for in this article, the supreme court may designate the published volumes of the decisions of the supreme court and the court of appeals, as the same are published by any person, firm, or corporation, to be the official reports of the decisions of the supreme court and the court of appeals. Any publication so designated as the official reports may include both the opinions of the supreme court and the court of appeals in the same volume.

(2) When any law of this state refers to the reports of the supreme court of the state of Colorado, said law shall be construed as referring to the reports in which are also contained the reported opinions of the court of appeals created pursuant to article 4 of this title.

(3) All books, both bound and unbound, and matrices covering the reports of the supreme court and the court of appeals which were published prior to July 1, 1982, and which are in the custody of the supreme court shall remain in the custody of the supreme court for the purpose of sale or replacement, and the supreme court may fix the price at which the prior official reports of the supreme court and the court of appeals are to be sold to the public. The supreme court may replace any lost or destroyed books free of cost if such books were originally distributed free of cost. The supreme court may authorize the reprinting of any prior volumes, the replacement supply of which has become exhausted or insufficient. The supreme court may also contract for the storage of such books and to sell, give away, destroy, or otherwise dispose of any excess books, bound or unbound, which it deems not needed to provide a reasonable replacement supply.

**Source:** L. 1891: p. 370, § 3. R.S. 08: § 1435. L. 19: p. 682, § 1. C.L. § 5650. L. 27: p. 678, § 1. CSA: C. 46, § 44. CRS 53: § 37-2-27. L. 57: p. 318, §§ 1, 2. L. 63: p. 268, § 2. C.R.S. 1963: § 37-2-23. L. 69: p. 269, § 6. L. 82: Entire section R&RE, p. 287, § 1, effective July 1.

**13-2-125. Purchase, distribution, and sale of reports.** (1) Upon the publication of each volume of the reports of the supreme court and the court of appeals under contract with the judicial department, the publisher shall be responsible for distributing as many copies as are required to meet the needs of the state in accordance with a list provided by the



librarian of the supreme court. Costs of mailing incurred in such distribution shall be borne by the state from appropriations made to the judicial department.

(2) The distribution pursuant to subsection (1) of this section shall include the following:

- (a) State and territorial libraries, as directed by the librarian of the supreme court;
- (b) The library of congress and of the United States supreme court;
- (c) The attorney general and secretary of state of Colorado, and officials of the executive branch as required;
- (d) District attorneys and judges of Colorado courts of record;
- (e) The justices and reporter of the Colorado supreme court;
- (f) The law library of the university of Colorado, and the library of any other accredited law school in Colorado;
- (g) Copies for use in the supreme court library and by the general assembly;
- (h) Copies to be used for exchange purposes in the maintenance of the supreme court library, as directed by the librarian of the supreme court;
- (i) Office of legislative legal services.

(3) All copies distributed to offices and agencies of the state of Colorado are at all times the property of the state and not the personal property of the incumbents of the respective offices and shall be so marked as the property of the state. This shall not apply to the justices and reporter of the supreme court as to volumes prepared during their tenure of office.

(4) The publisher shall sell the reports of the supreme court and the court of appeals to the public at a price which is set at the cost of the report plus a twenty percent markup for handling. The publisher shall retain the markup charges and remit to the state the costs of the reports sold as reimbursement to the general fund for payment by the state of the expenses of publication thereof. The unsold copies of all reports shall remain the property of the state and shall be returned by the publisher to the secretary of state upon the termination of the contract for publication. Until otherwise designated by law or order of the chief justice of the Colorado supreme court, the secretary of state shall be the legal custodian of the reports of the supreme court and the court of appeals. The secretary of state shall sell any remaining copies of such reports to the public at such cost plus twenty percent and transmit the sale proceeds to the state treasurer for deposit to the credit of the general fund.

**Source:** L. 1891: p. 371, § 7. R.S. 08: § 1438. C.L. § 5653. L. 27: p. 680, § 1. CSA: C. 46, § 46. L. 37: p. 495, § 2. CRS 53: § 37-2-30. L. 63: p. 269, § 3. C.R.S. 1963: § 37-2-24. L. 75: (1), IP(2), and (4) amended, p. 850, § 2, effective July 1. L. 76: (1) and (4) amended, p. 515, § 1, effective April 19. L. 88: (2)(i) amended, p. 310, § 18, effective May 23.

**13-2-126. Reports and session laws furnished.** (1) The legal custodian of publications of the state of Colorado is directed to furnish to the law library of the university of Colorado free of charge from existing stocks if feasible and in any event as such publications are from time to time issued:

- (a) Thirty copies each of the reports of the supreme court of the state of Colorado; and
- (b) Fifty copies each of the session laws and of any published regulations and decisions of the various administrative agencies of the state of Colorado; and
- (c) Five copies each of the Colorado yearbook; and
- (d) Two copies each of published legislative journals, published opinions and reports of the attorney general, and printed briefs and abstracts of record of the supreme court of Colorado.

(2) The law library is authorized to exchange any or all of the above publications for like publications of other jurisdictions.

**Source:** L. 15: p. 482, § 1. C.L. § 5655. CSA: C. 46, § 48. L. 49: p. 338, § 1. CRS 53: § 37-2-32. C.R.S. 1963: § 37-2-25. L. 75: IP(1) amended, p. 851, § 3, effective July 1.

**13-2-127. Method for review.** Appellate review by the supreme court of any action or proceeding of an inferior tribunal, whether such action or proceeding is civil, criminal, special, statutory, common law, or otherwise, shall be prescribed by rule of the supreme court, except as otherwise provided by law.

**Source:** L. 41: p. 369, § 1. CRS 53: § 37-2-33. C.R.S. 1963: § 37-2-26. L. 64: p. 225, § 58. L. 69: p. 269, § 7.

## ARTICLE 3

### Judicial Departments

13-3-101.	State court administrator.		
13-3-102.	Surveys - conferences - reports.	13-3-109.	ties - capital improvements. Retirement - past service benefits.
13-3-103.	Nominating and discipline commissions - expenses.	13-3-110.	Expenses and compensation of judges outside county of residence.
13-3-104.	State shall fund courts.		
13-3-105.	Personnel - duties - qualifications - compensation - conditions of employment.	13-3-111.	Appointment of retired or resigned justice or judge pursuant to agreement of parties - appointment discretionary.
13-3-106.	Judicial department operating budget - fiscal procedures.		
13-3-107.	Consolidation of offices of clerks of court in certain counties.	13-3-112.	Report on increase in docket fees. (Repealed)
13-3-108.	Maintenance of court facilities	13-3-113.	"Family-friendly Courts Act".

**13-3-101. State court administrator.** (1) There is created, pursuant to section 5 (3) of article VI of the state constitution, the position of state court administrator, who shall be appointed by the justices of the supreme court at such compensation as shall be determined by them. The state court administrator is responsible to the supreme court and shall perform such duties as assigned to him by the chief justice and the supreme court.

(2) The state court administrator shall employ such other personnel as the supreme court deems necessary to aid the administration of the courts, as provided in section 5 (3) of article VI of the state constitution.

(3) The state court administrator shall establish standards to ensure proficiency in court reporting in the courts of this state. The state court administrator shall also develop or cause to be developed examinations no less difficult than the examinations of the national shorthand reporters association and shall qualify those individuals who successfully complete such examination.

(4) Repealed.

(5) The state court administrator shall provide to the director of research of the legislative council criminal justice information and statistics and any other related data requested by the director. The state court administrator shall provide to the state commission on judicial performance and to district commissions on judicial performance case management statistics for justices and judges being evaluated.

(6) The state court administrator shall make grants from the family violence justice fund pursuant to the provisions of section 14-4-107, C.R.S.

(7) (a) The state court administrator shall make grants from the family-friendly court program cash fund pursuant to the provisions of section 13-3-113.

(b) Repealed.

(8) Repealed.

(9) The state court administrator is authorized to seek federal funding as it becomes available on behalf of the state court system for the establishment, maintenance, or expansion of veterans' treatment courts.

**Source:** L. 53: p. 236, § 1. CRS 53: § 37-10-1. L. 59: p. 356, § 1. L. 67: p. 453, § 5. C.R.S. 1963: § 37-11-1. L. 77: (3) added, p. 779, § 1, effective June 19; (4) added, p.



861, § 1, effective July 1, 1979. **L. 79:** (4)(a)(III) amended, p. 1663, § 130, effective July 19. **L. 84:** (4) repealed, p. 453, § 1, effective March 26. **L. 94:** (5) added, p. 1098, § 11, effective May 9. **L. 99:** (6) added, p. 1180, § 6, effective June 2. **L. 2002:** (7) added, p. 631, § 2, effective July 1. **L. 2005:** (7)(b) repealed, p. 1004, § 2, effective June 2. **L. 2006:** (8) added, p. 1590, § 1, effective June 2. **L. 2008:** (5) amended, p. 1284, § 13, effective July 1. **L. 2010:** (9) added, (HB 10-1104), ch. 139, p. 465, § 2, effective April 16.

**Editor's note:** (1) The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 21, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

(2) Subsection (8)(b) provided for the repeal of subsection (8), effective January 1, 2007. (See L. 2006, p. 1590.)

**Cross references:** For the legislative declaration in the 2010 act adding subsection (9), see section 1 of chapter 139, Session Laws of Colorado 2010.

### ANNOTATION

**Law reviews.** For article, "The System for Administration of Justice in Colorado", see 28 Rocky Mt. L. Rev. 299 (1956). For article, "Colorado's Program to Improve Court Administration", see 38 Dicta 1 (1961).

**13-3-102. Surveys - conferences - reports.** (1) The state court administrator under the direction of the chief justice shall make a continuous survey of the conditions of the dockets and the business of the courts of record and shall make reports and recommendations thereon to the chief justice.

(2) The chief justice shall assemble the judges of the courts of record at least once yearly to discuss such recommendations and such other business as will benefit the judiciary and the expedition of the business of the several courts. When so summoned, the judges of the courts of record shall attend such conferences at the expense of the state of Colorado. Each judge shall file a verified itemized statement of the mileage and all moneys actually paid out for personal maintenance expenses in attending such conferences with the court administrator, who shall audit the same and submit it to the state controller. The state controller shall draw a warrant therefor, which warrant shall be paid by the state treasurer out of the appropriate fund. Unless excused by illness, such judges are required to attend the conferences unless excused by the chief justice.

(3) Repealed.

**Source:** L. 53: p. 236, § 2. **CRS 53:** § 37-10-2. **L. 59:** p. 357, § 1. **C.R.S. 1963:** § 37-11-2. **L. 67:** p. 453, § 6. **L. 97:** (3) repealed, p. 1482, § 37, effective June 3.

**13-3-103. Nominating and discipline commissions - expenses.** (1) Members of judicial nominating commissions appointed pursuant to section 24 of article VI of the state constitution and members of the commission on judicial discipline appointed pursuant to section 23 of article VI of the state constitution shall be reimbursed for actual and necessary personal maintenance expenses while performing official duties, together with mileage at the rate prescribed for state officers and employees in section 24-9-104, C.R.S., for each mile actually and necessarily traveled in going to and returning from the place where official duties are performed.

(2) The mileage and expenses incurred by members of judicial nominating commissions and members of the commission on judicial discipline shall be paid from funds appropriated to the judicial department of the state. Each commission member shall keep an account of the mileage and all moneys actually paid out for personal maintenance expenses and shall file a verified itemized statement thereof with the court administrator, who shall audit the same and submit it to the state controller. The state controller shall draw a warrant therefor, which warrant shall be paid by the state treasurer out of the appropriate fund.



**Source:** L. 53: p. 237, § 3. CRS 53: § 37-10-3. L. 59: p. 358, § 1. L. 67: p. 454, § 7. C.R.S. 1963: § 37-11-3. L. 72: p. 590, § 55. L. 79: (1) amended, p. 597, § 8, effective July 1. L. 87: Entire section amended, p. 1576, § 12, effective July 10.

**13-3-104. State shall fund courts.** (1) The state of Colorado shall provide funds by annual appropriation for the operations, salaries, and other expenses of all courts of record within the state, except for county courts in the city and county of Denver and municipal courts.

(2) When a board of county commissioners determines that any furniture or equipment transferred to the judicial department as of January 1, 1970, has historic value, it shall remain in the county courthouse and revert to the county when no longer used by the judicial department.

**Source:** L. 69: p. 246, § 4. C.R.S. 1963: § 37-11-6. L. 77: Entire section amended, p. 780, § 1, effective May 24. L. 2006: (1) amended, p. 141, § 6, effective August 7.

**13-3-105. Personnel - duties - qualifications - compensation - conditions of employment.** (1) The supreme court, pursuant to section 5 (3) of article VI of the state constitution, shall prescribe, by rule, a personnel classification plan for all courts of record to be funded by the state, as provided in section 13-3-104.

(2) Such personnel classification and compensation plan shall include:

(a) A basic compensation plan of pay ranges to which classes of positions are assigned and may be reassigned;

(b) The qualifications for each position or class of positions, including education, experience, special skills, and legal knowledge;

(c) An outline of the duties to be performed in each position or class of positions;

(d) The classification of all positions based on the required qualifications and the duties to be performed, taking into account, where applicable, the amount and kinds of judicial business in each court of record subject to the provisions of this section;

(e) The number of full-time and part-time positions, by position title and classification, in each court of record subject to the provisions of this section;

(f) The procedures for and the regulations governing the appointment and removal of court personnel; and

(g) The procedures for and regulations governing the promotion or transfer of court personnel.

(3) The supreme court shall also prescribe by rule:

(a) The amount, terms, and conditions of sick leave and vacation time for court personnel, including annual allowance and accumulation thereof; and

(b) Hours of work and other conditions of employment.

(4) To the end that all state employees are treated generally in a similar manner, the supreme court, in promulgating rules as set forth in this section, shall take into consideration the compensation and classification plans, vacation and sick leave provisions, and other conditions of employment applicable to employees of the executive and legislative departments.

**Source:** L. 69: p. 246, § 4. C.R.S. 1963: § 37-11-7.

#### ANNOTATION

The Colorado judicial system personnel rules do not create an objective expectation of tenure which should be characterized as a property interest subject to due process protection. Hamm v. Scott, 426 F. Supp. 950 (D. Colo. 1977).

Contractual right of certified employee to continued employment would violate state

policy. Even if the language of Colorado judicial system personnel rules 25 and 26, which relate to the dismissal of certified employees, could be read to create a contractual right to continued employment, a certified employee could not prevail because the recognition of such a contract would violate the expressed public policy of the state of Colorado. Hamm v.

Scott, 426 F. Supp. 950 (D. Colo. 1977).

**The fourteenth amendment affords no extraordinary protection.** Even if it were assumed that a certified employee had a recognizable property interest which would not be contrary to express public policy, the fourteenth amendment affords him no protection other than the ordinary protections that would be afforded in a court of law on a breach of contract suit.

Hamm v. Scott, 426 F. Supp. 950 (D. Colo. 1977).

**Requirements for protection of certified employee.** The minimum opportunity to learn of the reasons for the action terminating employment and a chance to address the decision-maker is all that would be required as protection to a certified employee. Hamm v. Scott, 426 F. Supp. 950 (D. Colo. 1977).

**13-3-106. Judicial department operating budget - fiscal procedures.** (1) (a) The court administrator, subject to the approval of the chief justice, shall prepare annually a consolidated operating budget for all courts of record subject to the provisions of section 13-3-104, such budget to be known as the judicial department operating budget.

(b) The court administrator, subject to the approval of the chief justice, shall prepare an annual budget request upon forms and according to procedures agreed to by the executive director of the department of personnel and the joint budget committee of the general assembly. The budget request documents and such additional information as may be requested shall be submitted to the department of personnel and the joint budget committee according to the same time schedule for budgetary review and analysis required of all executive agencies. The governor shall include recommendations for court appropriations as part of his or her regular budget message and according to section 24-37-301, C.R.S. The general assembly, upon recommendation of the joint budget committee, shall make appropriations to courts based on an evaluation of the budget request and the availability of state funds.

(2) The court administrator, subject to the approval of the chief justice, shall prescribe the procedures to be used by the judicial department and each court of record subject to the provisions of section 13-3-104, with respect to:

- (a) The preparation of budget requests;
  - (b) The disbursement of funds appropriated to the judicial department by the general assembly;
  - (c) The purchase of forms, supplies, equipment, and other items as authorized in the judicial department operating budget; and
  - (d) Any other matter relating to fiscal administration.
- (3) The court administrator shall consult with the state controller in the preparation of regulations pertaining to budgetary and fiscal procedures and forms and the disbursement of funds.

**Source:** L. 69: p. 246, § 4. C.R.S. 1963: § 37-11-8. L. 72: p. 590, § 56. L. 76: (1)(b) amended, p. 301, § 28, effective May 20. L. 83: (1)(b) amended, p. 971, § 27, effective July 1, 1984. L. 95: (1)(b) amended, p. 638, § 24, effective July 1.

**Cross references:** For the legislative declaration contained in the 1995 act amending subsection (1)(b), see section 112 of chapter 167, Session Laws of Colorado 1995.

**13-3-107. Consolidation of offices of clerks of court in certain counties.** (1) The chief justice, pursuant to his authority under section 5 of article VI of the state constitution, may consolidate the offices of the clerks of the district and county courts in any county when he finds that there is insufficient judicial business to warrant the maintenance of separate offices.

(2) When the offices of the clerk of the district and county courts are so consolidated, the consolidated office shall be under a single clerk, who shall be both the clerk of the district court and the clerk of the county court; except that all functions, operations, and records required to be kept separate shall be so kept.

**Source:** L. 69: p. 247, § 4. C.R.S. 1963: § 37-11-9. L. 79: (1) amended, p. 598, § 9, effective July 1.



**13-3-108. Maintenance of court facilities - capital improvements.** (1) The board of county commissioners in each county shall continue to have the responsibility of providing and maintaining adequate courtrooms and other court facilities including janitorial service, except as otherwise provided in this section.

(2) The court administrator, subject to the approval of the chief justice, shall prepare annually a capital construction budget. The capital construction budget shall specify: The additional court housing facilities required for each court; the estimated cost of such additional structures or facilities and whether such additional court structures or facilities will include space used by other governmental units for nonjudicial purposes; and a detailed report on the present court facilities currently in use and the reasons for their inadequacy.

(3) (Deleted by amendment, L. 97, p. 1482, § 38, effective June 3, 1997.)

(4) (a) The chief justice is authorized to approve payment of state funds for the construction of any capital improvement facilities to be used for judicial purposes authorized and approved by the general assembly.

(b) The court administrator, with the approval of the chief justice, shall enter into leasing agreements with the governing body of the appropriate local unit of government when joint construction is authorized, or when the approved facilities are also to be used for nonjudicial purposes. The leasing agreement shall provide for the payment of state funds for that portion of the construction costs related to the operation of the courts.

(5) Construction or remodeling of any court or court-related facility shall be commenced only with prior approval of the chief justice of the Colorado supreme court after consultation with the board of county commissioners; except that a board of county commissioners, at its discretion, may take such actions.

**Source:** L. 69: p. 247, § 4. C.R.S. 1963: § 37-11-10. L. 72: p. 591, § 57. L. 75: (5) added, p. 565, § 1, effective July 1; (5) added, p. 558, § 9, effective July 1. L. 78: (2) and (3) amended, p. 261, § 43, effective May 23. L. 97: (2) and (3) amended, p. 1482, § 38, effective June 3. L. 2006: (5) amended, p. 142, § 7, effective August 7.

**Editor's note:** Amendments to subsection (5) by House Bill 75-1049 and House Bill 75-1055 were harmonized.

#### ANNOTATION

**Historically, Colorado law has placed the duty of providing a suitable courthouse upon the county commissioners** of each county. *Lawson v. Pueblo County*, 36 Colo. App. 370, 540 P.2d 1136 (1975).

Even though the general assembly indicated its intention to take over from the counties the financial burden of providing judicial facilities, the general assembly has not provided funds for the construction of court facilities in the various counties of the state, and the burden of providing courtroom space and facilities remains with the counties. *Lawson v. Pueblo County*, 36 Colo. App. 370, 540 P.2d 1136 (1975).

**Mandamus appropriate.** The language of subsection (1) meets the test for mandamus relief, and thus, an action in the nature of mandamus is available as a proper means of enforcing the statute. *Lawson v. Pueblo County*, 36 Colo. App. 370, 540 P.2d 1136 (1975); *State v. Bd. of County Comm'rs, Mesa County*, 897 P.2d 788 (Colo. 1995).

**Judicial guidelines.** To achieve compliance with subsection (1) requiring county commis-

sioners to provide adequate court facilities, without undue encroachment upon the prerogatives of the county commissioners, a judgment should give reasonable guidelines delineating what would constitute "adequate" space and then should direct that the space and related facilities be provided within a specific time. Included among the guidelines should be such physical requirements as dimensions, partitions, ventilation, security of prisoners, etc., as well as other details which would lead to creation of courtroom facilities of a character and quality commensurate with the proper and effective administration of justice. *Lawson v. Pueblo County*, 36 Colo. App. 370, 540 P.2d 1136 (1975).

**Court exceeded its authority in issuing order requiring the board of county commissioners to provide a new judicial facility.** While court does have the inherent authority to order the board to provide a new courthouse, the record does not demonstrate that the chief justice approved the initiation of the proceeding as required by subsection (5). In re *Court Facilities for the Routt County Combined Ct.*, 107 P.3d 981 (Colo. App. 2004).



**Mandamus order containing only one alternative unacceptable.** While an action in the nature of mandamus will lie to enforce subsection (1), a judgment designating one alternative course of action that the county commissioners must follow in meeting the requirements of the subsection constitutes an unacceptable intrusion into the exclusive province of the executive branch of government, and, accordingly, the specific course of action to be followed by the county commissioners in complying with the

subsection and with a mandamus judgment must be one of their choosing. *Lawson v. Pueblo County*, 36 Colo. App. 370, 540 P.2d 1136 (1975).

**Subsection (5) is applied** in *Pena v. District Court*, 681 P.2d 953 (Colo. 1984).

**A county's duties under this section may not be reduced or ended pursuant to art. X, § 20(9) of the state constitution.** *State v. Bd. of County Comm'rs, Mesa County*, 897 P.2d 788 (Colo. 1995).

**13-3-109. Retirement - past service benefits.** (1) Past service benefits in the public employees' retirement association shall be purchased for each employee covered under sections 13-3-104 and 13-3-105 who, on January 1, 1970, meets all of the following conditions:

- (a) Is sixty years of age or older;
- (b) Was not a member of a county or a city and county retirement plan, or, if a member, is not eligible to receive a deferred annuity;
- (c) If a member of a county or a city and county retirement plan, has withdrawn the funds credited to his account with the county or city and county retirement fund, and paid the full amount thereof, exclusive of any voluntary contributions to such county or city and county retirement plan, into the public employees' retirement association, or who withdraws such funds and deposits them with the public employees' retirement association no later than March 31, 1970.

(2) (a) When an employee meets all of the conditions in subsection (1) of this section, the public employees' retirement association shall grant him prior service credit based on length of service in a court, or department thereof, covered under sections 13-3-104 and 13-3-105, up to a maximum of five years.

(b) The public employees' retirement association shall calculate the cost of granting such prior service credit to each employee, after giving credit for the amount paid, if any, by the employee, and shall bill the judicial department for such cost. In the event that the cost for an employee is less than the amount paid in by him pursuant to subsection (1) (c) of this section, the treasurer of the public employees' retirement association shall instead refund the difference to the employee.

(c) The judicial department shall include the total of such billings in its appropriation request. The grant of prior service credits provided in paragraph (a) of this subsection (2) shall be made only if an appropriation therefor is made by the general assembly.

(3) (a) Any employee under the age of sixty years covered under sections 13-3-104 and 13-3-105 who has been a member of a county or city and county retirement plan may purchase prior service credit by withdrawing the funds credited to his account with the county or city and county retirement fund and paying the full amount thereof into the public employees' retirement fund.

(b) The public employees' retirement association shall calculate the amount of prior service credit purchased by an employee as provided in paragraph (a) of this subsection (3) and shall so notify him.

(c) An employee covered under sections 13-3-104 and 13-3-105 may also purchase prior service credit, not to exceed the actual number of years of employment in a court of record, or department thereof, by making a direct payment to the public employees' retirement association in an amount determined by the public employees' retirement association to be actuarially sound and without expense to the state.

(4) For the purposes set forth in article 51 of title 24, C.R.S., the employees for whom prior service credit is granted under this section shall be considered to have been employees of the state for the period of such prior service.

**Source:** L. 69: p. 248, § 4. C.R.S. 1963: § 37-11-11. L. 79: (3)(c) amended, p. 603, § 1, effective June 19. L. 87: (1)(c), (2)(b), (3)(c), and (4) amended, p. 1091, § 5, effective July 1.

**13-3-110. Expenses and compensation of judges outside county of residence.**

(1) When it is necessary for any district court judge, in the discharge of his duties, to hold court or transact judicial business outside the county of his residence, whether within or without the judicial district in which he resides, he shall be reimbursed for his actual and necessary expenses in the manner prescribed by rule of the supreme court, together with mileage at the rate prescribed for state officers and employees in section 24-9-104, C.R.S., for each mile actually and necessarily traveled going to and returning from the place where he is engaged in judicial duties.

(2) When any county judge, juvenile court judge, or probate court judge is assigned to perform judicial duties in a court outside of his county of residence pursuant to section 5 (3) of article VI of the state constitution, he shall be reimbursed for his actual and necessary expenses in the manner prescribed by rule of the supreme court, together with mileage at the rate prescribed for state officers and employees in section 24-9-104, C.R.S., for each mile actually and necessarily traveled going to and returning from the place where he is engaged in judicial duties.

(3) (a) When any county judge is assigned to perform judicial duties in a district, probate, or juvenile court outside of the judicial district in which he resides, as provided in section 13-6-218, he shall be paid for each day of such judicial duty, in addition to reimbursement for expenses and mileage as provided in this section, an amount equal to the difference between his per diem salary and the per diem salary of the judge of the court to which he is assigned.

(b) (I) When any county judge from a county of Class C or Class D is assigned to perform judicial duties in any district court pursuant to section 5 (3) of article VI of the state constitution, and when the duties the county judge performs increase the county judge's workload beyond the percentage of workload for which he or she is paid pursuant to section 13-30-103 (1) (I), the county judge shall be paid for each day of such judicial duty, in addition to the county judge's normal part-time salary and to reimbursement for expenses and mileage as provided in this section, an amount equal to the per diem salary of the judge of the district court to which the county judge is assigned.

(II) When any county judge from a county of Class C or Class D is assigned to perform judicial duties in any other county court pursuant to section 5 (3) of article VI of the state constitution, and when the duties the county judge performs increase the county judge's workload beyond the percentage of workload for which he or she is paid pursuant to section 13-30-103 (1) (I), the county judge shall be paid for each day of such judicial duty, in addition to the county judge's normal part-time salary and to reimbursement for expenses and mileage as provided in this section, an amount equal to the per diem salary of a full-time county judge.

(c) For the purposes of this subsection (3), the per diem salary of a judge shall be computed by dividing his annual salary by the figure two hundred forty.

(4) When a retired justice of the supreme court or retired judge of any other court of record is assigned to judicial duties pursuant to section 5 (3) of article VI of the state constitution, he shall be compensated as provided in said section and be reimbursed for his actual and necessary expenses in the manner prescribed by rule of the supreme court, together with mileage at the rate prescribed for state officers and employees in section 24-9-104, C.R.S., for each mile actually and necessarily traveled in going to and returning from the place where he is engaged in judicial duties.

(5) Any mileage and expenses incurred by a judge or a retired justice or judge pursuant to this section, except judges assigned to the county court of the city and county of Denver, shall be paid by the state pursuant to section 13-3-104. The records and procedures for such payment shall be prescribed by the state court administrator pursuant to section 13-3-106.

(6) Any per diem salary pursuant to subsection (3) or (4) of this section shall be paid by the state pursuant to section 13-3-104. The records and procedures for such payments shall be prescribed by the state court administrator pursuant to section 13-3-106.

**Source:** L. 71: p. 366, § 1. C.R.S. 1963: § 37-11-12. L. 72: p. 187, § 1. L. 79: (1), (2), and (4) amended, p. 598, § 10, effective July 1. L. 82: (3)(b) amended, p. 289, § 1,



effective March 17. **L. 85:** (2) and (3)(a) amended, p. 569, § 2, effective November 14, 1986. **L. 89:** (1), (2), and (4) amended, p. 747, § 1, effective July 1. **L. 97:** (3)(b) amended, p. 768, § 3, effective July 1, 1998.

**Cross references:** For compensation of justices and judges, see § 13-30-103.

**13-3-111. Appointment of retired or resigned justice or judge pursuant to agreement of parties - appointment discretionary.** (1) Upon agreement of all appearing parties to a civil action that a specific retired or resigned justice of the supreme court or a retired or resigned judge of any other court be assigned to hear the action and upon agreement that one or more of the parties shall pay the agreed upon salary of the selected justice or judge, together with all other salaries and expenses incurred, the chief justice may assign any retired or resigned justice or retired or resigned intermediate appellate, district, county, probate, or juvenile court judge who consents temporarily to perform judicial duties for such action.

(2) The decision as to whether a retired or resigned justice or judge shall be assigned to judicial duties, pursuant to subsection (1) of this section, shall be entirely within the discretion of the chief justice. The chief justice may require such undertakings as in his or her opinion may be necessary to ensure that proceedings held pursuant to this section shall be without expense to the state.

(3) Such appointment may be made at any time after the action is at issue.

(4) Orders, decrees, verdicts, and judgments resulting from hearings or trials presided over by a judge appointed pursuant to this section shall have the same force and effect as orders, decrees, verdicts, or judgments resulting from a hearing or trial presided over by a regularly serving judge.

(5) Orders, decrees, verdicts, and judgments resulting from hearings or trials presided over by a judge appointed pursuant to this section may be enforced or appealed in the same manner as orders, decrees, verdicts, or judgments resulting from a hearing or trial presided over by a regularly sitting judge.

(6) The salaries and expenses paid to judges appointed pursuant to this section shall be at the rate agreed upon by the parties and the judge.

(7) The supreme court may promulgate such rules as may be necessary to implement this section.

**Source:** **L. 81:** Entire section added, p. 875, § 1, effective May 26. **L. 96:** (1) to (3) and (6) amended, p. 128, § 1, effective August 7. **L. 98:** Entire section amended, p. 92, § 1, effective March 23.

#### ANNOTATION

**Law reviews.** For article, "A Practical Guide to Trials by 'Appointment' Under C.R.S. § 13-3-111", see 26 Colo. Law. 69 (November 1997). For article, "Privatizing Family Law Adjudications: Issues and Procedures", see 34 Colo.

Law. 95 (August 2005). For article, "Appointed Judges Under New C.R.C.P. 122: A Significant Opportunity for Litigants", see 34 Colo. Law. 37 (September 2005).

#### **13-3-112. Report on increase in docket fees. (Repealed)**

**Source:** **L. 90:** Entire section added, p. 851, § 10, effective May 31. **L. 96:** Entire section repealed, p. 1267, § 187, effective August 7.

**13-3-113. "Family-friendly Courts Act".** (1) **Short title.** This section shall be known and may be cited as the "Family-friendly Courts Act".

(2) **Legislative declaration.** (a) The general assembly hereby finds and declares that many families experience challenges and transitions with legal ramifications that often necessitate court involvement. Frequently individuals and family members attend court or visit other governmental offices for juvenile delinquency proceedings, domestic relations



proceedings, protective proceedings related to domestic abuse or domestic violence, child protection proceedings, meetings with probation officers, and other matters. Many persons who attend court proceedings are responsible for the care of young children. For many such individuals, child care issues can distract from, if not present obstacles or even barriers to, effective and complete participation in ongoing court proceedings. The general assembly finds that these issues were acknowledged and addressed in the 1999 report entitled "Creating Family Friendly Courts in Colorado: Children's Centers for the Courthouse", which report was submitted by the Colorado supreme court family friendly facilities task force and which report recommended the establishment of children's centers in courthouses.

(b) The general assembly further finds that the same individuals who are in need of child care services when they are participating in court proceedings may also benefit from the availability of information and resource referrals relating to certain types of services within the community, including services addressing at-risk youth, employment counseling, employment training and placement, health education and counseling, financial management, education, legal counseling and referral, mediation, domestic abuse and domestic violence, fatherhood programs, and substance abuse.

(c) The general assembly further finds that individuals who are involved in court proceedings may have additional court-ordered service needs involving their children, including, but not limited to, supervised parenting time and the transfer of the physical custody of a child from one parent to the other.

(d) The general assembly therefore determines and declares that the creation of family-friendly court programs is beneficial to and in the best interests of the citizens of Colorado. The general assembly further finds that the goal of such programs shall primarily be providing quality child care in or near courthouses to the children of individuals and families who attend court-related proceedings, but that such programs may also provide additional court-related family services at the facility and shall serve as a clearinghouse of information and resource referrals for program patrons concerning the wide variety of available services in the community, including services that provide help to at-risk youth, educational services, health services, mental health services, substance abuse services, legal services, and domestic abuse information.

(3) **Definitions.** For purposes of this section:

(a) "At-risk youth" shall have the same meaning as set forth in section 25-20.5-203 (3), C.R.S.

(b) "Domestic abuse" shall have the same meaning as set forth in section 13-14-101 (2).

(c) "Domestic violence" shall have the same meaning as set forth in section 18-6-800.3 (1), C.R.S.

(d) "Family-friendly court services" means child care and court-related family services provided in the courthouse or courthouse complex or in reasonable proximity to the courthouse.

(e) "Program" means the family-friendly court program established pursuant to this section.

(4) **Provision of family-friendly court services.** There is hereby created the family-friendly court program. The purpose of the program shall be to provide quality family-friendly court services to families and the children of individuals who are attending court proceedings or related matters and to serve as a central location for the dissemination of information to families about resources and services relating to at-risk youth, employment counseling, employment training and placement, health education and counseling, financial management, education, legal counseling and referral, mediation, domestic abuse and domestic violence, fatherhood programs, and substance abuse. Grants awarded pursuant to this section shall be used to establish and maintain new family-friendly court programs in judicial districts throughout the state that do not have comparable existing programs, as well as to enhance existing family-friendly court programs.

(5) **Grant applications - duties of judicial districts.** (a) To be eligible for moneys from the family-friendly court program cash fund, created in subsection (6) of this section, for the provision of family-friendly court services, a judicial district shall apply to the state

court administrator in accordance with the timelines and guidelines adopted by the state court administrator, using an application form provided by the state court administrator.

(b) The state court administrator, in determining which judicial districts may receive grant moneys pursuant to this section, shall consider the extent that a judicial district is responsible for:

(I) Actively recruiting qualified and skilled child care providers to provide quality child care services to families and children of individuals who are attending court proceedings or related matters;

(II) Conducting the necessary criminal history checks through the Colorado bureau of investigation and hiring qualified and appropriate child care providers;

(III) Selecting and establishing a safe physical location in the courthouse or in the courthouse complex or in reasonable proximity to the courthouse, for the provision of child care services;

(IV) When reasonably practicable in consideration of funding, staffing, and assistance from other public and private organizations, providing additional court-related family services to families and children experiencing the challenges and transitions that necessitate court involvement, including, but not limited to, supervised parenting time and transfer of the physical custody of a child from one parent to the other;

(V) Soliciting information from community-based organizations, faith communities, governmental entities, schools, community mental health centers, local nonprofit or not-for-profit agencies, local law enforcement agencies, businesses, and other community service providers about the following services and resources for the purpose of providing such information to patrons of the family-friendly court services:

(A) Youth services, including but not limited to youth mentoring services, services to prevent or reduce youth crime and violence, student dropout prevention and intervention services, and any other services that may be available in the community, the goal and purpose of which are to assist at-risk youth;

(B) Multipurpose service centers for displaced homemakers pursuant to article 15.5 of title 8, C.R.S., and other information to assist displaced homemakers, which information shall relate to employment counseling, employment training, employment placement, health education and counseling services, financial management services, educational services, and legal counseling and services;

(C) Information related to health insurance and health care coverage, including but not limited to the children's basic health plan and dental health plan, established pursuant to article 8 of title 25.5, C.R.S., and the baby and kid care program, established pursuant to section 25.5-5-205, C.R.S.;

(D) Substance abuse programs that are available in the community;

(E) Services and potential financial resources that may be available for victims of domestic abuse or domestic violence, including but not limited to counseling for persons who are victims of domestic abuse and their dependents, advocacy programs that assist victims in obtaining services and information, and educational services for victims of domestic violence;

(F) Fatherhood programs that are available in the community; and

(G) Any other services that would be beneficial to families experiencing challenges and transition necessitating court involvement, including but not limited to family stabilization services as provided in section 19-1-125, C.R.S., and mediation services; and

(VI) Providing to persons staffing the program training and ongoing support with regard to the available resources and additional referrals provided through the program at each court location.

(c) The judicial districts that are selected by the state court administrator to provide family-friendly court services shall be responsible for:

(I) Implementing a method of evaluating the effectiveness of the family-friendly court program and assessing the impact of the child care and informational services provided through the program; and

(II) Reporting annually to the state court administrator concerning the results of the judicial district's evaluation of the family-friendly court program as well as an accounting of fiscal contributions received and expenditures made by the judicial district for the



implementation, administration, and maintenance of the program and such other information that the state court administrator may require or that the judicial district determines to be relevant and informative.

(d) The judicial districts that are selected by the state court administrator to provide family-friendly court services that provide child care services shall meet the licensing requirements for child care facilities set forth in part 1 of article 6 of title 26, C.R.S., and all child care licensing rules promulgated by the state board of human services in connection therewith.

(e) In addition to grants received from the state court administrator pursuant to this section, judicial districts implementing or enhancing existing family-friendly court programs pursuant to this section are authorized to accept any funds, grants, gifts, or donations from any private or public source for the purpose of implementing this section; except that no grant or donation shall be accepted if the conditions attached to the grant or donation require the expenditure thereof in a manner contrary to law. Any such moneys received by a judicial district shall be credited to the family-friendly court program cash fund created in subsection (6) of this section for grants awarded by the board pursuant to this section.

(6) **Family-friendly court program cash fund.** (a) There is hereby created in the state treasury the family-friendly court program cash fund. The moneys in the family-friendly court program cash fund shall be subject to annual appropriation by the general assembly for the implementation of this section. The state court administrator is authorized to accept on behalf of the state any grants, gifts, or donations from any private or public source for the purpose of this section. All private and public funds received through grants, gifts, or donations shall be transmitted to the state treasurer, who shall credit the same to the family-friendly court program cash fund in addition to any moneys that may be appropriated to the cash fund directly by the general assembly. In addition, commencing July 1, 2002, the one-dollar surcharge set forth in section 42-4-1701 (4) (a) (VI), C.R.S., shall be transmitted to the state treasurer who shall credit the same to the family-friendly court program cash fund created in this subsection (6). All investment earnings derived from the deposit and investment of moneys in the fund shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

(b) All moneys in the family-friendly court program cash fund, created in paragraph (a) of this subsection (6), shall be available for grants awarded by the state court administrator to judicial districts seeking to implement or enhance existing family-friendly court programs and administrative costs associated with the implementation and administration of this section. The state court administrator, subject to annual appropriation by the general assembly, is hereby authorized to expend moneys appropriated to the judicial department from the family-friendly court program cash fund to judicial districts seeking to establish or enhance family-friendly court programs pursuant to this section.

(6.5) Notwithstanding any provision of subsection (6) of this section to the contrary, on April 20, 2009, the state treasurer shall deduct two hundred thousand dollars from the family-friendly court program cash fund and transfer such sum to the general fund.

(7) The state court administrator shall announce to all judicial districts the availability of grants pursuant to this section for the establishment and maintenance or enhancement of family-friendly court services programs in the judicial districts.

(8) (Deleted by amendment, L. 2005, p. 1000, § 1, effective June 2, 2005.)

**Source:** L. 2002: Entire section added, p. 627, § 1, effective July 1. L. 2004: (3)(b) amended, p. 554, § 6, effective July 1. L. 2005: (5)(b)(V)(C) amended, p. 764, § 19, effective June 1; (2), (3)(d), (4), (5), and (8) amended, p. 1000, § 1, effective June 2. L. 2006: (5)(b)(V)(C) amended, p. 2001, § 45, effective July 1. L. 2009: (6.5) added, (SB 09-208), ch. 149, p. 620, § 8, effective April 20.

**Editor's note:** Amendments to subsection (5)(b)(V)(C) by House Bill 05-1337 and Senate Bill 05-030 were harmonized.

## ARTICLE 4

## Court of Appeals

13-4-101.	Establishment.	13-4-107.	Place of court.
13-4-102.	Jurisdiction - repeal.	13-4-108.	Supreme court review.
13-4-102.1.	Interlocutory appeals of determinations of questions of law in civil cases.	13-4-109.	Certification of cases to the supreme court.
13-4-103.	Number of judges - qualifications.	13-4-110.	Determination of jurisdiction - transfer of cases.
13-4-104.	Term of office - selection.	13-4-111.	Employees - compensation.
13-4-104.5.	Temporary judicial duties.	13-4-112.	Fees of the clerk of court of appeals.
13-4-105.	Chief judge.	13-4-113.	Publication of decisions.
13-4-106.	Divisions.		

**13-4-101. Establishment.** There is hereby created the court of appeals, pursuant to section 1 of article VI of the state constitution. The court of appeals shall be a court of record. Judges of the court of appeals may serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court.

**Source:** L. 69: p. 265, § 1. C.R.S. 1963: § 37-21-1. L. 90: Entire section amended, p. 1247, § 1, effective April 5.

## ANNOTATION

**Court of appeals created to relieve appellate backlog.** Colorado has now provided for an intermediate court of appeals, which will relieve the appellate backlogs caused by the press of

court business in recent years. *Tanksley v. Warden State Penitentiary*, 429 F.2d 1308 (10th Cir. 1970).

**13-4-102. Jurisdiction - repeal.** (1) Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of, and interlocutory appeals of certified questions of law in civil cases pursuant to section 13-4-102.1 from, the district courts, the probate court of the city and county of Denver, and the juvenile court of the city and county of Denver, except in:

- (a) Repealed.
- (b) Cases in which a statute, a municipal charter provision, or an ordinance has been declared unconstitutional;
- (c) Cases concerned with decisions or actions of the public utilities commission;
- (d) Water cases involving priorities or adjudications;
- (e) Writs of habeas corpus;
- (f) Cases appealed from the county court to the district court, as provided in section 13-6-310;
- (g) Summary proceedings initiated under articles 1 to 13 of title 1 and article 10 of title 31, C.R.S.;
- (h) Cases appealed from the district court granting or denying postconviction relief in a case in which a sentence of death has been imposed.
- (2) The court of appeals has initial jurisdiction to:
  - (a) Review awards or actions of the industrial claim appeals office, as provided in articles 43 and 74 of title 8, C.R.S.;
  - (b) Review orders of the banking board granting or denying charters for new state banks, as provided in article 102 of title 11, C.R.S.;
  - (c) (Deleted by amendment, L. 2006, p. 761, § 19, effective July 1, 2006.)
  - (d) Review all final actions and orders appropriate for judicial review of the Colorado podiatry board, as provided in section 12-32-108.7, C.R.S.;
  - (e) Review all final actions and orders appropriate for judicial review of the Colorado state board of chiropractic examiners as provided in section 12-33-121, C.R.S.;



(f) Review actions of the Colorado medical board in refusing to grant or in revoking or suspending a license or in placing the holder thereof on probation, as provided in section 12-36-119, C.R.S.;

(g) Review actions of the board of dental examiners in refusing to issue or renew or in suspending or revoking a license to practice dentistry or dental hygiene, as provided in section 12-35-130, C.R.S.;

(h) Review all final actions and orders appropriate for judicial review of the board of nursing as provided in articles 38 and 42 of title 12, C.R.S.;

(i) Review actions of the state board of optometry in refusing to grant or renew, revoking, or suspending a license, issuing a letter of admonition, or placing a licensee on probation or under supervision, as provided by section 12-40-119 (2) (e), C.R.S.;

(j) Review all final actions and orders appropriate for judicial review of the director of the division of professions and occupations as provided in article 41 of title 12, C.R.S.;

(k) Review all final actions and orders appropriate for judicial review of the state board of pharmacy, as provided in section 12-42.5-125, C.R.S.;

(l) Review decisions of the board of education of a school district in proceedings for the dismissal of a teacher, as provided in section 22-63-302 (10), C.R.S.;

(m) Review final decisions or orders of the Colorado real estate commission, as provided in parts 1, 3, and 4 of article 61 of title 12, C.R.S.;

(n) Review final decisions and orders of the Colorado civil rights commission, as provided in parts 3, 4, and 7 of article 34 of title 24, C.R.S.;

(o) Review all final actions and orders appropriate for judicial review of the passenger tramway safety board, as provided in section 25-5-708, C.R.S.;

(p) Review decisions of the state personnel board, as provided in section 24-50-125.4, C.R.S.;

(q) Review final actions and orders appropriate for judicial review of the state electrical board, as provided in article 23 of title 12, C.R.S.;

(r) Review all final actions and orders appropriate for judicial review of the state board of licensure for architects, professional engineers, and professional land surveyors, as provided in section 12-25-309 (5), C.R.S.;

(s) Review final actions and orders of the boards, as defined in section 12-43-201 (1), C.R.S., that are appropriate for judicial review and final actions;

(t) (Deleted by amendment, L. 2008, p. 426, § 25, effective August 5, 2008.)

(u) Review all final actions and orders appropriate for judicial review of the coal mine board of examiners, as provided in section 34-22-107 (8), C.R.S.;

(v) Review final actions and orders of the director of the division of professions and occupations appropriate for judicial review, as provided in section 12-55.5-115, C.R.S.;

(w) Review final actions and orders appropriate for judicial review of the examining board of plumbers;

(x) Review decisions of the board of assessment appeals, as provided in section 39-8-108 (2), C.R.S.;

(y) Repealed.

(z) (I) Review final actions of the committee on anticompetitive conduct established pursuant to section 12-36.5-106, C.R.S.

(II) This paragraph (z) is repealed, effective September 1, 2013.

(aa) (Deleted by amendment, L. 98, p. 818, § 14, effective August 5, 1998.)

(bb) Review final actions taken pursuant to article 38.1 of title 12, C.R.S., by the state board of nursing in the division of professions and occupations in the department of regulatory agencies;

(cc) Review final actions and orders appropriate for judicial review of the securities commissioner, as provided in section 11-59-117, C.R.S.;

(dd) Review final actions and orders appropriate for judicial review of the commissioner of insurance, pursuant to title 10, C.R.S.;

(ee) Review final actions and orders appropriate for judicial review of the Colorado racing commission, as provided in section 12-60-507 (3), C.R.S.;

(ff) Review final actions and orders appropriate for judicial review of the Colorado passenger tramway safety board, as provided in section 25-5-708, C.R.S.;

(gg) Review final actions and orders appropriate for judicial review of the department of revenue relating to penalties for violations of statutes relating to the sale of cigarettes and tobacco products to minors pursuant to section 24-35-505 (5), C.R.S.;

(hh) Review final actions and orders appropriate for judicial review of the state board of veterinary medicine, as provided in section 12-64-112 (2), C.R.S.;

(ii) Review all final actions and orders appropriate for judicial review of the director of the division of professions and occupations as provided in section 12-37-107 (4), C.R.S.;

(jj) Review all final actions and orders appropriate for judicial review of the executive director of the department of labor and employment, as provided in section 8-20-104, C.R.S.;

(kk) Review all final actions and orders appropriate for judicial review of the director of the division of professions and occupations in the department of regulatory agencies, as provided in section 12-40.5-110, C.R.S.

(3) The court of appeals shall have authority to issue any writs, directives, orders, and mandates necessary to the determination of cases within its jurisdiction.

(4) (Deleted by amendment, L. 95, p. 235, § 4, effective April 17, 1995.)

**Source:** L. 69: p. 265, § 1. C.R.S. 1963: § 37-21-2. L. 73: p. 358, § 2. L. 74: (1)(a) repealed, p. 236, § 4, effective July 1. L. 75: (2) amended, p. 555, § 2, effective April 9; (2) amended, p. 459, § 9, effective July 1. L. 77: (2) amended, p. 717, § 2, effective July 1. L. 78: (2) amended, p. 302, § 4, effective July 1. L. 79: (2) amended, p. 919, § 1, effective July 1; (2) amended, p. 803, § 5, effective July 1; (2) amended, p. 553, § 1, effective March 1, 1980. L. 80: (1)(g) amended, p. 438, § 2, effective January 1, 1981. L. 83: (2) amended, p. 473, § 4, effective April 5. L. 85: (2) amended, p. 566, § 12, effective July 1; (2) amended, p. 484, § 2, effective July 1; (2) amended, p. 532, § 12, effective July 1; (2) amended, p. 505, § 21, effective July 1; (2) amended, p. 510, § 8, effective July 1; (2) amended, p. 538, § 13, effective July 1; IP(1) and (1)(f) amended, p. 570, § 3, effective November 14, 1986. L. 86: (2) amended, p. 978, § 9, effective April 3; (2) amended, p. 653, § 31, effective July 1; (2) amended, p. 498, § 116, effective July 1; (2) amended, p. 621, § 34, effective July 1; (2) amended, p. 1217, § 14, effective July 1. L. 88: (2)(x) added, p. 1305, § 14, effective April 29; (2)(o) and (2)(p) amended and (2)(u) added, p. 1199, § 9, effective May 3; (2)(o) and (2)(p) amended and (2)(r) added, p. 470, § 12, effective July 1; (2)(o) amended and (2)(s) and (2)(t) added, p. 568, § 6, effective July 1; (2)(o) and (2)(p) amended and (2)(v) added, p. 582, § 2, effective July 1; (2)(q) added, p. 502, § 22, effective July 1; (2)(w) added, p. 593, § 19, effective July 1. L. 89: (2)(m) amended, p. 744, § 23, effective April 3; (2)(y), (2)(z), and (2)(aa) added, pp. 728, 747, 406, §§ 31, 4, 6, effective July 1. L. 89, 1st Ex. Sess.: (2)(bb) added, p. 13, § 3, effective July 7. L. 90: (2)(l) amended, p. 1128, § 2, effective July 1. L. 91: (2)(cc) added, p. 2425, § 4, effective June 8; (2)(a) amended and (4) added, p. 1337, § 54, effective July 1. L. 92: (2)(dd) added, p. 1613, § 167, effective May 20; (1)(b) amended, p. 271, § 1, effective July 1. L. 93: (2)(ee) added, p. 1235, § 2, effective July 1; (2)(ee) added, p. 1033, § 14, effective July 1; (2)(ff) added, p. 1532, § 1, effective July 1. L. 94: (2)(y) repealed, p. 705, § 7, effective April 19; (1)(h) added, p. 1474, § 3, effective July 1. L. 95: (2)(a) and (4) amended, p. 235, § 4, effective April 17; (2)(f) amended, p. 1072, § 24, effective July 1; (2)(aa) amended, p. 419, § 6, effective July 1. L. 98: (2)(s) amended, p. 1158, § 28, effective July 1; (2)(gg) added, p. 1186, § 4, effective July 1; (2)(o) and (2)(aa) amended, p. 818, § 14, effective August 5. L. 2001: (2)(ii) added, p. 1260, § 8, effective June 5; (2)(hh) added, p. 480, § 13, effective July 1. L. 2003: (2)(jj) added, p. 1828, § 21, effective May 21; (2)(b) amended, p. 1209, § 18, effective July 1. L. 2004: (2)(c) amended, p. 1310, § 52, effective May 28; (2)(g) amended, p. 857, § 2, effective July 1. L. 2006: (2)(c) and (2)(r) amended, p. 761, § 19, effective July 1. L. 2008: (2)(kk) added, p. 830, § 3, effective July 1; (2)(s) and (2)(t) amended, p. 426, § 25, effective August 5. L. 2010: (2)(f) amended, (HB 10-1260), ch. 403, p. 1985, § 70, effective July 1; IP(1) amended, (HB 10-1395), ch. 364, p. 1719, § 1, effective August 11. L. 2011: IP(2) and (2)(i) amended, (SB 11-094), ch. 129, p. 451, § 29, effective April 22; IP(2) and (2)(s) amended, (SB 11-187), ch. 285, p. 1326, § 66, effective July 1. L. 2012: (2)(z) amended, (HB 12-1297), ch. 139, p. 506, § 4, effective April 26; (2)(k) amended, (HB 12-1311), ch. 281, p. 1617, § 33, effective July 1.



**Editor's note:** Amendments to subsection (2) by House Bill 79-1234 and Senate Bill 79-038 were harmonized with Senate Bill 79-099, effective March 1, 1980. Amendments to subsection (2) by Senate Bill 85-013, Senate Bill 85-049, House Bill 85-1030, House Bill 85-1031, House Bill 85-1032, and House Bill 85-1209 were harmonized. Amendments to subsection (2) by Senate Bill 86-011, Senate Bill 86-012, Senate Bill 86-165, House Bill 86-1029, and House Bill 86-1268 were harmonized. Amendments to subsection (2)(ee) by House Bill 93-1034 and House Bill 93-1268 were harmonized.

**Cross references:** For the legislative declaration contained in the 2003 act enacting subsection (2)(jj), see section 1 of chapter 279, Session Laws of Colorado 2003.

## ANNOTATION

**Law reviews.** For article, "The Problem of Delay in the Colorado Court of Appeals", see 58 Den. L.J. 1 (1980).

**General assembly may change appellate subject matter jurisdiction.** The changes brought about by this section, § 13-4-108, and § 13-4-110 pertain to the subject matter, i.e., jurisdiction of the supreme court and court of appeals and, as such, the changes are within the authority of the general assembly. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

**Statutes pertaining to the creation of appellate remedies take precedence over judicial rules of procedure.** *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

**A court cannot adopt a rule which changes jurisdiction.** The supreme court has authority to adopt rules for the regulation of the business of the courts and the procedure to be followed by litigants in doing that business. Nonetheless, absent constitutional authority, it is equally clear that this court cannot adopt a rule which changes jurisdiction of a court contrary to a provision of a statute. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Where the general assembly has enacted statutes prescribing appellate procedure, this court may not modify the jurisdiction granted it by statute. *People v. Meyers*, 43 Colo. App. 63, 598 P.2d 526 (1979).

**The manner in which subject matter jurisdiction is exercised** is properly within the scope of the supreme court's rule-making powers vested by § 2(1) of art. VI, Colo. Const. This procedure has been established and is set forth in C.A.R. 50-57. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

**Court of appeals has no jurisdiction over constitutionality of a city charter.** Where claimant contends that a city charter provision is unconstitutional, the Colorado court of appeals does not have jurisdiction to decide the issue. *McCamant v. City & County of Denver*, 31 Colo. App. 287, 501 P.2d 142 (1972).

**Jurisdiction of court of appeals to hear appeal.** Whether the court of appeals has jurisdiction to hear an appeal from the district court,

or any part thereof, depends upon whether the matters presented were properly before the district court. *Zaharia v. County Court ex rel. County of Jefferson*, 673 P.2d 378 (Colo. App. 1983).

An appeal that is filed before the entry of final judgment does not remove jurisdiction from the trial court. *People v. Rosales*, 134 P.3d 429 (Colo. App. 2005).

**The final judgment of the district court, following a trial de novo, is subject to review by the court of appeals under both § 13-6-310 and this section.** *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

**This section provides that court of appeals does not have initial jurisdiction over appeals from summary proceeding under certain election statutes,** but statute does not bar court of appeals' jurisdiction after the supreme court has declined to exercise its initial jurisdiction. *Zivian v. Brooke-Hitching*, 28 P.3d 970 (Colo. App. 2001).

**Right to appeal to courts from special assessment for public improvements** does not exist except by statute. *Orchard Court Dev. Co. v. City of Boulder*, 182 Colo. 361, 513 P.2d 199 (1973).

**Subsection (1)(h) expressly divests the court of appeals of jurisdiction over appeals from postconviction proceedings in cases in which the death penalty has been imposed.** When this provision is combined with § 16-12-101.5 and §§ 16-12-201 to 16-12-210, the legislature has made plain that it does not want the court of appeals to resolve issues arising from cases in which the death penalty has been imposed. *People v. Owens*, 219 P.3d 379 (Colo. App. 2009).

**Subsection (2)(x) does not, by its language, limit the court of appeals' jurisdiction to review board of assessment appeals decisions** that are not related to property valuation. *Prop. Tax Adjustment Specialists, Inc. v. Mesa County Bd. of Comm'rs*, 956 P.2d 1277 (Colo. App. 1998).

**Final judgment defined.** A final judgment is defined as one which ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties in-

volved in the proceeding. *D.H. v. People*, 192 Colo. 542, 561 P.2d 5 (1977); *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982); *People in Interest of S.M.O.*, 931 P.2d 572 (Colo. App. 1996).

A decision on the merits is a final judgment for appeal purposes despite any outstanding issue of attorney fees and certification pursuant to C.R.C.P. 54 (b) is not a prerequisite to appellate review of the merits of a case if a judgment has been entered and only the issue of attorney fees remains to be determined. *Baldwin v. Bright Mortg. Co.*, 757 P.2d 1072 (Colo. 1988).

An arbitrator's award is not a "final judgment" within the meaning of this section. *S. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

Order granting a stay in action pending resolution of case involving similar issues in another state was not a final appealable order where the issues and parties were not identical in the two proceedings and the order did not preclude plaintiff from seeking to lift the stay based upon a showing of prejudice. *Things Remembered v. Fireman's Ins. Co.*, 924 P.2d 1089 (Colo. App. 1996).

**Court of appeals jurisdiction is limited to review of final orders**, and the parties cannot confer subject matter jurisdiction upon the court by consent. *Arevalo v. Colo. Dept. of Human Servs.*, 72 P.3d 436 (Colo. App. 2003).

Court of appeals does not have jurisdiction to review the trial court's interpretation and enforcement of a settlement agreement until the trial court either certifies its orders as final pursuant to C.R.C.P. 54(b) or issues an order that outlines the parties' exact responsibilities pursuant to the settlement agreement and services plan and does not allow the trial court to further modify or vacate these responsibilities. *Arevalo v. Colo. Dept. of Human Servs.*, 72 P.3d 436 (Colo. App. 2003).

**A judgment of conviction is not final until sentence is imposed.** Absent a specific finding that the victim did not suffer a pecuniary loss, restitution is a mandatory part of the sentence. Thus, absent such a finding, sentencing is not final until restitution is ordered. *People v. Rosales*, 134 P.3d 429 (Colo. App. 2005).

**Order of dismissal without prejudice is a final judgment when the applicable statute of limitations period has expired.** *SMLL, L.L.C. v. Daly*, 128 P.3d 266 (Colo. App. 2005).

**A transfer order from juvenile to district court** is not a final judgment from which appeal lies because it is interlocutory in nature and in no sense completely determines the rights of the parties. *D.H. v. People*, 192 Colo. 542, 561 P.2d 5 (1977).

**Remand for further proceedings before city council of case against ordinance was final appealable order.** Where the city council in enacting a special assessment ordinance had

made all the required findings and in an action to enjoin the assessment, the district court, without explicitly stating whether it was affirming or reversing the council's action, remanded the case to the council for further proceedings, such action by the district court constituted final judgment and the court of appeals had jurisdiction to consider any appeal from the district court's order. *Cline v. City of Boulder*, 35 Colo. App. 349, 532 P.2d 770 (1975).

**Trial court's order on attorney fees** was a final judgment and could have been reviewed by the court of appeals if a party had appealed some other aspect of the case and the matter was otherwise properly before the court. *Bye v. District Court*, 701 P.2d 56 (Colo. 1985).

**However, court of appeals has initial jurisdiction to review an order regarding attorney fees that has been certified as final by the trial court**, even though other claims in the underlying action are pending before the trial court. *Steven A. Gall, P.C. v. District Court*, 965 P.2d 1268 (Colo. 1998).

**A postjudgment collection order is final** if the order ends the particular part of the action in which it is entered, leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that part of the proceeding, and is more than a ministerial or administrative determination. *Luster v. Brinkman*, 250 P.3d 664 (Colo. App. 2010).

**No review of issue raised first time on appeal.** Questioning the constitutionality of a statute for the first time in an appellate brief will not successfully raise the issue for review by Colorado supreme court on appeal. *Manka v. Martin*, 200 Colo. 260, 614 P.2d 875 (1980), cert. denied, 450 U.S. 913, 101 S. Ct. 1354, 67 L. Ed.2d 338 (1981).

**No jurisdiction over constitutionality of statute.** Court of appeals did not have jurisdiction to consider the constitutionality of a statute, despite a supreme court order stating that jurisdiction of the case "shall be retained by the court of appeals" because the general assembly did not intend to confer upon the supreme court the power to expand and contract the jurisdictional authority of the court of appeals. *People v. Salazar*, 715 P.2d 1265 (Colo. App. 1985), cert. denied, 744 P.2d 80 (Colo. 1987); *Kollodge v. Charnes*, 741 P.2d 1260 (Colo. App. 1987); *People v. Woertman*, 786 P.2d 443 (Colo. App. 1989); *Flores v. Dept. of Rev.*, 802 P.2d 1175 (Colo. App. 1990); *People v. Truesdale*, 804 P.2d 287 (Colo. App. 1990); *Lucchesi v. State*, 807 P.2d 1185 (Colo. App. 1990); *People v. Merrill*, 816 P.2d 958 (Colo. App. 1991); *People v. Robinson*, 833 P.2d 832 (Colo. App. 1992).

**Court of appeals has jurisdiction over constitutionality of a statute when issue raised in appeal of decisions of statutorily created tribunals under subsection (2).** *Indus. Comm'n v. Bd. of County Comm'rs*, 690 P.2d 839 (Colo. 1984).



**Statute does not otherwise limit court of appeals authority to address constitutional issues raised in a Colorado appellate rule promulgated by the Colorado supreme court.** Refusal to address the constitutional issues raised over C.A.R. 3.4 may mean that appellants would have no forum for their arguments, thus court of appeals concluded it had jurisdiction to address appellant's challenges to constitutionality of the rule. *People ex rel. T.D.*, 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

**Constitutional challenges to sales and use tax provisions of municipal code made to an administrative agency but were not made in declaratory judgment action in district court are not properly preserved for appellate review.** *Arapahoe Roofing & Sheet Metal v. Denver*, 831 P.2d 451 (Colo. 1992).

**Jurisdiction of the court of appeals was not precluded by subsection (1)(b) since the court was being asked to determine the facial constitutionality of an executive order of the mayor of the city and county of Denver rather than a statute, charter provision, or ordinance.** *Casados v. City & County of Denver*, 832 P.2d 1048 (Colo. App. 1992) (decided prior to 1992 amendment to subsection (1)(b)), rev'd on other grounds, 862 P.2d 908 (Colo. 1993), cert. denied, 511 U.S. 1005, 114 S. Ct. 1372, 128 L. Ed.2d 48 (1994).

**General assembly's authority to determine the jurisdiction of the court of appeals is exclusive.** *S. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

**Parties to an arbitration agreement cannot define and prescribe the powers of a court of law.** Where a contract term purported to allow an appellate court to conduct a substantive review of the arbitration panel's award, contrary to the controlling statutes, clause was void and unenforceable. *S. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

**Court of appeals has jurisdiction to address facial constitutionality challenge to a municipal executive order.** *Casados v. City & County of Denver*, 832 P.2d 1048 (Colo. App. 1992), rev'd on other grounds, 862 P.2d 908 (Colo. 1993), cert. denied, 511 U.S. 1005, 114 S. Ct. 1372, 128 L. Ed.2d 48 (1994).

**However, where the court of appeals refers a question of its jurisdiction to the supreme court, which then determined the case properly within the court of appeal's jurisdiction, that ruling is conclusive.** *Barela v. Beye*, 916 P.2d 668 (Colo. App. 1996).

**Court of appeals lacks jurisdiction to review an arbitration award; jurisdiction extends only to orders and judgments entered by statutorily specified courts.** *Thomas v. Farmers Ins. Exch.*, 857 P.2d 532 (Colo. App. 1993).

**Court of appeals does not possess general powers of supervision over lower courts or attorneys appearing therein.** Rather, such powers are vested in the supreme court. *People v. Bergen*, 883 P.2d 532 (Colo. App. 1994).

**Defendant's assertion that Colorado's homicide statutes violate principles of equal protection brings into question the constitutionality of a statute and is therefore outside the jurisdiction of the court.** *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

**Notwithstanding the provisions of this section, the supreme court may retain and review an appeal of a declaratory order of the state personnel board that should have been filed with the court of appeals.** The court's authority rests in its power under C.A.R. 50(b) to review cases pending in the court of appeals prior to judgment and under C.A.R. 2 to suspend the rules of appellate procedure. *Colo. Ass'n of Pub. Emp. v. Dept. of Hwys.*, 809 P.2d 988 (Colo. 1991).

**Court of appeals does not have jurisdiction over writs of habeas corpus.** All district courts have jurisdiction in habeas corpus proceedings and one seeking habeas corpus may select his forum. *Duran v. Price*, 868 P.2d 375 (Colo. 1994).

**Crim. P. 35(c) motion is properly vested in the court of appeals.** *Duran v. Price*, 868 P.2d 375 (Colo. 1994).

**Under this section, the court of appeals does not have jurisdiction over an appeal of a district court's decision modifying a county court decision, regardless of whether a district court judgment which modifies a county court judgment is a final judgment of the district court under rule 37 of the Colorado rules of criminal procedure.** *People v. Smith*, 874 P.2d 452 (Colo. App. 1993).

**The final judgment of the district court, following a trial de novo, is subject to review by the court of appeals under both § 13-6-310 and this section.** *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

**The dismissal of a claim without prejudice is generally not appealable unless such dismissal prohibits further proceedings, such as an applicable statute of limitations.** *Golden Lodge No. 13, I.O.O.F. v. Easley*, 916 P.2d 666 (Colo. App. 1996).

**The dismissal of a claim without prejudice for failure to exhaust the administrative remedies provided by the laws and regulations of the Sovereign Lodge was not appealable because the defendant Golden Lodge could at any time file an internal appeal protesting the actions of the Grand Lodge with the supreme governing body, the Sovereign Grand Lodge.** *Golden Lodge No. 13, I.O.O.F. v. Easley*, 916 P.2d 666 (Colo. App. 1996).

**A denial of a summary judgment motion is not generally considered a final decision that is immediately appealable under this section.** *City of Lakewood v. Brace*, 919 P.2d 231 (Colo. 1996).

**An appeal may be taken from an interlocutory order denying a motion to dismiss based on tribal sovereign immunity when the issue presented is one of law not of fact.** *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004).

**Trial court's order reserving ruling on a summary judgment motion and allowing full discovery to proceed is a final judgment for purposes of conferring appellate jurisdiction.** *Furlong v. Gardner*, 956 P.2d 545 (Colo. 1998).

**The same rules of finality apply in probate cases as in other civil cases.** An order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding. *In re Estate of Scott*, 119 P.3d 511 (Colo. App. 2004), *aff'd*, 136 P.3d 892 (Colo. 2006).

**C.R.C.P. 54(b) governs the interlocutory appeal of a probate court order.** *In re Estate of Scott*, 119 P.3d 511 (Colo. App. 2004), *aff'd*, 136 P.3d 892 (Colo. 2006).

**Where probate court's order of partial summary judgment adjudicated fewer than all of the parties' claims, it was not a final judgment, and party could not appeal the order without C.R.C.P. 54(b) certification.** *In re Estate of Scott*, 119 P.3d 511 (Colo. App. 2004), *aff'd*, 136 P.3d 892 (Colo. 2006).

**As reenacted, § 22-63-302 authorizes teachers to appeal only school board decisions of dismissal.** Under § 22-63-302, the court does not have jurisdiction to consider appeals of school board decisions placing a teacher on probation. *Holdridge v. Bd. of Educ.*, 881 P.2d 448 (Colo. App. 1994).

**Because an order directing a new trial is not a final judgment, the court of appeals has no jurisdiction over such an appeal, even if the defendant assert that a new trial would violate his or her rights.** *People v. Jones*, 942 P.2d 1258 (Colo. App. 1996).

**Trial court retains jurisdiction to determine substantive matters when a party files a premature notice of appeal of a nonfinal**

**judgment.** Barring extraordinary circumstances, a judgment subject to C.R.C.P. 54(b) certification must be so certified in order to be considered final and sufficient to transfer jurisdiction to the court of appeals. *Musick v. Woznicki*, 136 P.3d 244 (Colo. 2006).

**A trial court's ruling on a question of sovereign immunity under the CGIA raised by a public entity or public employee is a final, appealable judgment.** However, when a trial court refuses to dismiss on the basis of allegations of willful and wanton conduct that would eliminate the employee's immunity, its order is not immediately appealable. *Carothers v. Archuleta County Sheriff*, 159 P.3d 647 (Colo. App. 2006).

**The court of appeals has jurisdiction to review a district court decision regarding matters within the water courts' exclusive jurisdiction only insofar as is necessary to determine its own and the district court's jurisdiction.** Although the water courts do not, in general, have exclusive jurisdiction to determine the ownership of a water right as opposed to the use of the right under the rule of priority of appropriation, the rule is otherwise when the ownership claims are based on adverse possession and abandonment. In this case, the district court has jurisdiction only with regard to a damages claim, necessitating reversal of the holdings regarding ownership. *Archuleta v. Gomez*, 140 P.3d 281 (Colo. App. 2006).

**Applied in** *Evans v. Simpson*, 190 Colo. 426, 547 P.2d 931 (1976); *In re Petrafeck v. Indus. Comm'n*, 191 Colo. 566, 554 P.2d 1097 (1976); *Kelce v. Touche Ross & Co.*, 37 Colo. App. 352, 549 P.2d 415 (1976); *Mizel v. Banking Bd.*, 196 Colo. 98, 581 P.2d 306 (1978); *Thomas v. County Court*, 198 Colo. 87, 596 P.2d 768 (1979); *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (Colo. 1980); *People v. Scott*, 630 P.2d 615 (Colo. 1981); *In re W.D.A. v. City & County of Denver*, 632 P.2d 582 (Colo. 1981); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *People v. Abbott*, 638 P.2d 781 (Colo. 1981); *Riley v. Indus. Comm'n*, 628 P.2d 147 (Colo. App. 1981); *People v. Boyd*, 642 P.2d 1 (Colo. 1982); *People v. Mason*, 642 P.2d 8 (Colo. 1982); *In re P.F. v. Walsh*, 648 P.2d 1067 (Colo. 1982); *People v. Wieder*, 693 P.2d 1006 (Colo. App. 1984), *aff'd*, 722 P.2d 396 (Colo. 1986); *People v. Fields*, 697 P.2d 749 (Colo. App. 1984); *Leske v. Golder*, 124 P.3d 863 (Colo. App. 2005).

**13-4-102.1. Interlocutory appeals of determinations of questions of law in civil cases.** (1) The court of appeals, under rules promulgated by the Colorado supreme court, may permit an interlocutory appeal of a certified question of law in a civil matter from a district court or the probate court of the city and county of Denver if:

(a) The trial court certifies that immediate review may promote a more orderly disposition or establish a final disposition of the litigation; and

(b) The order involves a controlling and unresolved question of law.

(2) A majority of the judges who are in regular active service on the court of appeals



and who are not disqualified may, if approved by rules promulgated by the Colorado supreme court, order that an interlocutory appeal permitted by the court of appeals be heard or reheard by the court of appeals en banc.

**Source: L. 2010:** Entire section added, (HB 10-1395), ch. 364, p. 1719, § 2, effective August 11.

#### ANNOTATION

**Interlocutory resolution would not promote a more orderly disposition.** Where plaintiff petitioned for interlocutory review of district court's order that economic loss rule barred plaintiff's other claims against defendants, im-

mediate review would not have avoided a trial. Therefore, interlocutory resolution of the economic loss question would not promote a more orderly disposition of the litigation. *Wahrman v. Golden W. Realty*, \_\_ P.3d \_\_ (Colo. App. 2011).

**13-4-103. Number of judges - qualifications.** (1) The number of judges of the court of appeals shall be sixteen. Effective July 1, 2006, the number of judges of the court of appeals shall be nineteen. Subject to available appropriations, effective July 1, 2008, the number of judges of the court of appeals shall be twenty-two.

(2) Judges of the court of appeals shall have the same qualifications as justices of the Colorado supreme court.

**Source: L. 69:** p. 266, § 1. **C.R.S. 1963:** § 37-21-3. **L. 74:** (1) amended, p. 236, § 2, effective July 1. **L. 87:** (1) amended, p. 560, § 1, effective July 1. **L. 2006:** (1) amended, p. 22, § 1, effective July 1; (1) amended, p. 142, § 8, effective August 7. **L. 2007:** (1) amended, p. 1530, § 17, effective May 31.

**Editor's note:** Amendments to subsection (1) by Senate Bill 06-033 and House Bill 06-1028 were harmonized.

**13-4-104. Term of office - selection.** (1) The term of office for a judge of the court of appeals is eight years.

(2) Judicial appointments to the court of appeals shall be made pursuant to section 20 of article VI of the state constitution.

**Source: L. 69:** p. 266, § 1. **C.R.S. 1963:** § 37-21-4. **L. 72:** p. 592, § 65.

**13-4-104.5. Temporary judicial duties.** Whenever the chief justice of the supreme court deems assignment of a judge necessary to the prompt disposition of judicial business, the chief justice may assign any judge of the court of appeals, or any retired judge of the court of appeals who consents, to temporarily perform judicial duties in any court of record. For each day of such temporary service a retired judge shall receive compensation as provided by law.

**Source: L. 90:** Entire section added, p. 1247, § 2, effective April 5.

**13-4-105. Chief judge.** The chief justice of the supreme court shall appoint a judge of the court of appeals to serve as chief judge at the pleasure of the chief justice. The chief judge shall exercise such administrative powers as may be delegated to him by the chief justice.

**Source: L. 69:** p. 266, § 1. **C.R.S. 1963:** § 37-21-5.

**13-4-106. Divisions.** (1) The court of appeals shall sit in divisions of three judges each to hear and determine all matters before the court.

(2) The chief judge, with the approval of the chief justice, shall assign judges to each division. Such assignments shall be changed from time to time as determined by the chief judge, with the approval of the chief justice.

(3) Cases shall be assigned to the divisions of the court of appeals in rotation according to the order in which they are filed with the clerk of the court of appeals or transferred by the supreme court, except that the chief judge has the authority to transfer cases from one division to another to maintain approximately equal case loads or for any other appropriate reason.

**Source:** L. 69: p. 266, § 1. C.R.S. 1963: § 37-21-6.

**13-4-107. Place of court.** The court of appeals shall be located in the city and county of Denver, but any division of the court of appeals may sit in any county seat for the purpose of hearing oral argument in cases before the division.

**Source:** L. 69: p. 266, § 1. C.R.S. 1963: § 37-21-7.

**13-4-108. Supreme court review.** (1) Before application may be made for writ of certiorari, as provided in this section, application shall be made to the court of appeals for a rehearing if required by supreme court rule.

(2) Within thirty days after a rehearing has been refused by the court of appeals, any party in interest who is aggrieved by the judgment of the court of appeals may appeal by application to the supreme court for a writ of certiorari.

(3) Procedures on writs of certiorari, including procedures for rehearings, shall be as prescribed by rule of the supreme court.

**Source:** L. 69: p. 266, § 1. C.R.S. 1963: § 37-21-8. L. 98: Entire section amended, p. 949, § 11, effective May 27.

**Cross references:** For review on certiorari, see C.A.R. 49.

## ANNOTATION

This section, § 13-4-110, and § 2(2) of art. VI, Colo. Const., are not in conflict. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

The procedure established in this section and § 13-4-110 and in C.R.C.P. 50-57 clearly provides for appellate review in the supreme court. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

This section establishes certiorari as the form of review from the court of appeals. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Certiorari is presently recognized as a form of appellate review. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

General assembly may legislate appellate subject matter jurisdiction. The changes

brought about by this section, § 13-4-102, and § 13-4-110 pertain to the subject matter, i.e., jurisdiction of the supreme court and court of appeals and, as such, the changes are within the authority of the general assembly. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Statutes pertaining to the creation of appellate remedies take precedence over judicial rules of procedure. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

Applied in *Honey v. Ranchers & Farmers Livestock Auction Co.*, 191 Colo. 503, 553 P.2d 799 (1976); *Wiggins v. People*, 199 Colo. 341, 608 P.2d 348 (1980); *Nat'l Wildlife Fed'n v. Cotter Corp.*, 665 P.2d 598 (Colo. 1983).

**13-4-109. Certification of cases to the supreme court.** (1) The court of appeals, prior to final determination, may certify any case before it to the supreme court for its review and final determination, if the court of appeals finds:

- (a) The subject matter of the appeal has significant public interest;
- (b) The case involves legal principles of major significance; or



(c) The case load of the court of appeals is such that the expeditious administration of justice requires certification.

(2) The supreme court shall consider such certification and may accept the case for final determination or remand it for determination by the court of appeals.

(3) The supreme court may order the court of appeals to certify any case before the court of appeals to the supreme court for final determination.

**Source:** L. 69: p. 267, § 1. C.R.S. 1963: § 37-21-9.

#### ANNOTATION

**Applied** in *Fritz v. Regents of Univ. of Colo.*, 196 Colo. 335, 586 P.2d 23 (1978); *Coquina Oil*

*Corp. v. Harry Kourlis Ranch*, 643 P.2d 519 (Colo. 1982).

**13-4-110. Determination of jurisdiction - transfer of cases.** (1) (a) When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a summary manner, and its determination shall be conclusive.

(b) A party in interest shall allege that a case is not properly within the jurisdiction of the court of appeals by motion filed with the court of appeals within twenty-one days after the date the record is filed with the clerk of the court of appeals, failing which any objection to jurisdiction by a party in interest shall be waived.

(2) Any case within the jurisdiction of the court of appeals which is filed erroneously in the supreme court shall be transferred to the court of appeals by the supreme court.

(3) No case filed either in the supreme court or the court of appeals shall be dismissed for having been filed in the wrong court but shall be transferred and considered properly filed in the court which the supreme court determines has jurisdiction.

**Source:** L. 69: p. 267, § 1. C.R.S. 1963: § 37-21-10. L. 71: p. 372, § 1. L. 2012: (1)(b) amended, (SB 12-175), ch. 208, p. 822, § 2, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(b) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

#### ANNOTATION

**Section is not in conflict with the constitution.** This section and § 13-4-108, and § 2(2) of art. VI, Colo. Const., are not in conflict. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

**General assembly may legislate appellate subject matter jurisdiction.** The changes brought about by this section, § 13-4-102, and § 13-4-108 pertain to the subject matter, i.e., jurisdiction of the supreme court and court of appeals and, as such, the changes are within the authority of the general assembly. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

**Statutes pertaining to the creation of appellate remedies take precedence over judicial rules of procedure.** *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

**Procedure is established for final review in the supreme court.** The procedure established

in this section and § 13-4-108 and in C.A.R. 50-57 clearly provides for appellate review in the supreme court. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

**This section permits transfer to the court of appeals of certain cases** filed in the supreme court prior to January 1, 1970. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

**Because the substance of the complaint addressed primarily the use of water rights rather than their ownership, the complaint related to a water matter and should have been filed in a water court.** However, the appeal was properly transferred from the supreme court to the court of appeals because the appeal was from a district court judgment. *City of Sterling v. Sterling Irrig. Co.*, 42 P.3d 72 (Colo. App. 2002).

**Although subsection (3) provides that cases filed in wrong appellate court shall not be dismissed**, where appeal will not lie in either court, the only review being by certiorari, the case must be dismissed for failure to comply with the statutory procedure. *People v. Meyers*, 43 Colo. App. 63, 598 P.2d 526 (1979).

**Notwithstanding the provisions of this section, the supreme court may retain and review an appeal** of a declaratory order of the state personnel board that should have been filed with the court of appeals. The court's authority rests in its power under C.A.R. 50(b) to review cases pending in the court of appeals prior to judgment and under C.A.R. 2 to suspend the rules of appellate procedure. *Colorado Ass'n of Pub. Emp. v. Dept. of Highways*, 809 P.2d 988 (Colo. 1991).

**Court of appeals has jurisdiction over interlocutory ruling in injunction proceeding when the supreme court declined to exercise jurisdiction.** *Joel L. Schaffer v. C. M. Sullivan, P.C.*, 844 P.2d 1327 (Colo. App. 1992).

**Trial court had jurisdiction as a matter of law to waive bond requirement for indigent**

**taxpayer and proceed to adjudicate merits of appeal concerning use tax deficiency** where undisputed evidence in affidavit form was proffered to the trial court reciting taxpayer's inability to post bond or make deposit required by statute. *AF Prop. v. Dept. of Rev.*, 852 P.2d 1267 (Colo. App. 1992).

**Where the court of appeals refers a question of its jurisdiction to the supreme court**, which then determined the case properly within the court of appeal's jurisdiction, that ruling is conclusive. *Barela v. Beye*, 916 P.2d 668 (Colo. App. 1996).

**Applied in** *Thomas v. County Court*, 198 Colo. 87, 596 P.2d 768 (1979); *People v. White*, 199 Colo. 82, 606 P.2d 847 (1980); *People v. Dooley*, 630 P.2d 608 (Colo. 1981); *People v. Scott*, 630 P.2d 615 (Colo. 1981); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *People v. Abbott*, 638 P.2d 781 (Colo. 1981); *Federal Lumber Co. v. Wheeler*, 643 P.2d 31 (Colo. 1981); *People v. Mason*, 642 P.2d 8 (Colo. 1982); *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519 (Colo. 1982); *In re P.F. v. Walsh*, 648 P.2d 1067 (Colo. 1982).

**13-4-111. Employees - compensation.** (1) Subject to the rules and regulations of the supreme court, the court of appeals shall appoint a clerk, a reporter of decisions, deputy clerks, and such other assistants as may be necessary.

(2) Each judge of the court of appeals may appoint a law clerk who shall be learned in the law and one secretary or stenographer. The persons so employed may be discharged or removed at the pleasure of the judge employing them.

(3) All employees appointed under subsections (1) and (2) of this section shall be paid such compensation as shall be prescribed by the rules and regulations of the supreme court.

**Source:** L. 69: p. 267, § 1. C.R.S. 1963: § 37-21-11. L. 74: (1) amended, p. 236, § 3, effective July 1.

**13-4-112. Fees of the clerk of court of appeals.** (1) (a) Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the court of appeals a docket fee of two hundred twenty-three dollars.

(b) The docket fee for the appellee shall be one hundred forty-eight dollars to be paid upon the entry of appearance of the appellee.

(2) (a) Each fee collected pursuant to paragraph (a) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) One hundred fifty dollars shall be deposited in the supreme court library fund created pursuant to section 13-2-120;

(II) Five dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6); and

(III) Sixty-eight dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(b) Each fee collected pursuant to paragraph (b) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Seventy-five dollars shall be deposited in the supreme court library fund created pursuant to section 13-2-120; .

(II) Five dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6); and



(III) Sixty-eight dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

**Source:** L. 69: p. 268, § 1. C.R.S. 1963: § 37-21-12. L. 82: Entire section R&RE, p. 285, § 3, effective July 1. L. 98: (2) amended, p. 685, § 2, effective July 1. L. 2007: Entire section amended, p. 1530, § 18, effective May 31. L. 2008: Entire section amended, p. 2114, § 6, effective June 4.

**Cross references:** For the legislative declaration contained in the 2008 act amending this section, see section 1 of chapter 417, Session Laws of Colorado 2008.

### 13-4-113. Publication of decisions.

(1) Repealed.

(2) Those court of appeals opinions to be published in full shall be selected as prescribed by supreme court rule.

**Source:** L. 69: p. 268, § 1. C.R.S. 1963: § 37-21-13. L. 74: (1) repealed, p. 236, § 4, effective July 1.

**Cross references:** For the duty of reporter to compile and publish decisions, see § 13-2-123.

## ARTICLE 5

### Judicial Districts

PART 1		13-5-129.	Reporters' expenses. (Repealed)
JUDGES - TERMS		13-5-130.	Reporters to file verified statements. (Repealed)
13-5-101.	Judicial districts and terms.	13-5-131.	Multiple-judge districts.
13-5-102.	First district.	13-5-132.	Powers of judges sitting separately.
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## PART 2

## DISTRICT COURT MAGISTRATES

13-5-201. District court magistrates.

## PART 3

## FAMILY LAW MAGISTRATES

13-5-301 to

13-5-305. (Repealed)

## PART 1

## JUDGES - TERMS

**13-5-101. Judicial districts and terms.** The state is divided into twenty-two judicial districts as prescribed by this part 1. Terms of court shall be fixed by rules adopted by the district court in each district; except that at least one term of court shall be held each calendar year in each county within the district, at the county seat of such county.

**Source:** L. 64: p. 398, § 1. C.R.S. 1963: § 37-12-1. L. 83: Entire section amended, p. 600, § 2, effective May 20.

**Cross references:** For the constitutional authority for general assembly's changing of boundaries of judicial districts by a two-thirds vote of each house, see § 10(1) of art. VI, Colo. Const.

## ANNOTATION

**Law reviews.** For article, "Colorado's New Court System", see 41 Den. L. Ctr. J. 140 (1964).

**This statute is irreconcilable with § 13-5-119 (2); however, under rules of statutory**

**construction § 13-5-119 (2) controls since it was enacted later.** City of Littleton v. County Comm'rs, 787 P.2d 158 (Colo. 1990).

**13-5-102. First district.** (1) The first judicial district shall be composed of the counties of Gilpin and Jefferson.

(2) (a) The number of judges for the first judicial district shall be eleven.

(b) Subject to available appropriations, effective July 1, 2004, the number of judges for the first judicial district shall be twelve.

(c) Subject to available appropriations, effective July 1, 2008, the number of judges for the first judicial district shall be thirteen.

(d) (Deleted by amendment, L. 2011, (SB 11-028), ch. 21, p. 52, § 1, effective March 11, 2011.)

(e) Repealed.

(f) Notwithstanding the provisions of paragraph (a) of this subsection (2), subject to available appropriations, effective July 1, 2012, the number of judges for the first judicial district shall be thirteen.

(3) (a) Notwithstanding any provision of law to the contrary, the district and county judges regularly assigned to Gilpin county may sit and maintain their official chambers at a single location anywhere within such county, and any related office may also be maintained at such location.

(b) As used in this subsection (3), "related office" includes but need not be limited to the offices of the sheriff, county clerk and recorder, county treasurer, clerk of district court, and clerk of county court.

**Source:** L. 64: p. 398, § 2. C.R.S. 1963: § 37-12-2. L. 75: (1) amended, p. 559, § 1, effective July 1; (2) amended, p. 557, § 1, effective July 1. L. 77: (2) amended, p. 781, § 1, effective July 1. L. 89, 1st Ex. Sess.: (2) amended, p. 16, § 1, effective January 1, 1991. L. 93: (3) added, p. 91, § 1, effective July 1. L. 99: (2) amended, p. 557, § 1, effective July 1. L. 2001: (1) and (2) amended, p. 141, § 1, effective July 1. L. 2007: (2) amended,



p. 1525, § 1, effective May 31. **L. 2011:** (2) amended, (SB 11-028), ch. 21, p. 52, § 1, effective March 11. **L. 2012:** (2)(e) repealed and (2)(f) added, (HB 12-1073), ch. 11, p. 28, § 1, effective July 1.

**13-5-103. Second district.** (1) The second judicial district shall be composed of the city and county of Denver.

(2) (a) The number of judges for the second judicial district shall be nineteen. Effective January 1, 1978, the number of judges shall be twenty.

(b) Subject to available appropriations, effective July 1, 2008, the number of judges for the second judicial district shall be twenty-one.

(c) Subject to available appropriations, effective July 1, 2009, the number of judges for the second judicial district shall be twenty-three.

**Source:** **L. 64:** p. 398, § 3. **C.R.S. 1963:** § 37-12-3. **L. 71:** p. 368, § 1. **L. 75:** (2) amended, p. 557, § 2, effective January 1, 1976. **L. 77:** (2) amended, p. 781, § 2, effective July 1. **L. 2007:** (2) amended, p. 1525, § 2, effective May 31.

**13-5-104. Third district.** (1) The third judicial district shall be composed of the counties of Las Animas and Huerfano.

(2) The number of judges for the third judicial district shall be two.

(3) The third judicial district shall be divided into two divisions. The northern division shall consist of the county of Huerfano, and the southern division shall consist of the county of Las Animas. One judge of the district shall maintain his official residence and chambers in the northern division of the district, and one judge shall maintain his official residence and chambers in the southern division of the district. Travel and maintenance expenses shall be allowed a judge of the district only when he is outside the county of his official residence. For all other purposes, the district shall be considered as a single entity. The allocation of judges to the northern and southern divisions shall be made by court rule. In the event that the judges of the district are unable to agree upon an allocation by rule, the matter shall be determined by the chief justice of the supreme court.

**Source:** **L. 64:** p. 398, § 4. **C.R.S. 1963:** § 37-12-4. **L. 81:** (3) amended, p. 2024, § 12, effective July 14.

**13-5-105. Fourth district.** (1) The fourth judicial district shall be composed of the counties of El Paso and Teller.

(2) (a) The number of judges for the fourth judicial district shall be fifteen.

(b) Subject to available appropriations, effective July 1, 2002, the number of judges for the fourth judicial district shall be sixteen.

(c) Subject to available appropriations, effective July 1, 2003, the number of judges for the fourth judicial district shall be seventeen.

(d) Subject to available appropriations, effective July 1, 2004, the number of judges for the fourth judicial district shall be nineteen.

(e) Subject to available appropriations, effective July 1, 2008, the number of judges for the fourth judicial district shall be twenty.

(f) Subject to available appropriations, effective July 1, 2009, the number of judges for the fourth judicial district shall be twenty-two.

**Source:** **L. 64:** pp. 399, 405, 407, §§ 5, 1, 1. **C.R.S. 1963:** § 37-12-5. **L. 67:** p. 258, § 1. **L. 69:** p. 261, § 1. **L. 71:** p. 369, § 1. **L. 75:** (2) amended, p. 557, § 3, effective January 1, 1976. **L. 89, 1st Ex. Sess.:** (2) amended, p. 16, § 2, effective January 1, 1991. **L. 91:** (2) amended, p. 349, § 1, effective July 1. **L. 97:** (2) amended, p. 939, § 1, effective July 1, 1998. **L. 2000:** Entire section amended, p. 71, § 1, effective July 1. **L. 2001:** Entire section amended, p. 141, § 2, effective July 1. **L. 2007:** (2) amended, p. 1526, § 3, effective May 31.

**13-5-106. Fifth district.** (1) The fifth judicial district shall be composed of the counties of Clear Creek, Eagle, Lake, and Summit.

(2) (a) The number of judges for the fifth judicial district shall be three.

(b) Subject to available appropriations, effective July 1, 2002, the number of judges for the fifth judicial district shall be four.

(c) Subject to available appropriations, effective July 1, 2004, the number of judges for the fifth judicial district shall be five.

(d) At least one of the judges for the fifth judicial district shall maintain his or her official chambers and residence in the county of Eagle, Lake, or Summit.

**Source:** L. 64: p. 399, § 6. C.R.S. 1963: § 37-12-6. L. 75: Entire section amended, p. 559, § 2, effective July 1. L. 84: (2) amended, p. 454, § 1, effective September 1. L. 2001: Entire section amended, p. 142, § 3, effective July 1.

**13-5-107. Sixth district.** (1) The sixth judicial district shall be composed of the counties of Archuleta, La Plata, and San Juan.

(2) (a) The number of judges for the sixth judicial district shall be two.

(b) (Deleted by amendment, L. 2012.)

(c) Notwithstanding the provisions of paragraph (a) of this subsection (2), subject to available appropriations, effective July 1, 2012, the number of judges for the sixth judicial district shall be four.

**Source:** L. 64: p. 399, § 7. C.R.S. 1963: § 37-12-7. L. 2001: Entire section amended, p. 142, § 4, effective July 1. L. 2012: (2) amended, (HB 12-1073), ch. 11, p. 28, § 2, effective July 1.

**13-5-108. Seventh district.** (1) The seventh judicial district shall be composed of the counties of Delta, Gunnison, Hinsdale, Montrose, Ouray, and San Miguel.

(2) (a) The number of judges for the seventh judicial district shall be three.

(b) Subject to available appropriations, effective July 1, 2003, the number of judges for the seventh judicial district shall be four.

(c) Notwithstanding the provisions of paragraph (a) of this subsection (2), subject to available appropriations, effective July 1, 2011, the number of judges for the seventh judicial district shall be five.

**Source:** L. 64: p. 400, § 8. C.R.S. 1963: § 37-12-8. L. 84: (2) amended, p. 454, § 2, effective September 1. L. 2001: Entire section amended, p. 142, § 5, effective July 1. L. 2011: (2) amended, (SB 11-028), ch. 21, p. 52, § 2, effective March 11.

**13-5-109. Eighth district.** (1) The eighth judicial district shall be composed of the counties of Larimer and Jackson.

(2) (a) The number of judges for the eighth judicial district shall be five.

(b) Subject to available appropriations, effective July 1, 2007, the number of judges for the eighth judicial district shall be six.

(c) Subject to available appropriations, effective July 1, 2008, the number of judges for the eighth judicial district shall be seven.

(d) Subject to available appropriations, effective July 1, 2009, the number of judges for the eighth judicial district shall be eight.

**Source:** L. 64: p. 400, § 9. C.R.S. 1963: § 37-12-9. L. 75: (2) amended, p. 557, § 4, effective July 1. L. 2001: Entire section amended, p. 142, § 6, effective July 1. L. 2007: (2) amended, p. 1526, § 4, effective May 31.



## ANNOTATION

**Applied** in *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

**13-5-110. Ninth district.** (1) The ninth judicial district shall be composed of the counties of Garfield, Pitkin, and Rio Blanco.

(2) (a) The number of judges for the ninth judicial district shall be three.

(b) Subject to available appropriations, effective July 1, 2008, the number of judges for the ninth judicial district shall be four.

**Source:** L. 64: p. 400, § 10. C.R.S. 1963: § 37-12-10. L. 72: p. 188, § 1. L. 2007: (2) amended, p. 1526, § 5, effective May 31.

**13-5-111. Tenth district.** (1) The tenth judicial district shall be composed of the county of Pueblo.

(2) (a) The number of judges for the tenth judicial district shall be six.

(b) Subject to available appropriations, effective July 1, 2008, the number of judges for the tenth judicial district shall be seven.

**Source:** L. 64: p. 400, § 11. C.R.S. 1963: § 37-12-11. L. 73: p. 493, § 1. L. 75: (2) amended, p. 558, § 5, effective July 1. L. 2007: (2) amended, p. 1526, § 6, effective May 31.

**13-5-112. Eleventh district.** (1) The eleventh judicial district shall be composed of the counties of Chaffee, Custer, Fremont, and Park.

(2) (a) The number of judges for the eleventh judicial district shall be three.

(b) Subject to available appropriations, effective July 1, 2007, the number of judges for the eleventh judicial district shall be four.

(3) The eleventh judicial district shall be divided into two divisions. The northern division shall consist of the counties of Chaffee and Park, and the southern division shall consist of the counties of Fremont and Custer. One judge of the district shall maintain his official residence and chambers in the northern division of the district, one judge shall maintain his official residence and chambers in the southern division of the district, and one judge shall sit in both divisions as assigned by the chief judge. Travel and maintenance expenses shall be allowed a judge of the district only when he is outside the county of his official residence. For all other purposes the district shall be considered as a single entity. The allocation of judges to the northern and southern divisions shall be made by court rule. In the event that the judges of the district are unable to agree upon an allocation by rule, the matter shall be determined by the chief justice of the supreme court.

**Source:** L. 64: p. 400, § 12. C.R.S. 1963: § 37-12-12. L. 80: (2) and (3) amended, p. 507, § 1, effective July 1. L. 81: (3) amended, p. 2024, § 13, effective July 14. L. 2007: (2) amended, p. 1527, § 7, effective May 31.

**13-5-113. Twelfth district.** (1) The twelfth judicial district shall be composed of the counties of Alamosa, Conejos, Costilla, Mineral, Rio Grande, and Saguache.

(2) (a) The number of judges for the twelfth judicial district shall be two.

(b) Subject to available appropriations, effective July 1, 2007, the number of judges for the twelfth judicial district shall be three.

**Source:** L. 64: p. 401, § 13. C.R.S. 1963: § 37-12-13. L. 2007: (2) amended, p. 1527, § 8, effective May 31.

**13-5-114. Thirteenth district.** (1) The thirteenth judicial district shall be composed of the counties of Kit Carson, Logan, Morgan, Phillips, Sedgwick, Washington, and Yuma.

(2) The number of judges for the thirteenth judicial district shall be four.

**Source:** L. 64: p. 401, § 14. C.R.S. 1963: § 37-12-14. L. 69: p. 261, § 2.

**13-5-115. Fourteenth district.** (1) The fourteenth judicial district shall be composed of the counties of Grand, Moffat, and Routt.

(2) (a) The number of judges for the fourteenth judicial district shall be two.

(b) Subject to available appropriations, effective July 1, 2007, the number of judges for the fourteenth judicial district shall be three.

**Source:** L. 64: p. 401, § 15. C.R.S. 1963: § 37-12-15. L. 74: (2) amended, p. 235, § 1, effective July 1. L. 2007: (2) amended, p. 1527, § 9, effective May 31.

**13-5-116. Fifteenth district.** (1) The fifteenth judicial district shall be composed of the counties of Baca, Cheyenne, Kiowa, and Prowers.

(2) The number of judges for the fifteenth judicial district shall be two.

**Source:** L. 64: p. 401, § 16. C.R.S. 1963: § 37-12-16.

**13-5-117. Sixteenth district.** (1) The sixteenth judicial district shall be composed of the counties of Bent, Crowley, and Otero.

(2) The number of judges for the sixteenth judicial district shall be two.

**Source:** L. 64: p. 401, § 17. C.R.S. 1963: § 37-12-17.

**13-5-118. Seventeenth district.** (1) The seventeenth judicial district shall be composed of the county of Adams and the city and county of Broomfield.

(2) (a) The number of judges for the seventeenth judicial district shall be eight.

(b) Subject to available appropriations, effective July 1, 2002, the number of judges for the seventeenth judicial district shall be nine.

(c) Subject to available appropriations, effective July 1, 2003, the number of judges for the seventeenth judicial district shall be ten.

(d) Subject to available appropriations, effective July 1, 2007, the number of judges for the seventeenth judicial district shall be eleven.

(e) Subject to available appropriations, effective July 1, 2008, the number of judges for the seventeenth judicial district shall be thirteen.

(f) Subject to available appropriations, effective July 1, 2009, the number of judges for the seventeenth judicial district shall be fifteen.

(3) The seventeenth judicial district shall have jurisdiction over all causes of action accruing and all crimes committed within the city and county of Broomfield on or after November 15, 2001. Prior to November 15, 2001, the judicial districts for the counties, as they existed prior to November 15, 2001, shall have jurisdiction over all causes of action accruing and crimes committed within such counties.

**Source:** L. 64: p. 401, § 18. C.R.S. 1963: § 37-12-18. L. 67: p. 229, § 1. L. 77: (2) amended, p. 781, § 3, effective July 1. L. 84: (2) amended, p. 454, § 3, effective September 1. L. 2000: (1) amended and (3) added, p. 251, § 1, effective August 2. L. 2001: Entire section amended, p. 143, § 7, effective July 1. L. 2007: (2) amended, p. 1527, § 10, effective May 31.

**13-5-119. Eighteenth district.** (1) The eighteenth judicial district shall be composed of the counties of Arapahoe, Douglas, Elbert, and Lincoln.

(2) (a) The number of judges for the eighteenth judicial district shall be fourteen.



(b) Subject to available appropriations, effective July 1, 2002, the number of judges for the eighteenth judicial district shall be fifteen.

(c) Subject to available appropriations, effective July 1, 2003, the number of judges for the eighteenth judicial district shall be sixteen.

(d) (I) Subject to available appropriations, effective July 1, 2004, the number of judges for the eighteenth judicial district shall be seventeen.

(II) Subject to available appropriations, effective July 1, 2007, the number of judges for the eighteenth judicial district shall be eighteen.

(III) Subject to available appropriations, effective July 1, 2008, the number of judges for the eighteenth judicial district shall be twenty.

(IV) Subject to available appropriations, effective July 1, 2009, the number of judges for the eighteenth judicial district shall be twenty-one.

(e) The district judges regularly assigned to Arapahoe county shall maintain their offices in one location within Arapahoe county.

(3) Repealed.

**Source:** L. 64: pp. 401, 405, §§ 19, 2. C.R.S. 1963: § 37-12-19. L. 67: p. 229, § 2. L. 69: p. 261, § 3. L. 75: (2) amended and (3) added, p. 558, § 6, effective January 1, 1976. L. 77: (2) amended, p. 781, § 4, effective July 1. L. 79: (2) amended, p. 604, § 1, effective June 19. L. 81: (3) repealed, p. 2025, § 14, effective July 14. L. 85: (2) amended, p. 569, § 1, effective November 14, 1986. L. 86: (2) amended, p. 674, § 1, effective November 14. L. 93, 1st Ex. Sess.: (2) amended, p. 33, § 1, effective September 13. L. 97: (2) amended, p. 939, § 2, effective July 1, 1998. L. 2000: Entire section amended, p. 71, § 2, effective July 1. L. 2001: Entire section amended, p. 143, § 8, effective July 1. L. 2007: (2)(d) amended, p. 1527, § 11, effective May 31.

#### ANNOTATION

This section was intended to be an exception to the county seat requirement in § 13-1-116 and authorizes district judges assigned to Arapahoe county to sit at a single location anywhere in that county. *City of Littleton v. County Comm'rs*, 787 P.2d 158 (Colo. 1990).

This statute is irreconcilable with § 13-5-101; however, under rules of statutory construction subsection (2) controls since it was enacted later. *City of Littleton v. County Comm'rs*, 787 P.2d 158 (Colo. 1990).

**13-5-120. Nineteenth district.** (1) The nineteenth judicial district shall be composed of the county of Weld.

(2) (a) The number of judges for the nineteenth judicial district shall be four.

(b) Subject to available appropriations, effective July 1, 2002, the number of judges for the nineteenth judicial district shall be five.

(c) Subject to available appropriations, effective July 1, 2003, the number of judges for the nineteenth judicial district shall be six.

(d) Subject to available appropriations, effective July 1, 2007, the number of judges for the nineteenth judicial district shall be seven.

(e) Subject to available appropriations, effective July 1, 2008, the number of judges for the nineteenth judicial district shall be eight.

(f) Subject to available appropriations, effective July 1, 2009, the number of judges for the nineteenth judicial district shall be nine.

**Source:** L. 64: p. 402, § 20. C.R.S. 1963: § 37-12-20. L. 68: p. 48, § 1. L. 75: (2) amended, p. 558, § 7, effective July 1. L. 2001: Entire section amended, p. 143, § 9, effective July 1. L. 2007: (2) amended, p. 1528, § 12, effective May 31.

**13-5-121. Twentieth district.** (1) The twentieth judicial district shall be composed of the county of Boulder.

(2) (a) The number of judges for the twentieth judicial district shall be six.

(b) Subject to available appropriations, effective July 1, 2003, the number of judges for the twentieth judicial district shall be seven.

(c) Subject to available appropriations, effective July 1, 2004, the number of judges for the twentieth judicial district shall be eight.

(d) Subject to available appropriations, effective June 30, 2010, the number of judges for the twentieth judicial district shall be nine.

**Source:** L. 64: p. 402, § 21. C.R.S. 1963: § 37-12-21. L. 69: p. 262, § 1. L. 77: (2) amended, p. 782, § 5, effective July 1. L. 2001: Entire section amended, p. 144, § 10, effective July 1. L. 2007: (2) amended, p. 1528, § 13, effective May 31.

**13-5-122. Twenty-first district.** (1) The twenty-first judicial district shall be composed of the county of Mesa.

(2) (a) The number of judges for the twenty-first judicial district shall be four.

(b) Subject to available appropriations, effective July 1, 2007, the number of judges for the twenty-first judicial district shall be five.

**Source:** L. 64: p. 402, § 22. C.R.S. 1963: § 37-12-22. L. 77: (2) amended, p. 782, § 6, effective July 1. L. 89, 1st Ex. Sess.: (2) amended, p. 16, § 3, effective January 1, 1991. L. 2007: (2) amended, p. 1528, § 14, effective May 31.

**13-5-123. Twenty-second district.** (1) The twenty-second judicial district shall be composed of the counties of Dolores and Montezuma.

(2) (a) The number of judges for the twenty-second judicial district shall be one.

(b) Subject to available appropriations, effective July 1, 2007, the number of judges for the twenty-second judicial district shall be two.

**Source:** L. 64: p. 402, § 23. C.R.S. 1963: § 37-12-23. L. 2007: (2) amended, p. 1529, § 15, effective May 31.

**13-5-124. Appointment of clerk and employees.** District court personnel shall be appointed pursuant to the provisions of section 13-3-105.

**Source:** L. 64: p. 403, § 27. C.R.S. 1963: § 37-12-27. L. 69: p. 249, § 5. L. 79: Entire section R&RE, p. 598, § 11, effective July 1.

#### ANNOTATION

**Law reviews.** For note, "One Year Review of (1964). For article, "Colorado's New Court Constitutional Law", see 41 Den. L. Ctr. J. 77 System", see 41 Den. L. Ctr. J. 140 (1964).

**13-5-125. Clerks to keep records.** The clerks of district courts shall keep the financial records prescribed by the state court administrator under the provisions of section 13-3-106.

**Source:** L. 67: p. 454, § 8. C.R.S. 1963: § 37-12-30. L. 73: p. 1402, § 29.

**13-5-126. Duties of bailiff.** It is the duty of every bailiff to preserve order in the court to which he may be appointed; to attend upon the jury; to open and close the court; and to perform such other duties as may be required of him by the judge of the court.

**Source:** L. 67: p. 454, § 8. C.R.S. 1963: § 37-12-31.

**13-5-127. Duties of reporters.** The shorthand reporter, on the direction of the court, shall take down in shorthand all the testimony, rulings of the court, exceptions taken, oral instructions given, and other proceedings had during the trial of any cause, and in such causes as the court may designate.



**Source:** L. 67: p. 454, § 8. C.R.S. 1963: § 37-12-32.

#### ANNOTATION

**Annotator's note.** Since § 13-5-127 is similar to repealed laws antecedent to CSA, C. 46, § 91, a relevant case construing those provisions has been included in the annotations to this section.

**From whom a defendant can obtain the testimony for his bill of exceptions.** The defendant had the right to assume that he would obtain the testimony from the stenographer for his bill of exceptions. He was not called upon to make any other arrangements nor to anticipate that he would be called upon to procure that testimony from any other source, nor compelled to depend upon the uncertain memory of those present as to what the testimony was. *King v. People*, 54 Colo. 122, 129 P. 235 (1912)(special concurring opinion by J. Musser).

**It has been the invariable custom for district judges to appoint stenographers** for their respective districts to appear at every criminal trial, and under the court's direction, take down the testimony and other matters, and when a defendant wanted a bill of exceptions, containing all of the testimony in a case, if desired, it has been the custom invariably to obtain it from the stenographer. *King v. People*, 54 Colo. 122, 129 P. 235 (1912)(special concurring opinion by J. Musser).

**Court of record has an affirmative duty to contemporaneously record all proceedings.** Reconstruction of the record at a later time is not an adequate substitute for a contemporaneous record. *Jones v. District Court*, 780 P.2d 526 (Colo. 1989).

**13-5-128. Compensation of reporter.** The shorthand reporter of a court of record shall be compensated for preparation of the original and any copies of the typewritten transcript of his shorthand notes at such rates as from time to time may be established and promulgated by the supreme court of the state of Colorado. Where, in a court of record, no shorthand reporter is employed and trial transcripts are prepared by other court personnel, such personnel shall be similarly compensated for any transcript preparation required to be accomplished in other than normal working hours.

**Source:** L. 67: p. 455, § 8. C.R.S. 1963: § 37-12-33. L. 69: p. 1085, § 1. L. 73: p. 494, § 1. L. 79: Entire section R&RE, p. 605, § 1, effective May 22.

#### 13-5-129. Reporters' expenses. (Repealed)

**Source:** L. 67: p. 455, § 8. C.R.S. 1963: § 37-12-34. L. 69: p. 249, § 6. L. 79: Entire section repealed, p. 602, § 30, effective July 1.

#### 13-5-130. Reporters to file verified statements. (Repealed)

**Source:** L. 67: p. 455, § 8. C.R.S. 1963: § 37-12-35. L. 72: p. 591, § 58. L. 79: Entire section repealed, p. 602, § 30, effective July 1.

**13-5-131. Multiple-judge districts.** In any district court composed of more than one judge, each of the judges shall sit separately for the trial of causes and the transaction of business and shall have and exercise all the powers and functions, as well in vacation of court as in term time, which he might have and exercise if he were the sole judge of said court.

**Source:** L. 67: p. 456, § 8. C.R.S. 1963: § 37-12-38.

#### ANNOTATION

**Law reviews.** For article, "Expediting Court Procedure", see 10 Dicta 113 (1933).

**Annotator's note.** Since § 13-5-131 is similar to repealed laws antecedent to CSA, C. 46,

§ 107, relevant cases construing those provisions have been included in the annotations to this section.

**This section is constitutional.** *Jordan v. Peo-*

ple, 19 Colo. 417, 36 P. 218 (1894).

**Intent of section is to empower each district court judge to rule on matters challenging the constitutionality of the death penalty and procedures for qualifying a jury for a death penalty case only when sitting separately.** Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**District court has no authority to set motions challenging constitutionality of death penalty and procedures for qualifying a jury for a death penalty case for a hearing or for determination by a multi-judge panel.** Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**Each of the judges herein provided for is authorized to exercise the powers of a district court.** Jordan v. People, 19 Colo. 417, 36 P. 218 (1894).

**Each judge must exercise all the powers and functions of the court.** In the trial of causes, and in the hearing and determination of

any matter of purely judicial cognizance pending in the district court, each judge must sit and act alone. He must exercise all the powers and functions of the court and assume the full responsibility in the decision of each and every cause, demurrer, motion, and the like, coming before him for adjudication, as if he were the sole judge of said court. Two or more judges, by sitting together, cannot share or divide such responsibility. They cannot thus jointly hear and determine, and render a valid and binding judgment or order in any cause. People ex rel. Rucker v. District Court, 14 Colo. 396, 24 P. 260 (1890).

**Purposes set forth in § 13-5-133 (3) do not include the hearing or determination of motions or the making of decisions, orders, decrees, or judgments in criminal or civil cases filed in the district court.** Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**13-5-132. Powers of judges sitting separately.** Each court held by the several judges, while sitting separately, shall be known as the district court in and for the county where such court is held and shall have the same power to vacate or modify its own judgments, decrees, or orders rendered or made while so held as if the said court were composed of a single judge.

**Source: L. 67: p. 456, § 8. C.R.S. 1963: § 37-12-39.**

#### ANNOTATION

**Law reviews.** For article, "Expediting Court Procedure", see 10 Dicta 113 (1933). For article, "Supplementary Rules to Rules of the District Court", see 17 Dicta 107 (1940).

**Section has same meaning as its predecessor statute and therefore the same interpretation for them is adopted.** Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**This section relates to the powers of the several district judges sitting as the district court of a county.** Lenich v. Lenich, 138 Colo. 251, 331 P.2d 498 (1958) (decided under repealed § 37-4-18, CRS 53).

**Intent of section is to empower each district court judge to rule on matters challenging the constitutionality of the death penalty and procedures for qualifying a jury for a death penalty case only when sitting separately.** Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**District court has no authority to set motions challenging constitutionality of death**

**penalty and procedures for qualifying a jury for a death penalty case for a hearing or for determination by a multi-judge panel.** Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**A second judge may correct error of a judge no longer on the bench.** It makes little sense to hold that if a palpable error were committed by one judge in refusing the continuance, it cannot be corrected by a second judge since the judge first presiding is no longer on the bench. Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

**Purposes set forth in § 13-5-133 (3) do not include the hearing or determination of motions or the making of decisions, orders, decrees, or judgments in criminal or civil cases filed in the district court.** Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**Applied in K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981).**

**13-5-133. Judges may sit en banc - purpose - rules.** (1) In any district court composed of more than one judge, the judges may sit en banc at such times as they may determine, for the purpose of making rules of court, the appointment of a clerk and other employees, subject to the provisions of section 13-3-105, and other ministerial duties, subject to the administrative powers delegated to the chief judge by the chief justice of the supreme court pursuant to section 5 (4) of article VI of the state constitution.

(2) Subject to the approval of the chief justice of the supreme court, a district court sitting en banc may make rules:



(a) To facilitate the transaction of business in the courts held by the judges sitting separately; and

(b) To provide for the classification, arrangement, and distribution of the business of the court among the several judges thereof.

(3) Judges of a district court in districts having more than one judge may sit en banc only for the purposes enumerated in this section, and the court so sitting en banc shall have no power to review any order, decision, or proceeding of the court held by any judge sitting separately.

**Source:** L. 67: p. 456, § 8. C.R.S. 1963: § 37-12-40. L. 69: p. 250, § 9.

#### ANNOTATION

**Law reviews.** For article, "Expediting Court Procedure", see 10 Dicta 113 (1933).

**Section has same meaning as its predecessor statute** and therefore the same interpretation for them is adopted. Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**Intent of section is** to empower each district court judge to rule on matters challenging the constitutionality of the death penalty and procedures for qualifying a jury for a death penalty case only when sitting separately. Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**District court has no authority to set motions challenging constitutionality of death penalty** and procedures for qualifying a jury for a death penalty case for a hearing or for a

determination by a multi-judge panel. Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**In this state two or more district judges cannot lawfully sit and act together** as a district court except as they sit en banc for the purposes specified in this section. People ex rel. Rucker v. District Court, 14 Colo. 396, 24 P. 260 (1890) (decided under repealed laws antecedent to CSA, C. 46, § 109).

**Purposes set forth in subsection (3) do not include** the hearing or determination of motions or the making of decisions, orders, decrees, or judgments in criminal or civil cases filed in the district court. Tolerton v. District Court, 625 P.2d 1020 (Colo. 1981).

**13-5-134. Juries.** Jurors may be summoned and empaneled for each of the judges sitting separately as though each were the sole court.

**Source:** L. 67: p. 457, § 8. C.R.S. 1963: § 37-12-41. L. 84: Entire section amended, p. 476, § 1, effective February 6.

**13-5-135. Time limit on judgment.** Every motion, issue, or other matter arising in any cause pending or to be brought in any district court of this state, and which is submitted to any such court for judgment or decision thereof, shall be determined by the court within ninety days after the adjournment of court. This section shall not be so construed as to prohibit a decision after the expiration of the time limited, but only as working a forfeiture as provided in section 13-5-136.

**Source:** L. 67: p. 457, § 8. C.R.S. 1963: § 37-12-42.

#### ANNOTATION

**Neither this section nor § 13-5-136 is an authority for the entry of a judgment in vacation or at chambers.** A judgment appearing upon the records of the district court of one county, but which by the same record appears to have been rendered by the judge while at his chambers, in a different county, will be reversed on appeal. Scott v. Stutheit, 21 Colo. App. 28, 121 P. 151 (1912).

**This section does not divest jurisdiction or affect the validity of a judgment.** Neither the statute nor the constitution in any way divests

the trial court of jurisdiction to render a decision or affects the validity of the judgment rendered solely because of the lengthy delay between trial and judgment. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

**The bare fact of the delay is not sufficient to warrant reversal of the judgment.** Since no transcript of the evidence has been presented to this court, it appears that the findings of fact and conclusions of law are fully supported by the evidence. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

**13-5-136. Forfeit of salary.** (1) If any judge of any district court, to whom any motion, issue, or other matter, arising in any cause, is submitted for judgment or decision, fails or neglects to decide or give judgment upon the same within the time limited by section 13-5-135, such judge shall not receive from the state treasury any salary for the quarter in which such failure occurred, when the following requirements are satisfied:

(a) The party aggrieved by the failure of such judge to rule in a timely manner files a complaint demanding the withholding of the salary of such judge with the commission on judicial discipline established in section 23 (3) of article VI of the state constitution;

(b) The commission on judicial discipline, in accordance with rule 4 of the Colorado rules of judicial discipline, investigates the judge's alleged violation of section 13-5-135;

(c) After such investigation the commission on judicial discipline, in accordance with rule 4 of the Colorado rules of judicial discipline, makes a recommendation concerning the allegation to the Colorado supreme court; and

(d) If deemed appropriate, the Colorado supreme court issues an order directing the department of the treasury to withhold the judge's salary.

(2) This section shall not apply in case of the sickness or death of a judge.

**Source:** L. 67: p. 457, § 8. C.R.S. 1963: § 37-12-43. L. 2000: Entire section amended, p. 153, § 1, effective March 17.

**13-5-137. Judges seeking retention in office. (Repealed)**

**Source:** L. 79: Entire section added, p. 606, § 1, effective April 25; entire section repealed, p. 606, § 1, effective June 30, 1980.

**13-5-138. Appeals to district court.** If a statute provides for review of the acts of any court, board, commission, or officer by certiorari or other writ and if no time within which review may be sought is provided by statute, a petition to review such acts shall be filed in the district court not later than thirty days from the final action taken by said court, board, commission, or officer.

**Source:** L. 81: Entire section added, p. 877, § 1, effective April 24.

**13-5-139. Transfer of information from orders for child support and maintenance to child support enforcement agency - payment of support and maintenance.** (1) On and after July 1, 1991, and contingent upon the executive director of the department of human services notifying the state court administrator that a particular county or judicial district is ready to implement and participate in the family support registry created in section 26-13-114, C.R.S., the clerk of the court of every judicial district in the state shall transfer the information described in section 26-13-114 (7), C.R.S., to the delegate child support enforcement unit within five working days after entry or modification of a court order or filing of an administrative order in any IV-D case, as defined in section 26-13-102.5 (2), C.R.S.

(2) to (4) Repealed.

**Source:** L. 85: Entire section added, p. 588, § 3, effective July 1. L. 87: (1) amended, p. 591, § 12, effective July 10. L. 88: (4) amended, p. 635, § 15, effective July 1. L. 90: (1) amended and (2) to (4) repealed, pp. 1412, 1416, §§ 6, 17, effective June 8. L. 94: (1) amended, p. 2640, § 87, effective July 1.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (1), see section 1 of chapter 345, Session Laws of Colorado 1994.

**13-5-140. Transfer of certain registry functions - cooperation between departments.** The judicial department and the department of human services shall cooperate in the transfer of the functions relating to the collection of child support from the courts to the



child support enforcement agency specified in article 13 of title 26, C.R.S. In order to implement such transfer, which shall be completed on or after July 1, 1991, and upon notification to the state court administrator by the executive director of the department of human services that a particular county or judicial district is ready to implement and participate in the family support registry, the judicial department shall transfer to the state child support enforcement agency all necessary data, computer programs, technical written material, and budgetary information and shall provide such technical assistance as may be required. The judicial department shall retain payment records relating to child support orders until the executive director of the department of human services notifies the state court administrator that retention of the records is no longer necessary.

**Source:** L. 85: Entire section added, p. 588, § 3, effective July 1. L. 88: Entire section amended, p. 636, § 16, effective July 1. L. 90: Entire section amended, p. 1412, § 7, effective June 8. L. 94: Entire section amended, p. 2640, § 88, effective July 1.

**Cross references:** For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994.

**13-5-141. Compilation - sentences received upon conviction of felony.** (1) The state court administrator's office shall, by March 1 and by September 1 of each year, prepare and make available to the public at each district court, for a reasonable charge, a compilation of the sentences imposed in felony cases by each judge in each district court. Such compilation shall include:

- (a) The name of each judge;
- (b) The name of each offender and a description of the crime for which he was convicted;
- (c) The sentence imposed by each such judge for each such felony case; and
- (d) A statement that complete information concerning aggravating and mitigating factors, plea and sentence concessions, and other sentencing considerations is available in the court file. As soon as practical, such information shall be included in the compilation.

**Source:** L. 87: Entire section added, p. 542, § 1, effective July 1.

**13-5-142. National instant criminal background check system - reporting.** (1) Beginning July 1, 2002, the clerk of the court of every judicial district in the state shall periodically report the following information to the national instant criminal background check system created by the federal "Brady Handgun Violence Prevention Act" (Pub.L. 103-159), the relevant portion of which is codified at 18 U.S.C. sec. 922 (t):

- (a) The name of each person who has been found to be incapacitated by order of the court pursuant to part 3 of article 14 of title 15, C.R.S.;
- (b) The name of each person who has been committed by order of the court to the custody of the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, pursuant to section 27-81-112 or 27-82-108, C.R.S.; and
- (c) The name of each person with respect to whom the court has entered an order for involuntary certification for short-term treatment of mental illness pursuant to section 27-65-107, C.R.S., for extended certification for treatment of mental illness pursuant to section 27-65-108, C.R.S., or for long-term care and treatment of mental illness pursuant to section 27-65-109, C.R.S.

(2) Any report made by the clerk of the court of every judicial district in the state pursuant to this section shall describe the reason for the report and indicate that the report is made in accordance with 18 U.S.C. sec. 922 (g) (4).

(3) The clerk of the court of every judicial district in the state shall take all necessary steps to cancel a record made by that clerk in the national instant criminal background check system if:

- (a) The person to whom the record pertains makes a written request to the clerk; and

(b) No less than three years before the date of the written request:

(I) The court entered an order pursuant to section 15-14-318, C.R.S., terminating a guardianship on a finding that the person is no longer an incapacitated person, if the record in the national instant criminal background check system is based on a finding of incapacity;

(II) The period of commitment of the most recent order of commitment or recommitment expired, or the court entered an order terminating the person's incapacity or discharging the person from commitment in the nature of habeas corpus, if the record in the national instant criminal background check system is based on an order of commitment to the custody of the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse; except that the clerk shall not cancel any record pertaining to a person with respect to whom two recommitment orders have been entered under section 27-81-112 (7) and (8), C.R.S., or who was discharged from treatment under section 27-81-112 (11), C.R.S., on the grounds that further treatment will not be likely to bring about significant improvement in the person's condition; or

(III) The record in the case was sealed pursuant to section 27-65-107 (7), C.R.S., or the court entered an order discharging the person from commitment in the nature of habeas corpus pursuant to section 27-65-113, C.R.S., if the record in the national instant criminal background check system is based on a court order for involuntary certification for short-term treatment of mental illness.

**Source:** L. 2002: Entire section added, p. 753, § 1, effective January 1, 2003. L. 2010: (1)(b), (1)(c), (3)(b)(II), and (3)(b)(III) amended, (SB 10-175), ch. 188, p. 780, § 15, effective April 29.

**13-5-143. Judge as party to a case - recusal of judge upon motion.** (1) If a judge or former judge of a district court is a party in his or her individual and private capacity in a case that is to be tried within any district court in the same judicial district in which the judge or former judge is or was a judge of a district court, any party to the case may file a timely motion requesting that the judge who is appointed to preside over the case recuse himself or herself from the case.

(2) If a district court receives a motion filed by a party pursuant to subsection (1) of this section, the judge who is appointed to preside over the case shall recuse himself or herself if he or she is a judge of a district court in the same judicial district in which the judge or former judge who is a party to the case in his or her individual and private capacity is or was a judge of a district court.

(3) If a judge recuses himself or herself pursuant to subsection (2) of this section, the chief justice of the Colorado supreme court or his or her designee shall appoint a judge from outside the judicial district to preside over the case.

(4) The provisions of this section shall not apply to a water judge or referee when he or she is acting within his or her exclusive jurisdiction over water matters pursuant to section 37-92-203, C.R.S.

**Source:** L. 2008: Entire section added, p. 435, § 1, effective August 5.

**13-5-144. Chief judge - veterans treatment court authority.** The chief judge of a judicial district may establish an appropriate program for the treatment of veterans and members of the military.

**Source:** L. 2010: Entire section added, (HB 10-1104), ch. 139, p. 465, § 3, effective April 16.

**Cross references:** For the legislative declaration in the 2010 act adding this section, see section 1 of chapter 139, Session Laws of Colorado 2010.



PART 2

DISTRICT COURT MAGISTRATES

**13-5-201. District court magistrates.** (1) District court magistrates may be appointed, subject to available appropriations, pursuant to section 13-3-105, if approved by the chief justice of the supreme court.

(2) A district court magistrate shall be a qualified attorney-at-law admitted to practice in this state and in good standing. Nothing in this part 2 shall affect the qualifications of water referees appointed pursuant to section 37-92-203 (6), C.R.S.

(2.5) District court magistrates shall have the power to solemnize marriages pursuant to the procedures in section 14-2-109, C.R.S.

(3) District court magistrates may hear such matters as are determined by rule of the supreme court, subject to the provision that no magistrate may preside in any trial by jury.

(3.5) District court magistrates shall have the power to preside over matters specified in section 13-17.5-105.

(4) For purposes of this part 2, the Denver probate court shall be regarded as a district court.

**Source:** **L. 83:** Entire part added, p. 600, § 1, effective May 20. **L. 89:** (2.5) added, p. 781, § 2, effective April 4. **L. 91:** Entire section amended, p. 354, § 2, effective April 9. **L. 93:** (2) amended, p. 1774, § 30, effective June 6. **L. 95:** (3.5) added, p. 480, § 2, effective July 1.

**Cross references:** For magistrates in the small claims division of county courts, see § 13-6-405; for magistrates in county courts, see part 5 of article 6 of this title.

PART 3

FAMILY LAW MAGISTRATES

**13-5-301 to 13-5-305. (Repealed)**

**Source:** **L. 2004:** Entire part repealed, p. 224, § 1, effective July 1.

**Editor's note:** This part 3 was added in 1985. For amendments to this part 3 prior to its repeal in 2004, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

ARTICLE 5.5

Commissions on Judicial  
Performance

13-5.5-101.	Legislative declaration.	13-5.5-106.	Evaluation in retention election years.
13-5.5-101.5.	Office of judicial performance evaluation.	13-5.5-106.3.	Interim evaluations.
13-5.5-102.	State commission on judicial performance - repeal.	13-5.5-106.4.	Recusal.
13-5.5-103.	Powers and duties of the state commission.	13-5.5-106.5.	Confidentiality.
13-5.5-104.	District commission on judicial performance.	13-5.5-107.	Acceptance of private or federal grants - general appropriations.
13-5.5-105.	Powers and duties of district commissions.	13-5.5-108.	Implementation of article. (Repealed)
13-5.5-105.5.	Judicial performance criteria.	13-5.5-109.	Repeal of article.

**13-5.5-101. Legislative declaration.** (1) The general assembly hereby finds and declares that it is in the public interest to establish a system of evaluating judicial performance to provide persons voting on the retention of justices and judges with fair, responsible, and constructive information about judicial performance and to provide justices and judges with useful information concerning their own performances. The general assembly further finds and declares that the evaluation of judicial performance should be conducted statewide and within each judicial district using uniform criteria and procedures pursuant to the provisions of this article.

(2) The general assembly further finds and declares that it is in the public interest to establish an office of judicial performance evaluation within the judicial department of the state to implement the provisions of this article.

**Source:** L. 88: Entire article added, p. 596, § 1, effective May 12. L. 97: Entire section amended, p. 1647, § 1, effective June 5. L. 2008: Entire section amended, p. 1271, § 1, effective July 1.

**13-5.5-101.5. Office of judicial performance evaluation.** (1) There is hereby established in the judicial department the office of judicial performance evaluation, referred to in this article as the “office”. The state commission on judicial performance established pursuant to section 13-5.5-102 shall oversee the office.

(2) The state commission shall appoint an executive director of the office who shall serve at the pleasure of the state commission. The compensation of the executive director shall be the same as the general assembly establishes for a judge of the district court. The compensation paid to the executive director shall not be reduced during the time that a person serves as executive director. The executive director shall hire additional staff for the office as necessary and as approved by the state commission.

(3) Subject to the supervision of the state commission, the office shall:

(a) Staff the state and district commissions when directed to do so by the state commission;

(b) Train members of the state and district commissions;

(c) Collect and disseminate data on judicial performance evaluations;

(d) Conduct public education efforts concerning the judicial performance evaluation process and retention recommendations of the state and district commissions;

(e) Measure public awareness of the judicial performance evaluation process through regular polling; and

(f) Complete other duties as assigned by the state commission.

(4) Expenses of the office shall be paid for from the state commission on judicial performance cash fund created pursuant to section 13-5.5-107.

**Source:** L. 2008: Entire section added, p. 1271, § 2, effective July 1.

**13-5.5-102. State commission on judicial performance - repeal.** (1) (a) (I) (A) There is hereby established the state commission on judicial performance, referred to in this article as the “state commission”. The state commission shall consist of ten members. The speaker of the house of representatives and the president of the senate shall each appoint one attorney and one nonattorney. The governor and the chief justice of the supreme court shall each appoint one attorney and two nonattorneys.

(B) For purposes of this subsection (1), “attorney” means a person admitted to practice law before the courts of this state.

(II) (A) All members of the state commission shall serve terms of four years. The term of each member of the state commission shall expire on November 30 of an odd-numbered year, and the term of a member appointed to replace a member at the end of the member’s term shall commence on December 1 of the year in which the previous member’s term expires.

(B) The term of each member serving as of January 1, 2009, shall be extended until November 30 of the odd-numbered year following the completion of that member’s term. This sub-subparagraph (B) is repealed, effective July 1, 2014.



(b) (I) Any vacancy on the state commission shall be filled by the original appointing authority, but a member shall not serve more than two full terms plus any balance remaining on an unexpired term if the initial appointment was to fill a vacancy. Within five days after a vacancy arises on the state commission, the state commission shall notify the appointing authority of the vacancy, and the appointing authority shall make an appointment within forty-five days after the date of the vacancy. If the original appointing authority fails to make the appointment within forty-five days after the date of the vacancy, the state commission shall make the appointment.

(II) Justices and judges actively performing judicial duties may not be appointed to serve on the state commission. Former justices and judges are eligible to be appointed as attorney members; except that a former justice or judge may not be assigned or appointed to perform judicial duties while serving on the state commission.

(c) The chair of the state commission shall be elected by its members every two years.

(2) Members and employees of the state commission shall be immune from suit in any action, civil or criminal, based upon official acts performed in good faith as members of the state commission.

(3) A member of the state commission shall recuse himself or herself from any evaluation of the person who appointed the member to the commission.

**Source:** L. 88: Entire article added, p. 596, § 1, effective May 12. L. 93: (1)(a) and (1)(b) amended, p. 658, § 1, effective April 30. L. 97: (1)(a) and (1)(b) amended, p. 1647, § 2, effective June 5. L. 2008: (1)(a) and (1)(b) amended and (3) added, p. 1272, § 3, effective July 1.

#### ANNOTATION

**Effect of 1997 amendment was to establish that terms of all members expire on November 30 of even-numbered years.** Romanoff v. State Comm'n on Judicial Performance, 126 P.3d 182 (Colo. 2006).

**A member may serve past the expiration of the member's term until a successor is appointed.** Romanoff v. State Comm'n on Judicial Performance, 126 P.3d 182 (Colo. 2006).

**Original appointing official may not appoint a successor more than 45 days after the expiration of a member's term.** The state commission is authorized to appoint a successor when the original appointing official fails to make the appointment within 45 days after the expiration of a member's term. Romanoff v. State Comm'n on Judicial Performance, 126 P.3d 182 (Colo. 2006).

**13-5.5-103. Powers and duties of the state commission.** (1) In addition to other powers conferred and duties imposed upon the state commission by this article, the state commission has the following powers and duties:

(a) To appoint and supervise a person to serve as the executive director of the office of judicial performance evaluation;

(b) To assist the executive director in managing the office and providing fiscal oversight of the operating budget of the office;

(c) To develop uniform procedures and techniques for evaluating district and county judges, justices of the Colorado supreme court, and judges of the court of appeals based on performance criteria provided in section 13-5.5-105.5;

(d) To develop guidelines and procedures for the continuous collection of data for use in the evaluation process;

(e) To develop surveys for persons affected by justices and judges, including but not limited to attorneys, jurors, litigants, law enforcement personnel, attorneys within the district attorneys' and public defender's offices, employees of the court, court interpreters, employees of probation offices, employees of local departments of social services, and victims of crimes, as defined in section 24-4.1-302 (5), C.R.S.;

(f) To determine the statistical validity of completed surveys, report to the district commissions on the statistical validity of the surveys for their districts, and specify when and how statistically invalid surveys may be used;

(g) To prepare alternatives to surveys where sample populations are inadequate to produce valid results;

- (h) To produce and distribute narratives and survey reports;
- (i) To review case management data and statistics for individual appellate justices and judges provided by the state court administrator;
- (j) To review written judicial opinions;
- (k) To collect information from direct courtroom observation;
- (l) To interview justices and appellate judges and other persons and accept information and documentation from interested persons;
- (m) To draft narratives that reflect the results of judicial performance evaluations of justices and appellate judges;
- (n) To distribute to the public narratives that reflect the results of each judicial performance evaluation of each appellate justice or judge;
- (o) (I) Subject to approval by the Colorado supreme court, to promulgate rules necessary to implement and effectuate the provisions of this article, including rules to be followed by the district commissions.
- (II) Prior to the final promulgation of any rule pursuant to this paragraph (o), the state commission shall post a notice of the proposed rule, allow for a period for public comment, and give the public an opportunity to address the commission concerning the proposed rule at a public hearing.
- (III) The state commission may adopt rules or standards that provide guidance to members of the state commission or members of district commissions regarding the review or interpretation of information obtained as a result of the evaluation process and the criteria contained in section 13-5.5-105.5. Any such rules or standards shall:
  - (A) Be consistent with paragraphs (e), (f), and (g) of this subsection (1), in that the rules or standards and the application thereof shall take into consideration the statistical reliability of survey data; and
  - (B) Not divest any member of the state commission or a district commission of his or her ultimate authority to decide whether to vote for or against recommending retention of a justice or judge and be consistent with subsection (2) of this section and section 13-5.5-105 (2).
- (p) To develop procedures for the review of the deliberation procedures established by the district commissions. However, the state commission shall not have the power or duty to review actual determinations made by the district commissions.
- (q) To gather and maintain statewide statistical data and post a statistical report of the statewide data on its web site no later than thirty days prior to each retention election. The statistical report shall specify:
  - (I) The total number of justices and judges who were eligible to stand for retention;
  - (II) The total number of evaluations of justices and judges performed by the state and district commissions;
  - (III) The total number of justices and judges who were evaluated but did not stand for retention; and
  - (IV) The total number of justices and judges recommended as “retain”, “do not retain”, or “no opinion”, respectively.
- (2) Unless recused pursuant to a provision of this article, each member of the state commission shall have the discretion to vote for or against retention of a justice or judge based upon his or her review of all information before the state commission.

**Source:** **L. 88:** Entire article added, p. 597, § 1, effective May 12. **L. 93:** (1)(k) amended and (1)(l) added, p. 659, § 2, effective April 30. **L. 97:** (1)(g) repealed, p. 1482, § 39, effective June 3; (1)(b), (1)(c), (1)(e), and (1)(i) amended and (1)(d.5) and (1)(m) added, p. 1648, § 3, effective June 5. **L. 2008:** Entire section R&RE, p. 1273, § 4, effective July 1.

**13-5.5-104. District commission on judicial performance.** (1) (a) (I) (A) There is hereby established in each judicial district a district commission on judicial performance, referred to in this article as the “district commission”. The district commission shall consist of ten members. The speaker of the house of representatives and the president of the senate



shall each appoint one attorney and one nonattorney. The governor and the chief justice of the supreme court shall each appoint one attorney and two nonattorneys.

(B) For purposes of this subsection (1), "attorney" means a person admitted to practice law before the courts of this state.

(II) All members of the district commission shall serve terms of four years. The term of each member of a district commission shall expire on November 30 of an odd-numbered year, and the term of any member appointed to replace a member at the end of the member's term shall commence on December 1 of the year when the previous member's term expires.

(III) The appointing authority may remove members of the district commissions for cause.

(b) (I) Any vacancy on the district commission shall be filled by the original appointing authority, but a member shall not serve more than two full terms plus any balance remaining on an unexpired term if the initial appointment was to fill a vacancy. Within five days after a vacancy arises on a district commission, the district commission shall notify the appointing authority and the state commission of the vacancy, and the appointing authority shall make an appointment within forty-five days after the date of the vacancy. If the original appointing authority fails to make the appointment within forty-five days after the date of the vacancy, the state commission shall make the appointment.

(II) Justices and judges actively performing judicial duties may not be appointed to serve on the district commission. Former justices and judges are eligible to be appointed as attorney members; except that a former justice or judge may not be assigned or appointed to perform judicial duties while serving on the district commission.

(c) The chair of the district commission shall be elected by its members every two years.

(2) The district administrator of each judicial district and his or her staff shall serve as the staff for the district commission.

(3) Members and employees of a district commission shall be immune from suit in any action, civil or criminal, based upon official acts performed in good faith as members of the district commission.

(4) A member of a district commission shall recuse himself or herself from an evaluation of the person who appointed the member to the commission.

**Source:** **L. 88:** Entire article added, p. 598, § 1, effective May 12. **L. 93:** (1)(a) and (1)(b) amended, p. 659, § 3, effective April 30. **L. 97:** (1)(a) and (1)(b) amended, p. 1649, § 4, effective June 5. **L. 2008:** (1)(a), (1)(b), and (2) amended and (4) added, p. 1275, § 5, effective July 1.

**13-5.5-105. Powers and duties of district commissions.** (1) In addition to other powers conferred and duties imposed upon a district commission by this article, in conformity with the rules, guidelines, and procedures adopted by the state commission pursuant to section 13-5.5-103 (1) (f) and the state commission's review of the deliberation procedures pursuant to section 13-5.5-103 (1) (p), a district commission has the following powers and duties:

(a) To review case management statistics and data for individual district and county court judges provided by the state court administrator;

(b) To review written judicial opinions and orders of district and county court judges within the judicial district;

(c) To collect information from direct courtroom observation of district and county court judges within the judicial district;

(d) To interview district and county court judges and other persons and accept information and documentation from interested persons;

(e) To obtain information from parties and attorneys regarding district and county court judges' handling of domestic relations and family law cases with respect to the judges' fairness, patience with pro se parties, gender neutrality, and handling of emotional parties; and

(f) To draft narratives that reflect the results of judicial performance evaluations of district and county court judges.

(2) Unless recused pursuant to a provision of this article, each member of a district commission shall have the discretion to vote for or against retention of a district or county judge based upon his or her review of all information before the district commission.

(3) Upon completing its required recommendations and narratives, each district commission shall collect all documents and other information, including all copies, received regarding the justices or judges evaluated. Each district commission shall forward the documents and other information, including all copies, to the state commission within thirty days following submission of the district commission's recommendations and narratives to the state commission. The state commission shall adopt rules regarding retention of evaluation information, which shall be made available to district commissions for subsequent evaluations of the justices or judges.

**Source:** **L. 88:** Entire article added, p. 598, § 1, effective May 12. **L. 93:** Entire section amended, p. 660, § 4, effective April 30. **L. 97:** Entire section amended, p. 1650, § 5, effective June 5. **L. 2008:** Entire section R&RE, p. 1276, § 6, effective July 1.

**13-5.5-105.5. Judicial performance criteria.** (1) The state commission shall evaluate each justice of the Colorado supreme court and each judge of the Colorado court of appeals based on the following performance criteria:

- (a) Integrity, including but not limited to whether:
  - (I) The justice or judge avoids impropriety or the appearance of impropriety;
  - (II) The justice or judge displays fairness and impartiality toward all participants; and
  - (III) The justice or judge avoids ex parte communications;
- (b) Legal knowledge, including but not limited to whether:
  - (I) The justice's or judge's opinions are well-reasoned and demonstrate an understanding of substantive law and the relevant rules of procedure and evidence;
  - (II) The justice's or judge's opinions demonstrate attentiveness to factual and legal issues before the court; and
  - (III) The justice's or judge's opinions adhere to precedent or clearly explain the legal basis for departure from precedent;
- (c) Communication skills, including but not limited to whether:
  - (I) The justice's or judge's opinions are clearly written and understandable; and
  - (II) The justice's or judge's questions or statements during oral arguments are clearly stated and understandable;
- (d) Judicial temperament, including but not limited to whether:
  - (I) The justice or judge demonstrates courtesy toward attorneys, litigants, court staff, and others in the courtroom; and
  - (II) The justice or judge maintains appropriate decorum in the courtroom;
- (e) Administrative performance, including but not limited to whether:
  - (I) The justice or judge demonstrates preparation for oral argument, attentiveness, and appropriate control over judicial proceedings;
  - (II) The justice or judge manages workload effectively;
  - (III) The justice or judge issues opinions in a timely manner and without unnecessary delay; and
- (IV) The justice or judge participates in a proportionate share of the court's workload; and
- (f) Service to the legal profession and the public by participating in service-oriented efforts designed to educate the public about the legal system and to improve the legal system.

(2) The district commissions shall evaluate district and county judges based on the following criteria:

- (a) Integrity, including but not limited to whether:
  - (I) The judge avoids impropriety or the appearance of impropriety;
  - (II) The judge displays fairness and impartiality toward all participants; and
  - (III) The judge avoids ex parte communications;
- (b) Legal knowledge, including but not limited to whether:



(I) The judge demonstrates an understanding of substantive law and relevant rules of procedure and evidence;

(II) The judge demonstrates awareness of and attentiveness to factual and legal issues before the court; and

(III) The judge appropriately applies statutes, judicial precedent, and other sources of legal authority;

(c) Communication skills, including but not limited to whether:

(I) The judge's findings of fact, conclusions of law, and orders are clearly written and understandable;

(II) The judge's oral presentations are clearly stated and understandable and the judge clearly explains all oral decisions; and

(III) The judge clearly presents information to the jury;

(d) Judicial temperament, including but not limited to whether:

(I) The judge demonstrates courtesy toward attorneys, litigants, court staff, and others in the courtroom;

(II) The judge maintains and requires order, punctuality, and decorum in the courtroom; and

(III) The judge demonstrates appropriate demeanor on the bench;

(e) Administrative performance, including but not limited to whether:

(I) The judge demonstrates preparation for all hearings and trials;

(II) The judge uses court time efficiently;

(III) The judge issues findings of fact, conclusions of law, and orders without unnecessary delay;

(IV) The judge effectively manages cases;

(V) The judge takes responsibility for more than his or her own caseload and is willing to assist other judges; and

(VI) The judge understands and complies with directives of the Colorado supreme court; and-

(f) Service to the legal profession and the public by participating in service-oriented efforts designed to educate the public about the legal system and to improve the legal system.

**Source: L. 2008:** Entire section added, p. 1277, § 7, effective July 1.

**13-5.5-106. Evaluation in retention election years.** (1) (a) (I) The state commission shall conduct an evaluation of each justice of the supreme court and each judge of the court of appeals whose term is to expire and who must stand for retention election. The evaluations shall be referred to in this subsection (1) as "retention year evaluations".

(II) Retention year evaluations shall be completed and the narrative prepared and communicated to the appellate justice or judge no later than forty-five days prior to the last day available for the appellate justice or judge to declare such justice's or judge's intent to stand for retention.

(III) Prior to the completion of the narratives for retention year evaluations, and following at least ten days' notice to the public and the appellate justices and judges, it is highly recommended that the state commission hold a public hearing regarding all appellate justices and judges who are subject to retention year evaluations. The state commission shall arrange to have the public hearing electronically recorded and shall make copies of the recording available to members of the public. The state commission shall supply a copy of the recording at no cost to any justice or judge who is the subject of the hearing.

(IV) The narrative prepared for a retention year evaluation shall include an assessment of the appellate justice's or judge's strengths and weaknesses with respect to the judicial performance criteria contained in section 13-5.5-105.5 (1), a discussion regarding any deficiency identified in the interim evaluation prepared pursuant to section 13-5.5-106.3, and a statement of whether the state commission concludes that any deficiency identified has been satisfactorily addressed by the justice or judge.

(V) Each appellate justice or judge who receives a retention year evaluation shall have the opportunity to meet with the state commission or otherwise respond to the evaluation

no later than ten days following the justice's or judge's receipt of the evaluation. If the meeting is held or response is made, the state commission may revise its evaluation.

(b) After the requirements of paragraph (a) of this subsection (1) are met, the state commission shall make a recommendation regarding the retention of each appellate justice or judge who declares his or her intent to stand for retention, which recommendation shall be stated as "retain", "do not retain", or "no opinion". A "no opinion" recommendation shall be made only when the state commission concludes that results are not sufficiently clear to make a firm recommendation and shall be accompanied by a detailed explanation. The narrative shall include the number of commission members who voted for and against the recommendation.

(c) The state commission shall release the narrative, the recommendation, and any other relevant information related to a retention year evaluation to the public no later than forty-five days prior to the retention election. The state commission shall arrange to have the narrative and recommendation printed in the ballot information booklet prepared pursuant to section 1-40-124.5, C.R.S., and mailed to electors pursuant to section 1-40-125, C.R.S.

(2) (a) (I) The district commission shall conduct an evaluation of each district and county judge whose term is to expire and who must stand for retention election. The evaluations shall be referred to in this subsection (2) as "retention year evaluations".

(II) Retention year evaluations shall be completed and the narrative communicated to each judge no later than forty-five days prior to the last day available for the judge to declare the judge's intent to stand for retention.

(III) Prior to the completion of narratives for retention year evaluations, and following at least ten days' notice to the public and the district and county judges, it is highly recommended that the district commission conduct a public hearing regarding all district and county judges who are subject to retention year evaluations. The district commission shall arrange to have the public hearing electronically recorded and shall make copies of the recording available to members of the public. The district commission shall supply a copy of the recording at no cost to any judge who is the subject of the hearing.

(IV) The narrative prepared for a retention year evaluation shall include an assessment of the district or county judge's strengths and weaknesses with respect to the judicial performance criteria contained in section 13-5.5-105.5 (2), a discussion regarding any deficiency identified in the interim evaluation prepared pursuant to section 13-5.5-106.3, and a statement of whether the district commission concludes that any deficiency identified has been satisfactorily addressed by the judge.

(V) Each judge who receives a retention year evaluation shall have the opportunity to meet with the district commission or otherwise respond to the evaluation no later than ten days following the judge's receipt of the evaluation. If the meeting is held or response is made, the district commission may revise its evaluation.

(b) After the requirements of paragraph (a) of this subsection (2) are met, the district commission shall make a recommendation regarding the retention of each district or county judge who declares his or her intent to stand for retention, which recommendation shall be stated as "retain", "do not retain", or "no opinion". A "no opinion" recommendation shall be made only when the district commission concludes that results are not sufficiently clear to make a firm recommendation and shall be accompanied by a detailed explanation. The narrative shall include the number of commission members who voted for and against the recommendation.

(c) The state commission shall release the narrative, the recommendation, and any other relevant information to the public no later than forty-five days prior to the retention election. The state commission shall arrange to have a summary of the narrative and recommendation printed in the ballot information booklet prepared pursuant to section 1-40-124.5, C.R.S., and mailed to electors within the judicial district pursuant to section 1-40-125, C.R.S.

(3) Repealed.

**Source:** L. 88: Entire article added, p. 598, § 1, effective May 12. L. 93: (1)(a), (1)(c), (2)(a), and (2)(c) amended, p. 660, § 5, effective April 30. L. 97: (1)(c) and (2)(c) amended and (3) added, p. 1650, § 6, effective June 5. L. 2008: (1) and (2) amended and (3) repealed, pp. 1280, 1282, §§ 8, 9, effective July 1.



**13-5.5-106.3. Interim evaluations.** (1) (a) During each full term of office of each Colorado supreme court justice and each judge of the court of appeals, the state commission shall conduct at least one interim evaluation of each justice and each judge. The evaluations shall be referred to in this subsection (1) as “interim evaluations”.

(b) Interim evaluations shall be completed and communicated to the chief justice of the Colorado supreme court or the chief judge of the court of appeals and the appellate justice or judge being evaluated.

(c) Each appellate justice or judge who receives an interim evaluation shall have the opportunity to meet with the state commission or otherwise respond to the evaluation no later than ten days following the justice’s or judge’s receipt of the evaluation. If the meeting is held or response is made, the state commission may revise its evaluation.

(d) The state commission shall release the survey evaluations related to interim evaluations to the public simultaneously with, and no earlier than, the release of the retention year evaluations pursuant to section 13-5.5-106 (1) (c) prepared for that year.

(2) During each full term of office of each district judge and county judge, the district commission shall conduct at least one interim evaluation of each district judge and county judge. The evaluations shall be referred to in this subsection (2) as “interim evaluations”.

(b) Interim evaluations shall be completed and communicated to the chief judge of the district and to the district or county judge being evaluated.

(c) Each district or county judge who receives an interim evaluation shall have the opportunity to meet with the district commission or otherwise respond to the evaluation no later than ten days following the judge’s receipt of the evaluation. If the meeting is held or response is made, the district commission may revise its evaluation.

(d) The state commission shall release the survey evaluations related to interim evaluations to the public simultaneously with, and no earlier than, the release of the retention year evaluations prepared for that year.

**Source: L. 2008:** Entire section added, p. 1282, § 10, effective July 1.

**13-5.5-106.4. Recusal.** (1) A member of the state commission or a district commission shall disclose to the commission any professional or personal relationship with a justice or judge that may affect an unbiased evaluation of the justice or judge, including involvement with any litigation involving the justice or judge and the member, the member’s family, or the member’s financial interests. The state commission or a district commission may require the recusal of one of its members on account of a relationship with a justice or judge upon a two-thirds vote of the other members of the commission.

(2) A member of the state commission or a district commission shall recuse himself or herself from participating in the consideration and vote on any matter involving the evaluation of a justice or judge for failure to meet the training, courtroom observation, interview, or opinion review responsibilities provided by rule, unless excused by a two-thirds vote of the other members of the commission.

(3) An attorney serving as a member of the state commission or a district commission shall not request that a justice or judge being evaluated by the commission be recused from hearing a case in which the attorney appears as counsel of record, or request permission to withdraw from a case pending before a justice or judge being evaluated, solely on the basis that the attorney is serving as a member of a commission.

(4) An attorney who appears in a matter where opposing counsel or a witness serves as a member of the state commission or a district commission that is evaluating the justice or judge before whom the matter is set may not seek withdrawal of the attorney, exclusion of the witness, or recusal of the justice or judge solely on the basis that the opposing counsel or witness is serving as a member of a commission.

(5) A justice or judge being evaluated by the state commission or a district commission may not recuse himself or herself from a case solely on the basis that an attorney, party, or

witness is a member of the commission, nor should a justice or judge grant an attorney's request to withdraw from a case, solely on the basis that the attorney, party, or witness is serving as a member of a commission.

**Source: L. 2008:** Entire section added, p. 1283, § 10, effective July 1.

**13-5.5-106.5. Confidentiality.** (1) Except as provided in subsection (3) of this section, all comments in survey reports, self-evaluations, personal information protected under section 24-72-204 (3) (a) (II), C.R.S., additional oral or written information, content of improvement plans, and any matter discussed in executive session shall remain confidential except as otherwise specifically provided by rule. Comments in survey reports may be summarized for use in a narrative. A member of a commission shall not publicly discuss the evaluation of any particular justice or judge.

(2) Except as provided in subsection (3) of this section, all recommendations, narratives, and survey reports are confidential until released to the public on the first day following the deadline for justices and judges to declare their intent to stand for retention. Any comments included in the report shall be made available only to members of the commissions, the justice or judge being evaluated, and the chief justice or chief judge.

(3) Information required to be kept confidential pursuant to this article may be released only under the following circumstances:

(a) To the supreme court attorney regulation committee, as provided by rule of the state commission;

(b) To the commission on judicial discipline, as provided by rule of the state commission; or

(c) With the consent of the justice or judge being evaluated.

**Source: L. 2008:** Entire section added, p. 1284, § 10, effective July 1.

**13-5.5-107. Acceptance of private or federal grants - general appropriations.**

(1) The state commission is authorized to accept any grants of federal or private funds made available for any purpose consistent with the provisions of this article. Any funds received pursuant to this section shall be transmitted to the state treasurer, who shall credit the same to the state commission on judicial performance cash fund, which is hereby created and referred to in this section as the "fund". The fund shall also include the amount of the increases in docket fees collected pursuant to sections 13-32-105 (1) and 42-4-1710 (4) (a), C.R.S. Any interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of any fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or another fund. Moneys in the fund may be expended by the state commission, subject to annual appropriation by the general assembly, for the purposes of this article. In addition, the general assembly may make annual appropriations from the general fund for the purposes of this article.

(2) Notwithstanding any provision of subsection (1) of this section to the contrary, on April 20, 2009, the state treasurer shall deduct nine hundred thousand dollars from the fund and transfer such sum to the general fund.

**Source: L. 88:** Entire article added, p. 598, § 1, effective May 12. **L. 99:** Entire section amended, p. 167, § 2, effective March 25. **L. 2003:** Entire section amended, p. 2672, § 3, effective June 6. **L. 2009:** Entire section amended, (SB 09-208), ch. 149, p. 620, § 9, effective April 20.

**13-5.5-108. Implementation of article. (Repealed)**

**Source: L. 88:** Entire article added, p. 599, § 1, effective May 12. **L. 90:** Entire section amended, p. 860, § 1, effective May 23. **L. 2008:** Entire section repealed, p. 1284, § 11, effective July 1.



**13-5.5-109. Repeal of article.** (1) This article is repealed, effective June 30, 2019.  
(2) Repealed.

**Source:** **L. 88:** Entire article added, p. 600, § 1, effective May 12. **L. 93:** Entire section amended, p. 661, § 6, effective April 30. **L. 97:** (2) repealed, p. 1482, § 40, effective June 3. **L. 99:** (1) amended, p. 167, § 1, effective March 25. **L. 2008:** (1) amended, p. 1284, § 12, effective July 1.

ARTICLE 6

County Courts

**Cross references:** For the power of the general assembly to provide simplified procedures in county courts for the trial of misdemeanors, see § 21 of art. VI, Colo. Const.

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## PART 1

## ESTABLISHMENT AND JURISDICTION

**13-6-101. Establishment.** Pursuant to the provisions of section 1 of article VI of the Colorado constitution, there is hereby established in each county of the state of Colorado a county court.

**Source:** L. 64: p. 409, § 1. C.R.S. 1963: § 37-13-1.

## ANNOTATION

**Law reviews.** For article, "Colorado's New Court System", see 41 Den. L. Ctr. J. 140 (1964).

Rowland v. Theobald, 159 Colo. 1, 409 P.2d 272 (1965).

**For the general assembly using its constitutional power to create county courts,** see

**13-6-102. Court of record.** Each county court shall be a court of record, with such powers as are inherent in constitutionally created courts.

**Source:** L. 64: p. 409, § 2. C.R.S. 1963: § 37-13-2.

## ANNOTATION

**County court records are entitled to the same presumptions as those of district courts.** The county courts are courts of record, and as to matters within their jurisdiction under the constitution and laws of this state, their records are supported by the same presumptions and intentions of law as the records of district courts.

Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891), citing Hughes v. Cummings, 7 Colo. 138, 2 P. 289 (1883); Dusing v. Nelson, 7 Colo. 184, 2 P. 922 (1883); Behymer v. Nordloh, 12 Colo. 352, 21 P. 37 (1888); In re Rogers, 14 Colo. 18, 22 P. 1053 (1890)(cases decided under repealed laws antecedent to CSA, C. 46, § 156).

**13-6-103. Statewide jurisdiction.** The jurisdiction of the county court shall extend to all cases which arise within the boundaries of this state or are subject to its judicial power and which are within the limitations imposed by this article, but the exercise of this jurisdiction is subject to restrictions of venue as established by this article or, if there are none, by rule of the Colorado supreme court.

**Source:** L. 64: p. 409, § 3. C.R.S. 1963: § 37-13-3. L. 79: Entire section amended, p. 598, § 12, effective July 1.

**13-6-104. Original civil jurisdiction.** (1) On and after January 1, 1991, the county court shall have concurrent original jurisdiction with the district court in civil actions, suits, and proceedings in which the debt, damage, or value of the personal property claimed does not exceed fifteen thousand dollars, including by way of further example, and not limitation, jurisdiction to hear and determine actions in tort and assess damages therein not to exceed fifteen thousand dollars. The county court shall also have jurisdiction of counterclaims in



all such actions when the counterclaim does not exceed fifteen thousand dollars.

(2) The county court shall have concurrent original jurisdiction with the district court in actions to foreclose liens pursuant to article 20 of title 38, C.R.S., and in cases of forcible entry, forcible detainer, or unlawful detainer, except when such cases involve the boundary or title to real property and except as provided in section 13-40-109. Judgment in the county court for rent, damages on account of unlawful detention, damages for injury to property, and damages incurred under article 20 of title 38, C.R.S., under this subsection (2) shall not exceed a total of fifteen thousand dollars, exclusive of costs and attorney fees, nor shall the county court on and after January 1, 1991, have jurisdiction if the monthly rental value of the property exceeds fifteen thousand dollars.

(3) The county court shall have concurrent original jurisdiction with the district court in petitions for change of name.

(4) Repealed.

(5) The county court shall have concurrent original jurisdiction with the district court to issue temporary and permanent civil restraining orders as provided in article 14 of this title.

(6) (Deleted by amendment, L. 99, p. 501, § 5, effective July 1, 1999.)

(7) The county court shall have concurrent original jurisdiction with the district court to hear actions brought pursuant to section 25-8-607, C.R.S.

(8) The county court shall have original jurisdiction in hearings concerning the impoundment of motor vehicles pursuant to section 42-13-106, C.R.S.

(9) (Deleted by amendment, L. 99, p. 501, § 5, effective July 1, 1999.)

**Source:** L. 64: p. 409, § 4. C.R.S. 1963: § 37-13-4. L. 67: p. 1063, § 2. L. 75: (2) amended, p. 1419, § 8, effective April 24; (1) and (2) amended, p. 561, § 1, effective October 1. L. 78: (5) added, p. 352, § 1, effective April 21. L. 79: (6) added, p. 599, § 13, effective July 1. L. 81: (1) and (2) amended, p. 879, § 1, effective July 1; (7) added, p. 1338, § 2, effective July 1. L. 82: (5) R&RE and (6) amended, p. 301, §§ 2, 3, effective April 23. L. 86: (8) added, p. 924, § 2, effective April 3. L. 87: (2) amended, p. 1576, § 13, effective July 10. L. 90: (1) and (2) amended, p. 848, § 2, effective May 31; (1) and (2) amended, p. 854, § 2, effective July 1. L. 92: (9) added, p. 292, § 2, effective April 23. L. 94: (4) repealed, p. 2031, § 6, effective July 1; (8) amended, p. 2548, § 29, effective January 1, 1995. L. 99: (5), (6), and (9) amended, p. 501, § 5, effective July 1. L. 2001: (1) and (2) amended, p. 1517, § 11, effective September 1.

**Cross references:** (1) For treatment by county court of restraining orders issued in restraint of persons threatening assaults and bodily harm, see C.R.C.P. 365(b); for civil protection orders, see article 14 of this title; for provisions relating to domestic abuse programs, see article 7.5 of title 26.

(2) For the legislative declaration contained in the 1990 act amending subsections (1) and (2), see section 1 of chapter 100, Session Laws of Colorado 1990.

## ANNOTATION

### I. General Consideration.

#### II. Subject Matter Jurisdiction.

#### III. Jurisdictional Amount.

### I. GENERAL CONSIDERATION.

**Law reviews.** For comment on *Ohmie v. Martinez*, appearing below, see 38 *Dicta* 123 (1961). For note, "Rural Poverty and the Law in Southern Colorado", see 47 *Den. L.J.* 82 (1970).

**Annotator's note.** Since § 13-6-104 is similar to repealed laws antecedent to CSA, C. 46, § 156, relevant cases construing those provisions have been included in the annotations to this section.

**The jurisdiction of district and county courts is concurrent** with respect to matters which fall within the jurisdiction of both. *Ohmie v. Martinez*, 141 Colo. 480, 349 P.2d 131 (1960).

**County court may enforce a state agency's imposition of a monetary penalty.** *Gibbs v. Colo. Mined Land Reclamation Bd.*, 883 P.2d 592 (Colo. App. 1994).

### II. SUBJECT MATTER JURISDICTION.

**County courts have general subject matter jurisdiction.** Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case

relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. *Camplin v. Jackson*, 34 Colo. 447, 83 P. 1017 (1905).

**County court has jurisdiction in all civil matters, both in law and in equity, except as expressly limited.** *Flynn v. Casper*, 26 Colo. App. 344, 144 P. 1137 (1914), citing *Sievers v. Garfield County Court*, 11 Colo. App. 147, 52 P. 634 (1898); *Arnett v. Berg*, 18 Colo. App. 341, 71 P. 636 (1903).

**County court has jurisdiction in habeas corpus proceedings.** Habeas corpus by a parent, demanding the custody of his infant child, is, under this section, within the jurisdiction of the county court. *Flynn v. Casper*, 26 Colo. App. 344, 144 P. 1137 (1914).

**This section does not apply to proceedings under the eminent domain act.** *Bd. of County Comm'rs v. Poundstone*, 74 Colo. 191, 220 P. 234 (1923).

**Nor does it apply in proceedings for injunction against city or town ordinance.** County courts have no jurisdiction to control, by injunction, proceedings before police magistrates or justices of the peace acting as such in the enforcement of the ordinances of cities and towns. *Hart v. Dana*, 12 Colo. App. 499, 55 P. 958 (1889).

### III. JURISDICTIONAL AMOUNT.

**Annotator's note.** The jurisdictional amount in repealed laws antecedent to CSA, C. 46, § 156, was \$2,000.

**The purpose behind regulating the jurisdiction of the county court as to the amount in controversy is to expedite the handling of small claims.** This purpose must be considered in the light of the policy that a person cannot be allowed to invoke the jurisdiction of a court, acquiesce in the decree thus obtained, and later question the validity of the judgment when it is enforced against him. Under the circumstances, the petitioner is estopped by his acquiescence and conduct from asserting the invalidity of the judgment in the county court. *In re Estate of Lee v. Graber*, 170 Colo. 419, 462 P.2d 492 (1969).

**Jurisdictional allegation is an essential prerequisite.** Jurisdictional allegation in the complaint that the relief sought does not exceed the jurisdictional sum is an essential prerequisite to the exercise of jurisdiction by the court. *Myers v. Myers*, 110 Colo. 412, 135 P.2d 235 (1943).

**This section does not prescribe a form for the jurisdictional averment.** There is nothing in this section that indicates an intention to require the jurisdictional averment to be in a prescribed form. The import of the language employed therein is, that it must affirmatively appear from the complaint that the value of the property in controversy, or the amount involved, for which relief is sought, does not exceed the

jurisdictional sum. *Hughes v. Brewer*, 7 Colo. 583, 4 P. 1115 (1884); *Bloomer v. Jones*, 22 Colo. App. 404, 125 P. 541 (1912).

**Complaint may be amended to show jurisdiction.** A complaint in a county court which is insufficient by reason of the omission of a jurisdictional averment may be amended so as to give the court jurisdiction. *Myers v. Myers*, 110 Colo. 412, 135 P.2d 235 (1943).

**Amendment may be allowed to include averment.** In condemnation proceedings in the county courts under this section the complaint, if lacking the requisite jurisdictional allegations, is not entirely void but amendable, and when a complaint is amended, it stands as though it had originally read as amended. *Goodman v. City of Ft. Collins*, 164 F. 970 (8th Cir. 1908).

**A defect in this respect may be aided by the answer.** A complaint in an action in the county court which did not allege that the value of the property involved was less than \$2,000, if defective in that respect, was aided by the answer, which alleged it was not worth \$1,500. *Petri v. Doughty*, 75 Colo. 551, 227 P. 388 (1924).

**In a bill to quiet title to lands, an averment that "the value of the property involved does not exceed or equal two thousand dollars", suffices to support the jurisdiction of the county court.** *Green v. Gibson*, 53 Colo. 346, 127 P. 239 (1912).

**Complaint must indicate value of land.** In a complaint, in an action to quiet the title to lands, no money judgment being demanded, an averment that "the amount herein involved and sued for does not equal \$2,000", gives no indication of the value of the land, and is not a compliance with this section. A decree given upon such complaint is void, and may be collaterally assailed. *Bloomer v. Jones*, 22 Colo. App. 404, 125 P. 541 (1912).

**On error defendant will not be heard to question the jurisdiction of the court for want of the averment as to the amount in controversy required by this section.** To permit the jurisdiction to be thus questioned for the first time in the court of review would deprive plaintiff of the right to amend granted by the code of civil procedure. *Nelson v. Chittenden*, 53 Colo. 30, 123 P. 656 (1912).

**Uncertainties in the record will be resolved in favor of the party successful below;** e.g., as to whether an averment essential to the jurisdiction of the court below, appearing by interlineation in the complaint, was therein, when it was originally filed. *Dunkle v. French*, 51 Colo. 170, 116 P. 1039 (1911).

**Determination of jurisdictional amount.** The amount fixed as the statutory limitation of the jurisdiction must be taken to mean the amount due the plaintiff, or the value or amount of his claim, or the value of the property sought to be recovered at the time of bringing the action, and in an action for the recovery of



money, where the principal sum draws interest, if the amount due at the time of the commencement of the action, including interest, does not exceed the jurisdictional amount, the county court, under the constitution and this section, has jurisdiction, and the accumulation of interest pendente lite will not oust such jurisdiction. *Denver Brick Mfg. Co. v. McAllister*, 6 Colo. 326 (1882).

**Jurisdictional limit applies to the total amount to be paid**, and not to each monthly payment of child support. *Mathews v. Urban*, 645 P.2d 290 (Colo. App. 1982).

**For when averments are sufficient**, see *Hughes v. Brewer*, 7 Colo. 583, 4 P. 1115 (1884).

**Once a court has jurisdiction over a case because the total sum sought is within the jurisdictional limit**, the court does not lose jurisdiction simply because the case is litigated, and attorney fees incurred and awarded exceed the jurisdictional amount. *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936 (Colo. 1993).

**13-6-105. Specific limits on civil jurisdiction.** (1) The county court shall have no civil jurisdiction except that specifically conferred upon it by law. In particular, it shall have no jurisdiction over the following matters:

- (a) Matters of probate;
- (b) Matters of mental health, including commitment, restoration to competence, and the appointment of conservators;
- (c) Matters of dissolution of marriage, declaration of invalidity of marriage, and legal separation;
- (d) Matters affecting children, including the allocation of parental responsibilities, support, guardianship, adoption, dependency, or delinquency;
- (e) Matters affecting boundaries or title to real property;
- (f) Original proceedings for the issuance of injunctions, except as provided in section 13-6-104 (5), except as required to enforce restrictive covenants on residential property and to enforce the provisions of section 6-1-702.5, C.R.S., and except as otherwise specifically authorized in this article or, if there is no authorization, by rule of the Colorado supreme court.

(2) Any powers or duties previously placed in the county court by law in connection with any of the matters excluded from the jurisdiction of the county court by this section are transferred to the district court or, if within their jurisdiction, to the probate court of the city and county of Denver or the juvenile court of the city and county of Denver, and the statutes relating thereto shall be so construed.

(3) Nothing in this section shall be deemed to prevent the appointment of county judges as magistrates in juvenile matters or as magistrates in mental health and other matters. Appointments of county judges as magistrates in mental health and other matters are authorized, and, when so appointed by the district judge, the county judge shall serve as a district court officer for the designated purposes.

**Source:** L. 64: p. 410, § 5. C.R.S. 1963: § 37-13-5. L. 78: (1)(f) amended, p. 353, § 2, effective April 21. L. 79: (1)(f) amended, p. 599, § 14, effective July 1; (3) amended, p. 963, § 12, effective July 1. L. 88: (1)(f) amended, p. 601, § 1, effective July 1. L. 91: (3) amended, p. 356, § 8, effective April 9. L. 98: (1)(d) amended, p. 1392, § 24, effective February 1, 1999. L. 2000: (1)(f) amended, p. 2034, § 2, effective August 2. L. 2008: (1)(f) amended, p. 596, § 4, effective August 5.

## ANNOTATION

**Specific exclusions to county court jurisdiction are found in this section.** The jurisdiction of the newly created county courts was defined and specific exclusions were mentioned in this section. *Rowland v. Theobald*, 159 Colo. 1, 409 P.2d 272 (1965).

**Election disputes are not withdrawn from county court jurisdiction.** Six classifications of legal matters are expressly mentioned with ref-

erence to which the county court shall have no jurisdiction. Nothing concerning election disputes is withdrawn from consideration by the county courts by these expressed exclusions. *Rowland v. Theobald*, 159 Colo. 1, 409 P.2d 272 (1965).

**County court forced entry and detainer judgment not dispositive of subsequent property ownership question.** Because county

courts are specifically precluded from deciding any matters affecting title to real property, judgment entered in a county court forced entry and detainer action cannot be dispositive of the property ownership question in a subsequent quiet title action. *Gore Trading Co. v. Alice*, 35 Colo. App. 97, 529 P.2d 324 (1974).

**Section not applicable to decrees of specific performance.** In interpreting the reference in this section to "injunctions", presumption is

that the general assembly was aware of the legal distinction between injunctions and specific performance decrees. Therefore, subsection (1)(f), which limits a county court's power to issue injunctions, does not limit the court's power to issue decrees of specific performance, and C.R.C.P. 370 properly may be read with the understanding that county courts have jurisdiction to issue decrees of specific performance. *Snyder v. Sullivan*, 705 P.2d 510 (Colo. 1985).

**13-6-106. Original criminal jurisdiction.** (1) The county court shall have concurrent original jurisdiction with the district court in the following criminal matters:

(a) Criminal actions for the violation of state laws which constitute misdemeanors or petty offenses, except those actions involving children over which the juvenile court of the city and county of Denver or the district courts of the state, other than in Denver, have exclusive jurisdiction;

(b) The issuance of warrants, the conduct of preliminary examinations, the conduct of dispositional hearings pursuant to section 16-5-301 (1), C.R.S., and section 18-1-404 (1), C.R.S., the issuance of bindover orders, and the admission to bail in felonies and misdemeanors.

(2) The provisions of subsection (1) (b) of this section shall not apply to any child under the age of eighteen years alleged to have committed a felony, except a crime of violence punishable by death or life imprisonment where the accused is sixteen years of age or older.

**Source:** L. 64: p. 411, § 6. C.R.S. 1963: § 37-13-6. L. 67: p. 1051, § 6. L. 79: (1)(a) amended, p. 599, § 15, effective July 1. L. 98: (1)(b) amended, p. 1274, § 4, July 1.

#### ANNOTATION

**Law reviews.** For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952).

**Annotator's note.** Since § 13-6-106 is similar to repealed § 37-7-1, CRS 53, relevant cases construing that provision have been included in the annotations to this section.

**Under this section, the jurisdiction of county courts in criminal cases is limited to misdemeanors;** hence a conviction of grand larceny in the county court and a sentence to the state penitentiary is void. *Latham v. People*, 136 Colo. 252, 317 P.2d 894 (1957).

The jurisdiction conferred by the general assembly in § 42-4-1504 for misdemeanors involving the operation of motor vehicles did not intend to impliedly repeal this section conferring original jurisdiction upon the county courts in

misdemeanor cases. *People v. Griffith*, 130 Colo. 475, 276 P.2d 559 (1954).

**Jurisdiction extends to offenses under § 42-4-1501.** Jurisdiction of the county courts includes those offenses reclassified as misdemeanor traffic offenses under § 42-4-1501. *Phillips v. County Court*, 42 Colo. App. 187, 591 P.2d 600 (1979).

**Since a person under age 18 can only be charged with an offense in the manner permitted by the Children's Code,** the county court had no jurisdiction to entertain or to dispose of the merits of the proceeding involving an offense alleged against a juvenile and was without authority to go further than merely dismissing the case without prejudice for lack of jurisdiction. *People in Interest of C.O.*, 870 P.2d 1266 (Colo. App. 1994).

**13-6-107. Restraining orders to prevent emotional abuse of the elderly. (Repealed)**

**Source:** L. 92: Entire section added, p. 290, § 1, effective April 23. L. 94: (5), (9), (10), and (11) amended and (13) added, p. 2005, § 1, effective January 1, 1995. L. 98: (1) and (5) amended, p. 244, § 2, effective April 13. L. 99: Entire section repealed, p. 501, § 6, effective July 1.



## PART 2

## JUDGES AND OTHER PERSONNEL

**13-6-201. Classification of counties.** (1) For such organizational and administrative purposes concerning county courts as are specified in this part 2, counties shall be classified as provided in subsection (2) of this section. The classifications established in this section shall not have any effect upon any classifications now provided by law for any other purpose and specifically shall have no effect upon the existing classification of counties for the purpose of fixing judicial salaries for county judges as provided by section 13-30-103.

(2) Classes of counties for this part 2 are:

(a) Class A. Class A shall consist of the city and county of Denver.

(b) Class B. Class B shall consist of the counties of Adams, Arapahoe, Boulder, Douglas, Eagle, El Paso, Fremont, Jefferson, La Plata, Larimer, Mesa, Montrose, Pueblo, Summit, Weld, and the city and county of Broomfield.

(c) Class C. Class C shall consist of the counties of Alamosa, Delta, Garfield, Las Animas, Logan, Montezuma, Morgan, Otero, Prowers, and Rio Grande.

(d) Class D. Class D shall consist of the counties of Archuleta, Baca, Bent, Chaffee, Cheyenne, Clear Creek, Conejos, Costilla, Crowley, Custer, Dolores, Elbert, Gilpin, Grand, Gunnison, Jackson, Hinsdale, Huerfano, Kiowa, Kit Carson, Lake, Lincoln, Mineral, Moffat, Ouray, Park, Phillips, Pitkin, Saguache, San Juan, San Miguel, Sedgwick, Rio Blanco, Routt, Teller, Washington, and Yuma.

**Source:** L. 64: p. 411, § 7. C.R.S. 1963: § 37-14-1. L. 72: p. 591, § 59. L. 75: (2)(b) and (2)(d) amended, p. 563, § 1, effective July 1. L. 77: (2)(b) R&RE and (2)(c) amended, p. 783, §§ 1, 2, effective July 1, 1978. L. 81: (1) amended, p. 2025, § 15, effective July 14. L. 92: (2)(b) and (2)(d) amended, p. 274, § 1, effective February 12. L. 93: (2)(b) and (2)(d) amended, p. 1774, § 31, effective June 6. L. 97: (2)(b) and (2)(d) amended, p. 984, § 1, effective July 1, 1998. L. 2001: (2)(b) amended, p. 56, § 1, effective July 1. L. 2007: (1), (2)(b), and (2)(c) amended, p. 363, § 1, effective April 2. L. 2009: (2)(b) and (2)(c) amended, (HB 09-1037), ch. 18, p. 95, § 1, effective March 18.

**13-6-202. Number of judges.** (1) In each county there shall be one county judge; except that: In the county of El Paso, there shall be eight county judges; in each of the counties of Arapahoe and Jefferson, there shall be seven county judges; in the county of Adams, there shall be six county judges; in the county of Boulder, there shall be five county judges; in each of the counties of Larimer and Weld, there shall be four county judges; in each of the counties of Pueblo, Douglas, and Mesa, there shall be three county judges; and, in the city and county of Denver, there shall be the number of county judges provided by the charter and ordinances thereof. In the city and county of Broomfield, there shall be one county judge. One of the county judges in Boulder county shall maintain a courtroom in the city of Longmont at least three days per week. The judge of the Eagle county court shall conduct court business in that portion of Eagle county lying in the Roaring Fork river drainage area in a manner sufficient to deal with the business before the court.

(2) (a) Subject to available appropriations, effective July 1, 2008, the number of county judges in the county of Jefferson shall be eight.

(b) Subject to available appropriations, effective July 1, 2009, the number of county judges in the county of Jefferson shall be nine.

(3) (a) Subject to available appropriations, effective July 1, 2008, the number of county judges in the county of El Paso shall be nine.

(b) Subject to available appropriations, effective July 1, 2009, the number of county judges in the county of El Paso shall be ten.

(4) Subject to available appropriations, effective July 1, 2008, the number of county judges in the county of Larimer shall be five.

(5) (a) Subject to available appropriations, effective July 1, 2008, the number of county judges in the county of Adams shall be seven.

(b) Subject to available appropriations, effective July 1, 2009, the number of county judges in the county of Adams shall be eight.

(6) Subject to available appropriations, effective July 1, 2008, the number of county judges in the county of Arapahoe shall be eight.

**Source:** L. 64: p. 412, § 8. L. 65: p. 476, §§ 1, 2. C.R.S. 1963: § 37-14-2. L. 67: p. 485, § 1. L. 68: p. 38, § 1. L. 72: pp. 189, 592, §§ 1, 60. L. 73: p. 495, § 1. L. 75: Entire section amended, p. 565, § 2, effective October 1. L. 77: Entire section amended, p. 785, § 1, effective July 1. L. 80: Entire section amended, p. 509, § 1, effective July 1. L. 84: Entire section amended, p. 454, § 4, effective September 1. L. 89: Entire section amended, p. 749, § 1, effective April 1, 1990. L. 92: Entire section amended, p. 275, § 2, effective February 12. L. 95: Entire section amended, p. 452, § 1, effective May 16. L. 99: Entire section amended, p. 668, § 1, effective May 18. L. 2001: Entire section amended, p. 56, § 2, effective July 1. L. 2006: Entire section amended, p. 22, § 2, effective July 1. L. 2007: Entire section amended, p. 1529, § 16, effective May 31.

**13-6-203. Qualifications of judges.** (1) The county judge shall be a qualified elector of the county for which he is elected or appointed and shall reside there so long as he serves as county judge.

(2) In counties of Class A and B, no person shall be eligible for election or appointment to the office of county judge unless he has been admitted to the practice of law in Colorado.

(3) In counties of Class C and Class D, no person shall be eligible for appointment to the office of county judge unless he has graduated from high school or has attained the equivalent of a high school education as indicated by the possession of a certificate of equivalency issued by the department of education, based upon the record made on the general educational development test.

(4) Repealed.

(5) Judges-elect who have not been admitted to the practice of law shall not take office for the first time as county judge until they have attended an institute on the duties and functioning of the county court to be held under the supervision of the supreme court, unless such attendance is waived by the supreme court. Judges who are attorneys and who are taking office for the first time as county judge may attend this institute if they wish. All judges are entitled to their actual and necessary expenses while attending this institute. The supreme court shall establish the institute to which this subsection (5) refers and shall provide that it be held when the appointment of a sufficient number of nonlawyer county judges warrants, as determined by the chief justice.

**Source:** L. 64: p. 412, § 9. C.R.S. 1963: § 37-14-3. L. 67: p. 457, § 9. L. 69: p. 250, § 10. L. 72: p. 592, § 61. L. 73: p. 1402, § 30. L. 79: (3) amended and (4) repealed, pp. 599, 602, §§ 16, 30, effective July 1.

**13-6-204. Activities of judges.** (1) In counties of Class A and B, county judges shall devote their full time to judicial duties and shall not engage in the private practice of law. They may also serve as municipal judges in counties of Class A but may not do so in counties of Class B.

(2) In counties of Class C and D, county judges, if admitted to the bar, may engage in the private practice of law in courts other than the county court and in matters which have not and will not come before the county court and may serve as municipal judges.

(3) County judges of any class county may be appointed as magistrates in juvenile matters and as magistrates for the district court in mental health matters and shall receive no additional compensation for such service. County judges may accept appointment as magistrates in any other matter, and for such service a county judge is entitled to such compensation as the appointing district judge may allow, payable from funds provided under sections 13-3-104 and 13-3-106.

**Source:** L. 64: p. 413, § 10. C.R.S. 1963: § 37-14-4. L. 79: (3) amended, p. 764, § 13, effective July 1. L. 91: (3) amended, p. 356, § 9, effective April 9.



**13-6-205. Term and appointment of judges.** The term of office of county judges shall be four years. County judge appointments shall be made pursuant to section 20 of article VI of the state constitution. This section shall not apply to the city and county of Denver, and the term of office and manner of selection of county judges therein shall be determined by the charter and ordinances thereof.

**Source:** L. 64: p. 413, § 11. C.R.S. 1963: § 37-14-5. L. 72: p. 592, § 62.

**13-6-206. Vacancies.** If the office of a county judge, except in the city and county of Denver, becomes vacant because of death, resignation, failure to be retained in office pursuant to section 25 of article VI of the state constitution, or other cause, the governor, as provided in section 20 of article VI of the state constitution, shall appoint an individual possessing the qualifications specified in section 13-6-203.

**Source:** L. 64: p. 413, § 12. C.R.S. 1963: § 37-14-6. L. 67: p. 457, § 10.

#### ANNOTATION

**Vacancy exists if newly elected judge dies before possessing office.** People v. Boughton, 5

Colo. 487 (1880) (decided under repealed laws antecedent to CSA, C. 46, § 122).

#### **13-6-207. Bond. (Repealed)**

**Source:** L. 64: p. 413, § 13. C.R.S. 1963: § 37-14-7. L. 69: p. 250, § 11. L. 79: Entire section repealed, p. 602, § 30, effective July 1.

**13-6-208. Special associate, associate, and assistant county judges.** (1) In order to provide for the expeditious handling of county court business and for county court sessions in population centers which are not county seats, there may be created in counties designated by law the positions of special associate county judge, associate county judge, and assistant county judge.

(2) Special associate, associate, and assistant county judges, when so provided by law, except in the city and county of Denver, shall be elected or appointed at the same time, in the same manner, and for the same term, and shall possess the same qualifications, as the county judges of their respective counties. Vacancies in positions for special associate, associate, and assistant county judges shall be filled in the same manner as a vacancy in the office of county judge.

(3) The location of the official residence and court chambers for the purpose of holding court of special associate, associate, and assistant county judges shall be as prescribed by law. Travel and maintenance expenses shall be allowed special associate, associate, and assistant county judges only when they are performing official duties outside of their official places of residence.

(4) Special associate, associate, and assistant county judges when actually performing judicial duties shall have all the jurisdiction and power of a county judge, and their orders and judgments shall be those of the county court.

(5) Repealed.

(6) Special associate, associate, and assistant county judges in counties of Classes B, C, and D, if admitted to the bar, may engage in the private practice of law in courts other than the county court and in matters which have not and will not come before the county court, and may serve as municipal judges.

**Source:** L. 64: p. 414, § 14. C.R.S. 1963: § 37-14-8. L. 67: p. 457, § 11. L. 71: p. 370, § 1. L. 80: (5) repealed, p. 578, § 8, effective July 1.

## ANNOTATION

**This statute does not purport to create a new court.** Rather, it creates two new judicial positions, namely, that of associate county judge and assistant county judge. *Sanders v. District Court*, 166 Colo. 455, 444 P.2d 645 (1968).

**The only difference between an associate or assistant county judge and a county judge** relates to the emoluments which go with the respective judicial offices. *Sanders v. District Court*, 166 Colo. 455, 444 P.2d 645 (1968).

**The jurisdiction and power of an associate or an assistant county judge is coequal** with that of a full-fledged county judge. *Sanders v. District Court*, 166 Colo. 455, 444 P.2d 645 (1968).

**Associate and assistant judges are part-time.** Though the statute is silent on the matter, the general assembly must have intended that an associate county judge would perform, volumewise at least, about one-half the amount of work customarily performed by the county

judge and the assistant county judge about one-fourth. Associate and assistant county judges are "part-time" — not "full-time" — county judges, even though under the statute they have all of the jurisdiction and power of a county judge. *Sanders v. District Court*, 166 Colo. 455, 444 P.2d 645 (1968).

**Judge may sit in population centers other than the county seat.** One purpose of the statute creating associate county judges is to locate judicial officers with the power and jurisdiction of a county judge in population centers which are not county seats. This is not special or local legislation of the type prohibited by our constitution, which prohibitions relate essentially to the organization, jurisdiction and practice of and in a given court, and not to the number or titles of judicial officers, who are authorized to preside in a particular court. *Sanders v. District Court*, 166 Colo. 455, 444 P.2d 645 (1968).

### 13-6-209. Special associate and associate county judges - designated counties.

(1) In the county of Montrose there shall be an associate county judge who shall maintain his or her official residence in Montrose county and court chambers in that portion of Montrose county that is included in the southwestern water conservation district as set forth and described in section 37-47-103, C.R.S.

(2) In the county of Garfield there shall be a special associate county judge who shall maintain his official residence and court chambers in the city of Rifle.

(3) In the county of Rio Blanco there shall be an associate county judge who shall maintain his official residence and court chambers in the city of Rangely.

(4) Repealed.

**Source:** L. 64: p. 414, § 15. C.R.S. 1963: § 37-14-9. L. 67: p. 485, § 2. L. 71: p. 371, § 2. L. 75: (4) repealed, p. 564, § 3, effective January 1, 1979. L. 2012: (1) amended, (HB 12-1323), ch. 105, p. 358, § 1, effective April 13.

## ANNOTATION

**Section is constitutional.** Subsection (2) of this section does not violate § 25 of art. V, or § 19 of art. VI, Colo. Const., for there is no dispute that the general assembly has the power

to determine the number of judges in each district. *Sanders v. District Court*, 166 Colo. 455, 444 P.2d 645 (1968).

### 13-6-210. Assistant county judges - designated counties. (Repealed)

**Source:** L. 64: p. 415, § 16. L. 65: p. 477, §§ 1, 2. C.R.S. 1963: § 37-14-10. L. 67: p. 304, § 1. L. 69: p. 263, § 1. L. 72: p. 592, § 63. L. 77: (1) repealed, p. 785, § 2, effective July 1. L. 79: (3) amended, p. 607, § 1, effective May 18. L. 90: (2) repealed, p. 861, § 1, effective March 22. L. 92: (3) repealed, p. 275, § 3, effective February 12.

**13-6-211. Appointment of clerk.** (1) (a) The position of clerk of the county court is established in counties of Classes A, B, C, and D, except as otherwise provided in this section and in section 13-3-107.

(b) In counties of Class A, the appointment of the clerk shall be made and his salary fixed as prescribed in the charter and ordinances of such county.



(c) In counties of Classes B, C, and D, the appointment and salary of the clerk shall be in accordance with the provisions of section 13-3-105.

(2) In such counties as may be determined by the chief justice, the functions of the office of the clerk of the county court may be performed by a consolidated office serving both the district and county courts, as provided in section 13-3-107.

(3) In any county in which there is no clerk of the county court provided pursuant to the provisions of section 13-3-105, the judge of the county court shall act as ex officio clerk without further compensation and have all the duties and powers of the clerk.

**Source:** L. 64: p. 416, § 20. C.R.S. 1963: § 37-14-14. L. 69: p. 251, § 14. L. 79: (2) amended, p. 599, § 17, effective July 1.

#### ANNOTATION

**Annotator's note.** Since § 13-6-211 is similar to repealed laws antecedent to CSA, C. 46, § 191, relevant cases construing those provisions have been included in the annotations to this section.

**A county judge may elect to perform the duties of clerk of his court** and when he does so elect is authorized to issue and sign all processes from his court. But when a clerk has been appointed by a county judge, so long as the appointment is not revoked, the clerk or his

deputy alone has power to discharge the clerical duties of the office, and a summons issued and signed by the judge is void notwithstanding the disqualification of the clerk to act on account of absence or sickness. *McNevins v. McNevins*, 28 Colo. 245, 64 P. 199 (1901).

**A clerk may also be probation officer.** There is no statutory inhibition against one person holding the offices of clerk of the county court and probation officer. *Bd. of County Comm'rs v. Wharton*, 82 Colo. 466, 261 P. 4 (1927).

**13-6-212. Duties of clerk.** (1) The powers and duties of the clerk of the county court shall be similar to the powers and duties of the clerk of the district court exclusive of the powers of the district court clerk in probate and shall include such duties as may be assigned to him by law, by court rules, and by the county judge.

(2) Upon approval by the chief justice of the supreme court, the chief judge of a judicial district may authorize, either generally or in specific cases, the clerk of the county court to do the following:

(a) Issue bench warrants, misdemeanor or felony warrants, and writs of restitution upon written or oral order of a judge;

(b) Advise defendants in criminal cases of their procedural and constitutional rights;

(c) Accept pleas of not guilty in all criminal cases and set dates for hearings or trials in such cases;

(d) Subject to the requirements of the Colorado rules of civil procedure, enter default and default judgments and issue process for the enforcement of said judgments;

(e) Under the direction of a judge, grant continuances, set motions for hearing, and set cases for trial; and

(f) With the consent of the defendant, accept pleas of guilty and admissions of liability and impose penalties pursuant to a schedule approved by the presiding judge in misdemeanor cases involving violations of wildlife and parks and outdoor recreation laws for which the maximum penalty in each case is a fine of not more than one thousand dollars, and in misdemeanor traffic and traffic infraction cases involving the regulation of vehicles and traffic for which the penalty specified in section 42-4-1701, C.R.S., or elsewhere in articles 2 to 4 of title 42, C.R.S., in each case is less than three hundred dollars. A clerk shall not levy a fine of over said amounts nor sentence any person to jail. If, in the judgment of the clerk, a fine of over said amounts or a jail sentence is justified, the case shall be certified to the judge of the county court for rearraignment and trial de novo.

**Source:** L. 64: p. 417, § 21. C.R.S. 1963: § 37-14-15. L. 79: Entire section amended, p. 608, § 1, effective April 25. L. 83: (2)(f) amended, p. 602, § 1, effective July 1. L. 84: (2)(f) amended, p. 921, § 7, effective January 1, 1985. L. 94: (2)(f) amended, p. 2549, § 30, effective January 1, 1995.

**Cross references:** For court clerk's duties, see article 1 of this title and § 13-5-125; for law enforcement and penalties relating to wildlife and parks and outdoor recreation, see articles 6 and 15 of title 33.

**13-6-213. Bond of clerk. (Repealed)**

**Source:** L. 64: p. 417, § 22. C.R.S. 1963: § 37-14-16. L. 69: p. 251, § 15. L. 79: Entire section repealed, p. 602, § 30, effective July 1.

**13-6-214. Other employees.** (1) In counties of Class A, such deputy clerks, assistants, reporters, stenographers, and bailiffs as shall be necessary for the transaction of the business of the county court may be appointed and their compensation fixed in the manner provided in the charter and ordinances thereof.

(2) In counties of Classes B, C, and D, there shall be appointed such deputy clerks, assistants, reporters, stenographers, and bailiffs as are necessary, in accordance with the provisions of section 13-3-105.

**Source:** L. 64: p. 417, § 23. C.R.S. 1963: § 37-14-17. L. 69: p. 252, § 16.

**13-6-215. Presiding judges.** In each county court which has more than one county judge, the court, by rule, shall provide for the designation of a presiding judge. If there is a failure to select a presiding judge by rule, the chief justice shall designate a presiding judge.

**Source:** L. 64: p. 418, § 24. C.R.S. 1963: § 37-14-18. L. 79: Entire section amended, p. 599, § 18, effective July 1.

**13-6-216. Judges to sit separately.** In each county court which has more than one county judge, each judge shall sit separately for the trial of cases and the transaction of judicial business, and each court so held shall be known as the county court of the county wherein held. Each judge shall have all of the powers which he might have if he were the sole judge of the court, including the power to vacate his own judgments, decrees, or orders, or those of a predecessor when permitted by law, but not county court orders of another judge of the same county court who is still in office.

**Source:** L. 64: p. 418, § 25. C.R.S. 1963: § 37-14-19.

**13-6-217. Judges may sit en banc.** In each county court which has more than one judge, the court may sit en banc for the purpose of making rules of court, the appointment of a clerk and other employees, pursuant to section 13-3-105, and the conduct of other business relating to the administration of the court, as authorized by and subject to the approval of the chief justice of the supreme court.

**Source:** L. 64: p. 418, § 26. C.R.S. 1963: § 37-14-20. L. 67: p. 458, § 14. L. 69: p. 252, § 17.

**13-6-218. Assignment of county judges and retired county judges to other courts authorized.** Any county judge or retired county judge who has been licensed to practice law in this state for five years may be assigned by the chief justice of the supreme court, pursuant to section 5 (3) of article VI of the state constitution, to perform judicial duties in any district court, the probate court of the city and county of Denver, or the juvenile court of the city and county of Denver.

**Source:** L. 67: p. 458, § 15. C.R.S. 1963: § 37-14-21. L. 85: Entire section amended, p. 570, § 4, effective November 14, 1986.



## ANNOTATION

**Chief justice of supreme court can properly delegate appointment powers to another judicial officer, and appointments by chief district judges are not limited to specific cases.** There is no statutory basis for requiring the chief justice of the supreme court to personally make each temporary appointment. Further-

more, reading the statute to preclude delegation would bring it into conflict with art. VI, § 5(4), the constitutional provision expressly allowing the chief justice to delegate administrative powers. *People v. McCulloch*, 198 P.3d 1264 (Colo. App. 2008).

**13-6-219. Judge as party to a case - recusal of judge upon motion.** (1) If a judge or former judge of a county court is a party in his or her individual and private capacity in a case that is to be tried within any county court in the same judicial district in which the judge or former judge is or was a judge of a county court, any party to the case may file a timely motion requesting that the judge who is appointed to preside over the case recuse himself or herself from the case.

(2) If a county court receives a motion filed by a party pursuant to subsection (1) of this section, the judge who is appointed to preside over the case shall recuse himself or herself if he or she is a judge of a county court in the same judicial district in which the judge or former judge who is a party to the case in his or her individual and private capacity is or was a judge of a county court.

(3) If a judge recuses himself or herself pursuant to subsection (2) of this section, the chief justice of the Colorado supreme court or his or her designee shall appoint a judge from outside the judicial district to preside over the case.

**Source: L. 2008:** Entire section added, p. 436, § 2, effective August 5.

## PART 3

## GENERAL PROCEDURAL PROVISIONS

**13-6-301. Court rules.** Each county court possesses the power to make rules for the conduct of its business to the extent that such rules are not in conflict with the rules of the supreme court or the laws of the state, but are supplementary thereto. In each county court which has more than one judge, or has an associate judge sitting regularly, the court shall make such rules as it deems necessary for the classification, arrangement, and distribution of the business of the court among the several judges thereof. All county court rules are subject to review by the supreme court.

**Source: L. 64:** p. 418, § 27. **C.R.S. 1963:** § 37-15-1.

**13-6-302. Terms of court.** Terms of the county court shall be fixed by rule of the court in each county; except that at least one term shall be held in each county in each year.

**Source: L. 64:** p. 419, § 28. **C.R.S. 1963:** § 37-15-2.

**13-6-303. Place of holding court.** In each county, the county court shall sit at the county seat, and the county court by rule or order also may provide for hearing and trials to be held in locations other than the county seat. In particular, if the corporate limits of a municipality extend into two counties, the county court of either county, for the hearing of matters for which venue is properly laid before them or the requirements thereof are waived, may sit at any place within such municipality without regard to the location of the county line. Where the county court sits regularly at locations other than the county seat, proper venue within the county shall be fixed by court rule.

**Source: L. 64:** p. 419, § 29. **C.R.S. 1963:** § 37-15-3.

**13-6-304. Court facilities.** The county commissioners shall provide court facilities at the county seat and are authorized to do so elsewhere. Such facilities may be provided by arrangement with municipal authorities, by rental, or by other appropriate means.

**Source:** L. 64: p. 419, § 30. C.R.S. 1963: § 37-15-4.

#### ANNOTATION

**A county's duties under this section may not be reduced or ended pursuant to art. X, § 20(9) of the state constitution.** State v. Bd. of

County Comm'rs, Mesa County, 897 P.2d 788 (Colo. 1995).

**13-6-305. Maintenance of records.** (1) Permanent records of the county court shall be maintained at the office of the clerk of the court at the county seat.

(2) (a) If the county court sits regularly at a location other than the county seat, and the court so provides by rule, cases may be docketed at such locations, and thereafter all pleadings, writs, judgments, and other documents in the case shall be filed at such other location.

(b) Repealed.

(c) In criminal cases, a single copy of items filed is sufficient. A notice of docketing of criminal cases with sufficient information to identify the defendant and the offense charged shall be forwarded forthwith to the clerk of the court at the county seat. After termination of the case, all records on file and a transcript of the judgment shall be forwarded to the county seat.

**Source:** L. 64: p. 419, § 31. C.R.S. 1963: § 37-15-5. L. 79: (2)(b) repealed, p. 602, § 30, effective July 1.

**13-6-306. Seal.** The county court of each county shall have an appropriate seal.

**Source:** L. 64: p. 420, § 32. C.R.S. 1963: § 37-15-6.

**13-6-307. Process.** (1) Each county court shall have the power to issue process necessary to acquire jurisdiction, to require attendance, and to enforce all orders, decrees, and judgments. Such process runs to any county within the state and, when authorized by the Colorado rules of civil procedure, may be served outside the state. Any sheriff to whom process is directed is authorized and required to execute the same, and he is entitled to the same fees as are allowed for serving like process from the district courts. Persons other than the sheriff or his deputies may also serve process from the county court when permitted by the Colorado rules of civil procedure or by law.

(2) Upon request of the court, the prosecuting county, or the defendant, the clerk of the county court shall issue a subpoena for the appearance, at any and all stages of the court's proceedings, of the parent, guardian, or lawful custodian of any child under eighteen years of age who is charged with the violation of a county ordinance. Whenever a person who is issued a subpoena pursuant to this subsection (2) fails, without good cause, to appear, the court may issue an order for the person to show cause to the court as to why the person should not be held in contempt. Following a show cause hearing, the court may make findings of fact and conclusions of law and may enter an appropriate order, which may include finding the person in contempt.

**Source:** L. 64: p. 420, § 33. C.R.S. 1963: § 37-15-7. L. 94: Entire section amended, p. 908, § 1, effective April 28.

**Cross references:** For persons authorized to serve process, see C.R.C.P. 4(d); for personal and other service of process outside the state, see C.R.C.P. 4(e) and (g).



**13-6-308. Juries.** (1) When required, juries shall be selected and summoned as provided for courts of record in articles 71 to 74 of this title, with such exceptions as are provided in this section. With the consent of the district court and the jury commissioners, the county court may, if feasible, use the same panel of jurors summoned for the district court. Jurors selected and summoned for the county court may also be used in municipal court in counties of Class A, as defined in section 13-6-201.

(2) If a county court sits regularly in a location other than the county seat and if jury trials are held at that location as well as at the county seat, the jury commissioner may establish jury districts within the county for the selection of county court jurors. The county shall be divided into as many such districts as there are locations in which the county court regularly holds jury trials, and each district shall include one such location as well as appropriate contiguous territory. In counties so divided, the jury commissioner shall select separate lists of persons from each jury district to serve as county court jurors within their respective districts. Such lists shall contain not less than one hundred names. When jurors are to be summoned for county court service within such districts, names shall be drawn from the list by the jury commissioner. In all other respects, the provisions of articles 71 to 74 of this title shall be followed in selecting, drawing, and summoning jurors in counties divided into county court jury districts.

**Source:** L. 64: p. 420, § 34. C.R.S. 1963: § 37-15-8. L. 71: p. 875, § 2. L. 81: (2) amended, p. 881, § 1, effective April 24. L. 2001: Entire section amended, p. 1269, § 15, effective June 5.

**13-6-309. Verbatim record of proceedings.** A verbatim record of the proceedings and evidence at trials in the county court shall be maintained by electronic devices or by stenographic means, as the judge of the court may direct, except when such record may be unnecessary in certain proceedings pursuant to specific provisions of law.

**Source:** L. 64: p. 421, § 35. C.R.S. 1963: § 37-15-9. L. 79: Entire section amended, p. 600, § 19, effective July 1.

#### ANNOTATION

**Judge's discretion to employ court reporters** instead of electronic recording devices is subject to availability of funds in judicial department's consolidated operating budget and ap-

proval of chief justice acting as executive head of judicial system. Yeager v. Quinn, 767 P.2d 766 (Colo. App. 1988).

**13-6-309.5. Traffic violations bureau - schedule of traffic offenses and fines or penalties - method of payment - effect of payment. (Repealed)**

**Source:** L. 77: Entire section added, p. 787, § 1, effective January 10, 1978. L. 91: Entire section repealed, p. 1404, § 2, effective July 1.

**13-6-310. Appeals from county court.** (1) Appeals from final judgments and decrees of the county courts shall be taken to the district court for the judicial district in which the county court entering such judgment is located. Appeals shall be based upon the record made in the county court.

(2) The district court shall review the case on the record on appeal and affirm, reverse, remand, or modify the judgment; except that the district court, in its discretion, may remand the case for a new trial with such instructions as it may deem necessary, or it may direct that the case be tried de novo before the district court.

(3) Repealed.

(4) Further appeal to the supreme court from a determination of the district court in a matter appealed to such court from the county court may be made only upon writ of certiorari issued in the discretion of the supreme court and pursuant to such rules as that court may promulgate.

**Source:** L. 64: p. 421, § 36. C.R.S. 1963: § 37-15-10. L. 85: (3) repealed and (4) amended, pp. 572, 570, §§ 12, 5, effective November 14, 1986.

**Cross references:** For review on certiorari from a county court as authorized by this section, see C.A.R. 49.

## ANNOTATION

- I. General Consideration.
- II. Statutory Right of Appeal.
- III. Action of the District Court.
- IV. Appeals to Supreme Court.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Criminal Law", see 32 Dicta 409 (1955). For article, "One Year Review of Contracts", see 39 Dicta 161 (1962). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963).

**Annotator's note.** Since § 13-6-310 is similar to repealed § 37-15-101, C.R.S. 1963, § 37-6-101, CRS 53, CSA, C. 46, § 165, and laws antecedent thereto, relevant cases construing those sections have been included in the annotations to this section.

**Although § 13-4-110 (3) provides that cases filed in wrong appellate court shall not be dismissed**, where appeal will not lie in either court, the only review being by certiorari, the case must be dismissed for failure to comply with the statutory procedure. *People v. Meyers*, 43 Colo. App. 63, 598 P.2d 526 (1979).

**Applied** in *Chavez v. People*, 193 Colo. 50, 561 P.2d 1270 (1977); *People v. Gonzales*, 198 Colo. 546, 603 P.2d 139 (1979); *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980); *Garcia v. People*, 200 Colo. 413, 615 P.2d 698 (1980); *People v. Luna*, 648 P.2d 624 (Colo. 1982).

### II. STATUTORY RIGHT OF APPEAL.

**This section gives a statutory right of appeal.** There is no constitutional right to an appeal from the county court to the district court; such right exists only when the general assembly has expressly or by clear implication declared in its favor. *Callahan v. Jennings*, 16 Colo. 471, 27 P. 1055 (1891); *Shapter v. Arapahoe County Court*, 13 Colo. App. 484, 59 P. 59 (1892); *Andrews v. Lull*, 139 Colo. 536, 341 P.2d 475 (1959).

**This section provides that appeals from county courts shall be taken to the district courts.** This is a statute general in nature. *Russell v. Wheeler*, 159 Colo. 588, 413 P.2d 700 (1966).

**Appeals of final judgments.** This statute provides that appeals from final judgments and decrees of the county court "shall be" taken to

the district court. *People ex rel. City of Aurora v. Smith*, 162 Colo. 72, 424 P.2d 772 (1967).

**An order vacating a previous order setting aside a judgment is not a final judgment from which an appeal will lie.** *Hayhurst v. Hayhurst*, 91 Colo. 58, 11 P.2d 804 (1932).

**This section applies only to ordinary civil actions.** *Andrews v. Lull*, 139 Colo. 536, 341 P.2d 475 (1959).

**Therefore, no appellate jurisdiction exists in district court in special statutory proceedings.** The appellate jurisdiction of district courts from final judgments of county courts applies only to judgments rendered in ordinary civil actions. No such jurisdiction exists in special statutory proceedings. *Bd. of Comm'rs v. Poundstone*, 74 Colo. 191, 220 P. 234 (1923); *Selk v. Ramsey*, 110 Colo. 223, 132 P.2d 454 (1942); *Andrews v. Lull*, 139 Colo. 536, 341 P.2d 475 (1959); *Council of City of Englewood v. Nat'l Tea Co.*, 147 Colo. 96, 362 P.2d 1048 (1961).

**The section does not except from its operation those cases which are commenced in the municipal court and thereafter appealed to the county court.** Appeal from all final judgments of the county court is now to be made to the district court. *People ex rel. City of Aurora v. Smith*, 162 Colo. 72, 424 P.2d 772 (1967); *People v. Anderson*, 177 Colo. 84, 492 P.2d 844 (1972).

**Allowance of appeal from judgment by default.** An appeal is allowable from the county court to the district court from a judgment by default on two conditions: First, that the party aggrieved make application to have the judgment by default set aside within 10 days after its rendition; and, second, that the appeal be taken within 10 days, or the time allowed by the court, after the refusal of the court to set aside the default. *Johnson v. Lawson*, 9 Colo. App. 128, 50 P. 1087 (1897); *County Court v. Eagle Rock Gold Mining & Reduction Co.*, 50 Colo. 365, 115 P. 706 (1911).

**Appeal from part of judgment permissible.** Where a personal judgment was rendered in the county court against the lessees of a mining claim which was declared to be a lien against the mine, the owners of the mine could appeal to the district court from that part of the judgment declaring the lien without appealing from the entire judgment and without making the defendants, against whom personal judgment was rendered, parties to the appeal. *Davidson v. Jennings*, 27 Colo. 187, 60 P. 354 (1900).



**Objection to jurisdiction of district court on appeal may be waived.** Plaintiff was nonsuited in the county court, and, without making a motion to set aside the nonsuit according to this section, he appealed to the district court. The defendant's motion to dismiss the appeal being there denied, he appeared as though there were no irregularities in the proceedings, and, without taking an exception to the ruling, renewing his objection or standing upon his motion, introduced witnesses, etc. It was held that he waived objection to the jurisdiction of the district court. *Norton v. Young*, 6 Colo. App. 187, 40 P. 156 (1895).

### III. ACTION OF THE DISTRICT COURT.

**Under the statute, the district court, upon appeal of the case to it, has three threshold alternatives:** (1) It may review the case on the record; (2) it may remand the case for a new trial with instructions to the court from which appealed, or (3) it may direct that the case be tried de novo before it. *People v. Williams*, 172 Colo. 434, 473 P.2d 982 (1970).

**The general assembly, having provided for both review on the record and for trial de novo**, recognized the historical differences between the two both procedurally and in substance, so it is incumbent on the courts to make the same differentiation in carrying out their functions under the statute. *People v. Williams*, 172 Colo. 434, 473 P.2d 982 (1970).

**A trial de novo conducted by the district court is not a review of the county court judgment;** it is an entirely new proceeding. *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

**A trial de novo in a court of general jurisdiction**, in the absence of statutory language restricting its scope, means a trial in the commonly accepted sense of that term in such court. Any court conducting such a trial may make its own findings and judgment. *People v. Williams*, 172 Colo. 434, 473 P.2d 982 (1970).

**The district court would have the power to make new and independent findings of fact** if it were acting as a trial court. The statute provides a procedure whereby the district court can act as a trial court rather than as a court of review, if it directs the case be tried de novo before it. *People v. Williams*, 172 Colo. 434, 473 P.2d 982 (1970).

**Only in cases tried de novo by the district court will the district court judgment be subject to direct appeal.** Justifiably, then, the defendant may seek direct appeal when the district court enters its judgment from a de novo trial. *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

**The final judgment of the district court, following a trial de novo, thus, is subject to review by the court of appeals under both**

**§ 13-4-102 and this section.** *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

**Where the district court does not direct that the case be tried de novo before the district court**, as it might do pursuant to subsection (2), the appeal is limited to review of the record on appeal and a consideration of the accompanying briefs and arguments. *People v. Brown*, 174 Colo. 513, 485 P.2d 500 (1971).

**It is bound by the findings of the trial court.** The district court is reviewing the record on appeal from the county court and is bound by the findings of the trial court which have been determined on disputed evidence. *People v. Brown*, 174 Colo. 513, 485 P.2d 500 (1971).

**The function of the reviewing court is to correct any errors of law committed by the trial court** and not to try, nor retry, issues of fact. The lack of sufficient competent evidence to support a finding of a material fact, however, would be a matter of law and fall within the court's powers on review. *People v. Williams*, 172 Colo. 434, 473 P.2d 982 (1970).

**It cannot act as a fact finder.** Where the district court is exercising its powers of review rather than conducting a trial de novo, it cannot act as a fact finder. *People v. Williams*, 172 Colo. 434, 473 P.2d 982 (1970).

**Proper appeal from district court action is by writ of certiorari to the supreme court**, and not by appeal to the court of appeals. *Gallagher v. Ingram*, 32 P.3d 50 (Colo. App. 2001).

### IV. APPEALS TO SUPREME COURT.

**Certiorari review does not suffice as an appellate review from a final judgment of the district court.** *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

**Subsequent appeal to the supreme court only on certiorari.** Appeal to the supreme court from a determination of the district court in a matter appealed to such court from the county court may be made only on a writ of certiorari issued in the discretion of the supreme court. *People ex rel. City of Aurora v. Smith*, 162 Colo. 72, 424 P.2d 772 (1967); *People ex rel. Union Trust Co. v. Superior Court*, 175 Colo. 391, 488 P.2d 66 (1971).

**It must be distinguished from constitutional certiorari.** The writ of certiorari mentioned in § 3 of art. VI, Colo. Const., is to be distinguished from, and not to be confused with, the statutory writ of certiorari provided for in this section. *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

**"Further appeal" not limited to review of affirmances.** The legislative authorization for "further appeal" is not limited to cases where the superior court's determination would otherwise end the matter, as in an affirmance of the trial court's judgment. *People v. Dee*, 638 P.2d 749 (Colo. 1981).

**Review of superior court's reversal permitted.** The state supreme court may review by certiorari a superior court's reversal of a county court judgment. *People v. Dee*, 638 P.2d 749 (Colo. 1981) (decided prior to abolition of superior courts in 1986).

**For the supreme court granting certiorari,** see *Eyrich v. People*, 161 Colo. 554, 423 P.2d 582 (1967).

**Applied in** *Lucero v. Goldberger*, 804 P.2d 206 (Colo. App. 1990); *Byrd v. People*, 58 P.3d 50 (Colo. 2002).

**13-6-311. Appeals from county court - simplified procedure.** (1) (a) If either party in a civil action believes that the judgment of the county court is in error, he or she may appeal to the district court by filing notice of appeal in the county court within twenty-one days after the date of entry of judgment and by filing within the said twenty-one days an appeal bond with the clerk of the county court. The bond shall be furnished by a corporate surety authorized and licensed to do business in this state as surety, or one or more sufficient private sureties, or may be a cash deposit by the appellant and, if the appeal is taken by the plaintiff, shall be conditioned to pay the costs of the appeal and the counterclaim, if any, and, if the appeal is taken by the defendant, shall be conditioned to pay the costs and judgment if the appealing party fails. The bond shall be approved by the judge or the clerk.

(b) Upon filing of the notice of appeal, the posting and approval of the bond, and the deposit by the appellant of an estimated fee in advance for preparing the record, the county court shall discontinue all further proceedings and recall any execution issued. The appellant shall then docket his or her appeal in the district court. A motion for new trial is not required as a condition of appeal. If a motion for new trial is made within twenty-one days, the time for appeal shall be extended until twenty-one days after disposition of the motion, but only matters raised on the motion for new trial shall be considered on an appeal thereafter.

(2) (a) Upon the deposit of the estimated record fee, the clerk of the court shall prepare and issue as soon as possible a record of the proceedings in the county court, including the summons, the complaint, proof of service, and the judgment. The record shall also include a transcription of such part of the actual evidence and other proceedings as the parties may designate or, in lieu of transcription, to which they may stipulate. If a stenographic record has been maintained or the parties agree to stipulate, the party appealing shall lodge with the clerk of the court the reporter's transcript of the designated evidence or proceedings or a stipulation covering such items within forty-two days after judgment. If the proceedings have been electrically recorded, the transcription of designated evidence and proceedings shall be prepared in the office of the clerk of the county court, either by him or her or under his or her supervision, within forty-two days after judgment.

(b) The clerk shall notify, in writing, the opposing parties of the completion of the record, and the parties have twenty-one days within which to file objections. If none are received, the record shall be certified forthwith by the judge. If objections are made, the parties shall be called for hearing and the objections settled by the county judge as soon as possible and the record then certified.

(3) When the record has been duly certified and any additional fees therefor paid, it shall be filed with the clerk of the district court by the clerk of the county court, and the opposing parties shall be notified of such filing by the clerk of the county court.

(4) A written brief setting out matters relied upon as constituting error and outlining any arguments to be made shall be filed in the district court by the appellant within twenty-one days after filing of the record therein. A copy of the brief shall be served on the appellee. The appellee may file an answering brief within twenty-one days after such service. In the discretion of the district court, time for filing of briefs and answers may be extended.

(5) Unless there is further review by the supreme court upon writ of certiorari and pursuant to the rules of that court, after final disposition of the appeal by the district court, the judgment on appeal therein shall be certified to the county court for action as directed by the district court, except upon trials de novo held in the district court or in cases in which the judgment is modified, in which cases the judgment shall be that of the district court and enforced therefrom.

(6) Repealed.



**Source:** L. 64: p. 428, § 54. C.R.S. 1963: § 37-16-18. L. 80: (1) and (2)(b) amended, p. 511, § 1, effective April 6. L. 85: (6) repealed, p. 572, § 12, effective November 14, 1986. L. 2012: (1), (2), and (4) amended, (SB 12-175), ch. 208, p. 822, § 3, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1), (2), and (4) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

- I. General Consideration.
- II. Appeal Bond.

### I. GENERAL CONSIDERATION.

**Law reviews.** For comment on *Miller v. Miller*, appearing below, see 31 *Dicta* 160 (1954).

**Annotator's note.** Since § 13-6-311 is similar to repealed § 37-6-11, CRS 53, CSA, C. 46, §§ 167, 168, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**This section is mandatory;** and, although appellant, after the expiration of the prescribed time, docket his appeal by paying his docket fee, the transcript should be remitted to the lower court on appellee's motion, so that the latter might proceed as though no appeal had been taken. *Tierney v. Campbell*, 7 Colo. App. 299, 44 P. 948 (1896); *Thomas v. Beattie*, 42 Colo. 235, 93 P. 1093 (1908).

**Good faith and reasonable promptness are sufficient.** On appeal from county to district court, when appellant has acted in good faith, with reasonable promptness, and no one has suffered, this section ought not to be so strictly construed as to deny the right of appeal. *Markey v. People*, 73 Colo. 466, 216 P. 526 (1923).

**This section requires that after taking an appeal there shall be filed in the district court the record, including original process, pleadings, and other papers relating to the suit, and filed in the county court.** *Miller v. Miller*, 129 Colo. 462, 271 P.2d 411 (1954).

**If appeal is not filed in time, district court lacks jurisdiction.** Where a party does not lodge her appeal in a district court within the time required by this section, the court acquires no jurisdiction in the matter and has no authority to proceed in any manner in that action. *McKelvey v. District Court*, 140 Colo. 557, 345 P.2d 726 (1959).

**A motion to dismiss will be sustained after that time.** Where an appeal from the county to the district court was not made within 10 days after the judgment, and no order extending the time in which to perfect an appeal was obtained, a motion to dismiss it should be sustained. *Grove v. Foutch*, 6 Colo. App. 357, 40 P. 852 (1895); *Slattery v. Robinson*, 7 Colo. App. 22, 42 P. 179 (1895).

**This section provides for the filing of the original process, pleadings, and other papers with the clerk of a district court and for the docketing of the action in that court in appeals.** *Andrews v. Lull*, 139 Colo. 536, 341 P.2d 475 (1959).

**A motion for new trial filed in apt time suspends a judgment so that it becomes final only when the motion is overruled.** *Kinney v. Yoelin Bros. Mercantile Co.*, 74 Colo. 295, 220 P. 998 (1923); *Charles v. Sprott*, 75 Colo. 90, 224 P. 222 (1924), citing *Bates v. Woodward*, 66 Colo. 555, 185 P. 351 (1919).

**Time for docketing.** Subsection (1)(b) and rule 411(a)(1) of the county court rules clearly provide that the docketing must take place no later than the time allowed for completing and lodging the record. *Tumbarello v. Superior Court*, 195 Colo. 83, 575 P.2d 431 (1978).

**Section applies only to civil actions.** Where an information filed against defendant charges him with misdemeanors, the action is not a civil suit; hence is not governed by this section. *Naranjo v. People*, 130 Colo. 236, 274 P.2d 607 (1954).

**Appeal to superior court.** The district court has no jurisdiction to interfere with the appeal process between the county and superior courts. *Petry v. County Court*, 666 P.2d 1125 (Colo. App. 1983) (decided prior to abolition of superior courts in 1986).

**Fact that district court may enforce its order in the event that there is no appeal does not impact the appellate process:** Proper appeal from district court action is by writ of certiorari to the supreme court. *Gallagher v. Ingram*, 32 P.3d 50 (Colo. App. 2001).

### II. APPEAL BOND.

**The essential step in the perfection of an appeal is the filing of a bond;** even though the party had given a notice of appeal, or had in some other manner manifested intent to appeal, the judicial requirement of a bond filed within 10 days would still remain. *Wellmuth v. Rogers*, 25 Colo. App. 386, 138 P. 69 (1914); *Swingle v. Estate of Pollo*, 145 Colo. 591, 360 P.2d 808 (1961).

**The filing of bond is a condition precedent to appeal.** The filing of the bond required by

this section, in the county court, "and its approval by the judge or clerk of said court", is a condition precedent to the appeal, and unless such steps are taken the district court is without jurisdiction. *Fuller v. Fuller's Estate*, 7 Colo. App. 555, 44 P. 72 (1896).

**An appeal is not made until the bond is approved.** This clause requires appeals to the district court to be "made" within 10 days after judgment is rendered. An appeal is not "made" until the appeal bond is approved. *Zimmerman v. Combs*, 91 Colo. 313, 14 P.2d 693 (1932).

**Giving appeal bond is not equivalent to a general appearance in the district court.** This section clearly contemplates that in an appeal from the county to the district court, the appellant, if he has not entered his appearance in the county court, may be heard upon his appeal to object to the form of the summons, or the manner of serving the same, if he made that objection in the county court. Necessarily, therefore, giving of the appeal bond is not equivalent to a general appearance in the district court. *White House Mt. Gold Mining Co. v. Powell*, 30 Colo. 397, 70 P. 679 (1902).

**Section does not prescribe any particular manner or form** in which the appeal bond on appeal from a county court to a district court must be approved. *Stephens v. Wheeler*, 60 Colo. 351, 153 P. 444 (1915); *Zimmerman v. Combs*, 91 Colo. 313, 14 P.2d 693 (1932), citing *Adams v. Decker*, 50 Colo. 326, 114 P. 654 (1911).

**A county court party found to be indigent and allowed to proceed in forma pauperis is not required to post a judgment bond before appealing to district court.** *O'Donnell v. State Farm Mut. Auto. Ins. Co.*, 186 P.3d 46 (Colo. 2008).

**However, as with appeals from the district court to the court of appeals, the prevailing party in the county court would be able to execute the judgment while the appeal is still pending** because the judgment would not have

been stayed by a judgment bond. *O'Donnell v. State Farm Mut. Auto. Ins. Co.*, 186 P.3d 46 (Colo. 2008).

#### **Judgment against sureties on appeal bond.**

On an appeal from the county to the district court from a judgment against the appellant where judgment in the district court is in favor of appellee, the court in entering up an absolute and unconditional judgment against the sureties on the appeal bond does simply what it is required to do by this section. By serving a scire facias upon the sureties they are given an opportunity to show cause why the judgment should not be enforced against them. *Gutheil Suburban Inv. Co. v. Fahey*, 12 Colo. App. 487, 55 P. 946 (1899).

**Bond not containing proper statutory conditions.** Where on appeal from the county court to the district court the appeal bond was conditioned to pay all costs and damages adjudged to the appellee on appeal and to satisfy the judgment appealed from instead of the statutory condition to pay any judgment the district court should render, and the district court rendered a judgment against appellant in a greater amount than that of the county court, the measure of the liability of the sureties on the appeal bond was the original judgment of the county court with interest and costs. *Barela v. Tootle*, 29 Colo. 52, 66 P. 899 (1901).

**This section is not to be regarded as providing another mode of commencing civil actions;** it does not provide for introducing a new cause of action into the suit in which the undertaking is given; but the true construction of the section is that by executing the undertaking the sureties are deemed to consent that they shall, under the contingencies specified in the undertaking, be considered parties to the original suit, and liable to judgment for the original cause of action against their principal. *Shannon v. Dodge*, 18 Colo. 164, 32 P. 61 (1893).

**For the sufficiency of the bond,** see *Swingle v. Estate of Pollo*, 145 Colo. 591, 360 P.2d 808 (1961).

## **PART 4**

### **COUNTY COURT - SMALL CLAIMS DIVISION**

**Law reviews:** For article, "Changes to the Statutes and Rules Governing Procedures in Colorado Small Claims Courts", see 31 Colo. Law. 29 (February 2002).

**13-6-401. Legislative declaration.** The general assembly hereby finds and declares that individuals, partnerships, corporations, and associations frequently do not pursue meritorious small civil claims because of the disproportion between the expense and time of counsel and litigation and the amount of money or property involved; that the law and procedures of civil litigation are technical and frequently unknown to persons who are representing themselves; that procedures for the inexpensive, speedy, and informal resolution of small claims in a forum where the rules of substantive law apply, but the rules of procedure and pleading and the technical rules of evidence do not apply, are desirable; that such procedures should be conducted at times convenient to the persons using them, including evening and Saturday sessions; that the personnel implementing and conducting



such procedures should be trained and equipped to assist anyone with a small claim in a friendly, efficient, and courteous manner; and that, therefore, the establishment of a small claims division of the county court as provided in this part 4 is in the public interest.

**Source:** L. 76: Entire part added, p. 517, § 1, effective October 1. L. 77: Entire section amended, p. 789, § 1, effective June 19. L. 2001: Entire section amended, p. 1512, § 1, effective September 1.

#### ANNOTATION

**The rules of substantive law apply in small claims actions.** Hamilton v. Thompson, 23 P.3d 114 (Colo. 2001).

**13-6-402. Establishment of small claims division.** There is hereby established in each county court a division designated as the small claims court.

**Source:** L. 76: Entire part added, p. 517, § 1, effective October 1.

**13-6-403. Jurisdiction of small claims court - limitations.** (1) On and after January 1, 1996, the small claims court shall have concurrent original jurisdiction with the county and district courts in all civil actions in which the debt, damage, or value of the personal property claimed by either the plaintiff or the defendant, exclusive of interest and cost, does not exceed seven thousand five hundred dollars, including such civil penalties as may be provided by law. By way of further example, and not limitation, the small claims court shall have jurisdiction to hear and determine actions in tort and assess damages therein not to exceed seven thousand five hundred dollars. The small claims court division shall also have concurrent original jurisdiction with the county and district courts in actions where a party seeks to enforce a restrictive covenant on residential property and the amount required to comply with the covenant does not exceed seven thousand five hundred dollars, exclusive of interest and costs, in actions where a party seeks replevin if the value of the property sought does not exceed seven thousand five hundred dollars, and in actions where a party seeks to enforce a contract by specific performance or to disaffirm, avoid, or rescind a contract and the amount at issue does not exceed seven thousand five hundred dollars.

(2) The small claims court shall have no jurisdiction except that specifically conferred upon it by law. In particular, it shall have no jurisdiction over the following matters:

- (a) Those matters excluded from county court jurisdiction under section 13-6-105 (1);
- (b) Actions involving claims of defamation by libel or slander;
- (c) Actions of forcible entry, forcible detainer, or unlawful detainer;
- (d) and (e) (Deleted by amendment, L. 2001, p. 1512, § 2, effective September 1, 2001.)
- (f) Actions brought or defended on behalf of a class;
- (g) Actions requesting or involving prejudgment remedies;
- (h) Actions involving injunctive relief, except as required to:
  - (I) Enforce restrictive covenants on residential property;
  - (II) Enforce the provisions of section 6-1-702.5, C.R.S.;
  - (III) Accomplish replevin; and
  - (IV) Enter judgments in actions where a party seeks to enforce a contract by specific performance or to disaffirm, avoid, or rescind a contract;
    - (i) Traffic violations and other criminal matters;
    - (j) Awards of body executions.

**Source:** L. 76: Entire part added, p. 518, § 1, effective October 1. L. 81: (1) amended, p. 879, § 2, effective July 1. L. 87: (1) amended, p. 544, § 1, effective July 1. L. 88: (1), (2)(e), and (2)(h) amended, p. 601, § 2, effective July 1. L. 90: (1) amended, p. 849, § 4, effective May 31; (1) amended, p. 855, § 4, effective July 1. L. 95: (1) amended, p. 728,

§ 1, effective January 1, 1996. **L. 2000:** (2)(h) amended, p. 2034, § 3, effective August 2. **L. 2001:** Entire section amended, p. 1512, § 2, effective September 1. **L. 2008:** (2)(h)(II) amended, p. 596, § 5, effective August 5.

**Cross references:** For the legislative declaration contained in the 1990 act amending subsection (1), see section 1 of chapter 100, Session Laws of Colorado 1990.

#### ANNOTATION

**Small claims court actions for monetary damages do not bar on the basis of res judicata subsequent 42 U.S.C. § 1983 claims for**

**equitable relief in federal court.** *Ortiz v. Costilla County Bd. of Comm'rs*, 11 F. Supp.2d 1254 (D. Colo. 1998).

**13-6-404. Clerk of the small claims court.** The clerk of the county court or a deputy designated by said clerk shall act as the clerk of the small claims court. The clerk of the small claims court shall provide such assistance as may be requested by any person regarding the jurisdiction, operations, and procedures of the small claims court; however, the clerk shall not engage in the practice of law. All necessary forms shall be available from the clerk.

**Source:** **L. 76:** Entire part added, p. 518, § 1, effective October 1.

**13-6-405. Magistrate in small claims court.** (1) In the following circumstances, a magistrate may hear and decide claims in a small claims court:

(a) In Class A counties, as defined in section 13-6-201, magistrates for small claims may be appointed by the presiding judge.

(b) In Class B counties, as defined in section 13-6-201, magistrates for small claims may be appointed, pursuant to section 13-3-105, if approved by the chief justice.

(2) A magistrate shall be a qualified attorney-at-law admitted to practice in the state of Colorado or a nonattorney if the nonattorney is serving as a county judge pursuant to section 13-6-203.

(3) While acting as a magistrate for small claims, a magistrate shall have the same powers as a judge.

(3.5) A magistrate shall have the power to solemnize marriages pursuant to the procedures in section 14-2-109, C.R.S.

(4) If any party files a timely written objection, pursuant to rule of the supreme court, with the magistrate conducting the hearing, that party's case shall be rereferred to a judge.

**Source:** **L. 76:** Entire part added, p. 518, § 1, effective October 1. **L. 84:** (2) amended, p. 459, § 1, effective April 5. **L. 89:** (3.5) added, p. 782, § 4, effective April 4. **L. 91:** Entire section amended, p. 356, § 10, effective April 9. **L. 2001:** (2) and (4) amended, p. 1513, § 3, effective September 1.

**Cross references:** For magistrates in county courts, see part 5 of this article; for magistrates in district courts, see § 13-5-201.

**13-6-406. Schedule of hearings.** The small claims court shall conduct hearings at such times as the judge or magistrate may determine or as the supreme court may order.

**Source:** **L. 76:** Entire part added, p. 518, § 1, effective October 1. **L. 91:** Entire section amended, p. 356, § 11, effective April 9.

**13-6-407. Parties - representation.** (1) Any natural person, corporation, partnership, association, or other organization may commence or defend an action in the small claims court, but no assignee or other person not a real party to the transaction which is the subject



of the action may commence an action therein, except as a court-appointed personal representative, conservator, or guardian of the real party in interest.

(2) (a) (I) Notwithstanding the provisions of article 5 of title 12, C.R.S., in the small claims court, an individual shall represent himself or herself; a partnership shall be represented by an active general partner or an authorized full-time employee; a union shall be represented by an authorized active union member or full-time employee; a for-profit corporation shall be represented by one of its full-time officers or full-time employees; an association shall be represented by one of its active members or by a full-time employee of the association; and any other kind of organization or entity shall be represented by one of its active members or full-time employees or, in the case of a nonprofit corporation, a duly elected nonattorney officer or an employee.

(II) It is the intent of this section that no attorney, except pro se or as an authorized full-time employee or active general partner of a partnership, an authorized active member or full-time employee of a union, a full-time officer or full-time employee of a for-profit corporation, or a full-time employee or active member of an association, which partnership, union, corporation, or association is a party, shall appear or take any part in the filing or prosecution or defense of any matter in the small claims court, except as permitted by supreme court rule.

(b) In actions arising under part 1 of article 12 of title 38, C.R.S., including, but not limited to, actions involving claims for the recovery of a security deposit or for damage to property arising from a landlord-tenant relationship, a property manager who has received security deposits, rents, or both, or who has signed a lease agreement on behalf of the owner of the real property that is the subject of the small claims action, shall be permitted to represent the owner of the property in such action.

(3) In any action to which the federal "Soldiers' and Sailors' Civil Relief Act of 1940", as amended, 50 App. U.S.C. sec. 521, is applicable, the court may enter a default against a defendant who is in the military without entering judgment, and the court shall appoint an attorney to represent the interests of the defendant prior to the entry of judgment against the defendant.

(4) If an attorney appears, as permitted in subsection (2) or (3) of this section, the other party or parties in the case may be represented by counsel, if such party or parties so choose.

(5) Nothing contained in this section is intended to limit or otherwise interfere with a party's right to assign, or to employ counsel to pursue that party's rights and remedies subsequent to the entry of judgment by a small claims court.

(6) Any small claims court action in which an attorney appears shall be processed and tried pursuant to the statutes and court rules governing small claims court actions.

**Source:** L. 76: Entire part added, p. 519, § 1, effective October 1. L. 88: (2) amended, pp. 602, 1438, §§ 3, 43, effective July 1. L. 2001: Entire section amended, p. 1514, § 4, effective September 1. L. 2007: (3) amended, p. 2024, § 23, effective June 1.

**Cross references:** For representation of closely held corporations before courts or administrative agencies, see § 13-1-127.

#### ANNOTATION

**Law reviews.** For article, "What Is a Lawyer Doing in Small Claims Court?", see 13 Colo. Law. 430 (1984).

**This section contains the only exception to the principle that a partnership is an entity**

**separate and apart from its general partners and may be represented in court only by a licensed attorney.** E & A Assoc. v. First Nat. Bank of Denver, 899 P.2d 243 (Colo. App. 1994).

**13-6-408. Counterclaims exceeding jurisdiction of small claims court - procedures - sanctions for improper assertion.** Counterclaims exceeding the jurisdiction of the small claims court shall be removed to the county or district court of appropriate jurisdiction pursuant to rule of the supreme court. If a county or district court determines that a plaintiff

who originally filed a claim in the small claims court is entitled to judgment and also that a counterclaim against the same plaintiff in the small claims action was filed solely to defeat the jurisdiction of the small claims court and was without merit, the county or district court may also award the plaintiff costs, including reasonable attorney fees, incurred in prosecuting the action in the county or district court.

**Source:** L. 76: Entire part added, p. 519, § 1, effective October 1. L. 87: Entire section amended, p. 1576, § 14, effective July 10. L. 2001: Entire section amended, p. 1515, § 5, effective September 1.

**13-6-409. Trial procedure.** The judge or magistrate shall conduct the trial in such manner as to do justice between the parties and shall not be bound by formal rules or statutes of procedure or pleading or the technical rules of evidence, except for rules promulgated by the supreme court controlling the conduct of proceedings in the small claims court.

**Source:** L. 76: Entire part added, p. 519, § 1, effective October 1. L. 77: Entire section amended, p. 789, § 2, effective June 19. L. 91: Entire section amended, p. 356, § 12, effective April 9.

**13-6-410. Appeal of a claim.** A record shall be made of all small claims court proceedings, and either the plaintiff or the defendant may appeal pursuant to county court rules. Upon appeal, all provisions of law and rules concerning appeals from the county court shall apply, including right to counsel. A tape recording of the trial proceedings shall satisfy any requirements of a transcript for appeal, upon the payment of a nominal fee by the appellant.

**Source:** L. 76: Entire part added, p. 519, § 1, effective October 1. L. 93: Entire section amended, p. 1775, § 32, effective June 6. L. 2001: Entire section amended, p. 1515, § 6, effective September 1.

**13-6-411. Limitation on number of claims filed.** (1) No plaintiff may file more than two claims per month, eighteen claims per year, in the small claims court of any county. Each claim filed in any small claims court shall contain a certification by the plaintiff that the plaintiff has not filed any more than two claims during that month and eighteen claims in that year in the small claims court of that county.

(2) The limitation imposed by subsection (1) of this section shall not apply to a state-supported institution of higher education which files claims to recover loans or other outstanding obligations due to such institution; except that no such state-supported institution of higher education shall file more than a total of thirty such claims per month in all small claims courts in Colorado.

**Source:** L. 76: Entire part added, p. 520, § 1, effective October 1. L. 81: Entire section amended, p. 880, § 3, effective July 1. L. 83: Entire section amended, p. 792, § 1, effective June 3. L. 87: (1) amended, p. 544, § 2, effective July 1. L. 92: Entire section amended, p. 289, § 1, effective July 1. L. 2001: (1) amended, p. 1515, § 7, effective September 1.

**13-6-411.5. Place of trial.** (1) Except as provided in subsection (2) of this section, all actions in the small claims court shall be brought in the county in which any defendant at the time of filing of the claim resides, is regularly employed, is a student at an institution of higher education, or has an office for the transaction of business.

(2) Actions to enforce restrictive covenants and actions arising under part 1 of article 12 of title 38, C.R.S., including, but not limited to, actions involving claims for the recovery of a security deposit or for damage to property arising from a landlord-tenant relationship,



may be brought in the county in which the defendant's property that is the subject of the action is situated.

(3) If a defendant appears and defends a small claims action on the merits at trial, such defendant shall be deemed to have waived any objection to the place of trial permitted under this section.

**Source:** **L. 90:** Entire section added, p. 850, § 5, effective May 31. **L. 2001:** Entire section amended, p. 1515, § 8, effective September 1.

**Cross references:** For the legislative declaration contained in the 1990 act enacting this section, see section 1 of chapter 100, Session Laws of Colorado 1990.

**13-6-412. Notice to public.** The clerk of the small claims court shall publicize in an appropriate manner the existence of the small claims court, its procedures, and its hours of operation. Such publication shall be made so as to bring the court's existence to the attention of the entire community. The state court administrator shall publish a small claims court handbook outlining the procedures of the court in layman's language.

**Source:** **L. 76:** Entire part added, p. 520, § 1, effective October 1.

**13-6-413. Supreme court shall promulgate rules.** The supreme court shall implement this part 4 by appropriate rules of procedure for the small claims court.

**Source:** **L. 76:** Entire part added, p. 520, § 1, effective October 1.

**13-6-414. No jury trial.** There shall be no right to a trial by jury in the small claims court.

**Source:** **L. 76:** Entire part added, p. 520, § 1, effective October 1.

**13-6-415. Service of process.** Every defendant shall be notified that an action has been filed against that defendant in the small claims court either by certified mail, return receipt requested, or by personal service of process, as provided by the rules of procedure for the small claims court. The clerk of the small claims court shall collect, in advance, the fee provided for in section 13-32-104 (1) (i) for each service of process attempted by certified mail.

**Source:** **L. 76:** Entire part added, p. 520, § 1, effective October 1. **L. 90:** Entire section amended, p. 850, § 7, effective May 31. **L. 2001:** Entire section amended, p. 1516, § 9, effective September 1.

**Cross references:** For the legislative declaration contained in the 1990 act amending this section, see section 1 of chapter 100, Session Laws of Colorado 1990.

**13-6-416. Facilities.** No county shall be required to furnish new facilities pursuant to this part 4.

**Source:** **L. 76:** Entire part added, p. 520, § 3, effective October 1.

**13-6-417. Execution and proceedings subsequent to judgment.** Execution and proceedings subsequent to judgment entered in the small claims division may be processed in the small claims division and shall be the same as in a civil action in the county court as provided by law.

**Source:** **L. 90:** Entire section added, p. 850, § 5, effective May 31.

**Cross references:** For the legislative declaration contained in the 1990 act enacting this section, see section 1 of chapter 100, Session Laws of Colorado 1990.

## PART 5

### MAGISTRATE ADJUDICATION SYSTEM

**Cross references:** For magistrates in the small claims division of county courts, see § 13-6-405; for magistrates in district courts, see § 13-5-201.

**13-6-501. County court magistrates - qualifications - duties.** (1) In Class A counties, as defined in section 13-6-201, county court magistrates may be appointed by the presiding judge.

(2) In Class B counties, as defined in section 13-6-201, county court magistrates may be appointed pursuant to section 13-3-105, if approved by the chief justice.

(3) Any county court magistrate shall be a qualified attorney-at-law admitted to practice in the state of Colorado and in good standing; except that a county court magistrate who hears only class A and class B traffic infraction matters need not be an attorney-at-law and except that any duly appointed county judge may act as a traffic magistrate regardless of whether he is an attorney-at-law.

(4) Subject to the provision that no magistrate may preside in any trial by jury, county court magistrates shall have power to hear the following matters:

(a) Class 2 misdemeanor traffic offenses and class A and class B traffic infractions, as defined in section 42-4-1701, C.R.S.;

(b) Such other matters as determined by rule of the supreme court.

(4.5) County court magistrates shall have the power to solemnize marriages pursuant to the procedures in section 14-2-109, C.R.S.

(4.7) County court magistrates shall have the power to preside over matters specified in section 13-17.5-105.

(5) Except in class A and class B traffic infraction matters, before a county court magistrate may hear any matter, all parties thereto shall have waived, on the record, their right to proceed before a county judge. If any party fails to waive such right, or objects to the magistrate, that party's case shall be rereferred to a county judge.

(6) Magistrates, when handling county court matters and class A and class B traffic infraction matters and where the parties to such proceedings, other than traffic infraction matters, shall have waived their right to proceed before a county judge, shall have all the jurisdiction and power of a county judge, and their orders and judgments shall be those of the county court.

(7) Procedure in matters heard by a county court magistrate shall be determined by statute and by rules promulgated by the supreme court and by local rules.

(8) The duties, qualifications, compensation, conditions of employment, and other administrative details concerning magistrates who hear traffic infraction matters not set forth in this part 5 shall be established in accordance with the provisions of section 13-3-105.

(9) The supreme court shall adopt such rules and regulations as it deems necessary or proper to carry out the provisions of this part 5 relating to traffic infraction matters, including, but not limited to, procedural matters.

(10) Existing space provided by a county, including already existing courtroom and administrative space, shall be used to the maximum extent possible for hearings on traffic infraction matters.

(11) Before any county court magistrate is appointed pursuant to the provisions of this part 5, the judicial department shall consult with the board of county commissioners of the affected county or counties regarding any additional space or facilities that may be required. All feasible alternatives shall be considered and the least costly alternative shall be accepted by the department whenever practicable.

**Source:** L. 77: Entire part added, p. 791, § 1, effective January 1, 1978. L. 82: (3), (4)(a), (5), and (6) amended and (8) to (11) added, p. 653, § 1, effective January 1, 1983.



**L. 83:** (3) amended, p. 602, § 2, effective July 1. **L. 87:** (4)(a) amended, p. 1495, § 1, effective July 1. **L. 89:** (4.5) added, p. 782, § 5, effective April 4. **L. 91:** Entire section amended, p. 357, § 13, effective April 9. **L. 94:** (4)(a) amended, p. 2549, § 31, effective January 1, 1995. **L. 95:** (4.7) added, p. 480, § 3, effective July 1.

### ANNOTATION

**Salutary purposes of informal traffic infraction hearings would be frustrated if collateral estoppel** were to be applied so as to limit a full and fair consideration of the issue in a criminal trial. *Williamsen v. People*, 735 P.2d 176 (Colo. 1987).

**Magistrates exercise authority** only at the discretion of the judges who appoint them.

Therefore no impropriety in the provision of a court memorandum prohibiting magistrates from conducting bond hearings. *Wiegand v. Larimer County Court Magistrate*, 937 P.2d 880 (Colo. App. 1996).

**13-6-502. Jury trials.** Notwithstanding the provisions of section 16-10-109, C.R.S., or any other provision of law, the right to a jury trial shall not be available at a hearing before a magistrate where the cited person is charged with a class A or a class B traffic infraction.

**Source:** **L. 82:** Entire section added, p. 654, § 2, effective January 1, 1983. **L. 93:** Entire section amended, p. 1775, § 33, effective June 6.

**13-6-503. Evidence offered by officer.** At any hearing on a class A or class B traffic infraction, the officer who issued the citation shall offer evidence of the facts concerning the alleged infraction either in person or by affidavit, as such affidavit may be established by rules adopted by the supreme court pursuant to section 13-6-501 (9). If such officer appears personally, the magistrate and the cited person may then examine such officer. The cited party shall have the right to call the officer by subpoena as in the case of other civil matters.

**Source:** **L. 82:** Entire section added, p. 654, § 2, effective January 1, 1983. **L. 91:** Entire section amended, p. 358, § 14, effective April 9.

**13-6-504. Appeals procedure.** (1) Any appeal, either by the state or the cited person, from a judgment entered pursuant to this part 5 shall be processed as an appeal from the county court.

(2) The district attorney or deputy district attorney shall represent the state on the appeal.

(3) The state may appeal only a ruling by a magistrate that declares a state statute unconstitutional or unenforceable. Whether or not to appeal shall be in the discretion of the district attorney.

**Source:** **L. 82:** Entire section added, p. 654, § 2, effective January 1, 1983. **L. 91:** (3) amended, p. 358, § 15, effective April 9.

## ARTICLE 7

### Superior Courts

#### 13-7-101 to 13-7-112. (Repealed)

**Source:** **L. 85:** Entire article repealed, p. 572, § 12, effective November 14, 1986.

**Editor's note:** (1) This article was numbered as article 10 of chapter 37, C.R.S. 1963. For amendments to this article prior to its repeal in 1986, consult the Colorado statutory research

explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 13 of the act that eliminated the superior courts, House Bill No. 1074, L. 85, p. 572, § 13, provided the following: "All cases and matters pending in superior courts on November 14, 1986, shall be transferred to the district court in the county or in the city and county in which the superior court is located. No bond or obligation given in any case or matter transferred to the district court shall be affected by the transfer of jurisdiction."

## ARTICLE 8

### Juvenile Court of Denver

13-8-101.	Establishment.	13-8-114.	Practice and procedure.
13-8-102.	Court of record - powers.	13-8-115.	Rules of court.
13-8-103.	Jurisdiction.	13-8-116.	Terms.
13-8-104.	Number of judges.	13-8-117.	Seal.
13-8-105.	Qualifications of judges.	13-8-118.	Process.
13-8-106.	Activities of judge.	13-8-119.	Venue.
13-8-107.	Term of office.	13-8-120.	Sheriff to attend.
13-8-108.	Vacancies.	13-8-121.	Appearance by district attorney and city attorney.
13-8-109.	Magistrates.	13-8-122.	Juries.
13-8-110.	Clerk.	13-8-123.	Judgments.
13-8-111.	Other employees.	13-8-124.	Appellate review.
13-8-112.	Judges may sit en banc - presiding judge.	13-8-125.	Fees.
13-8-113.	Judges to sit separately.	13-8-126.	Supervision by supreme court.

**13-8-101. Establishment.** Pursuant to the provisions of section 1 of article VI of the Colorado constitution, there is hereby established the juvenile court of the city and county of Denver.

**Source:** L. 64: p. 437, § 1. C.R.S. 1963: § 37-19-1.

### ANNOTATION

**Law reviews.** For article, "The Denver Juvenile Court", see Den. B. Ass'n R. 1 (May 1928).

For article, "Colorado's New Court System", see 41 Den. L. Ctr. J. 140 (1964).

**13-8-102. Court of record - powers.** The juvenile court shall be a court of record with such powers as are inherent in constitutionally created courts and with such legal and equitable powers to effectuate its jurisdiction and carry out its orders, judgments, and decrees as are possessed by the district courts.

**Source:** L. 64: p. 437, § 2. C.R.S. 1963: § 37-19-2.

### ANNOTATION

**Jurisdiction to enter money judgment against Denver department of social services.** It is within the jurisdiction of the Denver juvenile court to enter a money judgment against the Denver department of social services to require payment for the costs of the care and maintenance of a minor found to be a child in need of supervision. *City & County of Denver v. Brockhurst Boys Ranch, Inc.*, 195 Colo. 22, 575 P.2d 843 (1978).

Enforcement of a money judgment against the Denver department of social services for payments that should have gone to party is within the juvenile court's jurisdiction. *People in Interest of D.C.*, 797 P.2d 840 (Colo. App. 1990).

**Applied** in *People in Interest of R.J.G.*, 38 Colo. App. 148, 557 P.2d 1214 (1976).



**13-8-103. Jurisdiction.** The jurisdiction of the juvenile court of the city and county of Denver is as set forth in sections 19-1-104, 19-2-104, and 19-4-109, C.R.S., for juvenile courts, as defined in section 19-1-103 (70), C.R.S.

**Source:** L. 64: p. 437, § 3. C.R.S. 1963: § 37-19-3. L. 67: p. 1051, § 7. L. 78: (1)(h) amended, p. 262, § 44, effective May 23; (1)(b) amended, p. 367, § 13, effective July 1, 1979. L. 84: (2) amended, p. 560, § 8, effective April 5. L. 85: (1)(d)(I) amended, p. 688, § 7, effective March 1; entire section R&RE, p. 690, § 1, effective July 1. L. 87: Entire section amended, p. 813, § 6, effective October 1. L. 96: Entire section amended, p. 1688, § 14, effective January 1, 1997.

**Editor's note:** Subsection (1)(d)(I) was amended in House Bill 85-1005. Those amendments were superseded by the repeal and reenactment of the section in House Bill 85-1272.

#### ANNOTATION

The juvenile court is a statutory court with no jurisdiction beyond that expressly given by statute. *Maniatis v. Karakitsios*, 161 Colo. 378, 422 P.2d 52 (1967) (decided under repealed § 37-9-2, C.R.S. 1963).

No general jurisdiction to litigate controversies arising outside jurisdictional areas encompassed within this section. *City & County of Denver v. Brockhurst Boys Ranch, Inc.*, 195 Colo. 22, 575 P.2d 843 (1978).

Order to Denver department of welfare within court's jurisdiction. The juvenile court did not exceed its jurisdiction, or lack jurisdiction, to order the Denver department of welfare to return a child who was adjudicated in need of supervision to a group care facility. *City & County of Denver v. Juvenile Court*, 182 Colo. 157, 511 P.2d 898 (1973).

Denver juvenile court was within its jurisdiction in ordering the Denver department of

social services to refund respondent's federal tax refund which had been obtained through a federal income tax refund intercept program designed to collect delinquent child support payment. *People in Interest of G.S.*, 678 P.2d 1033 (Colo. App. 1983).

The juvenile court had jurisdiction over the subject matter of the petition to determine the paternity of an unborn child. The juvenile court may, in its discretion in a proper case, issue temporary orders providing for protection, support, or medical or surgical treatment as it deems in the best interest of the child prior to adjudication or disposition of the petition to determine paternity. *People in Interest of an Unborn Child v. Estergard*, 169 Colo. 445, 457 P.2d 698 (1969).

**13-8-104. Number of judges.** There shall be three judges of the juvenile court of the city and county of Denver.

**Source:** L. 64: p. 438, § 4. C.R.S. 1963: § 37-19-4. L. 73: p. 496, § 1.

**13-8-105. Qualifications of judges.** A judge of the juvenile court shall be a qualified elector of the city and county of Denver at the time of his election or selection and shall have been licensed to practice law in the state of Colorado for five years at such time. He shall be a resident of the city and county of Denver during his term of office.

**Source:** L. 64: p. 438, § 5. C.R.S. 1963: § 37-19-5.

**13-8-106. Activities of judge.** A judge of the juvenile court shall devote his full time to judicial duties and shall not engage in the private practice of law while serving in office.

**Source:** L. 64: p. 438, § 6. C.R.S. 1963: § 37-19-6.

## ANNOTATION

**License of attorney revoked for violating this section.** An attorney who, while occupying the position of juvenile judge, practiced his profession for compensation in violation of this section, held guilty of unprofessional conduct,

his license revoked, and his name stricken from the roll of attorneys and counselors at law in this state. *People ex rel. Colo. Bar Ass'n v. Lindsey*, 86 Colo. 458, 283 P. 539 (1929) (decided under repealed CSA, C. 46, § 205).

**13-8-107. Term of office.** The term of office of a judge of the juvenile court of the city and county of Denver shall be six years.

**Source:** L. 64: p. 439, § 8. C.R.S. 1963: § 37-19-8. L. 67: p.459, § 16. L. 73: p. 496, § 2.

**13-8-108. Vacancies.** If the office of juvenile court judge becomes vacant because of death, resignation, failure to be retained in office pursuant to section 25 of article VI of the state constitution, or other cause, the vacancy shall be filled by the governor as provided in section 20 of article VI of the state constitution.

**Source:** L. 64: p. 439, § 9. C.R.S. 1963: § 37-19-9. L. 67: p. 459, § 17.

**13-8-109. Magistrates.** The judges of the juvenile court of the city and county of Denver may appoint magistrates, as provided in section 19-1-108, C.R.S.

**Source:** L. 64: p. 440, § 11. C.R.S. 1963: § 37-19-11. L. 67: p. 1052, § 8. L. 79: Entire section amended, p. 764, § 14, effective July 1. L. 87: Entire section amended, p. 813, § 7, effective October 1. L. 95: Entire section amended, p. 1109, § 60, effective May 31.

**13-8-110. Clerk.** (1) The judges of the juvenile court shall appoint a clerk of the juvenile court pursuant to the provisions of section 13-3-105.

(2) Repealed.

(3) The powers and duties of the clerk of the juvenile court shall be similar to the powers and duties of the clerk of the district court. The duties of the clerk of the juvenile court shall also include such matters as may be assigned to him by law, by court rules, and by the juvenile judges.

**Source:** L. 64: p. 440, § 12. C.R.S. 1963: § 37-19-12. L. 69: p. 252, § 20. L. 79: (2) amended, p. 602, § 30, effective July 1; (2) repealed, p. 602, § 30, effective July 1.

**Editor's note:** Subsection (2) was amended in Senate Bill 79-274. Those amendments were superseded by the repeal of subsection (2) in House Bill 79-1206.

**13-8-111. Other employees.** The judges of the juvenile court shall also appoint, pursuant to the provisions of section 13-3-105, probation officers and such other employees as may be necessary to carry out the functions and duties of the juvenile court, including the clerk's office thereof.

**Source:** L. 64: p. 441, § 13. C.R.S. 1963: § 37-19-13. L. 69: p. 252, § 21. L. 79: Entire section amended, p. 600, § 20, effective July 1.

**13-8-112. Judges may sit en banc - presiding judge.** The judges of the juvenile court may sit en banc for the purpose of making rules of court, the appointment of a clerk and other employees pursuant to section 13-3-105, and the conduct of other business relating to the administration of the court, including the selection of a presiding judge, as authorized by and subject to the approval of the chief justice of the supreme court.



**Source:** L. 64: p. 441, § 14. C.R.S. 1963: § 37-19-14. L. 67: p. 460, § 19. L. 69: p. 253, § 22.

**13-8-113. Judges to sit separately.** In the juvenile court, each of the judges shall sit separately for the trial of cases and the transaction of judicial business, and each of the courts so held shall be known as the juvenile court. Each judge shall have all of the powers which he might have if he were the sole judge of the court, including the power to vacate his own judgments, decrees, or orders, or those of a predecessor when permitted by law, but not juvenile court orders of another judge of the juvenile court who is still in office.

**Source:** L. 64: p. 441, § 15. C.R.S. 1963: § 37-19-15.

**13-8-114. Practice and procedure.** Practice and procedure in the juvenile court shall be conducted in accordance with the provisions of this article and title 19, C.R.S.

**Source:** L. 64: p. 441, § 16. C.R.S. 1963: § 37-19-16. L. 67: p. 1052, § 9.

**13-8-115. Rules of court.** The juvenile court has the power to make rules for the conduct of its business to the extent that such rules are not in conflict with the rules of the supreme court or the laws of the state but are supplementary thereto. Juvenile court rules are subject to review by the supreme court.

**Source:** L. 64: p. 442, § 17. C.R.S. 1963: § 37-19-17.

#### ANNOTATION

**A local rule of court is reviewable pursuant to this statute.** In re Rules by Juvenile Court, 178 Colo. 268, 496 P.2d 1014 (1972).

**A memorandum opinion is not reviewable under this section.** To the extent that a memorandum opinion is or may be construed by some

as a local rule, it is not, in the manner and under the circumstances under which it is rendered, reviewable under this section. In re Rules by Juvenile Court, 178 Colo. 268, 496 P.2d 1014 (1972).

**13-8-116. Terms.** Terms of the juvenile court shall be fixed by rule of court; but at least one term shall be held each year.

**Source:** L. 64: p. 442, § 18. C.R.S. 1963: § 37-19-18.

**13-8-117. Seal.** The juvenile court shall have a seal, bearing upon the face thereof the words "The Juvenile Court of the City and County of Denver, Colorado".

**Source:** L. 64: p. 442, § 19. C.R.S. 1963: § 37-19-19.

**13-8-118. Process.** The juvenile court has the power to issue process necessary to acquire jurisdiction, to require attendance, and to enforce all orders, decrees, and judgments. Such process runs to any county within the state and, when authorized by law in special proceedings or, in the absence thereof, by the Colorado rules of civil procedure in civil cases, or the Colorado rules of criminal procedure in criminal cases, may be served outside of the state. Any sheriff to whom process is directed is authorized and required to execute the same and shall be entitled to the same fees as are allowed by law for serving like process from the district court. Persons other than the sheriff or his deputies also may serve process from the juvenile court when permitted by law in special proceedings or, in the absence thereof, by the Colorado rules of civil procedure in civil cases or the Colorado rules of criminal procedure in criminal cases.

**Source:** L. 64: p. 442, § 20. C.R.S. 1963: § 37-19-20.

**13-8-119. Venue.** Venue in the juvenile court shall be as provided in sections 19-2-105, 19-3-201, 19-4-109, 19-5-102, 19-5-204, and 19-6-102, C.R.S.

**Source:** L. 64: p. 442, § 21. C.R.S. 1963: § 37-19-21. L. 67: p. 1053, § 10. L. 87: Entire section amended, p. 813, § 8, effective October 1. L. 96: Entire section amended, p. 1688, § 15, effective January 1, 1997.

**13-8-120. Sheriff to attend.** It is the duty of the sheriff of the city and county of Denver to attend in the juvenile court.

**Source:** L. 64: p. 442, § 22. C.R.S. 1963: § 37-19-22.

**13-8-121. Appearance by district attorney and city attorney.** Upon the request of the court, the district attorney shall represent the state in the interest of the child in any proceedings brought under section 19-1-104 (1) (a), C.R.S., and the city attorney shall represent the state in the interest of the child in any other proceedings.

**Source:** L. 64: p. 442, § 23. C.R.S. 1963: § 37-19-23. L. 67: p. 1053, § 11.

**13-8-122. Juries.** When required, juries may be selected and summoned as provided for courts of record in articles 71 to 74 of this title. With the permission of the district court, the juvenile court may use the panel of jurors summoned for the district court of the second judicial district.

**Source:** L. 64: p. 442, § 24. C.R.S. 1963: § 37-19-24. L. 2001: Entire section amended, p. 1270, § 16, effective June 5.

**13-8-123. Judgments.** The judgments of the juvenile court shall be enforceable in the same manner as judgments of the district court and, when appropriate, may be made liens upon real estate or other property in the manner provided by law for judgments of the district court.

**Source:** L. 64: p. 443, § 25. C.R.S. 1963: § 37-19-25.

**Cross references:** For procedures for attachment and duration of a judgment lien, see § 13-52-102.

#### ANNOTATION

**Jurisdiction to enter money judgment against Denver department of social services.** It is within the jurisdiction of the Denver juvenile court to enter a money judgment against the Denver department of social services to require payment for the costs of the care and maintenance of a minor found to be a child in need of supervision. *City & County of Denver v. Brockhurst Boys Ranch, Inc.*, 195 Colo. 22, 575 P.2d 843 (1978).

**Applied** in *People in Interest of R.J.G.*, 38 Colo. App. 148, 557 P.2d 1214 (1976).

**13-8-124. Appellate review.** Appellate review of any order, decree, or judgment may be taken to the supreme court or the court of appeals, as provided by law and the Colorado appellate rules. Initials shall appear on the record on appeal in place of the name of the child. Appeals from orders or decrees concerning legal custody, the allocation of parental responsibilities, termination of parent-child legal relationships, and adoptions shall be advanced upon the calendar of the supreme court or of the court of appeals and shall be decided at the earliest practicable time.



**Source:** L. 64: p. 443, § 26. C.R.S. 1963: § 37-19-26. L. 67: p.1053, § 12. L. 69: p. 270, § 9. L. 77: Entire section amended, p. 1029, § 2, effective July 1. L. 87: Entire section amended, p. 813, § 9, effective October 1. L. 98: Entire section amended, p. 1392, § 25, effective February 1, 1999.

**13-8-125. Fees.** The fees charged by the juvenile court and the clerk thereof shall be those provided in article 32 of this title.

**Source:** L. 64: p. 443, § 27. C.R.S. 1963: § 37-19-27.

**13-8-126. Supervision by supreme court.** The supervisory powers of the supreme court established by article 3 of this title shall extend to the juvenile court.

**Source:** L. 64: p. 444, § 30. C.R.S. 1963: § 37-19-30.

## ARTICLE 9

### Probate Court of Denver

**Cross references:** For the Colorado rules of probate procedure, see chapter 27 of the Colorado court rules.

13-9-101.	Establishment.	13-9-113.	Terms.
13-9-102.	Court of record - powers.	13-9-114.	Seal.
13-9-103.	Jurisdiction.	13-9-115.	Process.
13-9-104.	Number of judges.	13-9-116.	Venue.
13-9-105.	Qualifications of judges.	13-9-117.	Juries.
13-9-106.	Compensation of judges.	13-9-118.	Judgments.
13-9-107.	Appointment and term of office.	13-9-119.	Appeals.
13-9-108.	Vacancies.	13-9-120.	Fees.
13-9-109.	Clerk.	13-9-121.	Funds.
13-9-110.	Other employees.	13-9-122.	Supervision by supreme court.
13-9-111.	Practice and procedure.	13-9-123.	National instant criminal background check system - reporting.
13-9-112.	Rules of court.		

**13-9-101. Establishment.** Pursuant to the provisions of section 1 of article VI of the Colorado constitution, there is hereby established the probate court of the city and county of Denver.

**Source:** L. 64: p. 445, § 1. C.R.S. 1963: § 37-20-1.

**13-9-102. Court of record - powers.** The probate court shall be a court of record with such powers as are inherent in constitutionally created courts and with such legal and equitable powers to effectuate its jurisdiction and carry out its orders, judgments, and decrees as are possessed by the district courts.

**Source:** L. 64: p. 445, § 2. C.R.S. 1963: § 37-20-2.

**13-9-103. Jurisdiction.** (1) The probate court of the city and county of Denver has original and exclusive jurisdiction in said city and county of:

(a) The administration, settlement, and distribution of estates of decedents, wards, and absentees;

(b) Property vested in any person under a legal disability but paid to or held by another for such person's use or benefit as authorized by court order or as authorized by a power contained in a will or trust instrument;

(c) Property vested in any minor pursuant to the “Colorado Uniform Transfers to Minors Act”, or any predecessor act thereto, or any act having a substantially similar legal effect;

(d) The probate of wills;

(e) The granting of letters testamentary, of administration, of guardianship, and of conservatorship;

(f) The administration of guardianships of minors and of mentally competent persons and of conservatorships of persons with mental illness or mentally deficient persons and of absentees;

(g) Proceedings under article 23 of title 17 and articles 10 to 15 of title 27, C.R.S.;

(h) The determination of heirship in probate proceedings and the devolution of title to property in probate proceedings;

(i) Actions on the official bonds of fiduciaries appointed by it;

(j) The construction of wills;

(k) The administration of testamentary trusts, except as provided in subsection (2) of this section; and

(l) All other probate matters.

(2) If a testamentary trust is established by the will of the decedent and if it appears that it was not the intention of the testator that the court should continue the administration of the estate after the payment in full of all debts and legacies except the trust property, the court shall proceed to final settlement of such estate as in other cases, order the trust fund or property to be turned over to the trustee as such, and shall not require the filing of inventories and accounts, or supervise the administration of the trust; except that any party in interest of such trust, including the trustee thereof, may invoke the jurisdiction of the probate court with respect to any matters pertaining to the administration or distribution of such trust or to construe the will under which it was established.

(3) The court has jurisdiction to determine every legal and equitable question arising in connection with decedents', wards', and absentees' estates, so far as the question concerns any person who is before the court by reason of any asserted right in any of the property of the estate or by reason of any asserted obligation to the estate, including, without limiting the generality of the foregoing, the jurisdiction:

(a) To give full and complete legal and equitable relief in any case in which it is alleged that the decedent breached an agreement to make or not to make a will;

(b) In any case in which a district court could grant such relief in a separate action brought therein, to impose or raise a trust with respect to any of the property of the decedent or any property in the name of the decedent, individually or in any other capacity, in any case in which the demand for such relief arises in connection with the administration of the estate of a decedent;

(c) To partition any of the real or personal property of any estate in connection with the settlement thereof.

(4) Nothing in this article shall prevent any district court sitting in law or equity from construing a will which is not before the probate court or from determining questions arising in connection with trusts which are not under the jurisdiction of the probate court.

(5) The court has jurisdiction to determine every legal and equitable question arising out of or in connection with express trusts.

(6) The provisions of articles 10 to 20 of title 15, article 23 of title 17, and articles 10 to 15 of title 27, C.R.S., shall govern the issuance and service and proof of service of any process, notice, citation, writ, or order of court and shall govern all other proceedings had pursuant to the powers of the court recited in subsections (1) and (2) of this section. The Colorado rules of civil procedure shall govern such matters when the proceedings are had pursuant to the powers granted to the court under any of the other provisions of this section.

(7) With respect to any trust established by or for an individual with his or her assets, income, or property of any kind, notwithstanding any statutory provision to the contrary, the court shall not authorize, direct, or ratify any trust that either has the effect of qualifying or purports to qualify the trust beneficiary for federal supplemental security income, or public



or medical assistance pursuant to title 26, C.R.S., unless the trust meets the criteria set forth in sections 15-14-412.6 to 15-14-412.9, C.R.S., and any rule adopted by the medical services board pursuant to section 25.5-6-103, C.R.S.

**Source:** L. 64: p. 445, § 3. L. 65: pp. 483, 484, §§ 1, 2. C.R.S. 1963: § 37-20-3. L. 67: p. 103, § 1. L. 79: (1)(g) and (6) amended, p. 1634, § 22, effective July 19. L. 84: (1)(c) amended, p. 394, § 4, effective July 1. L. 94: (7) added, p. 1604, § 13, effective July 1. L. 2000: (7) amended, p. 1832, § 3, effective January 1, 2001. L. 2006: (7) amended, p. 2001, § 46, effective July 1; (1)(f) amended, p. 1395, § 35, effective August 7.

**Cross references:** For the “Colorado Uniform Transfers to Minors Act”, see article 50 of title 11.

### ANNOTATION

**Law reviews.** For article, “Civil Commitment of the Mentally Ill in the Denver Probate Court”, see 46 Den. L.J. 496 (1969). For article, “Will Contests — Some Procedural Aspects”, see 15 Colo. Law. 787 (1986). For article, “Probate Jurisdiction for Creditors’ Claims”, see 29 Colo. Law. 57 (May 2000).

**Specific enumeration of court’s subject-matter jurisdiction is applicable to all district courts sitting in probate matters** since all probate courts may exercise subject-matter jurisdiction vested by this title. *Lembach v. Lembach*, 622 P.2d 606 (Colo. App. 1980).

**In determining proper jurisdiction as between district court and probate court**, the court must look at the facts alleged, the claims asserted, and the relief requested. Here, where the complaints were premised upon defendant’s alleged legal malpractice in the drafting of the estate instruments, the estate planning, and the implementation of the estate plan, the complaints were not considered probate claims, and, therefore, jurisdiction lay with the district court not the probate court. *Levine v. Katz*, 192 P.3d 1008 (Colo. App. 2006).

**Probate court lacks subject matter jurisdiction over claims of legal malpractice** where plaintiff does not seek to recover assets of the estate. *Levine v. Katz*, 167 P.3d 141 (Colo. App. 2006).

**The phrase “in connection with” in subsection (3)(a) is a grant of authority to resolve disputes logically relating to an estate.** This grant of jurisdiction presupposes, by necessary implication, the possibility that a person may have a valid claim to property claimed by an estate, and therefore contemplates that such property, while claimed by the estate, does not belong to the estate. *In re Estate of Murphy*, 195 P.3d 1147 (Colo. App. 2008).

**In evaluating the child’s best interests, the probate court did not exceed its jurisdiction by directing the GAL to find a permanent guardian or by considering the potential for a future adoption.** Nothing in this section deprives the district court of the authority to appoint a guardian for a child. *In re J.C.T.*, 176 P.3d 726 (Colo. 2007).

**When extrinsic fraud is shown to exist, a judgment may be collaterally attacked**, for such fraud renders the judgment not merely irregular, but void. As such, the judgment has neither life nor incipience and as a nullity it may be attacked directly or collaterally at any time. *In re Estate of Bonfils*, 190 Colo. 70, 543 P.2d 701 (1975).

**Intrinsic frauds, however, cannot give rise to collateral attack**, though they may create voidable judgments, be the basis of a successful direct appeal, or be the subject of a motion for relief from judgment. *In re Estate of Bonfils*, 190 Colo. 70, 543 P.2d 701 (1975).

**Probate court had jurisdiction** to order cancellation of bonds and release of security held by trustee pursuant to municipal revenue bond trust indenture. *Petition of First Interstate Bank*, 767 P.2d 792 (Colo. App. 1988).

**The probate court has the authority, in the appropriate circumstances, to instruct trustee to act or not act to carry out the court’s goal in the administration of such trust without relying on C.R.C.P. 65.** When a trustee’s administration of a trust is challenged, the probate court has the authority to issue an injunction against the trustee without establishing grounds for a preliminary injunction to prevent further depletion of the trust while proper distribution of the trust is determined. *In re Estate of Scott*, 77 P.3d 906 (Colo. App. 2003).

**13-9-104. Number of judges.** There shall be one judge of the probate court of the city and county of Denver.

**Source:** L. 64: p. 446, § 4. C.R.S. 1963: § 37-20-4.

**13-9-105. Qualifications of judges.** A judge of the probate court shall be a qualified elector of the city and county of Denver at the time of his selection and shall have been licensed to practice law in the state of Colorado for five years at such time. He shall be a resident of the city and county of Denver during his term of office. He shall not engage in the private practice of law while serving in office.

**Source:** L. 64: p. 446, § 5. C.R.S. 1963: § 37-20-5.

**13-9-106. Compensation of judges.** A probate judge shall receive an annual salary as provided by law.

**Source:** L. 64: p. 446, § 6. C.R.S. 1963: § 37-20-6.

**Cross references:** For salaries of probate judges, see § 13-30-103.

**13-9-107. Appointment and term of office.** (1) The term of office of a probate judge shall be six years.

(2) A probate judge shall be appointed for the probate court of the city and county of Denver in the same manner provided for the appointment of district judges.

**Source:** L. 64: p. 446, § 7. C.R.S. 1963: § 37-20-7. L. 67: p. 460, § 20.

**13-9-108. Vacancies.** If the office of probate court judge becomes vacant because of death, resignation, failure to be retained in office pursuant to section 25 of article VI of the state constitution, or other cause, the vacancy shall be filled by the governor as provided in section 20 of article VI of the state constitution.

**Source:** L. 64: p. 446, § 8. C.R.S. 1963: § 37-20-8. L. 67: p. 460, § 21.

**13-9-109. Clerk.** (1) The judge of the probate court shall appoint a clerk of the probate court pursuant to section 13-3-105.

(2) Repealed.

(3) The powers and duties of the clerk of the probate court shall be similar to the powers and duties of the clerk of the district court including such powers as may be delegated to the clerk of the district court in probate matters. The duties of the clerk of the probate court shall also include such matters as may be assigned to him by law, by court rules, and by the probate judge.

**Source:** L. 64: p. 448, § 10. C.R.S. 1963: § 37-20-10. L. 69: p. 253, § 25. L. 79: (2) amended, p. 424, § 15, effective July 1; (2) repealed, p. 602, § 30, effective July 1.

#### ANNOTATION

**No authority to set aside divorce decree.** Constitutional and statutory provisions vest in the probate court the authority to decide, inter alia, matters relating to the probate of wills. They do not, however, confer authority upon the probate court to disregard the rules relating to

collateral attacks on judgments and to set aside a divorce decree of a district court which has jurisdiction of the parties and of the subject matter. *In re Estate of Bonfils*, 190 Colo. 70, 543 P.2d 701 (1975).

**13-9-110. Other employees.** The judge of the probate court shall appoint pursuant to section 13-3-105 such deputy clerks, assistants, reporters, stenographers, and bailiffs as may be necessary for the transaction of the business of the court.

**Source:** L. 64: p. 448, § 11. C.R.S. 1963: § 37-20-11. L. 69: p. 253, § 26.



**13-9-111. Practice and procedure.** Practice and procedure in the probate court shall be conducted in accordance with laws providing special proceedings for matters within its jurisdiction and with the Colorado rules of civil procedure.

**Source:** L. 64: p. 448, § 12. C.R.S. 1963: § 37-20-12.

**13-9-112. Rules of court.** The probate court has the power to make rules for the conduct of its business to the extent that such rules are not in conflict with the rules of the supreme court or the laws of the state but are supplementary thereto. Probate court rules are subject to review by the supreme court.

**Source:** L. 64: p. 448, § 13. C.R.S. 1963: § 37-20-13.

**13-9-113. Terms.** Terms of the probate court shall be fixed by rule of court, but at least one term shall be held each year.

**Source:** L. 64: p. 448, § 14. C.R.S. 1963: § 37-20-14.

**13-9-114. Seal.** The probate court shall have a seal, bearing upon the face thereof the words: "The Probate Court of the City and County of Denver, Colorado".

**Source:** L. 64: p. 448, § 15. C.R.S. 1963: § 37-20-15.

**13-9-115. Process.** The probate court has the power to issue process necessary to acquire jurisdiction, to require attendance, and to enforce all its orders, decrees, and judgments. Such process runs to any county within the state and, when authorized by law in special proceedings or, in the absence thereof, by the Colorado rules of civil procedure, may be served outside the state. Any sheriff to whom process is directed is authorized and required to execute the same and shall be entitled to the same fees as are allowed by law for serving like process from the district court. Persons other than the sheriff or his deputies also may serve process from the probate court when permitted by law in special proceedings or, in the absence thereof, by the Colorado rules of civil procedure.

**Source:** L. 64: p. 448, § 16. C.R.S. 1963: § 37-20-16.

**Cross references:** For procedures and persons authorized to serve process of the district court, see C.R.C.P. 4.

**13-9-116. Venue.** Venue in the probate court shall be determined as provided in articles 10 to 20 of title 15, C.R.S., or by other applicable statutes prescribing special proceedings or, in the absence thereof, by the Colorado rules of civil procedure.

**Source:** L. 64: p. 449, § 17. C.R.S. 1963: § 37-20-17.

**13-9-117. Juries.** When required, juries may be selected and summoned as provided for courts of record in articles 71 to 74 of this title. With the permission of the district court, the probate court may use the panel of jurors summoned for the district court of the second judicial district.

**Source:** L. 64: p. 449, § 18. C.R.S. 1963: § 37-20-18. L. 2001: Entire section amended, p. 1270, § 17, effective June 5.

**13-9-118. Judgments.** The judgments of the probate court shall be enforceable in the same manner as judgments of the district court and may be made liens upon real estate or other property in the manner provided by law for judgments of the district court.

**Source:** L. 64: p. 449, § 19. C.R.S. 1963: § 37-20-19.

**Cross references:** For procedures for attachment and duration of a judgment lien, see § 13-52-102.

**13-9-119. Appeals.** Appellate review of final judgments of the probate court shall be by the supreme court or by the court of appeals, as provided by law, and shall be conducted in the same manner as prescribed by the Colorado appellate rules for review by the court of appeals and the supreme court of final judgments of the district courts.

**Source:** L. 64: p. 449, § 20. C.R.S. 1963: § 37-20-20. L. 69: p. 270, § 10.

**13-9-120. Fees.** The fees charged by the probate court and the clerk thereof shall be those provided in article 32 of this title.

**Source:** L. 64: p. 449, § 21. C.R.S. 1963: § 37-20-21.

**13-9-121. Funds.** Funds for the operation of the probate court, including the salaries of the employees thereof, shall be provided in the same manner as funds are provided for the establishment and operation of the district courts for the second judicial district.

**Source:** L. 64: p. 449, § 22. C.R.S. 1963: § 37-20-22. L. 69: p. 254, § 27.

**13-9-122. Supervision by supreme court.** The supervisory powers of the supreme court established by article 3 of this title extend to the probate court.

**Source:** L. 64: p. 450, § 23. C.R.S. 1963: § 37-20-23.

**13-9-123. National instant criminal background check system - reporting.**  
(1) Beginning July 1, 2002, the clerk of the probate court shall periodically report the following information to the national instant criminal background check system created by the federal "Brady Handgun Violence Prevention Act", Pub.L. 103-159, the relevant portion of which is codified at 18 U.S.C. sec. 922 (t):

(a) The name of each person who has been found to be incapacitated by order of the court pursuant to part 3 of article 14 of title 15, C.R.S.;

(b) The name of each person who has been committed by order of the court to the custody of the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, pursuant to section 27-81-112 or 27-82-108, C.R.S.; and

(c) The name of each person with respect to whom the court has entered an order for involuntary certification for short-term treatment of mental illness pursuant to section 27-65-107, C.R.S., for extended certification for treatment of mental illness pursuant to section 27-65-108, C.R.S., or for long-term care and treatment of mental illness pursuant to section 27-65-109, C.R.S.

(2) Any report made by the clerk of the probate court pursuant to this section shall describe the reason for the report and indicate that the report is made in accordance with 18 U.S.C. sec. 922 (g) (4).

(3) The clerk of the probate court shall take all necessary steps to cancel a record made by that clerk in the national instant criminal background check system if:

(a) The person to whom the record pertains makes a written request to the clerk; and

(b) No less than three years before the date of the written request:

(I) The court entered an order pursuant to section 15-14-318, C.R.S., terminating a guardianship on a finding that the person is no longer an incapacitated person, if the record in the national instant criminal background check system is based on a finding of incapacity;

(II) The period of commitment of the most recent order of commitment or recommitment expired, or the court entered an order terminating the person's incapacity or discharge.



ing the person from commitment in the nature of habeas corpus, if the record in the national instant criminal background check system is based on an order of commitment to the custody of the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse; except that the clerk shall not cancel any record pertaining to a person with respect to whom two recommitment orders have been entered under section 27-81-112 (7) and (8), C.R.S., or who was discharged from treatment under section 27-81-112 (11), C.R.S., on the grounds that further treatment will not be likely to bring about significant improvement in the person's condition; or

(III) The record in the case was sealed pursuant to section 27-65-107 (7), C.R.S., or the court entered an order discharging the person from commitment in the nature of habeas corpus pursuant to section 27-65-113, C.R.S., if the record in the national instant criminal background check system is based on a court order for involuntary certification for short-term treatment of mental illness.

**Source:** L. 2002: Entire section added, p. 754, § 2, effective January 1, 2003. L. 2010: (1)(b), (1)(c), (3)(b)(II), and (3)(b)(III) amended, (SB 10-175), ch. 188, p. 781, § 16, effective April 29.

## MUNICIPAL COURTS

### ARTICLE 10

#### Municipal Courts

**Law reviews:** For article, "Colorado's Municipal System", see 30 Colo. Law. 33 (December 2001).

13-10-101.	Legislative declaration.	13-10-114.	Trial by jury.
13-10-102.	Definitions.	13-10-115.	Fines and costs.
13-10-103.	Applicability.	13-10-116.	Appeals.
13-10-104.	Municipal court created - jurisdiction.	13-10-117.	Time - docket fee - bond.
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13-10-106.	Qualifications of municipal judges.	13-10-119.	Certification to appellate court.
13-10-107.	Compensation of municipal judges.	13-10-120.	Bond - approval of sureties - forfeitures.
13-10-108.	Clerk of the municipal court.	13-10-121.	Conditions of bond - forfeiture - release.
13-10-109.	Bond.	13-10-122.	Docket fee - dismissal.
13-10-110.	Court facilities and supplies.	13-10-123.	Procedendo on dismissal.
13-10-111.	Commencement of actions - process.	13-10-124.	Action on bond in name of municipality.
13-10-112.	Powers and procedures.	13-10-125.	Judgment.
13-10-113.	Fines and penalties.	13-10-126.	Prostitution offender program authorized - reports.

**13-10-101. Legislative declaration.** The general assembly finds that the right to a trial by jury for petty offenses, as defined in section 16-10-109, C.R.S., is of vital concern to all of the people of the state of Colorado and that the interests of the state as a whole are so great that the general assembly shall retain sole legislative jurisdiction over the matter, which is hereby declared to be of statewide concern.

**Source:** L. 69: p. 273, § 1. C.R.S. 1963: § 37-22-1. L. 70: p. 150, § 2. L. 72: p. 266, § 2. L. 82: Entire section amended, p. 654, § 3, effective January 1, 1983.

**13-10-102. Definitions.** As used in this article, unless the context otherwise requires: (1) "Municipal court" includes police courts and police magistrate courts created or existing under previous laws or under a municipal charter and ordinances.

(2) "Municipal judges" includes police magistrates as defined and used in previous laws.

(3) "Qualified municipal court of record" means a municipal court established by, and operating in conformity with, either local charter or ordinances containing provisions requiring the keeping of a verbatim record of the proceedings and evidence at trials by either electric devices or stenographic means, and requiring as a qualification for the office of judge of such court that he has been admitted to, and is currently licensed in, the practice of law in Colorado.

**Source:** L. 69: p. 273, § 1. C.R.S. 1963: § 37-22-1. L. 70: p. 150, § 2. L. 72: p. 266, § 2.

**13-10-103. Applicability.** This article shall apply to and govern the operation of municipal courts in the cities and towns of this state. Except for the provisions relating to the method of salary payment for municipal judges, the incarceration of children provided for in sections 19-2-402 and 19-2-508, C.R.S., the appearance of the parent, guardian, or lawful custodian of any child under eighteen years of age who is charged with a municipal offense as required by section 13-10-111, the right to a trial by jury for petty offenses provided for in section 16-10-109, C.R.S., rules of procedure promulgated by the supreme court, and appellate procedure, this article may be superseded by charter or ordinance enacted by a home rule city.

**Source:** L. 69: p. 273, § 1. C.R.S. 1963: § 37-22-1. L. 70: p. 150, § 2. L. 72: p. 266, § 2. L. 81: Entire section amended, p. 1041, § 1, effective July 1. L. 87: Entire section amended, p. 813, § 10, effective October 1. L. 94: Entire section amended, p. 909, § 2, effective April 28. L. 96: Entire section amended, p. 1688, § 16, effective January 1, 1997.

#### ANNOTATION

**Right to trial by jury even if city charter denies it.** In cases involving petty offenses, there is a right to a jury trial, even in a municipal court of a home rule city whose city charter has expressly denied such right. *Hardamon v. Municipal Court*, 178 Colo. 271, 497 P.2d 1000 (1972).

**Right to jury trial not abridged by forum for trial.** The statutory right to a jury trial cannot be abridged on account of the forum in which the petty offense is tried. *City of Aurora ex rel. People v. Erwin*, 706 F.2d 295 (10th Cir. 1983).

**Courts of home-rule cities are not excepted from the purview of municipal court rules of procedure** issued by the supreme court. *Alessi v. Municipal Court*, 38 Colo. App. 153, 556 P.2d 87 (1976); *Christie v. People*, 837 P.2d 1237 (Colo. 1992).

The general assembly has made it clear that the power of home-rule cities over the operation of their municipal courts has some limitations, specifically in relation to rules of procedure. *Alessi v. Municipal Court*, 38 Colo. App. 153, 556 P.2d 87 (1976).

**There is no violation of the due process clause in a trial before a nontenured judge.** *People ex rel. People of City of Thornton v. Horan*, 192 Colo. 144, 556 P.2d 1217 (1976), cert. denied, 431 U.S. 966, 97 S. Ct. 2922, 53 L. Ed.2d 1061 (1977).

There is nothing to show that a trial before a nontenured judge in and of itself is sufficient to taint the fairness of the trial, thereby denying due process or equal protection. *People ex rel. People of City of Thornton v. Horan*, 192 Colo. 144, 556 P.2d 1217 (1976), cert. denied, 431 U.S. 966, 97 S. Ct. 2922, 53 L. Ed.2d 1061 (1977).

**Tenure decision lies in hands of citizens of home-rule cities.** The fact that the term of office for municipal judges is not included in the exceptions in this section clearly indicates the general assembly's recognition that the tenure decision lies in the hands of the citizens of home-rule cities. *People ex rel. People of City of Thornton v. Horan*, 192 Colo. 144, 556 P.2d 1217 (1976), cert. denied, 431 U.S. 966, 97 S. Ct. 2922, 53 L. Ed.2d 1061 (1977); *Artes-Roy v. City of Aspen*, 856 P.2d 823 (Colo. 1993).

**13-10-104. Municipal court created - jurisdiction.** The municipal governing body of each city or town shall create a municipal court to hear and try all alleged violations of ordinance provisions of such city or town.



**Source:** L. 69: p. 273, § 1. C.R.S. 1963: § 37-22-2.

### ANNOTATION

**Limitation on power of courts.** This section does not give municipal courts the power to provide relief similar to that provided by remedial or original writs. *City of Englewood v. Parkinson*, 703 P.2d 626 (Colo. App. 1985).

**Prerequisites of a written demand and \$25 fee for a jury trial pursuant to C.R.M.P. 223**

**and this section do not violate defendant's right to a jury trial or deprive him of equal protection of the laws under the federal constitution.** *Christie v. People*, 837 P.2d 1237 (Colo. 1992).

**13-10-105. Municipal judge - appointment - removal.** (1) (a) Unless otherwise provided in the charter of a home rule city, the municipal court shall be presided over by a municipal judge who shall be appointed by the municipal governing body for a specified term of not less than two years and who may be reappointed for a subsequent term; except that the initial appointment under this section may be for a term of office which expires on the date of the next election of the municipal governing body. Any vacancy in the office of municipal judge shall be filled by appointment of the municipal governing body for the remainder of the unexpired term.

(b) The municipal governing body may appoint such assistant judges as may be necessary to act or such substitute judges as circumstances may require in case of temporary absence, sickness, disqualification, or other inability of the presiding or assistant municipal judges to act.

(c) In the event that more than one municipal judge is appointed, the municipal governing body shall designate a presiding municipal judge, who shall serve in this capacity during the term for which he was appointed.

(2) A municipal judge may be removed during his term of office only for cause. A judge may be removed for cause if:

- (a) He is found guilty of a felony or any other crime involving moral turpitude;
- (b) He has a disability which interferes with the performance of his duties and which is or is likely to become of a permanent character;
- (c) He has willfully or persistently failed to perform his duties;
- (d) He is habitually intemperate; or
- (e) The municipality required the judge, at the time of appointment, to be a resident of the municipality, or county in which the municipality is located, and he subsequently becomes a nonresident of the municipality or the county during his term of office.

**Source:** L. 69: p. 273, § 1. C.R.S. 1963: § 37-22-3. L. 77: (2)(c) and (2)(d) amended and (2)(e) added, p. 793, § 1, effective June 3. L. 91: (1)(b) amended, p. 742, § 1, effective April 4.

### ANNOTATION

**There is no violation of the due process clause in a trial before a nontenured judge.** *People ex rel. People of City of Thornton v. Horan*, 192 Colo. 144, 556 P.2d 1217 (1976), cert. denied, 431 U.S. 966, 97 S. Ct. 2922, 53 L. Ed.2d 1061 (1977).

There is nothing to show that a trial before a nontenured judge in and of itself is sufficient to taint the fairness of the trial, thereby denying due process or equal protection. *People ex rel. People of City of Thornton v. Horan*, 192 Colo. 144, 556 P.2d 1217 (1976), cert. denied, 431 U.S. 966, 97 S. Ct. 2922, 53 L. Ed.2d 1061 (1977).

The fact that the term of office for municipal judges is not included in the exceptions in § 13-10-103 clearly indicates the general assembly's recognition that the tenure decision lies in the hands of the citizens of home-rule cities. *People ex rel. People of City of Thornton v. Horan*, 192 Colo. 144, 556 P.2d 1217 (1976), cert. denied, 431 U.S. 966, 97 S. Ct. 2922, 53 L. Ed.2d 1061 (1977).

**Home-rule cities to specify terms of tenure.** Subsection (1)(a), read in context with § 6 of art. XX, Colo. Const., makes it clear that the statute's unambiguous language offers home-rule cities the opportunity to specify the terms

under which a municipal judge holds his office. *People ex rel. People of City of Thornton v. Horan*, 192 Colo. 144, 556 P.2d 1217 (1976), cert. denied, 431 U.S. 966, 97 S. Ct. 2922, 53 L. Ed.2d 1061 (1977).

The decision of a home-rule city to appoint judges removable at the will of the city council is consistent with this section. *People ex rel. People of City of Thornton v. Horan*, 192 Colo.

144, 556 P.2d 1217 (1976), cert. denied, 431 U.S. 966, 97 S. Ct. 2922, 53 L. Ed.2d 1061 (1977).

Likewise, a city charter that provides for the appointment of a municipal judge by the city council for a fixed term and that limits the removal of a judge only for cause does not violate this section. *Artes-Roy v. City of Aspen*, 856 P.2d 823 (Colo. 1993).

**13-10-106. Qualifications of municipal judges.** (1) A municipal judge shall have the same qualifications as a county judge in a Class D county, as set forth in section 13-6-203 (3).

(2) Preference shall be given by the municipal governing body, when possible, to the appointment of a municipal judge who is licensed to practice law in Colorado or who is trained in the law.

(3) The municipal governing body may appoint a county judge in a Class C or D county, as defined in section 13-6-203, to serve as a municipal judge.

(4) The municipal governing body may require that the municipal judge be a qualified elector of the municipality or the county in which the municipality is located.

**Source:** L. 69: p. 274, § 1. C.R.S. 1963: § 37-22-4. L. 77: (1) amended and (4) added, p. 793, § 2, effective June 3.

**13-10-107. Compensation of municipal judges.** (1) The municipal governing body shall provide by ordinance for the salary of the municipal and assistant judges. Such salary shall be a fixed annual compensation and payable on a monthly or other periodic basis. The municipal governing body may pay any substitute judge appointed pursuant to section 13-10-105 (1) (b) based upon the number of court sessions served by such judge.

(2) (Deleted by amendment, L. 91, p. 742, § 2, effective April 4, 1991.)

**Source:** L. 69: p. 274, § 1. C.R.S. 1963: § 37-22-5. L. 91: Entire section amended, p. 742, § 2, effective April 4.

**13-10-108. Clerk of the municipal court.** (1) The municipal governing body shall establish the position of clerk of the municipal court, except that the municipal judge shall serve as ex officio clerk if the business of the court is insufficient to warrant a separate full-time or part-time clerk.

(2) The clerk of the municipal court shall be appointed by the presiding municipal judge and shall have such duties as are delegated to him by law, court rule, or the presiding municipal judge.

(3) The municipal governing body shall provide for the salary of the clerk of the municipal court in the same manner as specified in section 13-10-107; except that if the municipal judge serves as ex officio clerk, he shall not receive any additional compensation.

**Source:** L. 69: p. 274, § 1. C.R.S. 1963: § 37-22-6.

**13-10-109. Bond.** (1) The clerk of the municipal court shall give a performance bond in the sum of two thousand dollars, or in such amount as may be set by ordinance, to the city or town for which he is appointed.

(2) The performance bond shall be approved by the municipal governing body and be conditioned upon the faithful performance of his duties, and for the faithful accounting for, and payment of, all funds deposited with or received by the court.

(3) When the municipal judge serves as clerk of the municipal court, as provided in section 13-10-108 (3), he shall execute the performance bond required by this section.

(4) The governing body of the city or town may waive the bond required by this section.



**Source:** L. 69: p. 275, § 1. C.R.S. 1963: § 37-22-7. L. 89: (4) added, p. 1287, § 1, effective April 6.

**13-10-110. Court facilities and supplies.** (1) The municipal governing body shall furnish the municipal court with suitable courtroom facilities and sufficient funds for the acquisition of all necessary books, supplies, and furniture for the proper conduct of the business of the court.

(2) In order to carry out the provisions of subsection (1) of this section, the municipal governing body may locate court facilities outside of the municipality or county in which the municipality is located, if such facilities are in reasonable proximity to the municipality and the governing body determines that suitable facilities cannot be provided within the municipality.

(3) Any two or more governments may cooperate or contract, pursuant to part 2 of article 1 of title 29, C.R.S., to provide joint court facilities and supplies. Such joint facilities may be located outside of any or all of the cooperating or contracting governments but shall be located within reasonable proximity to each of the cooperating or contracting governments.

(4) Where, pursuant to this section, a municipality locates its court facilities outside of its boundaries, any reference in this article to the municipality in which the court is located shall mean the municipality creating the municipal court, and any reference in this article to the county in which the municipal court is located shall mean the county in which the municipality creating the court is located.

**Source:** L. 69: p. 275, § 1. C.R.S. 1963: § 37-22-8. L. 75: Entire section amended, p. 567, § 1, effective June 13.

**13-10-111. Commencement of actions - process.** (1) Any action or summons brought in any municipal court to recover any fine or enforce any penalty or forfeiture under any ordinance shall be filed in the corporate name of the municipality in which the court is located by and on behalf of the people of the state of Colorado.

(2) Any process issued from a municipal court runs in the corporate name of the municipality by and on behalf of the people of the state of Colorado. Processes from any municipal court shall be executed by any authorized law enforcement officer from the municipality in which the court is located.

(3) Any authorized law enforcement officer may execute within such officer's jurisdiction any summons, process, writ, or warrant issued by a municipal court from another jurisdiction arising under the ordinances of such municipality for an offense which is criminal or quasi-criminal. For the purposes of this subsection (3), traffic offenses shall not be considered criminal or quasi-criminal offenses unless penalty points may be assessed under section 42-2-127 (5) (a) to (5) (cc), C.R.S. The issuing municipality shall be liable for and pay all costs, including costs of service or incarceration incurred in connection with such service or execution.

(4) The clerk of the municipal court shall issue a subpoena for the appearance of any witness in municipal court upon the request of either the prosecuting municipality or the defendant. The subpoena may be served upon any person within the jurisdiction of the court in the manner prescribed by the rules of procedure applicable to municipal courts. Any person subpoenaed to appear as a witness in municipal court shall be paid a witness fee in the amount of five dollars.

(5) Upon the request of the municipal court, the prosecuting municipality, or the defendant, the clerk of the municipal court shall issue a subpoena for the appearance, at any and all stages of the court's proceedings, of the parent, guardian, or lawful custodian of any child under eighteen years of age who is charged with a municipal offense. Whenever a person who is issued a subpoena pursuant to this subsection (5) fails, without good cause, to appear, the court may issue an order for the person to show cause to the court as to why the person should not be held in contempt. Following a show cause hearing, the court may make findings of fact and conclusions of law and may enter an appropriate order, which may include finding the person in contempt.

**Source:** L. 69: p. 275, § 1. C.R.S. 1963: § 37-22-9. L. 77: (3) amended, p. 793, § 3, effective June 3. L. 78: (3) amended, p. 262, § 45, effective May 23. L. 81: (5) added, p. 882, § 1, effective April 30. L. 94: (5) amended, p. 909, § 3, effective April 28; (3) amended, p. 2549, § 32, effective January 1, 1995.

**13-10-112. Powers and procedures.** (1) The municipal judge of any municipal court has all judicial powers relating to the operation of his court, subject to any rules of procedure governing the operation and conduct of municipal courts promulgated by the Colorado supreme court. The presiding municipal judge of any municipal court has authority to issue local rules of procedure consistent with any rules of procedure adopted by the Colorado supreme court.

(2) The judicial powers of any municipal judge shall include the power to enforce subpoenas issued by any board, commission, hearing officer, or other body or officer of the municipality authorized by law or ordinance to issue subpoenas.

**Source:** L. 69: p. 275, § 1. C.R.S. 1963: § 37-22-10. L. 91: Entire section amended, p. 742, § 3, effective April 4.

#### ANNOTATION

**Contempt power is implied** by need to maintain order and decorum indispensable to judicial proceedings. *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

**Determination whether or not certain conduct constitutes contempt** is within the trial court's sound discretion, and it is not reviewable on appeal absent an abuse of discretion. *Tipton v. City of Lakewood ex rel. People*, 198 Colo. 18, 595 P.2d 689 (1979).

**It is not designed to protect judge's dignity or person.** A judge's power to punish contempt committed in his presence is not designed to protect his own dignity or person, but to protect the rights of litigants and the public by ensuring that the administration of justice shall not be thwarted or obstructed. *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

**Contempt power must be exercised with self-restraint.** Like other inherent judicial powers, the contempt power must be exercised with patience and self-restraint. *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

**While a court may have inherent power to perform its judicial functions effectively**, the method a court chooses to use in exercising its inherent power must be one which the court has jurisdiction to utilize. *City of Englewood v. Parkinson*, 703 P.2d 626 (Colo. App. 1985).

**Judges must be cautious to avoid overreacting** when persons not familiar with court procedures, through ignorance or frustration, unintentionally cause minor commotions. *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

**When contempt power should be invoked.** Since the contempt power is rooted in the ne-

cessity to maintain the respectful atmosphere appropriate to efficient administration of justice, it should be invoked only when the judicial process has been seriously affronted or disrupted. Only then is there a need to vindicate the dignity and authority of the court or to reestablish the respect owed to it. *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

**One cannot be convicted of contempt for respectfully declining to comply with an order which is beyond the court's authority.** *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

**Invocation of contempt power to punish valid exercise of constitutional right** is an abuse of discretion by the court. *Tipton v. City of Lakewood ex rel. People*, 198 Colo. 18, 595 P.2d 689 (1979).

**Ordering husband to reveal remarks to wife.** A municipal judge had no authority, without the consent of the defendant or his wife, to order him to reveal what he had told her. *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

**Evidence insufficient to support contempt conviction.** *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

Where the record indicates that the only substantial delay or disruption in court proceedings occurred after the judge required the defendant to return to the courtroom, sought to force him to divulge his prior remarks to his wife, and had him handcuffed in open court, that disruption cannot be attributed to the defendant's conduct. *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

**13-10-113. Fines and penalties.** (1) Any person convicted of violating a municipal ordinance in a municipal court of record may be incarcerated for a period not to exceed one year or fined an amount not to exceed one thousand dollars, or both.



(1.5) Any person convicted of violating a municipal ordinance in a municipal court which is not of record may be incarcerated for a period not to exceed ninety days or fined an amount not to exceed three hundred dollars, or both.

(2) In sentencing or fining a violator, the municipal judge shall not exceed the sentence or fine limitations established by ordinance. Any other provision of the law to the contrary notwithstanding, the municipal judge may suspend the sentence or fine of any violator and place him on probation for a period not to exceed one year.

(3) The municipal judge is empowered in his discretion to assess costs, as established by the municipal governing body by ordinance, against any defendant who pleads guilty or nolo contendere or who enters into a plea agreement or who, after trial, is found guilty of an ordinance violation.

(4) Notwithstanding any provision of law to the contrary, a municipal court has the authority to order a child under eighteen years of age confined in a juvenile detention facility operated or contracted by the department of human services or a temporary holding facility operated by or under contract with a municipal government for failure to comply with a lawful order of the court, including an order to pay a fine. Any confinement of a child for contempt of municipal court shall not exceed forty-eight hours.

(5) Notwithstanding any other provision of law, a child, as defined in section 19-1-103 (18), C.R.S., arrested for an alleged violation of a municipal ordinance, convicted of violating a municipal ordinance or probation conditions imposed by a municipal court, or found in contempt of court in connection with a violation or alleged violation of a municipal ordinance shall not be confined in a jail, lockup, or other place used for the confinement of adult offenders but may be held in a juvenile detention facility operated by or under contract with the department of human services or a temporary holding facility operated by or under contract with a municipal government that shall receive and provide care for such child. A municipal court imposing penalties for violation of probation conditions imposed by such court or for contempt of court in connection with a violation or alleged violation of a municipal ordinance may confine a child pursuant to section 19-2-508, C.R.S., for up to forty-eight hours in a juvenile detention facility operated by or under contract with the department of human services. In imposing any jail sentence upon a juvenile for violating any municipal ordinance when the municipal court has jurisdiction over the juvenile pursuant to section 19-2-104 (1) (a) (II), C.R.S., a municipal court does not have the authority to order a child under eighteen years of age to a juvenile detention facility operated or contracted by the department of human services.

(6) Whenever the judge in a municipal court of record imposes a fine for a nonviolent municipal ordinance or code offense, if the person who committed the offense is unable to pay the fine at the time of the court hearing or if he or she fails to pay any fine imposed for the commission of such offense, in order to guarantee the payment of such fine, the municipal judge may compel collection of the fine in the manner provided in section 18-1.3-506, C.R.S. For purposes of this subsection (6), "nonviolent municipal ordinance or code offense" means a municipal ordinance or code offense which does not involve the use or threat of physical force on or to a person in the commission of the offense.

(7) Notwithstanding subsections (1) and (1.5) of this section, the municipal judge of each municipality which implements an industrial wastewater pretreatment program pursuant to the federal act, as defined in section 25-8-103 (8), C.R.S., may provide such relief and impose such penalties as are required by such federal act and its implementing regulations for such programs.

(8) If, as a condition of or in connection with any sentence imposed pursuant to this section, a municipal court judge requires a juvenile who is younger than eighteen years of age to attend school, the municipal court shall notify the school district in which the juvenile is enrolled of such requirement.

**Source:** L. 69: p. 275, § 1. C.R.S. 1963: § 37-22-11. L. 81: (4) added, p. 882, § 2, effective April 30; (5) added, p. 1041, § 2, effective July 1. L. 87: (2) and (3) amended, p. 546, § 1, effective April 23; (4) and (5) amended, p. 814, § 11, effective October 1. L. 89: (6) added, p. 887, § 3, effective April 6. L. 90: (4) and (5) amended, p. 1016, § 1, effective April 20; (7) added, p. 1345, § 6, effective July 1. L. 91: (1) and (3) amended and (1.5)

added, p. 743, § 4, effective April 4. **L. 92:** (7) amended, p. 2183, § 59, effective June 2. **L. 94:** (4) and (5) amended, pp. 2641, 2615, §§ 90, 23, effective July 1; (5) amended, p. 1462, § 1, effective July 1. **L. 96:** (5) amended, p. 1679, § 2, effective January 1, 1997. **L. 2000:** (8) added, p. 320, § 8, effective April 7. **L. 2002:** (6) amended, p. 1487, § 121, effective October 1.

**Editor's note:** Amendments to subsection (5) by Senate Bill 94-089 and House Bill 94-1029 were harmonized.

**Cross references:** (1) For municipal ordinances and penalties relating thereto, see §§ 31-15-103 and 31-16-101.

(2) For the legislative declaration contained in the 1994 act amending subsections (4) and (5), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsection (6), see section 1 of chapter 318, Session Laws of Colorado 2002.

**13-10-114. Trial by jury.** (1) In any action before municipal court in which the defendant is entitled to a jury trial by the constitution or the general laws of the state, such party shall have a jury upon request. The jury shall consist of three jurors unless, in the case of a trial for a petty offense, a greater number, not to exceed six, is requested by the defendant.

(2) In municipalities having less than five thousand population, juries may be summoned by the issuance of venire to a police officer or marshal. In municipalities having a population of five thousand or more, juries shall be selected from a jury list as is provided for courts of record.

(3) Jurors shall be paid the sum of six dollars per day for actual jury service and three dollars for each day of service on the jury panel alone; except that the governing body of a municipality may, by resolution or ordinance, set higher or lower fees for attending its municipal court.

(4) For the purposes of this section, a defendant waives his or her right to a jury trial under subsection (1) of this section unless, within twenty-one days after entry of a plea, the defendant makes a request to the court for a jury trial, in writing, and tenders to the court a fee of twenty-five dollars, unless the fee is waived by the judge because of the indigence of the defendant. If the action is dismissed or the defendant is acquitted of the charge, or if the defendant having paid the jury fee files with the court at least seven days before the scheduled trial date a written waiver of jury trial, the jury fee shall be refunded.

(5) At the time of arraignment for any petty offense in this state, the judge shall advise any defendant not represented by counsel of the defendant's right to trial by jury; of the requirement that the defendant, if he or she desires to invoke his or her right to trial by jury, request such trial by jury within twenty-one days after entry of a plea, in writing; of the number of jurors allowed by law; and of the requirement that the defendant, if he or she desires to invoke his or her right to trial by jury, tender to the court within twenty-one days after entry of a plea a jury fee of twenty-five dollars, unless the fee is waived by the judge because of the indigence of the defendant.

**Source:** **L. 69:** p. 276, § 1. **C.R.S. 1963:** § 37-22-12. **L. 70:** p. 150, § 3. **L. 83:** (4) amended, p. 615, § 1, effective July 1. **L. 88:** (3) amended, p. 1124, § 1, effective April 4. **L. 2005:** (4) and (5) amended, p. 428, § 10, effective July 28. **L. 2012:** (4) and (5) amended, (SB 12-175), ch. 208, p. 823, § 4, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (4) and (5) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

#### ANNOTATION

**Applicability of the Uniform Jury Selection and Service Act.** Although the act is not applicable to municipal courts, the statutory disquali-

fications in § 13-71-109 (2) should be applied to trials in municipal courts of record. *City of Aurora v. Rhodes*, 689 P.2d 603 (Colo. 1984).



For purposes of § 13-71-109, a prospective juror summoned to a municipal court qualifies as a "resident of the county" as long as he resides in that part of the county located within the territorial limits of the municipality. *City of Aurora v. Rhodes*, 689 P.2d 603 (Colo. 1984).

**A defendant has the right to a jury in municipal court if charged with the commission of a petty offense**, as defined under §16-10-109, C.R.S. *Bradford v. Longmont Mun. Court*, 830 P.2d 1135 (Colo. App. 1992).

**The rule proscribing a child's right to a jury trial is limited to delinquency proceed-**

**ings.** *Bradford v. Longmont Mun. Court*, 830 P.2d 1135 (Colo. App. 1992).

**Prerequisites of a written demand and \$25 fee for a jury trial pursuant to C.R.M.P. 223 and this section do not violate defendant's right to a jury trial or deprive him of equal protection of the laws under the federal constitution.** *Christie v. People*, 837 P.2d 1237 (Colo. 1992).

**Applied in** *Lininger v. City of Sheridan*, 648 P.2d 1097 (Colo. App. 1982).

**13-10-115. Fines and costs.** All fines and costs collected or received by the municipal court shall be reported and paid monthly, or at such other intervals as may be provided by an ordinance of the municipality, to the treasurer of the municipality and deposited in the general fund of the municipality.

**Source: L. 69: p. 276, § 1. C.R.S. 1963: § 37-22-13.**

**13-10-116. Appeals.** (1) Appeals may be taken by any defendant from any judgment of a municipal court which is not a qualified municipal court of record to the county court of the county in which such municipal court is located, and the cause shall be tried de novo in the appellate court.

(2) Appeals taken from judgments of a qualified municipal court of record shall be made to the district court of the county in which the qualified municipal court of record is located. The practice and procedure in such case shall be the same as provided by section 13-6-310 and applicable rules of procedure for the appeal of misdemeanor convictions from the county court to the district court, and the appeal procedures set forth in this article shall not apply to such case.

(3) No municipality shall have any right to appeal from any judgment of a municipal court, not of record, concerning a violation of any charter provision or ordinance, but this subsection (3) shall not be construed to prevent a municipality from maintaining any action to construe, interpret, or determine the validity of any ordinance or charter provision involved in such proceeding. Nothing in this subsection (3) shall be construed to prevent a municipality from appealing any question of law arising from a proceeding in a qualified municipal court of record.

(4) If, in any municipal court, a defendant is denied a jury trial to which he is entitled under section 13-10-114, he is entitled to a trial by jury under section 16-10-109, C.R.S., and to a trial de novo upon application therefor on appeal.

(5) Notwithstanding any provision of law to the contrary, if confinement of a child is ordered pursuant to a contempt conviction as set forth in section 13-10-113 (4), appeal shall be to the juvenile court for the county in which the municipal court is located. Such appeals shall be advanced on the juvenile court's docket to the earliest possible date. Procedures applicable to such appeals shall be in the same manner as provided in subsections (1) and (2) of this section for appeals to the county court.

**Source: L. 69: p. 276, § 1. C.R.S. 1963: § 37-22-14. L. 70: p. 151, § 4. L. 72: p. 267, § 3. L. 77: (3) amended, p. 794, § 4, effective June 3. L. 81: (5) added, p. 882, § 3, effective July 1. L. 85: (1), (2), and (5) amended, p. 570, § 6, effective November 14, 1986.**

#### ANNOTATION

- I. General Consideration.
- II. Appeals From Municipal Courts.

- III. Appeals From Municipal Courts of Record.

## I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Colorado Appellate Procedure", see 40 U. Colo. L. Rev. 551 (1968).

**Annotator's note.** Since § 13-10-116 is similar to repealed § 139-36-2, CRS 53 and § 139-36-2, C.R.S. 1963, relevant cases construing those provisions have been included in the annotations to this section.

**Municipal courts may take judicial notice of the municipal ordinances that fall within their jurisdiction.** *City of Pueblo v. Murphy*, 189 Colo. 559, 542 P.2d 1288 (1975).

A court which assumes the trial duties of the municipal court in a trial de novo appeal may take judicial notice of the same ordinances which the lower court does. *City of Pueblo v. Murphy*, 189 Colo. 559, 542 P.2d 1288 (1975).

**A county court may take judicial notice of municipal ordinances** when an appeal is taken from the municipal court to the county court for a trial de novo. *City of Pueblo v. Murphy*, 189 Colo. 559, 542 P.2d 1288 (1975).

The appellate court in such a circumstance stands in the same position and has the same duties as the trial court. As a result, the county court may take judicial notice of the ordinances which were before the municipal court. *City of Pueblo v. Murphy*, 189 Colo. 559, 542 P.2d 1288 (1975).

**Courts of general jurisdiction may not take judicial notice of the ordinances of municipal corporations in civil or criminal cases.** *City of Pueblo v. Murphy*, 189 Colo. 559, 542 P.2d 1288 (1975).

**When district court may take judicial notice of municipal ordinance.** Where a municipal ordinance was properly the subject of judicial notice in the municipal court, and the case is then before a district court on appeal on the record, the district court may also take judicial notice of the municipal ordinance. *Chavez v. People*, 193 Colo. 50, 561 P.2d 1270 (1977).

**An executed sentence in municipal court does not necessarily constitute a waiver of the right of review** to have the taint cleared on the name of the person. Where he has involuntarily complied with the sanction imposed by the trial court, he nevertheless has the opportunity to have undone the dishonor and discredit of a conviction. *City of Pueblo v. Clemmer*, 150 Colo. 546, 375 P.2d 99 (1962).

**A municipality cannot appeal acquittal of a violation of an ordinance.** Under this section a judgment finding accused not guilty of a traffic violation is a judgment on the merits and concludes the litigation between the parties, there being no right in the municipality to appeal from such judgment. *People ex rel Town of Cherry Hills Vill. v. Cervi*, 144 Colo. 338, 356 P.2d 241 (1960).

**Appellate procedure must be followed before defendant can seek habeas corpus.** De-

fendant, a 14 year old, who was found guilty of reckless driving and sentenced to 90 days in jail, was not entitled to habeas corpus relief on the ground of alleged violation of his right to counsel where he did not appeal to county court where adequate remedy of trial de novo was available, but instead proceeded immediately by way of habeas corpus. *Garrett v. Knight*, 173 Colo. 419, 480 P.2d 569 (1971).

**Applied in** *Fuller v. Colo. Dept. of Rev.*, 43 Colo. App. 404, 610 P.2d 1078 (1979); *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980).

## II. APPEALS FROM MUNICIPAL COURTS.

**This section provides that appeals from a municipal or police court may be taken to the county court** of the county where the municipal or police court is located. *City of Central v. Axton*, 159 Colo. 69, 410 P.2d 173 (1966).

**County court sitting as appellate court in trial de novo has same duties as trial court.** *Rainwater v. County Court*, 43 Colo. App. 477, 604 P.2d 1195 (1979).

**Trial de novo is not an entirely new trial**, but is, instead, a continuation of the original trial in the form of an appeal. *Rainwater v. County Court*, 43 Colo. App. 477, 604 P.2d 1195 (1979).

**"Any defendant" may appeal "any judgment"**. When he does appeal in compliance with the procedure set forth in this article, he is entitled to a trial de novo. *City of Pueblo v. Trujillo*, 150 Colo. 549, 374 P.2d 863 (1962).

**This section means that a defendant starts afresh in the county court**, i.e., if he resolves to contest the charge against him in the county court, he may have a trial de novo there without regard to what took place in the municipal court. *City of Pueblo v. Trujillo*, 150 Colo. 549, 374 P.2d 863 (1962).

**Generally, municipal judges are untrained in the law.** The general assembly and the courts recognize the fact that the judges and magistrates who preside over inferior tribunals are frequently untrained and unskilled in the law, and that they conduct courts not of record, in which the proceedings are apt to be summary in nature. They also recognize that, because of frequent shortcomings in training in the law, safeguards afforded defendants may be curtailed and, by reason thereof, defendants may not be properly advised of their rights in the premises or adequately warned of the consequences of a plea. *City of Pueblo v. Trujillo*, 150 Colo. 549, 374 P.2d 863 (1962).

## III. APPEALS FROM MUNICIPAL COURTS OF RECORD.

**If a municipal court is a court of record, the cause is heard on the record, and the practice and procedure is to be the same as**



provided for in regard to the appeal of misdemeanor convictions from county courts. *Hylton v. City of Colo. Springs*, 32 Colo. App. 9, 505 P.2d 26 (1973).

**Remanded or tried de novo by the district court.** These sections require a district court either to review a decision of a municipal court of record on the record, to remand the case for a new trial with instructions, or to direct that trial de novo be had before the district court. In the instant case, the district court adopted the first alternative, and therefore, the question is whether the court properly exercised the appellate jurisdiction granted to it under the sections noted above. *People v. Anderson*, 177 Colo. 84, 492 P.2d 844 (1972).

**The function of a district court in acting as an appellate court is the same** whether the case originates in a municipal court of record or a county court. *People v. Anderson*, 177 Colo. 84, 492 P.2d 844 (1972).

**Party seeking review of a municipal court judgment is entitled to file a petition for rehearing** unless the district court by express order dispenses with the filing of the petition. *City of Aurora v. Rhodes*, 689 P.2d 603 (Colo. 1984).

**Because appellant's conviction originated in a municipal court of record**, appellant had 30 days following the judgment of conviction to file the notice of appeal pursuant to this section and its implementing rules. *Normandin v. Town of Parachute*, 91 P.3d 383 (Colo. 2004).

**13-10-117. Time - docket fee - bond.** Appeals may be taken within fourteen days after entry of any judgment of a municipal court. No appeal shall be allowed until the appellant has paid to the clerk of the municipal court one dollar and fifty cents as a fee for preparing the transcript of record on appeal. If the municipal court is a court of record, the clerk of the municipal court is entitled to the same additional fees for preparing the record, or portions thereof designated, as is the clerk of the county court on the appeal of misdemeanors, but said fees shall be refunded to the defendant if the judgment is set aside on appeal. No stay of execution shall be granted until the appellant has executed an approved bond as provided in sections 13-10-120 and 13-10-121.

**Source:** L. 69: p. 276, § 1. C.R.S. 1963: § 37-22-15. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 824, § 5, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

#### ANNOTATION

**One appealing from a judgment of a municipal court must file an appeal bond as directed by this section.** *City of Pueblo v.*

*Trujillo*, 150 Colo. 549, 374 P.2d 863 (1962) (decided under repealed § 139-36-4, CRS 53).

**13-10-118. Notice - scope.** (1) Appeals may be taken by filing with the clerk of the municipal court a notice of appeal, in duplicate. The notice of appeal shall set forth the title of the case; the name and address of the appellant and appellant's attorney, if any; identification of the offense or violation of which the appellant was convicted; a statement of the judgment, including its date and any fines or sentences imposed; and a statement that the appellant appeals from the judgment. The notice of appeal shall be signed by the appellant or his attorney.

(2) The taking of an appeal shall not permit the retrial of any matter of which the appellant has been acquitted, or any conjoined charge from the conviction of which he does not seek to appeal.

**Source:** L. 69: p. 277, § 1. C.R.S. 1963: § 37-22-16.

#### ANNOTATION

**Substantial compliance is appropriate standard for notice of appeal.** *Pueblo v. County Court*, 761 P.2d 275 (Colo. App. 1988).

**13-10-119. Certification to appellate court.** Upon payment of the fee provided in section 13-10-117, and filing of notice as provided in section 13-10-118, the original papers in the municipal court file, together with a transcript of the record of the municipal court, and a duplicate notice of appeal shall be certified to the appropriate appellate court pursuant to section 13-10-116 by the municipal court.

**Source:** L. 69: p. 277, § 1. C.R.S. 1963: § 37-22-17. L. 81: Entire section amended, p. 883, § 4, effective July 1.

**13-10-120. Bond - approval of sureties - forfeitures.** (1) When an appellant desires to stay the judgment of the municipal court, he shall execute a bond to the municipality in which the municipal court is located, in such penal sum as may be fixed by the municipal court, and in such form and with sureties qualified as the municipality may, by ordinance, designate.

(2) Sureties shall be approved by a judge of the municipal court from which the appeal is taken.

(3) The amount of bond shall not exceed double the amount of the judgment for fines and costs, plus an amount commensurate with any jail sentence, which latter amount shall be not less than fifty dollars nor more than a sum equal to two dollars for each day of jail sentence imposed.

**Source:** L. 69: p. 277, § 1. C.R.S. 1963: § 37-22-18.

**13-10-121. Conditions of bond - forfeiture - release.** (1) The bond shall be conditioned that the appellant will duly prosecute such appeal and satisfy any judgment that may be rendered upon trial of the case in the appropriate appellate court to which appeal is taken pursuant to section 13-10-116 and that the appellant will surrender himself in satisfaction of such judgment if that is required.

(2) If the bond is forfeited, the appellate court, upon motion of the municipality, shall enter judgment against the appellant and sureties on the bond for the amount of such bond. The appellate court, with the consent of the municipality, shall enter judgment against the appellant and sureties on the bond for the amount of such bond. The appellate court, with the consent of the municipality, may set aside or modify the judgment.

(3) Any municipality may provide by ordinance such other bond terms and conditions as are not inconsistent with the provisions of this article. The filing of such bond or any notice thereof of record shall not constitute any lien against any property of the sureties.

(4) When the condition of the bond has been satisfied or the forfeiture thereof set aside or remitted, the municipal court shall exonerate the obligors and release the bond. At any time before final judgment in the appellate court, a surety may be exonerated by a deposit of cash in the amount of the bond or by timely surrender of the appellant into custody.

**Source:** L. 69: p. 277, § 1. C.R.S. 1963: § 37-22-19. L. 81: (1), (2), and (4) amended, p. 883, § 5, effective July 1.

**13-10-122. Docket fee - dismissal.** The appellant shall pay a docket fee as provided by law to the clerk of the appellate court, within fourteen days from the date he or she ordered the transcript of record. If he or she does not do so, his or her appeal may be dismissed on motion of the municipality.

**Source:** L. 69: p. 278, § 1. C.R.S. 1963: § 37-22-20. L. 81: Entire section amended, p. 883, § 6, effective July 1. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 824, § 6, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.



**13-10-123. Procedendo on dismissal.** Upon dismissal of an appeal, the clerk of the appellate court shall at once issue a procedendo to the municipal court from the judgment on which appeal was taken, to the amount of the judgment and all costs incurred before the municipal court.

**Source:** L. 69: p. 278, § 1. C.R.S. 1963: § 37-22-21. L. 81: Entire section amended, p. 883, § 7, effective July 1.

**13-10-124. Action on bond in name of municipality.** Action may be instituted upon any bond under this article in the name of the municipality in whose favor it is executed.

**Source:** L. 69: p. 278, § 1. C.R.S. 1963: § 37-22-22.

**13-10-125. Judgment.** Upon trial de novo of the case on appeal to the appellate court, if a jury has been demanded, the duties of the jurors shall be to determine only whether the appellant has violated the ordinance charged. Upon a verdict of guilty, the judge shall then hear and consider any material facts in mitigation or aggravation of the offense and shall impose a penalty as provided by ordinance.

**Source:** L. 69: p. 278, § 1. C.R.S. 1963: § 37-22-23. L. 81: Entire section amended, p. 884, § 8, effective July 1.

#### ANNOTATION

**County judge imposes penalty as required by law.** Since on appeal to county court, if a jury sits, this section requires that the jury determine only whether the ordinance has been violated, the trial judge has the responsibility of imposing "a penalty as provided by law". *Hylton v. City of Colo. Springs*, 32 Colo. App. 9, 505 P.2d 26 (1973) (decided under repealed § 139-36-17, C.R.S. 1963).

**Under this section, "law" can be none other than municipal ordinance.** *Hylton v. City of Colo. Springs*, 32 Colo. App. 9, 505 P.2d 26 (1973).

**Judgment is a county court judgment.** Whether action and penalties are characterized as criminal, quasi-criminal, or civil, a county court is empowered by statute to impose a sentence within the limits provided by the municipal ordinance, but it is nevertheless a county court judgment. *Hylton v. City of Colo. Springs*, 32 Colo. App. 9, 505 P.2d 26 (1973).

**Municipal court has no power to issue execution on a county court judgment,** as the county court must issue execution on its own judgment. *Hylton v. City of Colo. Springs*, 32 Colo. App. 9, 505 P.2d 26 (1973).

**13-10-126. Prostitution offender program authorized - reports.** (1) Subject to the provisions of this section, a municipal or county court, or multiple municipal or county courts, may create and administer a program for certain persons who are charged with soliciting for prostitution, as described in section 18-7-202, C.R.S., patronizing a prostitute, as described in section 18-7-205, C.R.S., or any corresponding municipal code or ordinance.

(2) A program created and administered by a municipal or county court or multiple municipal or county courts pursuant to subsection (1) of this section shall:

(a) Permit enrollment in the program only by an offender who either:

(I) (A) Has no prior convictions or any charges pending for any felony; for any offense described in section 18-3-305, 18-3-306, or 18-13-128, C.R.S., in part 4 or 5 of article 3 of title 18, C.R.S., in part 3, 4, 6, 7, or 8 of article 6 of title 18, C.R.S., in section 18-7-201.7, 18-7-203, 18-7-205.7, or 18-7-206, C.R.S., or in part 3, 4, or 5 of article 7 of title 18, C.R.S.; or for any offense committed in another state that would constitute such an offense if committed in this state; and

(B) Has been offered and has agreed to a deferred sentencing arrangement as described in subsection (3) of this section; or

(II) (A) Has at least one prior conviction for any offense described in section 18-7-201,

18-7-202, 18-7-204, 18-7-205, 18-7-207, or 18-7-208, C.R.S.; or for any offense committed in another state that would constitute such an offense if committed in this state; and

(B) Has been sentenced by a court to complete the program as part of the penalty imposed for a subsequent conviction for soliciting for prostitution, as described in section 18-7-202, C.R.S., patronizing a prostitute, as described in section 18-7-205, C.R.S., or any corresponding municipal code or ordinance.

(b) Permit the court or courts to require each offender who enrolls in the program to pay an administration fee, which fee the court or courts shall use to pay the costs of administering the program;

(c) To the extent practicable, be available to offenders, courts, and prosecutors of other jurisdictions; and

(d) Be administered by the court or courts with assistance from one or more municipal prosecutor's offices, one or more district attorney's offices, one or more state or local law enforcement agencies, and one or more nonprofit corporations, as defined in section 7-121-401, C.R.S., which nonprofit corporations have a stated mission to reduce human trafficking or prostitution. The court or courts are encouraged to consult, in addition to the aforementioned entities, recognized criminology experts and mental health professionals.

(3) (a) Enrollment in the program shall be offered to each offender at the sole discretion of the prosecuting attorney in each offender's case.

(b) If the prosecuting attorney offers enrollment in the program to an offender as a condition of a plea bargain agreement as described in subparagraph (I) of paragraph (a) of subsection (2) of this section, the agreement shall include at a minimum the following stipulations:

(I) The offender shall enter a plea of guilty to the prostitution-related offense or offenses with which he or she is charged;

(II) The court shall defer judgment and sentencing of the offender for a period not to exceed two years, as described in section 18-1.3-102 (1), C.R.S., during which time the offender shall enroll in and complete the program and may be required to pay an administration fee, as described in paragraph (b) of subsection (2) of this section;

(III) Upon the offender's satisfactory completion of the program, the court shall dismiss with prejudice the prostitution-related charge or charges;

(IV) The offender shall waive his or her right to a speedy trial; and

(V) If the offender fails to complete the program or fails to satisfy any other condition of the plea bargain agreement, he or she shall be sentenced for the offenses to which he or she has pleaded guilty and shall be required to pay a fine of not less than two thousand five hundred dollars and not more than five thousand dollars, or the maximum amount available to a municipal or county court, in the discretion of the court, in addition to any other sentence imposed by the court.

(c) If the prosecuting attorney offers enrollment in the program to an offender pursuant to subparagraph (II) of paragraph (a) of subsection (2) of this section and the offender fails to complete the program, the offender shall be required to pay a fine of not less than two thousand five hundred dollars and not more than five thousand dollars, or the maximum amount available to the municipal or county court, in the discretion of the court, in addition to any other sentence imposed by the court.

(4) If a municipal or county court or multiple municipal or county courts create and administer a program pursuant to subsection (1) of this section, the court or courts shall prepare and submit a report to the judiciary committees of the house of representatives and senate, or any successor committees, concerning the effectiveness of the program. The court or courts shall submit the report not less than two years nor more than three years after the creation of the program. The report shall include information concerning:

(a) The cost of the program and the extent to which the cost is mitigated by the imposition of the fees described in paragraph (b) of subsection (2) of this section; and

(b) The effectiveness of the program in reducing recidivism among persons who commit prostitution-related offenses.



**Cross references:** For the legislative declaration in the 2011 act adding this section, see section 1 of chapter 257, Session Laws of Colorado 2011.

## CIVIL PROTECTION ORDERS

### ARTICLE 14

#### Civil Protection Orders

13-14-101.	Definitions.	13-14-103.	Emergency protection orders.
13-14-102.	Civil protection orders - legislative declaration.	13-14-104.	Foreign protection orders.

**13-14-101. Definitions.** For purposes of this article, unless the context otherwise requires:

(1) "Abuse of the elderly or of an at-risk adult" means mistreatment of a person who is sixty years of age or older or who is an at-risk adult as defined in section 26-3.1-101 (1), C.R.S., including but not limited to repeated acts that:

- (a) Constitute verbal threats or assaults;
- (b) Constitute verbal harassment;
- (c) Result in the inappropriate use or the threat of inappropriate use of medications;
- (d) Result in the inappropriate use of physical or chemical restraints;
- (e) Result in the misuse of power or authority granted to a person through a power of attorney or by a court in a guardianship or conservatorship proceeding that results in unreasonable confinement or restriction of liberty; or
- (f) Constitute threats or acts of violence against, or the taking, transferring, concealing, harming, or disposing of, an animal owned, possessed, leased, kept, or held by the elderly or at-risk adult, which threats or acts are intended to coerce, control, punish, intimidate, or exact revenge upon the elderly or at-risk adult.

(1.5) "Adult" means a person eighteen years of age or older.

(2) "Domestic abuse" means any act or threatened act of violence that is committed by any person against another person to whom the actor is currently or was formerly related, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship. "Domestic abuse" may also include any act or threatened act of violence against:

- (a) The minor children of either of the parties; or
- (b) An animal owned, possessed, leased, kept, or held by either of the parties or by a minor child of either of the parties, which threat or act is intended to coerce, control, punish, intimidate, or exact revenge upon either of the parties or a minor child of either of the parties.

(2.2) "Minor child" means a person under eighteen years of age.

(2.3) "Protected person" means the person or persons identified in a protection order as the person or persons for whose benefit the protection order was issued.

(2.4) (a) "Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person, or from threatening, taking, transferring, concealing, harming, or disposing of an animal owned, possessed, leased, kept, or held by a protected person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises or any other provision to protect the protected person from imminent danger to life or health that is issued by a court of this state or a municipal court and that is issued pursuant to:

(I) This article, section 18-1-1001, C.R.S., section 19-2-707, C.R.S., section 19-4-111, C.R.S., or rule 365 of the Colorado rules of county court civil procedure;

(II) Sections 14-4-101 to 14-4-105, C.R.S., section 14-10-107, C.R.S., section 14-10-108, C.R.S., or section 19-3-316, C.R.S., as those sections existed prior to July 1, 2004;

(III) An order issued as part of the proceedings concerning a criminal municipal ordinance violation; or

(IV) Any other order of a court that prohibits a person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching a person, or from threatening, taking, transferring, concealing, harming, or disposing of an animal owned, possessed, leased, kept, or held by a person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises.

(b) For purposes of this article only, "protection order" includes any order that amends, modifies, supplements, or supersedes the initial protection order. "Protection order" also includes any restraining order entered prior to July 1, 2003, and any foreign protection order as defined in section 13-14-104.

(2.8) "Restrained person" means a person identified in a protection order as a person prohibited from doing a specified act or acts.

(3) "Stalking" means the crime of stalking as described in section 18-3-602, C.R.S.

**Source:** **L. 99:** Entire article added, p. 495, § 1, effective July 1. **L. 2000:** (3) amended, p. 1012, § 3, effective July 1. **L. 2003:** IP(1) amended and (2.3), (2.4), and (2.8) added, p. 995, § 1, effective July 1. **L. 2004:** (1.5) and (2.2) added and (2.4) amended, p. 544, § 1, effective July 1. **L. 2010:** (1)(e), (2), IP(2.4)(a), and (2.4)(a)(IV) amended and (1)(f) added, (SB 10-080), ch. 78, p. 264, § 1, effective July 1; (3) amended, (HB 10-1233), ch. 88, p. 295, § 3, effective August 11.

#### ANNOTATION

**Law reviews.** For article, "Statutes Consolidate Civil Restraining Orders", see 28 Colo. Law. 39 (October 1999). For article, "Crisis

Intervention to Prevent Elder Abuse: Emergency Guardianships and Other Legal Procedures" see 33 Colo. Law. 91 (July 2004).

**13-14-102. Civil protection orders - legislative declaration.** (1) (a) The general assembly hereby finds that the issuance and enforcement of protection orders are of paramount importance in the state of Colorado because protection orders promote safety, reduce violence, and prevent serious harm and death. In order to improve the public's access to protection orders and to assure careful judicial consideration of requests and effective law enforcement, there shall be two processes for obtaining protection orders within the state of Colorado, a simplified civil process and a mandatory criminal process.

(b) The general assembly further finds and declares that:

(I) Domestic violence is not limited to physical threats of violence and harm but includes financial control, document control, property control, and other types of control that make a victim more likely to return to an abuser due to fear of retaliation or inability to meet basic needs;

(II) Victims of domestic violence in many cases are unable to access resources to seek lasting safety options;

(III) These victims need the assistance of additional court orders to meet their immediate needs for food, shelter, transportation, medical care, and child care at the time they go to court for a civil protection order; and

(IV) These additional court orders are needed not only in cases that end in dissolution of marriage but also in cases in which reconciliation is appropriate, as well as in other cases.

(1.5) Any municipal court of record, if authorized by the municipal governing body; any county court; and any district, probate, or juvenile court shall have original concurrent jurisdiction to issue a temporary or permanent civil protection order against an adult or against a juvenile who is ten years of age or older for any of the following purposes:

(a) To prevent assaults and threatened bodily harm;

(b) To prevent domestic abuse;

(c) To prevent emotional abuse of the elderly or of an at-risk adult;

(d) To prevent stalking.

(2) Any civil protection order issued pursuant to this section shall be issued using the standardized set of forms developed by the state court administrator pursuant to section 13-1-136.



(2.5) Venue for filing a motion or complaint pursuant to this section is proper in any county where the acts that are the subject of the motion or complaint occur, in any county where one of the parties resides, or in any county where one of the parties is employed. This requirement for venue does not prohibit the change of venue to any other county appropriate under applicable law.

(3) A motion for a temporary civil protection order shall be set for hearing, which hearing may be ex parte, at the earliest possible time and shall take precedence over all matters, except those matters of the same character that have been on the court docket for a longer period of time. The court shall hear all such motions as expeditiously as possible.

(3.3) Any district court, in an action commenced under the "Uniform Dissolution of Marriage Act", article 10 of title 14, C.R.S., shall have authority to issue temporary and permanent protection orders pursuant to the provisions of subsection (1.5) of this section. Such protection order may be as a part of a motion for a protection order accompanied by an affidavit filed in an action brought under article 10 of title 14, C.R.S. Either party may request the court to issue a protection order consistent with any other provision of this article.

(3.7) At the time a protection order is requested pursuant to this section, the court shall inquire about, and the requesting party and such party's attorney shall have an independent duty to disclose, knowledge such party and such party's attorney may have concerning the existence of any prior protection or restraining order of any court addressing in whole or in part the subject matter of the requested protection order. In the event there are conflicting restraining or protection orders, the court shall consider, as its first priority, issues of public safety. An order that prevents assaults, threats of assault, or other bodily harm shall be given precedence over an order that deals with the disposition of property or other tangible assets. Every effort shall be made by judicial officers to clarify conflicting orders.

(4) (a) A temporary civil protection order may be issued if the issuing judge or magistrate finds that an imminent danger exists to the person or persons seeking protection under the civil protection order. In determining whether an imminent danger exists to the life or health of one or more persons, the court shall consider when the most recent incident of abuse or threat of harm occurred as well as all other relevant evidence concerning the safety and protection of the persons seeking the protection order. However, the court shall not deny a petitioner the relief requested solely because of a lapse of time between an act of abuse or threat of harm and filing of the petition for a protection order.

(b) If the judge or magistrate finds that an imminent danger exists to the employees of a business entity, he or she may issue a civil protection order in the name of the business for the protection of the employees. An employer shall not be liable for failing to obtain a civil protection order in the name of the business for the protection of the employees and patrons.

(5) Upon the filing of a complaint duly verified, alleging that the defendant has committed acts that would constitute grounds for a civil protection order, any judge or magistrate, after hearing the evidence and being fully satisfied therein that sufficient cause exists, may issue a temporary civil protection order to prevent the actions complained of and a citation directed to the defendant commanding the defendant to appear before the court at a specific time and date and to show cause, if any, why said temporary civil protection order should not be made permanent. In addition, the court may order any other relief that the court deems appropriate. Complaints may be filed by persons seeking protection for themselves or for others as provided in section 26-3.1-102 (1) (b) and (1) (c), C.R.S.

(6) A copy of the complaint together with a copy of the temporary civil protection order and a copy of the citation shall be served upon the defendant and upon the person to be protected, if the complaint was filed by another person, in accordance with the rules for service of process as provided in rule 304 of the rules of county court civil procedure or rule 4 of the Colorado rules of civil procedure. The citation shall inform the defendant that, if the defendant fails to appear in court in accordance with the terms of the citation, a bench warrant may be issued for the arrest of the defendant and the temporary protection order previously entered by the court shall be made permanent without further notice or service upon the defendant.

(7) The return date of the citation shall be set not more than fourteen days after the issuance of the temporary civil protection order and citation. If the petitioner is unable to serve the defendant in that period, the court shall extend the temporary protection order previously issued, continue the show of cause hearing, and issue an alias citation stating the date and time to which the hearing is continued. The petitioner may thereafter request, and the court may grant, additional continuances as needed if the petitioner has still been unable to serve the defendant.

(8) (a) Any person against whom a temporary protection order is issued pursuant to this section, which temporary protection order excludes such person from a shared residence, shall be permitted to return to such shared residence one time to obtain sufficient undisputed personal effects as are necessary for such person to maintain a normal standard of living during any period prior to a hearing concerning such order. Such person against whom a temporary protection order is issued shall be permitted to return to such shared residence only if such person is accompanied at all times while the person is at or in such shared residence by a peace officer.

(b) When any person is served with a temporary protection order issued against such person excluding such person from a shared residence, such temporary protection order shall contain a notification in writing to such person of such person's ability to return to such shared residence pursuant to paragraph (a) of this subsection (8). Such written notification shall be in bold print and conspicuously placed in such temporary protection order. No judge, magistrate, or other judicial officer shall issue a temporary protection order that does not comply with this subsection (8).

(c) Any person against whom a temporary protection order is issued pursuant to this section, which temporary protection order excludes such person from a shared residence, shall be entitled to avail himself or herself of the forcible entry and detainer remedies available pursuant to article 40 of this title. However, such person shall not be entitled to return to the residence until such time as a valid writ of restitution is executed, filed with the court issuing the protection order, and, if necessary, the protection order is modified accordingly. A landlord whose lessee has been excluded from a residence pursuant to the terms of a protection order is also entitled to avail himself or herself of the remedies available pursuant to article 40 of this title.

(9) (a) On the return date of the citation, or on the day to which the hearing has been continued, the judge or magistrate shall examine the record and the evidence. If upon such examination the judge or magistrate is of the opinion that the defendant has committed acts constituting grounds for issuance of a civil protection order and that unless restrained will continue to commit such acts, the judge or magistrate shall order the temporary civil protection order to be made permanent or order a permanent civil protection order with different provisions from the temporary civil protection order. The judge or magistrate shall inform said defendant that a violation of the civil protection order shall constitute a criminal offense pursuant to section 18-6-803.5, C.R.S., or shall constitute contempt of court and subject the defendant to such punishment as may be provided by law. If the defendant fails to appear before the court for the show cause hearing at the time and on the date identified in the citation issued by the court and the court finds that the defendant was properly served with the temporary protection order and such citation, it shall not be necessary to re-serve the defendant to make the protection order permanent. However, if the court modifies the protection order on the motion of the protected party, the modified protection order shall be served upon the defendant.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (9), the judge or magistrate, after examining the record and the evidence, for good cause shown, may continue the temporary protection order and the show cause hearing to a date certain not to exceed one hundred twenty days after the date of the hearing if he or she determines such continuance would be in the best interests of the parties and if both parties are present at the hearing and agree to the continuance. In addition, each party may request one continuance for a period not to exceed fourteen days which the judge or magistrate, after examining the record and the evidence, may grant upon a finding of good cause. The judge or magistrate shall inform the defendant that a violation of the temporary civil protection order shall



constitute a criminal offense pursuant to section 18-6-803.5, C.R.S., or shall constitute contempt of court and subject the defendant to such punishment as may be provided by law.

(c) Notwithstanding the provisions of paragraph (b) of this subsection (9), for a protection order filed in a proceeding commenced under the “Uniform Dissolution of Marriage Act”, article 10 of title 14, C.R.S., the court may, on the motion of either party if both parties agree to the continuance, continue the temporary protection order until the time of the final decree or final disposition of the action.

(10) The court shall electronically transfer into the central registry of protection orders established pursuant to section 18-6-803.7, C.R.S., a copy of any order issued pursuant to this section and shall deliver a copy of such order to the protected party.

(11) If the order has not been personally served, the peace officer responding to a call for assistance shall serve a copy of said order on the person named defendant therein and shall write the time, date, and manner of service on the protected person’s copy of such order and shall sign such statement.

(12) The duties of peace officers enforcing the civil protection order shall be in accordance with section 18-6-803.5, C.R.S., and any rules adopted by the Colorado supreme court pursuant to said section.

(13) A person failing to comply with any order of the court issued pursuant to this section shall be found in contempt of court or may be prosecuted for violation of a civil protection order pursuant to section 18-6-803.5, C.R.S.

(14) At the time a civil protection order is requested, the court shall inquire about, and the requesting party and such party’s attorney shall have an independent duty to disclose, any knowledge such party and such party’s attorney may have concerning the existence of any prior protection orders of any court addressing in whole or in part the subject matter of the requested civil protection order.

(15) A municipal court of record that is authorized by its municipal governing body to issue protection or restraining orders and any county court, in connection with issuing a civil protection order, shall have original concurrent jurisdiction with the district court to issue such additional orders as the municipal or county court deems necessary for the protection of persons. Such additional orders may include, but are not limited to:

(a) Restraining a party from threatening, molesting, or injuring any other party or the minor child of either of the parties;

(b) Restraining a party from contacting any other party or the minor child of either of the parties;

(c) Excluding a party from the family home upon a showing that physical or emotional harm would otherwise result;

(d) Excluding a party from the home of another party upon a showing that physical or emotional harm would otherwise result;

(e) (I) Awarding temporary care and control of any minor children of either party involved for a period of not more than one hundred twenty days.

(II) If temporary care and control is awarded, the order may include parenting time rights for the other party involved and any conditions of such parenting time, including the supervision of such parenting time by a third party who agrees on the record to the terms of the supervised parenting time and any costs associated with supervised parenting time, if necessary. If the restrained party is unable to pay the ordered costs, the court shall not place such responsibility with publicly funded agencies. If the court finds that the safety of any child or the protected party cannot be ensured with any form of parenting time reasonably available, the court may deny parenting time.

(II.5) The court may award interim decision-making responsibility of a child to a person entitled to bring an action for the allocation of parental responsibilities under section 14-10-123, C.R.S., when such award is reasonably related to preventing domestic abuse as defined in section 13-14-101 (2), or preventing the child from witnessing domestic abuse.

(III) The standard for the award of temporary care and control or interim decision-making responsibility shall be in accordance with section 14-10-124, C.R.S.

(f) Such other relief as the court deems appropriate;

(f.2) Restraining a party from threatening, molesting, injuring, killing, taking, transferring, encumbering, concealing, or disposing of an animal owned, possessed, leased, kept, or held by any other party, a minor child of any other party, or an elderly or at-risk adult;

(f.4) Specifying arrangements for possession and care of an animal owned, possessed, leased, kept, or held by any other party, a minor child of any other party, or an elderly or at-risk adult;

(g) (I) A temporary injunction that may be issued by the court that, upon personal service or upon waiver and acceptance of service by the defendant, is to be in effect against the defendant for a period determined to be appropriate by the court and restrains the defendant from ceasing to make payments for mortgage or rent, insurance, utilities or related services, transportation, medical care, or child care when the defendant has a prior existing duty or legal obligation or from transferring, encumbering, concealing, or in any way disposing of personal effects or real property, except in the usual course of business or for the necessities of life. The restrained party shall be required to account to the court for all extraordinary expenditures made after the injunction is in effect. Any injunction issued shall not exceed one hundred twenty days after the issuance of the permanent civil protection order.

(II) The provisions of the injunction shall be printed on the summons, and the petition and the injunction shall become an order of the court upon fulfillment of the requirements of subparagraph (I) of this paragraph (g).

(III) Nothing in this paragraph (g) shall preclude either party from applying to the district court for further temporary orders, an expanded temporary injunction, or modification or revocation. Any subsequent order issued by the district court as part of a domestic matter involving the parties shall supersede an injunction made pursuant to this paragraph (g).

(16) Any order for temporary care and control issued pursuant to subsection (15) of this section shall be governed by the "Uniform Child-custody Jurisdiction and Enforcement Act", article 13 of title 14, C.R.S.

(17) Any order granted pursuant to paragraph (c) or (e) of subsection (15) of this section shall terminate whenever a subsequent order regarding the same subject matter is granted pursuant to the "Uniform Dissolution of Marriage Act", article 10 of title 14, C.R.S., or the "Uniform Child-custody Jurisdiction and Enforcement Act", article 13 of title 14, C.R.S., or the "Colorado Children's Code", title 19, C.R.S.

(17.5) (a) Nothing in this section shall preclude the protected party from applying to the court at any time for modification, including but not limited to a modification of the duration of a protection order, or dismissal of a temporary or permanent protection order issued pursuant to this section. The restrained party may apply to the court for modification, including but not limited to a modification of the duration of the protection order, or dismissal of a permanent protection order pursuant to this section. However, if a permanent protection order has been issued or if a motion for modification or dismissal of a permanent protection order has been filed by the restrained party, whether or not it was granted, no motion to modify or dismiss may be filed by the restrained party within four years after issuance of the permanent order or after disposition of the prior motion.

(b) (I) (A) Notwithstanding any provision of paragraph (a) of this subsection (17.5) to the contrary, after issuance of the permanent protection order, if the restrained party is convicted of any misdemeanor other than the original misdemeanor that formed the basis for the issuance of the protection order, the underlying factual basis of which has been found by a court on the record to include an act of domestic violence, as that term is defined in section 18-6-800.3 (1), C.R.S., or of any felony, then the protection order shall remain permanent and shall not be modified or dismissed by the court.

(B) Notwithstanding the prohibition in sub-subparagraph (A) of this subparagraph (I), a protection order may be modified or dismissed on the motion of the protected person, or the person's attorney, parent or legal guardian if a minor, or conservator of legal guardian if one has been appointed; except that this sub-subparagraph (B) shall not apply if the parent, legal guardian, or conservator is the restrained person.

(II) A court shall not consider a motion to modify a protection order filed by a restrained party pursuant to paragraph (a) of this subsection (17.5) unless the court receives



the results of a fingerprint-based criminal history record check of the restrained party that is conducted within ninety days prior to the filing of the motion. The fingerprint-based criminal history record check shall include a review of the state and federal criminal history records maintained by the Colorado bureau of investigation and federal bureau of investigation. The restrained party shall be responsible for supplying fingerprints to the Colorado bureau of investigation and to the federal bureau of investigation and paying the costs of the record checks. The restrained party may be required by the court to provide certified copies of any criminal dispositions that are not reflected in the state or federal records and any other dispositions that are unknown.

(c) Except as otherwise provided in this section, the issuing court shall retain jurisdiction to enforce, modify, or dismiss a temporary or permanent protection order.

(d) Any motion filed pursuant to paragraph (a) of this subsection (17.5) shall be heard by the court. The party moving for a modification or dismissal of a temporary or permanent protection order pursuant to paragraph (a) of this subsection (17.5) shall affect personal service on the other party with a copy of the motion and notice of the hearing on the motion, as provided by rule 4 (e) of the Colorado rules of civil procedure. The moving party shall bear the burden of proof to show, by a preponderance of the evidence, that the modification is appropriate or that a dismissal is appropriate because the protection order is no longer necessary. If the protected party has requested that his or her address be kept confidential, the court shall not disclose such information to the restrained party or any other person, except as otherwise authorized by law.

(e) In considering whether to modify or dismiss a protection order issued pursuant to this section, the court shall consider all relevant factors, including but not limited to:

(I) Whether the restrained party has complied with the terms of the protection order;

(II) Whether the restrained party has met the conditions associated with the protection order, if any;

(III) Whether the restrained party has been ordered to participate in and complete a domestic violence treatment program provided by an entity approved pursuant to section 16-11.8-103 (4) (a) (III) (C), C.R.S., and whether the restrained party has completed the program;

(IV) Whether the restrained party has voluntarily participated in any domestic violence treatment program or other counseling addressing domestic violence or anger management issues;

(V) The time that has lapsed since the protection order was issued;

(VI) When the last incident of abuse or threat of harm occurred or other relevant information concerning the safety and protection of the protected person;

(VII) Whether, since the issuance of the protection order, the restrained person has been convicted of or pled guilty to a crime, the underlying factual basis of which has been found by a court on the record to include an act of domestic violence, as that term is defined in section 18-6-800.3 (1), C.R.S., other than the original offense, if any, that formed the basis for the issuance of the protection order;

(VIII) Whether any other restraining orders or protective orders or protection orders have been subsequently issued against the restrained person pursuant to this section or any other law of this state or any other state; and

(IX) The circumstances of the parties, including the relative proximity of the parties' residences and work places and whether the parties have minor children together.

(18) A court shall not grant a mutual protection order to prevent domestic abuse for the protection of opposing parties unless each party has met his or her burden of proof as described in subsection (4) of this section and the court makes separate and sufficient findings of fact to support the issuance of the mutual protection order to prevent domestic abuse for the protection of opposing parties. No party may waive the requirements set forth in this subsection (18).

(19) Repealed.

(20) Enactment of this section shall not affect the effectiveness of any civil protection or restraining order issued prior to July 1, 1999.

(21) (a) The court may assess a filing fee against a petitioner seeking relief under this section; except that the court may not assess a filing fee against a petitioner if the court

determines the petitioner is seeking the protection order as a victim of domestic abuse as defined by section 13-14-101 (2); domestic violence as defined by section 18-6-800.3 (1), C.R.S.; stalking as described in section 18-3-602, C.R.S.; sexual assault as defined by section 18-3-402, C.R.S.; or unlawful sexual contact as defined by section 18-3-404, C.R.S. Petitioners shall be provided the necessary number of certified copies at no cost.

(b) Fees for service of process may not be assessed by a state agency or public agency against petitioners seeking relief under this section as a victim of conduct consistent with the following: Domestic abuse as defined by section 13-14-101 (2); domestic violence as defined by section 18-6-800.3 (1), C.R.S.; stalking as described in section 18-3-602, C.R.S.; sexual assault as defined by section 18-3-402, C.R.S.; or unlawful sexual contact as defined by section 18-3-404, C.R.S.

(c) At the permanent protection order hearing, the court may require the respondent to pay the filing fee and service-of-process fees, as established by the state agency, political subdivision, or public agency pursuant to a fee schedule, and to reimburse the petitioner for costs incurred in bringing the action.

**Source:** **L. 99:** Entire article added, p. 496, § 1, effective July 1. **L. 2000:** IP(1), (5), and (6) amended, (2.5) added, and (19) repealed, pp. 1012, 1013, §§ 4, 5, 6, effective July 1; (16) and (17) amended, p. 1538, § 5, effective July 1. **L. 2002:** (4) amended, p. 323, § 1, effective April 19; (9)(b) amended and (17.5) added, p. 491, § 1, effective July 1; (11) amended and (21) added, p. 1143, § 1, effective July 1. **L. 2003:** IP(1), (1)(c), (2), (3) to (9), (12), (13), (14), IP(15), (17.5), (18), and (21) amended, p. 996, § 2, effective July 1. **L. 2004:** (1), (5), (7), (8)(b), (8)(c), (9), (10), IP(15), (15)(e), and (20) amended and (1.5), (3.3), and (3.7) added, p. 545, § 2, effective July 1; (17.5)(b)(II) amended, p. 74, § 1, effective September 1. **L. 2007:** (1) amended and (15)(g) added, pp. 940, 941, §§ 1, 2, effective July 1. **L. 2010:** (15)(f.2) and (15)(f.4) added, (SB 10-080), ch. 78, p. 265, § 2, effective July 1; (17.5)(e)(III) amended, (HB 10-1422), ch. 419, p. 2068, § 22, effective August 11; (21)(a) and (21)(b) amended, (HB 10-1233), ch. 88, p. 296, § 4, effective August 11.

#### ANNOTATION

**Law reviews.** For article, “Statutes Consolidate Civil Restraining Orders”, see 28 Colo. Law. 39 (October 1999). For article, “Overview of Colorado’s New Domestic Violence Leave Law”, see 31 Colo. Law. 69 (December 2002). For article, “Crisis Intervention to Prevent Elder Abuse: Emergency Guardianships and Other Legal Procedures” see 33 Colo. Law. 91 (July 2004). For article, “Protecting Clients From Abuse and Identity Theft”, see 34 Colo. Law. 43 (October 2005). For article, “Domestic Violence Intervention: 2010 Update”, see 39 Colo. Law. 83 (September 2010).

**Based on the plain language of the statute, the finding of imminent danger is a prerequisite only to the issuance of a temporary protection order.** In re Fiffe, 140 P.3d 160 (Colo. App. 2005).

**Procedural due process does not require a finding of imminent danger when the parties are accorded the requisite constitutional safeguards of notice and an opportunity to be heard.** In re Fiffe, 140 P.3d 160 (Colo. App. 2005).

**13-14-103. Emergency protection orders.** (1) (a) Any county or district court shall have the authority to enter an emergency protection order pursuant to the provisions of this subsection (1).

(b) An emergency protection order issued pursuant to this subsection (1) may include:

(I) Restraining a party from threatening, molesting, injuring, or contacting any other party, a minor child of either of the parties, or a minor child who is in danger in the reasonably foreseeable future of being a victim of an unlawful sexual offense or domestic abuse;

(II) Excluding a party from the family home or from the home of another party upon a showing that physical or emotional harm would otherwise result;

(III) Awarding temporary care and control of any minor child of a party involved;



(IV) Enjoining an individual from contacting a minor child at school, at work, or wherever he or she may be found;

(V) Restraining a party from threatening, molesting, injuring, killing, taking, transferring, encumbering, concealing, or disposing of an animal owned, possessed, leased, kept, or held by any other party, a minor child of either of the parties, or an elderly or at-risk adult; or

(VI) Specifying arrangements for possession and care of an animal owned, possessed, leased, kept, or held by any other party, a minor child of either of the parties, or an elderly or at-risk adult.

(c) In cases involving a minor child, the juvenile court and the district court shall have the authority to issue emergency protection orders to prevent an unlawful sexual offense, as defined in section 18-3-411 (1), C.R.S., or to prevent domestic abuse, as defined in section 13-14-101 (2), when requested by the local law enforcement agency, the county department of social services, or a responsible person who asserts, in a verified petition supported by affidavit, that there are reasonable grounds to believe that a minor child is in danger in the reasonably foreseeable future of being the victim of an unlawful sexual offense or domestic abuse, based upon an allegation of a recent actual unlawful sexual offense or domestic abuse or threat of the same. Any emergency protection order issued pursuant to this subsection (1) shall be on a standardized form prescribed by the judicial department and a copy shall be provided to the protected person.

(d) The chief judge in each judicial district shall be responsible for making available in each judicial district a judge to issue, by telephone, emergency protection orders at all times when the county and district courts are otherwise closed for judicial business. Such judge may be a district court or county court judge or a special associate, an associate, an assistant county judge, or a magistrate.

(e) When the county, district, and juvenile courts are unavailable from the close of business at the end of the day or week to the resumption of business at the beginning of the day or week and a peace officer asserts reasonable grounds to believe that an adult is in immediate and present danger of domestic abuse, based upon an allegation of a recent incident of actual domestic abuse or threat of domestic abuse, or that a minor child is in immediate and present danger of an unlawful sexual offense, as defined in section 18-3-411 (1), C.R.S., or of domestic abuse, as defined in section 13-14-101 (2), a judge made available pursuant to paragraph (d) of this subsection (1) may issue a written or verbal ex parte emergency protection order. Any written emergency protection order issued pursuant to this subsection (1) shall be on a standardized form prescribed by the judicial department and a copy shall be provided to the protected person.

(f) An emergency protection order issued pursuant to this subsection (1) shall expire not later than the close of judicial business on the next day of judicial business following the day of issue, unless otherwise continued by the court. The court may continue an emergency protection order filed to prevent domestic abuse pursuant to this subsection (1) only if the judge is unable to set a hearing on plaintiff's request for a temporary protection order on the day the complaint was filed pursuant to section 13-14-102; except that this limitation on a court's power to continue an emergency protection order shall not apply to an emergency protection order filed to protect a minor child from an unlawful sexual offense or domestic abuse. For any emergency protection order continued pursuant to the provisions of this paragraph (f), following two days' notice to the party who obtained the emergency protection order or on such shorter notice to said party as the court may prescribe, the adverse party may appear and move its dissolution or modification. The motion to dissolve or modify the emergency protection order shall be set down for hearing at the earliest possible time and shall take precedence over all matters except older matters of the same character, and the court shall determine such motions as expeditiously as the ends of justice require.

(2) (a) A verbal emergency protection order may be issued pursuant to subsection (1) of this section only if the issuing judge finds that an imminent danger in close proximity exists to the life or health of one or more persons or that a danger exists to the life or health of the minor child in the reasonably foreseeable future.

(b) Any verbal emergency protection order shall be reduced to writing and signed by the officer or other person asserting the grounds for the order and shall include a statement of the grounds for the order asserted by the officer or person. The officer or person shall not be subject to civil liability for any statement made or act performed in good faith. The emergency protection order shall be served upon the respondent with a copy given to the protected party and filed with the county or district court as soon as practicable after issuance. Any written emergency protection order issued pursuant to this subsection (2) shall be on a standardized form prescribed by the judicial department, and a copy shall be provided to the protected person.

(3) The court shall electronically transfer into the central registry of protection orders established pursuant to section 18-6-803.7, C.R.S., a copy of any order issued pursuant to this section and shall deliver a copy of such order to the protected party or his or her parent or an individual acting in the place of a parent who is not the respondent.

(4) If any person named in an order issued pursuant to this section has not been served personally with such order but has received actual notice of the existence and substance of such order from any person, any act in violation of such order may be deemed sufficient to subject the person named in such order to any penalty for such violation.

(5) Venue for filing a complaint pursuant to this section is proper in any county where the acts constituting unlawful sexual assault or domestic abuse that are the subject of the complaint occur, in any county where one of the parties resides, or in any county where one of the parties is employed. This requirement for venue does not prohibit the change of venue to any other county appropriate under applicable law.

(6) A person failing to comply with any order of the court issued pursuant to this section shall be found in contempt of court and, in addition, may be punished as provided in section 18-6-803.5, C.R.S.

(7) At any time that the law enforcement agency having jurisdiction to enforce the emergency protection order has cause to believe that a violation of the order has occurred, it shall enforce the order. If the order is written and has not been personally served, a member of the law enforcement agency shall serve a copy of said order on the person named respondent therein. If the order is verbal, a member of the law enforcement agency shall notify the respondent of the existence and substance thereof.

(8) The availability of an emergency protection order shall not be affected by the subject of domestic abuse leaving his or her residence to avoid such abuse.

(9) The issuance of an emergency protection order shall not be considered evidence of any wrongdoing.

(10) If three emergency protection orders are issued within a one-year period involving the same parties within the same jurisdiction, the court shall summon the parties to appear before the court at a hearing to review the circumstances giving rise to such emergency protection orders.

(11) The duties of peace officers enforcing orders issued pursuant to this section shall be in accordance with section 18-6-803.5, C.R.S., and any rules adopted by the Colorado supreme court pursuant to said section.

**Source: L. 2004:** Entire section added, p. 549, § 3, effective July 1. **L. 2010:** (1)(b)(III) amended and (1)(b)(V) and (1)(b)(VI) added, (SB 10-080), ch. 78, p. 266, § 3, effective July 1.

**13-14-104. Foreign protection orders. (1) Definitions.** As used in this section, “foreign protection order” means any protection or restraining order, injunction, or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary or final orders, other than child support or custody orders, issued by a civil or criminal court of another state, an Indian tribe, or a U.S. territory or commonwealth.

(2) **Full faith and credit.** A foreign protection order shall be accorded full faith and credit by the courts of this state as if the order were an order of this state, notwithstanding section 14-11-101, C.R.S., and article 53 of this title, if the order meets all of the following conditions:



(a) The foreign protection order was obtained after providing the person against whom the protection order was sought reasonable notice and an opportunity to be heard sufficient to protect his or her due process rights. If the foreign protection order is an ex parte injunction or order, the person against whom it was obtained shall have been given notice and an opportunity to be heard within a reasonable time after the order was issued sufficient to protect his or her due process rights.

(b) The court that issued the order had jurisdiction over the parties and over the subject matter;

(c) The order complies with section 13-14-102 (18).

(3) **Process.** A person entitled to protection under a foreign protection order may, but shall not be required to, file such order in the district or county court by filing with such court a certified copy of such order, which shall be entered into the central registry of protection orders created in section 18-6-803.7, C.R.S. The certified order shall be accompanied by an affidavit in which the protected person affirms to the best of his or her knowledge that the order has not been changed or modified since it was issued. There shall be no filing fee charged. It is the responsibility of the protected person to notify the court if the protection order is subsequently modified.

(4) **Enforcement.** Filing of the foreign protection order in the central registry or otherwise domesticating or registering the order pursuant to article 53 of this title or section 14-11-101, C.R.S., is not a prerequisite to enforcement of the foreign protection order. A peace officer shall presume the validity of, and enforce in accordance with the provisions of this article, a foreign protection order that appears to be an authentic court order that has been provided to the peace officer by any source. If the protected party does not have a copy of the foreign protection order on his or her person and the peace officer determines that a protection order exists through the central registry, the national crime information center as described in 28 U.S.C. sec. 534, or communication with appropriate authorities, the peace officer shall enforce the order. A peace officer may rely upon the statement of any person protected by a foreign protection order that it remains in effect. A peace officer who is acting in good faith when enforcing a foreign protection order shall not be civilly or criminally liable pursuant to section 18-6-803.5 (5), C.R.S.

**Source: L. 2004:** Entire section added, p. 549, § 3, effective July 1.

## CHANGE OF NAME

### ARTICLE 15

#### Change of Name

13-15-101.	Petition - proceedings.	13-15-102.	Publication of change.
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**13-15-101. Petition - proceedings.** (1) (a) (I) Every person desiring to change his or her name may present a petition to that effect, verified by affidavit, to the district or county court in the county of the petitioner's residence, except as otherwise provided in paragraph (a.5) of this subsection (1). The petition shall include:

- (A) The petitioner's full name;
- (B) The new name desired; and
- (C) A concise statement of the reason for the name change.

(II) If the petitioner is over fourteen years of age, the petition shall also include the results of a certified, fingerprint-based criminal history record check conducted pursuant to paragraph (c) of this subsection (1) within ninety days prior to the date of the filing of the petition.

(III) If the petitioner is under nineteen years of age, the petition shall also include the caption of any proceeding in which a court has ordered child support, allocation of parental responsibilities, or parenting time regarding the petitioner.

(a.5) If the petitioner is under nineteen years of age and is the subject of an action concerning child support, allocation of parental responsibilities, or parenting time, then the

petition for name change shall be filed in the court having jurisdiction over the action concerning child support, allocation of parental responsibilities, or parenting time.

(b) The fingerprint-based criminal history check shall include arrests, conviction records, any criminal dispositions reflected in the Colorado bureau of investigation and federal bureau of investigation records, and fingerprint processing by the federal bureau of investigation and the Colorado bureau of investigation. The petitioner shall be responsible for providing certified copies of any criminal dispositions that are not reflected in the Colorado bureau of investigation or federal bureau of investigation records and any other dispositions which are unknown.

(c) The petitioner shall be responsible for supplying fingerprints to the Colorado bureau of investigation and to the federal bureau of investigation and for obtaining the fingerprint-based criminal history record checks. The petitioner shall also be responsible for the cost of such checks.

(1.5) Unless the petitioner has shown good cause why the publication provisions of section 13-15-102 should not apply, the court shall order the petitioner to publish notice as provided in section 13-15-102 and file proof of the publication with the court.

(2) (a) Upon receipt of proof of publication or upon an order of the court stating that publication is not required, the court, except as otherwise provided in paragraphs (b) and (c) of this subsection (2), shall order the name change to be made and spread upon the records of the court in proper form if the court is satisfied that the desired change would be proper and not detrimental to the interests of any other person.

(b) The court shall not grant a petition for a name change if the court finds the petitioner was previously convicted of a felony or adjudicated a juvenile delinquent for an offense that would constitute a felony if committed by an adult in this state or any other state or under federal law. If the certified, fingerprint-based criminal history check filed with the petition reflects a criminal charge for which there is no disposition shown, the court may grant the name change after affirmation in open court by the petitioner, or submission of a signed affidavit by the petitioner, stating he or she has not been convicted of a felony in this state or any other state or under federal law.

(c) (Deleted by amendment, L. 2005, p. 20, § 1, effective February 23, 2005.)

(3) Notwithstanding the provisions of paragraph (b) of subsection (2) of this section, the court may grant a petition for a change of name of a petitioner who was previously convicted of a felony in this state or any other state or adjudicated a juvenile delinquent for an offense that would constitute a felony if committed by an adult in this state or any other state or under federal law if the court finds that the petitioner must have a legal name change in order to be issued in that name a driver's license or identification card from the department of revenue and if all of the following requirements are met:

(a) The petitioner meets all of the requirements of subsections (1) and (1.5) of this section and paragraph (a) of subsection (2) of this section;

(b) The proposed name change is to a name under which the petitioner was convicted or adjudicated; except that, for good cause, the court may allow a change to a name other than a name under which the petitioner was convicted or adjudicated;

(c) Prior to filing the petition, the name change applicant:

(I) (A) Submits his or her fingerprints to the Colorado bureau of investigation and the federal bureau of investigation for purposes of obtaining a fingerprint-based criminal history records check along with a written request to add his or her proposed name as an alias to the name change applicant's criminal history record.

(B) The Colorado bureau of investigation is authorized to add an alias to a name change applicant's criminal history record upon request.

(II) (A) Notifies the district attorney's office in any district in which the applicant was convicted of a felony that he or she is requesting a name change pursuant to this subsection (3).

(B) If the district attorney's office has a record of any victim of the applicant's crime, the district attorney's office shall send notice of the proposed name change to the victim.

(III) If, at the time the petition is filed, the applicant is in custody of the department of corrections, under an order for probation or community corrections, or incarcerated in a



county jail, the applicant provides written notice to the supervising agency that he or she is requesting a change of name under this section; and

(IV) Provides the court with a copy of his or her criminal history record from both the Colorado bureau of investigation and the federal bureau of investigation and the criminal history report from the Colorado bureau of investigation reflects the addition of the proposed changed name as an alias; and

(d) The court finds that:

(I) The name change is not for the purpose of fraud, to avoid the consequences of a criminal conviction, or to facilitate a criminal activity; and

(II) The desired name change would be proper and not detrimental to the interests of any other person.

(4) The department of revenue shall not issue a driver's license or an identification card in the new name of a name change applicant unless the name change applicant submits a court order changing the applicant's name pursuant to this section.

**Source:** G.L. § 1850. G.S. § 2452. R.S. 08: § 4348. C.L. § 6484. CSA: C. 30, § 1. CRS 53: § 19-1-1. C.R.S. 1963: § 20-1-1. L. 65: p. 425, § 1. L. 87: Entire section amended, p. 1576, § 15, effective July 10. L. 2002: Entire section amended, p. 1141, § 1, effective June 3. L. 2004: (1)(a) and (1)(c) amended, p. 75, § 2, effective September 1; (1)(a) and (2) amended and (1.5) added, p. 119, § 1, effective September 1. L. 2005: (1)(a) and (2)(c) amended and (1)(a.5) added, p. 20, § 1, effective February 23. L. 2010: (3) and (4) added, (SB 10-006), ch. 341, p. 1579, § 5, effective June 5.

**Editor's note:** Amendments to subsection (1)(a) by House Bill 04-1052 and House Bill 04-1195 were harmonized.

**Cross references:** For the legislative declaration in the 2010 act adding subsections (3) and (4), see section 1 of chapter 341, Session Laws of Colorado 2010.

## ANNOTATION

**At common law a person could adopt another name at will.** In re Knight, 36 Colo. App. 187, 537 P.2d 1085 (1975).

**Statutes setting forth procedures to be followed in changing a name merely provide an additional method** beyond the common law for making the change. In re Knight, 36 Colo. App. 187, 537 P.2d 1085 (1975); In re Nguyen, 684 P.2d 258 (Colo. App. 1983), cert. denied, 469 U.S. 1108, 105 S. Ct. 785, 83 L. Ed.2d 779 (1985).

**Trial court has the power, founded in common law, to order a change of name of a minor child** in a dissolution of marriage action but court should consider those factors applicable to a statutory name change in determining whether to grant a parent's request. In re Nguyen, 684 P.2d 258 (Colo. App. 1983), cert. denied, 469 U.S. 1108, 105 S. Ct. 785, 83 L. Ed.2d 779 (1985).

**Statutory change encouraged.** It is more advantageous to the state to have a statutory method of changing names followed, and for that reason applications under the statute should be encouraged, and generally should be granted unless made for a wrongful or fraudulent purpose. In re Knight, 36 Colo. App. 187, 537 P.2d 1085 (1975).

**Basis for denial.** While a court has wide discretion in matters of a name change, it should

not deny the application for a change of name as being improper unless special circumstances or facts are found to exist. Included in these would be unworthy motive, the possibility of fraud on the public, the choice of a name that is bizarre, unduly lengthy, ridiculous, or offensive to common decency and good taste, or if the interests of a wife or child of the applicant would be adversely affected thereby. In re Knight, 36 Colo. App. 187, 537 P.2d 1085 (1975).

**Hearing prior to denial.** Before a court denies a request for a change of name under the statute, it should conduct an evidentiary hearing to determine if good and sufficient cause exists to deny the application. In re Knight, 36 Colo. App. 187, 537 P.2d 1085 (1975).

**When a child was given the noncustodial parent's surname** prior to the dissolution of the parent's marriage, the noncustodial parent has a continuing interest in the minor child's use of that surname. Hamman v. County Court, 753 P.2d 743 (Colo. 1988).

But, the noncustodial parent does not necessarily have the power to prevent a name change merely by making known his objections. Hamman v. County Court, 753 P.2d 743 (Colo. 1988).

**Notice requirement.** Noncustodial parent, as an interested party, is entitled to reasonable no-

tice of the filing of a petition requesting name change by the custodial parent. Hamman v. County Court, 753 P.2d 743 (Colo. 1988).

Such notice should be reasonably calculated to notify the noncustodial parent of the pending action in a time and manner which allows participation in the proceeding if the noncustodial parent wishes. Hamman v. County Court, 753 P.2d 743 (Colo. 1988).

**13-15-102. Publication of change.** (1) Public notice of a change of name shall be given at least three times within twenty-one days after the court orders publication pursuant to section 13-15-101 (1.5). The person changing his or her name shall cause such public notice to be given in a newspaper published in the county in which the person resides. If no newspaper is published in that county, such notice shall be published in a newspaper in such county as the court directs.

(2) Public notice of such name change through publication as required in subsection (1) of this section shall not be required if the petitioner has been:

- (a) The victim of a crime, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in section 18-6-800.3 (1), C.R.S.;
- (b) The victim of child abuse, as defined in section 18-6-401, C.R.S.; or
- (c) The victim of domestic abuse as that term is defined in section 13-14-101 (2).

**Source:** G.L. § 1851. G.S. § 2453. **R.S. 08:** § 4349. **C.L.** § 6485. **CSA:** C. 30, § 2. **CRS 53:** § 19-1-2. **C.R.S. 1963:** § 20-1-2. **L. 99:** Entire section amended, p. 1178, § 4, effective June 2. **L. 2004:** (2)(c) amended, p. 554, § 7, effective July 1; (1) amended, p. 120, § 2, effective September 1. **L. 2005:** (1) amended, p. 21, § 2, effective February 23.

**Cross references:** For the number of publications required, see § 24-70-106.

COSTS

ARTICLE 16

Costs - Civil Actions

**Cross references:** For costs generally, see C.R.C.P. 41(d), 54(d), 58, 65(c), 69(b), 70, 80(a), and 102 and C.A.R. 10(b), 35(d), and 39; for docket fees and clerks’ fees, see article 32 of this title; for witness fees, see §§ 13-33-102 and 13-33-103; for special fees in probate proceedings, see § 13-32-102; for fees of jurors, see § 13-33-101; for assessment of costs in criminal actions, see Crim. P. 32; for awarding of attorney fees in civil actions generally, see § 13-17-102.

**Law reviews:** For article, “Obtaining Costs of Clients — Part 1”, see 14 Colo. Law. 1974 (1985).

13-16-101.	Security for costs.	13-16-115.	In suit for use of another.
13-16-102.	Motion to require cost bond.	13-16-116.	Costs in adverse suit.
13-16-103.	Costs of poor person.	13-16-117.	On appeal from decisions in probate.
13-16-104.	When plaintiff recovers costs.	13-16-118.	Clerk to tax costs.
13-16-105.	When defendant recovers costs.	13-16-119.	Costs retaxed - forfeit by clerk.
13-16-106.	Costs in replevin.	13-16-120.	Fee bill - precept - levy and return.
13-16-107.	Costs on motion to dismiss.	13-16-121.	Costs allowed to defendants who prevail against public entities. (Repealed)
13-16-108.	When several matters pleaded.	13-16-122.	Items includable as costs.
13-16-109.	Costs on several counts.	13-16-123.	Award of fees and costs to garnishee.
13-16-110.	When several defendants.	13-16-124.	Sheriff’s fees charged to judicial department.
13-16-111.	Recovery of costs of suit.	13-16-125.	Limit on supersedeas bond.
13-16-112.	Number of witness fees taxed.		
13-16-113.	Costs upon dismissal or summary judgment.		
13-16-114.	Costs in equity.		



**13-16-101. Security for costs.** (1) In all actions on official bonds for the use of any persons, actions on the bonds of executors, administrators, or guardians, and qui tam actions on any penal statute, the person or plaintiff for whose use the action is to be commenced, before he or she institutes such suit, shall file or cause to be filed with the clerk of the court in which the action is to be commenced an instrument in writing as described in subsection (3) of this section for security for the payment of costs of suit.

(2) In all cases in law and equity where the plaintiff, or the person for whose use an action is to be commenced, is not a resident of this state, upon motion of the defendant or any officer of the court pursuant to section 13-16-102, the court may require the nonresident plaintiff to give an instrument in writing for the payment of costs of suit as described in subsection (3) of this section; except that, to ensure that access to the courts is not unreasonably denied, a court shall not require an instrument in writing for the payment of costs of suit in excess of five thousand dollars.

(3) As used in this section and section 13-16-102, "instrument in writing" means an instrument in writing of some responsible person, being a resident of this state, to be approved by the clerk, whereby such person shall acknowledge himself or herself bound to pay, or cause to be paid, all costs which may accrue in such action either to the opposite party or to any of the officers of such courts, which instrument may be in form as follows:

A. B. )  
vs. ) ..... Court.  
C. D. )

I do hereby enter myself security for costs in this case, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court pursuant to the laws of this state.

Dated this ..... day of ....., 20.. .

**Source:** R.S. p. 153, § 1. G.L. § 323. G.S. § 397. R.S. 08: § 1064. C.L. § 6580. CSA: C. 43, § 10. CRS 53: § 33-1-1. C.R.S. 1963: § 33-1-1. L. 2009: Entire section amended, (HB 09-1305), ch. 311, p. 1690, § 1, effective September 1.

ANNOTATION

**Law reviews.** For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005).

**Nonresident plaintiff in suing out a writ of error must file cost bond.** A writ of error is a new suit, and before it can be prosecuted, if the plaintiff in error is a nonresident, he must file a cost bond. If he fails to do so, he has no standing in court; his case cannot be heard on the merits, if objection be made. *W. Union Tel. Co. v. Graham*, 1 Colo. 182 (1870); *Talpey v. Doane*, 2 Colo. 298 (1874).

**The filing of a bond for a supersedeas cannot accomplish that purpose,** or in any sense waive the necessity of filing security for costs. *Filley v. Cody*, 3 Colo. 221 (1877); *Fifer v. Fifer*, 120 Colo. 10, 206 P.2d 336 (1949).

**Despite plaintiff's non-citizen status, the proper determination of her residence, which is necessary for purposes of this section, was not dependent on her immigration status but, instead, on the evaluation of her place of domicile and her subjective intent to remain in the**

state. *Munoz-Hoyos v. de Cortez*, 207 P.3d 951 (Colo. App. 2009).

Trial court erred in ruling that plaintiff's non-citizen status alone precluded her from qualifying as a resident for purposes of this section and in requiring her to post a cost bond on that basis. *Munoz-Hoyos v. de Cortez*, 207 P.3d 951 (Colo. App. 2009).

**In absence of judgment for costs, surety would not be liable.** The payment of all costs occasioned by the plaintiff in error without regard to the ultimate judgment of the court is secured by the cost bond. The officers of the court are protected. If there were no cost bond and the officers of the court had to rely upon the supersedeas bond for the costs made by the plaintiff in error, then in the absence of a judgment against him for cost, his security would not be liable for any. *Filley v. Cody*, 3 Colo. 221 (1877).

**Court may order that cost bond be filed within thirty days.** *Ferrara v. Auric Mining Co*, 20 Colo. App. 411, 79 P. 302 (1905).

**Where a writ was dismissed for want of a cost bond, a new writ may be prosecuted in the same cause.** *W. Union Tel. Co. v. Graham*, 1 Colo. 182 (1870).

**A bond of a corporation which is executed by an attorney in fact**, appointed by the president, is well executed. *W. Union Tel. Co. v. Graham*, 1 Colo. 182 (1870).

**There is no statutory authority to enter a summary judgment against the surety** upon a cost bond, and in the absence of such statutory authority, before any judgment could be taken against a surety upon such a bond, an opportunity must be provided said surety to assert any defense which he might have to an action seeking to enforce his liability as surety. *Fifer v. Fifer*, 120 Colo. 10, 206 P.2d 336 (1949).

**Section does not apply to actions brought in federal court.** In an action in the United States district court, defendant's motion, grounded upon this section, that plaintiff, a nonresident, be required to furnish a cost bond was denied, for the federal rules of civil procedure have repealed the conformity act, and state prac-

tice in this connection may no longer be invoked under its terms. *Nat'l Distillers Prods. Corp. v. Hindech*, 10 F.R.D. 229 (D. Colo. 1950).

**Court has no discretion under this section**, but must require security from a nonresident plaintiff. *Lewis v. Keim*, 883 P.2d 610 (Colo. App. 1994).

**Section 13-16-103 provides judges with the authority to waive cost requirements under this section and § 13-16-102** and, therefore, provides sufficient authority to permit a plaintiff to proceed when the plaintiff is a poor person and unable to pay costs and expenses. *Walcott v. District Ct., 2nd Jud. Dist.*, 924 P.2d 163 (Colo. 1996).

**Husband who sought modification of prior dissolution decree was person for whose use the action was commenced** and, because he was a nonresident, trial court properly required him to post bond. *In re Kronbach*, 757 P.2d 175 (Colo. App. 1988).

**Applied** in *Glickman v. Mesigh*, 200 Colo. 320, 615 P.2d 23 (1980).

**13-16-102. Motion to require cost bond.** If an action described in section 13-16-101 (2) is commenced by a nonresident of this state without filing an instrument in writing, or if at any time after the commencement of any suit by a resident of this state he or she shall become nonresident, and the court is satisfied that the nonresident plaintiff is unable to pay the costs of suit, the court may, on motion of the defendant or any officer of the court, order the nonresident plaintiff, on or before the day in such order named, to give an instrument in writing for the payment of costs in the suit. To ensure that access to the courts is not unreasonably denied, a court shall not require an instrument in writing for the payment of costs of suit in excess of five thousand dollars. If the nonresident plaintiff neglects or refuses, on or before the day in such rule named, to file such instrument, the court, on motion, shall dismiss the suit.

**Source:** R.S. p. 154, § 2. G.L. § 324. G.S. § 398. L. 1885: p. 156, § 1. R.S. 08: § 1065. C.L. § 6581. CSA: C. 43, § 11. CRS 53: § 33-1-2. C.R.S. 1963: § 33-1-2. L. 2009: Entire section amended, (HB 09-1305), ch. 311, p. 1691, § 2, effective September 1.

## ANNOTATION

**Law reviews.** For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005).

**Dismissals under this section are reviewed under an abuse of discretion standard.** *Hytken v. Wake*, 68 P.3d 508 (Colo. App. 2002).

**The filing of a motion for a cost bond preserves defendant's rights to answer** and prevents plaintiff from seeking default judgment. *McDermett v. Rosenbaum*, 13 Colo. App. 444, 58 P. 880 (1899).

**Requirement of cost bond is a matter of judicial discretion as to residents.** Whether or not a resident plaintiff shall be required to give security for costs is a matter in the sound discretion of the court. *Knight v. Fisher*, 15 Colo. 176, 25 P. 78 (1890); *Ward v. Williams*, 16 Colo.

86, 27 P. 247 (1891); *Fleming v. Breitner*, 73 Colo. 250, 215 P. 133 (1923).

**Court has no discretion as to nonresidents.** If any action shall be commenced by a nonresident without filing the cost bond required by § 13-6-101, the court, on motion, shall dismiss the same. This court has repeatedly held that this language is unequivocal and leaves nothing to the discretion of the court. *Edgar Gold & Silver Mining Co. v. Taylor*, 10 Colo. 110, 14 P. 113 (1887); *Lewis v. Keim*, 883 P.2d 610 (Colo. App. 1994).

**The filing of a bond by a nonresident, after commencement of suit comes too late.** Filing the bond subsequently to the commencement of the suit, and whether before or after the motion to dismiss is interposed, cannot avail the non-



resident plaintiff. *Sutro v. Simpson*, 14 F. 370 (D. Colo. 1882); *Edgar Gold & Silver Mining Co. v. Taylor*, 10 Colo. 110, 14 P. 113 (1887).

**Defendant waives right to cost bond when no motion made in trial court.** When no motion for a cost bond is made in the trial court, the defendant's right to a cost bond is waived. *Payton v. Spiesberger & Son Co.*, 40 Colo. 289, 90 P. 605 (1907).

**For the lack of authority for clerk to demand a bond for accrued costs**, see *Teller v. Sievers*, 20 Colo. App. 109, 77 P. 261 (1904).

**Security required under this section may not be excused or deferred under § 13-16-103.** *Lewis v. Keim*, 883 P.2d 610 (Colo. App. 1994) (disapproved of by supreme court in *Walcott v. District Ct.*, 2nd Jud. Dist., 924 P.2d 163 (Colo. 1996)).

**Inability to obtain cost bond does not equate to the neglect or refusal to pay such a bond.** *Lewis v. Keim*, 883 P.2d 610 (Colo. App. 1994); *Walcott v. District Ct.*, 2nd Jud. Dist., 924 P.2d 163 (Colo. 1996).

**The burden is on the plaintiff to file a cost bond and failure to do so for any reason other than indigency or defendant's waiver man-**

**dates dismissal.** *Hytken v. Wake*, 68 P.3d 508 (Colo. App. 2002).

**Section 13-16-103 provides judges with the authority to waive cost requirements under this section and § 13-16-101** and, therefore, provides sufficient authority to permit a plaintiff to proceed when the plaintiff is a poor person and unable to pay costs and expenses. *Walcott v. District Ct.*, 2nd Jud. Dist., 924 P.2d 163 (Colo. 1996).

**Although court improperly denied defendant's motion for filing of cost bond**, order appointing receiver need not be vacated. *Bank of Am. Nat. Trust & Sav. Ass'n v. Denver Hotel Ass'n Ltd. P'ship*, 830 P.2d 1138 (Colo. App. 1992).

**Although district court erred in denying cost bond for nonresident plaintiff, such error did not require that an order for appointment of receiver be vacated**; under such circumstances, remand of cause with directions to set date for the filing of cost bond was appropriate remedy. *Bank of Am. Nat. Trust & Sav. Ass'n v. Denver Hotel Ass'n Ltd. P'ship*, 830 P.2d 1138 (Colo. App. 1992).

**13-16-103. Costs of poor person.** (1) If the judge or justice of any court, including the supreme court, is at any time satisfied that any person is unable to prosecute or defend any civil action or special proceeding because he is a poor person and unable to pay the costs and expenses thereof, the judge or justice, in his discretion, may permit such person to commence and prosecute or defend an action or proceeding without the payment of costs; but, in the event such person prosecutes or defends an action or proceeding successfully, there shall be a judgment entered in his favor for the amount of court costs which he would have incurred except for the provision of this section, and this judgment shall be first satisfied out of any money paid into court, and such costs shall be paid to the court before any such judgment is satisfied of record.

(2) In determining whether a plaintiff in an action brought pursuant to article 4 of title 14, C.R.S., may be permitted to proceed without the payment of costs, the court shall take into account only those assets to which the plaintiff has direct access. The court shall not consider assets which the plaintiff is unable to directly access even though the plaintiff may have an ownership interest in those assets.

**Source:** R.S. p. 154, § 3. G.L. § 325. G.S. § 399. R.S. 08: § 1076. C.L. § 6592. CSA: C. 43, § 22. L. 47: p. 458, § 5. CRS 53: § 33-1-3. C.R.S. 1963: § 33-1-3. L. 64: p. 220, § 44. L. 79: Entire section amended, p. 600, § 21, effective July 1. L. 91: Entire section amended, p. 239, § 3, effective July 1.

## ANNOTATION

- I. General Consideration.
- II. Habeas Corpus Proceedings.
- III. Reporter's Transcript.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Motions in Forma Pauperis: The First Step in Access to Justice", see 28 Colo. Law. 29 (April 1999).

**This section requires a judicial officer of any court, trial or appellate, to permit an indigent plaintiff to exercise the statutory right to appeal without the payment of costs.** *Bell v. Simpson*, 918 P.2d 1123 (Colo. 1996).

**The plain language of subsection (1) requires a judicial officer of any court, trial or appellate, to permit an indigent plaintiff to exercise the right of appeal without payment of costs**, and district court erred in dismissing

plaintiff's appeal for failure to post an appeal bond in the amount of \$250 ordered by the county court at the same time it found that he was indigent. *Rodden v. Colo. State Penitentiary*, 52 P.3d 223 (Colo. 2002).

**The sole and only purpose of this section is to aid the indigent litigant in getting into court** in effect, opening the courts of justice to the poor person. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**This section aids in administering justice "without sale"**. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**To be entitled to a waiver of "costs", the litigant must** not only be "a poor person" who is not able to pay the costs, but also is unable to pay the expenses of the civil action or proceeding. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**The inability to pay expenses is, in effect, a test of indigency** under this section. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**"In forma pauperis"**. Although this section does not use the term "in forma pauperis", this phrase is commonly employed to describe the petition for waiver of costs authorized by this section. *Cook v. District Court ex rel. County of Weld*, 670 P.2d 758 (Colo. 1983).

**Whether payment of costs may be deferred is a matter of judicial discretion.** From an analysis of this section it appears that, in the first instance, whether a litigant may commence or defend an action or proceeding without the payment of costs rests within the sound judicial discretion of the judge. *Alvarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970); *Medina v. District Court*, 177 Colo. 185, 493 P.2d 367 (1972); *Collins v. Jaquez*, 15 P.3d 299 (Colo. App. 2000).

**Judge's discretion in reviewing petition to commence without payment of costs.** In the absence of factors such as bad faith or a plainly frivolous claim, the general assembly intended that the judge's discretion in reviewing a petition to commence and prosecute an action without payment of costs be limited to determining whether the petitioning party has the financial resources to pay the costs and expenses incident to the litigation. *Cook v. District Court ex rel. County of Weld*, 670 P.2d 758 (Colo. 1983).

**Where plaintiff acted promptly to submit his amended in forma pauperis (IFP) motion, the granting of the amended motion should relate back to the filing of the original IFP motion.** *Fraser v. Colo. Bd. of Parole*, 931 P.2d 560 (Colo. App. 1996).

**In determining whether a prisoner may proceed under this section without payment of costs,** the court may consider the person's complete financial condition, including the timing and nature of the prisoner's spending in the weeks immediately preceding commencement

of the action. *Vance v. District Ct. of Fremont County*, 908 P.2d 1189 (Colo. App. 1995).

**But a prisoner need not be destitute to proceed without payment of costs, nor must a prisoner develop a savings plan to provide for the possibility that he or she may want to file an action while incarcerated.** Prisoners need not deprive themselves of the small amenities that they are allowed to acquire in order to qualify to proceed without payment of costs. *Vance v. District Ct. of Fremont County*, 908 P.2d 1189 (Colo. App. 1995).

**Court must abuse discretion to reverse its order.** To reverse an order denying such a request to proceed in forma pauperis, the court must have "abused its discretion". *Medina v. District Court*, 177 Colo. 185, 493 P.2d 367 (1972).

**Finding by trial court of nonindigency not supported by record.** *Medina v. District Court*, 177 Colo. 185, 493 P.2d 367 (1972).

**This section does not apply to appeals from justice to county courts.** *Spain v. Murry*, 77 Colo. 197, 235 P. 338 (1925).

**Nor does it apply to the prosecution of writs of error.** In *Ferrara v. Auric Mining Co.* (20 Colo. App. 411, 79 P. 302 (1905)) it is stated that the rulings of the supreme court are to the effect that this section does not apply to the prosecution of writs of error. *Spain v. Murry*, 77 Colo. 197, 235 P. 338 (1925).

**The court is not confined to any particular stage in the progress of a case,** after it is instituted, either before or after the trial is begun, in granting this permission; and certainly in the absence of any showing of an abuse by the trial court of its discretion under this section, or of injury or prejudice to the defendant, neither of which is made to appear in this case, a court of review will not interfere. *Peck v. Farnham*, 24 Colo. 141, 49 P. 364 (1897).

**Security required under § 13-16-102 may not be excused or deferred under this section.** *Lewis v. Keim*, 883 P.2d 610 (Colo. App. 1994) (disapproved of by supreme court in *Walcott v. District Ct., 2nd Jud. Dist.*, 924 P.2d 163 (Colo. 1996)).

**This section provides judges with the authority to waive cost requirements under §§ 13-16-101 and 13-16-102** and, therefore, provides sufficient authority to permit a plaintiff to proceed when the plaintiff is a poor person and unable to pay costs and expenses. *Walcott v. District Ct., 2nd Jud. Dist.*, 924 P.2d 163 (Colo. 1996).

## II. HABEAS CORPUS PROCEEDINGS.

**While habeas corpus may, of course, be found to be a civil action** for procedural purposes, it does not follow that its availability in testing the state's right to detain any indigent prisoner may be subject to the payment of a



filing fee. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

**This section guarantees it to poor persons.** The legal device existing in the state which provides this equal protection in the postconviction civil remedy of habeas corpus is contained in and governed by this section, which allows a poor person to proceed without the payment of costs in a civil action on his making a showing of poverty. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

**In the administration of criminal justice the indigent must be afforded access to established channels of appellate review** in such manner that he is freed from the "invidious discriminations" which attach when proceeding in penury. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

**There is no higher duty than to maintain the federal writ of habeas corpus unimpaired** and unsuspended save only in the cases specified in the federal constitution. When an equivalent right is granted by a state, financial hurdles must not be permitted to condition its exercise. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

**Judges have restricted discretion when habeas corpus is sought.** Federal constitutional standards require consideration of the "freedom writ" in a quasi-criminal light when state procedures are tested for equal protection, and the discretion normally allowed the court under this section is restricted by very tangible federal limitations. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

**Courts cannot saddle defendant with costs even when habeas petition is denied.** The supreme court sees no difference of substance save subtlety between the "invidious discrimination" worked by a fee imposed upon an indigent before he is allowed to petition, which he cannot pay, and a fee saddled upon him after dismissal, which he also cannot pay. Both practices are effective deterrents. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

**Invidious discrimination.** To fasten a financial burden only upon those unsuccessful appel-

lants who are confined in state institutions is to make an invidious discrimination. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

### III. REPORTER'S TRANSCRIPT.

**Section does not give a right to a free transcript.** This section does not give an individual, found to be a pauper within the meaning of the statute, a right to a trial transcript without cost in order to prosecute an appeal. *Almarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**Transcript is not, by definition, a writ, process, or proceeding.** *Almarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**The fees for the preparation of a transcript by a reporter are not payable to the court** and the court cannot waive them. *Almarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**This section only permits the waiver by the judge of costs chargeable by the court.** *Almarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**The supreme court may find other means of affording adequate and effective appellate review** to indigent defendants than through a reporter's transcript. *Almarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**Section does not violate § 6 of art. II, Colo. Const.** Although this section does not require that a trial transcript without cost be provided, § 13-16-103 is not violative of § 6 of art. II, Colo. Const. *Almarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**A transcript is not an absolute necessity in the reviewing court.** *Almarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**Colorado, under its rule-making power, has augmented the waiver of costs by simplifying the requirements for a record.** The supreme court, consonant with the spirit of this section to ease the burden on litigants, adopted C.A.R. 10. A discussion of this rule should dispel any implications that Colorado denies an effective review of trial court judgments by not providing free reporters' transcripts. *Almarez v. Carpenter*, 173 Colo. 284, 477 P.2d 792 (1970).

**13-16-104. When plaintiff recovers costs.** If any person sues in any court of this state in any action, real, personal, or mixed, or upon any statute for any offense or wrong immediately personal to the plaintiff and recovers any debt or damages in such action, then the plaintiff or demandant shall have judgment to recover against the defendant his costs to be taxed; and the same shall be recovered, together with the debt or damages, by execution, except in the cases mentioned in this article.

**Source:** R.S. p. 154, § 4. G.L. § 326. G.S. § 400. R.S. 08: § 1055. C.L. § 6571. CSA: C. 43, § 1. CRS 53: § 33-1-4. C.R.S. 1963: § 33-1-4.

## ANNOTATION

**The successful plaintiff is entitled to recover all costs.** *Wallace Plumbing Co. v. Dillon*, 73 Colo. 10, 213 P. 130 (1922).

**The party to be taxed must be interested in suit and before court.** This section does not authorize the court to render judgment against one not interested in the litigation or the subject matter thereof, not a party to the suit and not before the court. *Downs v. Reno*, 53 Colo. 217, 124 P. 582 (1912).

**A party who challenges the necessity and reasonableness of expert witness fees and expenses is entitled to an evidentiary hearing.** *Fed. Ins. Co. v. Ferrellgas, Inc.*, 961 P.2d 511 (Colo. App. 1997).

**A party is entitled to have the trial court make findings sufficient to disclose the basis for its decision to award costs and to support the amount awarded.** *Fed. Ins. Co. v. Ferrellgas, Inc.*, 961 P.2d 511 (Colo. App. 1997).

**Where there is more than one trial, he is entitled to recover costs for all the trials.** *Wallace Plumbing Co. v. Dillon*, 73 Colo. 10, 213 P. 130 (1922).

**Costs of a prior mistrial.** The provisions of this section, that the prevailing party shall recover his costs to be taxed, authorize him to recover all his costs in the action, including those of a prior mistrial, as well as those of the last trial; and a defeated party who would obtain a new trial must first pay the costs of the prevailing party at a mistrial, as well as all other necessary costs he has incurred in the action. *Shreve v. Cheesman*, 69 F. 785 (8th Cir. 1895).

**If the defendant prevails, costs in one court may be set off against those in the other.** Where a judgment is reversed on review and the cause remanded for a new trial, the plaintiff in error is entitled to costs in the appellate court; and where the defendant in error thereafter prevails in the trial court, the costs in one court may be set off against those in the other. *Wallace Plumbing Co. v. Dillon*, 73 Colo. 10, 213 P. 130 (1922).

**Plaintiff properly charged with costs where cross-complainant recovers judgment.** Where a complaint was dismissed and the plaintiff objected to the dismissal of the case, but insisted on a trial on the defendant's cross-complaint and the replication, and the cross-complainant recovered judgment, the plaintiff was properly charged with the costs. *Cone v. Montgomery*, 25 Colo. 277, 53 P. 1052 (1898).

**Successful plaintiff in error may recover cost of transcript of record.** The long practice of the supreme court should not lightly be changed, and amounts to a construction of the statutes, and that thereunder the successful plaintiff in error may recover any costs properly taxable. It is claimed that the transcript of record is not a proper matter to be taxed, but what has

been said above shows that we must regard it as proper. It has always been customary to tax it. *Antero & Lost Park Reservoir Co. v. Lowe*, 70 Colo. 467, 203 P. 265 (1921).

**The bill of exceptions.** For some years the bill of exceptions was not separately taxed but was included with the transcript of record, and in *Phillips v. Corbin* (25 Colo. 567, 56 P. 180 (1898)) a bill of costs including the costs for the transcript of the bill of exceptions, the original of which bill and not a transcript was sent to this court, was expressly approved. We cannot sustain this practice, since it is supported by no statute or rule and cannot, therefore, allow the costs of the bill of exceptions. *Antero & Lost Park Reservoir Co. v. Lowe*, 70 Colo. 467, 203 P. 265 (1921).

**Costs in annexation proceedings in the lower court are not allowed under this section.** *Phillips v. Corbin*, 25 Colo. 567, 56 P. 180 (1898).

**This section is expressly limited to costs arising out of court actions,** and it has no application to special proceedings before any boards, bureaus, or commissions unless expressly authorized by the creative act. *Maryland Cas. Co. v. Indus. Comm'n*, 116 Colo. 58, 178 P.2d 426 (1947).

**Costs rarely taxed against a public officer.** In the discharge of a duty imposed upon him by law, costs are rarely, if ever, taxed against a public officer. *Witter v. Whipple*, 26 Colo. 1, 55 P. 1081 (1899).

**No costs can be taxed in the lower court against the secretary of state in a proceeding to require him to publish a list of nominees on the official ballot,** and the same applies to the cost of proceeding in the supreme court where the secretary of state acted in good faith. *Witter v. Whipple*, 26 Colo. 1, 55 P. 1081 (1899).

**An award of costs is proper against a municipal corporation.** *Kussman v. City & County of Denver*, 671 P.2d 1000 (Colo. App. 1983).

**Right of a plaintiff to select the forum for a claim less than \$5,000** is not conditioned by constitution or by statute; rather, the general assembly has seen fit to permit a claimant to file such actions in district court unconstrained by considerations of whether the county court is an adequate forum for just resolution of the complaint and of any increased costs to the public incident to the district court adjudicative process. *Cook v. District Court ex rel. County of Weld*, 670 P.2d 758 (Colo. 1983).

**Expert witness fees are recoverable as costs to prevailing parties.** *Graefe & Graefe v. Beaver Mesa Exploration*, 695 P.2d 767 (Colo. App. 1984).

**Plaintiff not entitled to costs against state** pursuant to this section because there is no



express authorization allowing costs to be assessed against the state. *McFarland v. Gunter*, 829 P.2d 510 (Colo. App. 1992); *Smith v. Furlong*, 976 P.2d 889 (Colo. App. 1999); *Rocky Mtn. Animal Def. v. Div. of Wildlife*, 100 P.3d 508 (Colo. App. 2004).

**The language of § 13-16-122 describing allowable costs does not negate the mandatory provisions of this section** by allowing the court to refuse all costs. *Nat'l Canada Corp. v. Dikeou*, 868 P.2d 1131 (Colo. App. 1993).

**A prevailing party entitled to costs should be identified by focusing on the countervailing claims and defenses asserted by the litigants and not on incidental independent factors that may affect the ultimate monetary judgement.** The trial court erred by considering non-collateral source receipts in determining if real estate purchasers were prevailing parties entitled to costs. *Frost v. Schroeder & Co., Inc.*, 876 P.2d 126 (Colo. App. 1994).

**Determining a plaintiff to be a prevailing party on the basis of nominal damages when the defendant recovers more in damages than the nominal damages would be abuse of discretion.** Plaintiff sought nominal damages and subsequent determination as the prevailing party, which carries with it an entitlement to costs. However, such determination on the basis of nominal damages would be an abuse of discretion by the court, since the nominal damages of one dollar would have been less than the \$966,178 awarded to the defendant on a counterclaim, and thus the defendant would be determined the prevailing party using a "net judgment" analysis. *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472 (Colo. App. 2003).

**13-16-105. When defendant recovers costs.** If any person sues in any court of record in this state in any action wherein the plaintiff or demandant might have costs in case judgment is given for him and he is nonprossed, suffers a discontinuance, is nonsuited after appearance of the defendant, or a verdict is passed against him, then the defendant shall have judgment to recover his costs against the plaintiff, except against executors or administrators prosecuting in the right of their testator or intestate, or demandant, to be taxed; and the same shall be recovered of the plaintiff or demandant, by like process as the plaintiff or demandant might have had against the defendant, in case judgment has been given for the plaintiff or demandant.

**Source:** R.S. p. 154, § 5. G.L. § 327. G.S. § 401. R.S. 08: § 1058. C.L. § 6574. CSA: C. 43, § 4. CRS 53: § 33-1-5. C.R.S. 1963: § 33-1-5.

#### ANNOTATION

**Section 13-64-205 (1)(b) does not preclude or affect a prevailing defendant's right to recover costs** and does not imply a repeal of this section. *Mullins v. Kessler*, 83 P.3d 1203 (Colo. App. 2003).

**The trial court's right to allocate costs between defendants is discretionary.** The trial court did not abuse its discretion in making the award of costs against the defendants joint and several where one of the defendants is an individual and the other is a conference of churches. *Winkler v. Rocky Mountain Conference*, 923 P.2d 152 (Colo. App. 1995).

**Even though the imposition of costs is required by this section**, the apportionment of costs among multiple defendants is not prescribed. It remains at the discretion of the court. *Bohrer v. DeHart*, 943 P.2d 1220 (Colo. App. 1996), rev'd on other grounds, 961 P.2d 472 (Colo. 1998).

**An award of costs is not prohibited under C.R.C.P. 54 (d)**, even if a plaintiff is not entitled to costs under this section. *Weeks v. City of Colo. Springs*, 928 P.2d 1346 (Colo. App. 1996).

**This statute and C.R.C.P. 54(d) are modified by § 13-17-202 (1)(a)(II)**, which does not allow a party who rejects a settlement offer and recovers less at trial to recover his or her costs, even though that party is determined to be the prevailing party. *Bennett v. Hickman*, 992 P.2d 670 (Colo. App. 1999).

**Plaintiff entitled to recover costs for settlement conference and trial transcript if the court made either necessary for litigation.** *Parker v. USAA*, 216 P.3d 7 (Colo. App. 2007), aff'd on other grounds, 200 P.3d 350 (Colo. 2009).

**Offer of settlement as to "all claims"** unambiguously includes attorney fees and costs if the only claim for attorney fees and costs appears in the complaint. The offer of settlement need not explicitly reference attorney fees or costs. *Bumbal v. Smith*, 165 P.3d 844 (Colo. App. 2007).

**A party challenging the reasonableness of expert fees** is entitled to a hearing on the issue. *Dunlap v. Long*, 902 P.2d 446 (Colo. App. 1995).

**Whether to award costs and what amount**

to award are decisions within the sound discretion of the trial court. Its ruling will not be reversed on appeal without clear abuse of discretion. *Wark v. McClellan*, 68 P.3d 574 (Colo. App. 2003).

**Costs of third-party defendant properly divided between plaintiff and defendant or borne by two defendants when both had claims against third-party defendant** since dismissal of the claims made third-party defendant the prevailing party against both. *Cobai v. Young*, 679 P.2d 121 (Colo. App. 1984); *Poole v. Estate of Collins*, 728 P.2d 741 (Colo. App. 1986).

**Court construed the Health Care Availability Act in harmony with this section and C.R.C.P. 54(d)** to allow a prevailing defendant to recover costs in a medical negligence action. *Mullins v. Kessler*, 83 P.3d 1203 (Colo. App. 2003).

**Applied** in *Survey Eng'rs, Inc. v. Zoline Found.*, 193 Colo. 488, 568 P.2d 436 (1977); *Romero v. Rossmiller*, 43 Colo. App. 215, 603 P.2d 964 (1979); *Gilmore v. Rubeck*, 708 P.2d 486 (Colo. App. 1985); *Bowers v. Loveland Pub. Co.*, 773 P.2d 595 (Colo. App. 1988).

**13-16-106. Costs in replevin.** Any person making justification or cognizance in replevin, if the same is found for him, or the plaintiff is nonsuited or nonprosessed, suffers discontinuance, or is otherwise barred, then such person shall recover his damages and costs against the plaintiff.

**Source:** R.S. p. 155, § 6. G.L. § 328. G.S. § 402. R.S. 08: § 1066. C.L. § 6582. CSA: C. 43, § 12. CRS 53: § 33-1-6. C.R.S. 1963: § 33-1-6.

**13-16-107. Costs on motion to dismiss.** If, in any action, judgment upon motion to dismiss by either party to the action is given against the plaintiff, the defendant shall recover costs against the plaintiff; if such judgment is given for the plaintiff, he shall recover costs against the defendant.

**Source:** R.S. p. 155, § 7. G.L. § 329. G.S. § 403. R.S. 08: § 1056. C.L. § 6572. CSA: C. 43, § 2. CRS 53: § 33-1-7. C.R.S. 1963: § 33-1-7.

#### ANNOTATION

Where a case is remanded for further proceedings by the Colorado Court of Appeals, an award of costs pursuant to this section is inappropriate. *Dalton v. Miller*, 984 P.2d 666 (Colo. App. 1999).

**A court that grants a motion to dismiss but does not enter judgment thereon lacks authority to award costs under this section.** *Sotelo v. Hutchens Trucking Co.*, 166 P.3d 285 (Colo. App. 2007).

**13-16-108. When several matters pleaded.** When any defendant in any action, or plaintiff in replevin, pleads several matters, and any of such matters upon demurrer joined are adjudged insufficient, or if a verdict is found in any issue of the cause for the plaintiff, costs shall be given at the discretion of the court.

**Source:** R.S. p. 155, § 8. G.L. § 330. G.S. § 404. R.S. 08: § 1067. C.L. § 6583. CSA: C. 43, § 13. CRS 53: § 33-1-8. C.R.S. 1963: § 33-1-8.

#### ANNOTATION

**For trial court's ruling that each party pay his own cost not being an abuse of discretion**, see *Livingston v. Utah-Colorado Land & Live Stock Co.*, 106 Colo. 278, 103 P.2d 684 (1940); *W. H. Woolley & Co. v. Bear Creek Manor*, 735 P.2d 910 (Colo. App. 1986).

**Where each party prevails in part an award of costs is committed to sole discretion of trial court** and court's discretion remains

unaffected by fact that judgment awarded to one party is larger than judgment awarded to the other. *Husband v. Colo. Mountain Cellars*, 867 P.2d 57 (Colo. App. 1993); *Archer v. Farmer Bros.*, 70 P.3d 495 (Colo. App. 2002), *aff'd*, 90 P.3d 228 (Colo. 2004).

**When a case involves many claims**, some of which are successful and some of which are not, it is left to the sole discretion of the trial court to



determine which party, if any, is the prevailing party and whether costs should be awarded.

Archer v. Farmer Bros. Co., 90 P.3d 228 (Colo. 2004).

**13-16-109. Costs on several counts.** Where there are several counts in any declaration, and any of them are adjudged insufficient, or a verdict on any issue joined thereon is found for the defendant, costs shall be awarded in the discretion of the court.

**Source:** R.S. p. 155, § 9. G.L. § 331. G.S. § 405. R.S. 08: § 1063. C.L. § 6579. CSA: C. 43, § 9. CRS 53: § 33-1-9. C.R.S. 1963: § 33-1-9.

#### ANNOTATION

Where each party prevails in part an award of costs is committed to sole discretion of trial court and court's discretion remains unaffected by fact that judgment awarded to one party is larger than judgment awarded to the other. Husband v. Colo. Mountain Cellars, 867 P.2d 57 (Colo. App. 1993).

When a case involves many claims, some of which are successful and some of which are not, it is left to the sole discretion of the trial court to determine which party, if any, is the prevailing party and whether costs should be awarded. Archer v. Farmer Bros. Co., 90 P.3d 228 (Colo. 2004).

**13-16-110. When several defendants.** Where several persons are made defendants to any action of trespass, assault, false imprisonment, detinue, replevin, trover, or ejectment, and any one or more of them are upon trial acquitted by verdict, every person so acquitted shall recover his costs of suit in like manner as if such verdict or acquittal had been given in favor of the defendant.

**Source:** R.S. p. 155, § 10. G.L. § 332. G.S. § 406. R.S. 08: § 1068. C.L. § 6584. CSA: C. 43, § 14. CRS 53: § 33-1-10. C.R.S. 1963: § 33-1-10.

**13-16-111. Recovery of costs of suit.** A plaintiff who obtains judgment or an award of execution in an action brought under subsection (4) or (5) of rule 106 (a), C.R.C.P., shall recover his costs of suit. The defendant shall recover his costs if the action brought under subsection (4) or (5) of rule 106 (a), C.R.C.P., is dismissed pursuant to rule 41, C.R.C.P.

**Source:** R.S. p. 155, § 11. G.L. § 333. G.S. § 407. R.S. 08: § 1069. C.L. § 6585. CSA: C. 43, § 15. CRS 53: § 33-1-11. C.R.S. 1963: § 33-1-11.

#### ANNOTATION

The word "shall" in this section evinces a legislative intent that the prevailing party in a C.R.C.P. 106 (a)(4) action must be awarded reasonable costs. Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

Section allows a prevailing plaintiff in a C.R.C.P. 106(a)(4) action to recover costs against the state, its officers, or agencies. Branch v. Colo. Dept. of Corr., 89 P.3d 496 (Colo. App. 2003).

This section does not require an award of costs if a party achieves mixed success in a

C.R.C.P. 106 (a)(4) action involving multiple claims or issues. Any other reading would require a court to ignore §§ 13-16-108 and 13-16-109 and established case law that provides the court discretion to award costs if a party achieves some success when several matters are pleaded. Phillips v. Watkins, 166 P.3d 197 (Colo. App. 2007).

Applied in Romero v. Rossmiller, 43 Colo. App. 215, 603 P.2d 964 (1979); Rossmiller v. Romero, 625 P.2d 1029 (Colo. 1981).

**13-16-112. Number of witness fees taxed.** In no case in the district court shall the fees of more than four witnesses be taxed against the party against whom judgment is given for costs, unless the court certifies on its minutes that more than four witnesses were really necessary, in which case the clerk shall tax the costs of as many witnesses as the court so certifies.

**Source:** R.S. p. 155, § 12. G.L. § 334. G.S. § 408. R.S. 08: § 1062. C.L. § 6578. CSA: C. 43, § 8. CRS 53: § 33-1-12. C.R.S. 1963: § 33-1-12.

### ANNOTATION

**The section is confined to civil cases**, and it is not the intention of the general assembly to extend it to criminal proceedings. Had it been thought necessary and proper, it would have been embraced in the criminal code. *Parker v. People*, 7 Colo. App. 56, 42 P. 172 (1895).

**Hearing upon remand considered separate hearing.** Under this section, a hearing held after remand was a separate hearing, and plaintiff would be entitled to use such witnesses as may be considered necessary by him to present his evidence, subject to the restriction contained in this section. *Yeager Garden Acres, Inc. v. Summit Constr. Co.*, 32 Colo. App. 242, 513 P.2d 458 (1973).

**Award for fees of eight witnesses without specific finding for their necessity held to be error** in child custody hearing. *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989).

**Record of trial court was not sufficient** to determine which costs were allowed and whether they were reasonable and permitted by statute, thereby requiring a remand to the trial court to make findings under this section and § 13-16-112. *Fenton v. Fibreboard Corp.*, 827 P.2d 564 (Colo. App. 1991).

**Applied** in Denver Urban Renewal Auth. v. Hayutin, 40 Colo. App. 559, 583 P.2d 296 (1978).

**13-16-113. Costs upon dismissal or summary judgment.** (1) In all cases where any action is dismissed for irregularity, or is nonprossed or nonsuited by reason that the plaintiff neglects to prosecute the same, the defendant shall have judgment for his costs.

(2) In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed prior to trial under rule 12 (b) of the Colorado rules of civil procedure, the defendant shall have judgment for his costs. This subsection (2) shall not apply if a motion under rule 12 (b) (5) of the Colorado rules of civil procedure is treated as a motion for summary judgment and disposed of as provided in rule 56 of the Colorado rules of civil procedure.

**Source:** R.S. p. 155, § 13. G.L. § 335. G.S. § 409. R.S. 08: § 1059. C.L. § 6575. CSA: C. 43, § 5. CRS 53: § 33-1-13. C.R.S. 1963: § 33-1-13. L. 87: Entire section amended, p. 547, § 1, effective July 1.

### ANNOTATION

**Law reviews.** For article, "1988 Update on Colorado Tort Reform Legislation — Part II", see 17 Colo. Law. 1949 (1988).

**Award of costs for claims dismissed because of failure to prosecute is mandatory.** *Munoz v. Measner*, 214 P.3d 510 (Colo. App. 2009), rev'd on other grounds, 247 P.3d 1031 (Colo. 2011).

**The specific limitation in the second sentence of subsection (2) cannot reasonably be interpreted as a general prohibition** extending

to all motions for summary judgment brought under C.R.C.P. 56, and the defendant's entitlement to an award of costs was properly considered under C.R.C.P. 54(d). *Spencer v. United Mortg. Co.*, 857 P.2d 1342 (Colo. App. 1993).

**This section and § 13-17-201 mandate awards of attorney fees and costs and do not permit a reduction** for work that may be used in companion litigation. *Crandall v. City & County of Denver*, 238 P.3d 659 (Colo. 2010).

**13-16-114. Costs in equity.** Upon the complainant dismissing his bill in equity or the defendant dismissing the same for want of prosecution, the defendant shall recover against the complainant full costs; and, in all other cases in equity not otherwise directed by law, it is in the discretion of the court to award costs or not.

**Source:** R.S. p. 155, § 14. G.L. § 336. G.S. § 410. R.S. 08: § 1060. C.L. § 6576. CSA: C. 43, § 6. CRS 53: § 33-1-14. C.R.S. 1963: § 33-1-14.



## ANNOTATION

In an equity case the taxation of costs ordinarily rests in the sound discretion of the court, and its action in assessing the fees of expert witnesses as a part of the costs will not be disturbed on review where no abuse of discretion appears. *Union Exploration Co. v. Moffat Tunnel Imp. Dist.*, 104 Colo. 109, 89 P.2d 257 (1939).

For a court of equity charging costs of surveyor to losing party, see *Moore v. Burritt*, 106 Colo. 413, 105 P.2d 1084 (1940).

**C.R.C.P. 68 applies only to actions at law which seek a money judgment.** Court held to be correct in refusing to apply said rule to dissolution of marriage proceeding which is an action in equity that does not seek a money judgment at law. Such cases are governed by this section which authorizes court to award costs or not. In re *Marshall*, 781 P.2d 177 (Colo. App. 1989), cert. denied, 794 P.2d 1011 (Colo. 1990).

**13-16-115. In suit for use of another.** When any suit is commenced in the name of one person to the use of another, the person to whose use the action is brought shall be held liable and bound for the payment of all costs which the plaintiff may be adjudged or bound to pay, to be recovered by civil action.

**Source:** R.S. p. 156, § 15. G.L. § 337. G.S. § 411. R.S. 08: § 1057. C.L. § 6573. CSA: C. 43, § 3. CRS 53: § 33-1-15. C.R.S. 1963: § 33-1-15.

**13-16-116. Costs in adverse suit.** In all cases where any person makes an application for a patent to any lode, claim, placer claim, millsite, or other mining property under the mining laws of the United States, and any other person claiming adversely to such applicant files an adverse claim in the proper land office or brings a suit for the purpose of determining the title, or right of possession, to such mining property, or any part thereof, if such adverse claimant, being plaintiff in such suit, prevails, so as to recover costs therein, he shall also recover and be entitled to tax as a part of his said costs all disbursements and expense necessarily incurred and paid by him for plats, abstracts, and copies of papers filed in said land office with his adverse claim, and also a reasonable counsel fee, not exceeding fifty dollars in any case, for the expense of preparing his said adverse claim.

**Source:** L. 1876: p. 54, § 1. G.L. § 349. G.S. § 423. R.S. 08: § 1061. C.L. § 6577. CSA: C. 43, § 7. CRS 53: § 33-1-16. C.R.S. 1963: § 33-1-16.

## ANNOTATION

**Attorney fees are not recoverable as costs under this section.** In an adverse suit between the owners of two conflicting mining claims, where after judgment was entered it was on motion of the successful party amended so as to include an attorney fee and the expense of ad-

verse, in accordance with a stipulation between the parties made before trial, the sums thus included in the judgment were a part of the judgment and not costs. *Hiwassee Gold Mining Co. v. Hotchkiss Mt. Mining & Reduction Co.*, 16 Colo. App. 22, 63 P. 708 (1901).

**13-16-117. On appeal from decisions in probate.** In all cases of appeal from the decision of a court of probate, the assessment of costs shall be in the discretion of the court in which such appeal is heard.

**Source:** R.S. p. 156, § 17. G.L. § 339. G.S. § 413. R.S. 08: § 1070. C.L. § 6586. CSA: C. 43, § 16. CRS 53: § 33-1-17. C.R.S. 1963: § 33-1-17.

**13-16-118. Clerk to tax costs.** The clerk of any court in the state is authorized and required to tax and subscribe all bills of costs arising in any cause or proceeding in the court of which he is clerk, agreeable to the rates which are allowed or specified by law.

**Source:** R.S. p. 156, § 19. G.L. § 341. G.S. § 415. R.S. 08: § 1073. C.L. § 6589. CSA: C. 43, § 19. CRS 53: § 33-1-18. C.R.S. 1963: § 33-1-18.

**Cross references:** For the fees of the clerk of court, see article 32 of this title.

### ANNOTATION

**No discretionary authority in clerk to determine attorney fees and expert witness fees.** Discretion is a judicial function not properly

delegable to the clerk of court. *Davis v. Bruton*, 797 P.2d 830 (Colo. App. 1990).

**13-16-119. Costs retaxed - forfeit by clerk.** If any person feels aggrieved by the taxation of any bill of costs, he may apply to the court to have the same retaxed, and, if it appears that the party aggrieved has paid any higher charge than by law is allowed, the court may order that the clerk forfeit all fees allowed to him for taxation and pay to the party aggrieved the whole amount which he has paid by reason of the allowing of any unlawful charge.

**Source:** R.S. p. 156, § 20. G.L. § 342. G.S. § 416. R.S. 08: § 1074. C.L. § 6590. CSA: C. 43, § 20. CRS 53: § 33-1-19. C.R.S. 1963: § 33-1-19.

**13-16-120. Fee bill - precept - levy and return.** The clerk shall make out a bill of costs as the same have been taxed in any cause against the party liable to pay the same and his security for costs, if any, together with his precept, directed to the sheriff of the proper county, commanding that, if the costs in the said bill of costs mentioned are not paid within thirty days after demand made therefor, he shall cause the same to be levied on the goods and chattels, lands and tenements, of the party so liable therefor, and his security, if any, named therein. Every such fee bill shall run in the name of the people, shall be under the seal of the court, and shall be returnable within ninety days from the date thereof, and the sheriff shall proceed to collect the same.

**Source:** R.S. p. 156, § 21. G.L. § 343. G.S. § 417. R.S. 08: § 1075. C.L. § 6591. CSA: C. 43, § 21. CRS 53: § 33-1-20. C.R.S. 1963: § 33-1-20.

### ANNOTATION

**A fee bill for costs runs against the party liable to pay the same and his security for costs.** *Shannon v. Dodge*, 18 Colo. 164, 32 P. 61 (1893); *Staples v. Barclay*, 30 Colo. 428, 71 P. 374 (1902).

**Any review must be an appeal from the judgment.** The liability of the sureties was fixed

by the judgment against their principal and any review of such liability must be had by an appeal from or error to such judgment, and could not be had by a motion to quash the fee bill and retax the costs and an appeal from the order denying the motion. *Staples v. Barclay*, 30 Colo. 428, 71 P. 374 (1902).

**13-16-121. Costs allowed to defendants who prevail against public entities. (Repealed)**

**Source:** L. 77: Entire section added, p. 796, § 1, effective July 1. L. 84: Entire section repealed, p. 462, § 6, effective July 1.

**13-16-122. Items includable as costs.** (1) Whenever any court of this state assesses costs pursuant to any provision of this article, such costs may include:

- (a) Any docket fee required by article 32 of this title or any other fee or tax required by statute to be paid to the clerk of the court;
- (b) The jury fees and expenses provided for in article 71 of this title;
- (c) Any fees required to be paid to sheriffs pursuant to section 30-1-104, C.R.S.;
- (d) Any fees of the court reporter for all or any part of a transcript necessarily obtained for use in this case;
- (e) The witness fees, including subsistence payments, mileage at the rate authorized by



section 13-33-103, and charges for expert witnesses approved pursuant to section 13-33-102 (4);

(f) Any fees for exemplification and copies of papers necessarily obtained for use in the case;

(g) Any costs of taking depositions for the perpetuation of testimony, including reporters' fees, witness fees, expert witness fees, mileage for witnesses, and sheriff fees for service of subpoenas;

(h) Any attorney fees, when authorized by statute or court rule;

(i) Any fees for service of process or fees for any required publications;

(j) Any item specifically authorized by statute to be included as part of the costs.

**Source:** **L. 81:** Entire section added, p. 947, § 2, effective July 1. **L. 2001:** (1)(b) amended, p. 1270, § 18, effective June 5.

**Cross references:** For items includable as costs in criminal actions, see § 18-1.3-701.

### ANNOTATION

**Law reviews.** For article, "The Bill of Costs", see 25 Colo. Law. 71 (November 1996).

**The awarding of costs is at the discretion of the trial court.** *Mem'l Gardens, Inc. v. Olympian Sales & Mgt. Consultants, Inc.*, 661 P.2d 296 (Colo. App. 1982).

**An award of costs lies within the discretion of the trial court**, subject to the parameters of this section; however, the awarding of expert witness fees is not without limits but is circumscribed by the rule of reason, viz., sound judicial discretion. *Fenton v. Fibreboard Corp.*, 827 P.2d 564 (Colo. App. 1991).

**Whether to award expert witness fees and the amount, if any, to be awarded are matters within the sound discretion of the trial court.** Only reasonable expert witness fees may be awarded. *Steele v. Law*, 78 P.3d 1124 (Colo. App. 2003).

**Subject to the limitations set forth in this section, an award of costs lies within the sound discretion of the trial court.** *Rossmiller v. Romero*, 625 P.2d 1029 (Colo. 1981); *Spencer v. United Mortg. Co.*, 857 P.2d 1342 (Colo. App. 1993).

**As long as the costs incurred are incurred solely for the benefit of the litigation and are not commingled with any of the general costs of doing business or the costs of other litigation, they cannot properly be termed overhead and may be included as costs under this section.** *Harvey v. Farmers Ins. Exch.*, 983 P.2d 34 (Colo. App. 1998), *aff'd* on other grounds *sub nom. Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000).

Trial court abused its discretion in awarding plaintiff costs for a client fee related to contempt order because the affidavit submitted for recovery of the fee failed to establish that it was incurred solely for the related litigation. At least some portion of the fee was for general business costs; therefore, the fee is not recoverable. *Mad-*

*ison Capital Co., LLC v. Star Acquisition VIII*, 214 P.3d 557 (Colo. App. 2009).

**Cost of preparing trial transcript recoverable under subsection (1)(d)** where transcript was obtained for use in the case. By stipulating that the court determine liability based upon the trial transcripts, the parties reduced the costs of litigation by avoiding a retrial. The court needed the trial transcript, however, to consider all the testimony. *Parker v. USAA*, 216 P.3d 7 (Colo. App. 2007), *aff'd* on other grounds, 200 P.3d 350 (Colo. 2009).

**Although the expenses of taking a deposition are generally not allowed as items of costs**, subsection (1)(g) permits the award of the "costs of taking depositions for the perpetuation of testimony". Since the deposition transcript was used in lieu of testimony at trial to resolve the disputed claims, there was no abuse of the trial court's discretion in its inclusion of the costs of the deposition in defendant's bill of costs. *Spencer v. United Mortg. Co.*, 857 P.2d 1342 (Colo. App. 1993).

**Record of trial court was not sufficient** to determine which costs were allowed and whether they were reasonable and permitted by statute, thereby requiring a remand to the trial court to make findings under this section and § 13-16-112. *Fenton v. Fibreboard Corp.*, 827 P.2d 564 (Colo. App. 1991).

**The determination of whether attorney fees are costs or damages in a particular case** is, by its very nature, a fact- and context-sensitive one, which rests within the sound discretion of the trial court. *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936 (Colo. 1993); *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

**The list of items awardable as costs in this section is illustrative rather than exclusive.** The use of the word "includes" rather than the word "means" in a regulatory definition indicates a nonexclusive list which may be enlarged

upon. *Cherry Creek Sch. Dist. v. Voelker*, 859 P.2d 805 (Colo. 1993); *Am. Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994).

**While deposition costs for ordinary discovery purposes are not allowable**, if witness dies and his deposition is listed on the trial data certificate in lieu of his testimony, this constitutes perpetuation of testimony, and costs are allowable. *Schultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo. App. 1986); *Frontier Exploration v. Am. Nat.*, 849 P.2d 887 (Colo. App. 1992).

**Allowance of expenses in taking discovery deposition proper** where the taking of the deposition and its general content are reasonably necessary for the development of the case in light of facts known to counsel at the time it was taken. *Cherry Creek Sch. Dist. v. Voelker*, 859 P.2d 805 (Colo. 1993); *Harvey v. Farmers Ins. Exch.*, 983 P.2d 34 (Colo. App. 1998), *aff'd* on other grounds *sub nom. Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000).

**Including costs of medical reports was not abuse of discretion.** Absent specific prohibition, trial court has discretion in awarding costs since the list of expenses that may be awarded as costs under this section is not exclusive. *Church v. Am. Standard Insurance Co.*, 764 P.2d 405 (Colo. App. 1988).

**Accrued interest on loans taken out by prevailing parties to finance their cases is not a recoverable cost as a matter of law.** *Catlin v. Tormey Bewley Corp.*, 219 P.3d 407 (Colo. App. 2009).

**Denial of costs for videotaping deposition was not abuse of discretion by court.** *Dorrance v. Family Athletic Club*, 772 P.2d 667 (Colo. App. 1989).

**No abuse of discretion** in the trial court's denial of plaintiff's request for expert witness fees when plaintiff failed to provide sufficient documentation and itemization to establish her entitlement to expert witness fees since the court was under no obligation to order a costs hearing and plaintiff expressly requested the court not hold such a hearing. *Steele v. Law*, 78 P.3d 1124 (Colo. App. 2003).

**Trial court has discretion to award costs**, subject to this section, and award of deposition costs is within the court's discretion. *Terry v. Sullivan*, 58 P.3d 1098 (Colo. App. 2002).

**C.R.C.P. 103 (8)(b)(5) provides authority to make an award of attorney fees.** *United Bank v. State Treasurer*, 797 P.2d 851 (Colo. App. 1990).

**Witness fees incurred for expert whose testimony on steps taken by reasonably prudent applicant in Torrens action on which court relied in reaching its conclusions on due process issues properly included in cost award under subsection (1)(g).** *Lobato v. Taylor*, 13

P.3d 821 (Colo. App. 2000), *rev'd* on other grounds, 71 P.3d 938 (Colo. 2002).

**Costs attributable to expert witness fees for expert witnesses that did not testify at trial were properly awarded.** These costs were valuation expenses necessarily incurred by reason of the litigation and were necessary for the proper preparation for trial. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff'd* in part and *rev'd* in part on other grounds, 17 P.3d 797 (Colo. 2001).

**When an expert witness for the prevailing party does not testify because his or her testimony is ruled unnecessary, and such ruling does not change the posture of the case, the prevailing party is not entitled to costs for the expert witness's fees.** *Catlin v. Tormey Bewley Corp.*, 219 P.3d 407 (Colo. App. 2009).

**Costs were properly awarded for an engineer despite the fact that the engineer's license had expired**, because litigation consultation and testimony do not require a license. In re *Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595 (Colo. 2005).

**Costs of deposition not permitted** where deposition taken for purposes of ordinary discovery and not to perpetuate testimony. *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989).

**This section was not intended to repeal the requirement of § 13-33-103** that mileage fees may be awarded only to subpoenaed witnesses. *Welch v. George*, 19 P.3d 675 (Colo. 2000).

**The language of this section describing allowable costs does not negate the mandatory nature of § 13-16-104** which requires the court to award costs to a successful plaintiff. *Nat'l Canada Corp. v. Dikeou*, 868 P.2d 1131 (Colo. App. 1993).

**This section does not prohibit an award of costs that includes the expenses associated with computerized legal research**, but the costs must be billed separately from attorney fees, such research must have been necessary for trial preparation, and the costs requested for such research must be reasonable. *Roget v. Grand Pontiac, Inc.*, 5 P.3d 341 (Colo. App. 1999).

**District court abused its discretion in awarding full in-house photocopying expenses, all costs billed by mediator and special master, and mileage and meal expenses.** There was no evidence supporting the reasonableness or necessity of the in-house photocopying or the mileage expenses; the award of the mediator's and the special master's costs contravened an agreement between the parties; and the cost of counsel's meals was not attributable to litigation — counsel would need to eat regardless of any litigation. *Valentine v. Mtn. States Mut. Cas. Co.*, 252 P.3d 1182 (Colo. App. 2011).

**While a mandatory settlement conference is not specifically enumerated as an award-**



**able cost in this section, plaintiff was entitled to recover the costs** of the conference because the court made the cost necessary for the litigation of the case. The court required the parties to participate in a settlement conference prior to proceeding to trial. *Parker v. USAA*, 216 P.3d 7

(Colo. App. 2007), aff'd on other grounds, 200 P.3d 350 (Colo. 2009).

**Applied** in *Songer v. Bowman*, 804 P.2d 261 (Colo. App. 1990); *Barnes v. Winford*, 833 P.2d 756 (Colo. App. 1992); *Carruthers v. Carrier Access Corp.*, 251 P.3d 1199 (Colo. App. 2010).

**13-16-123. Award of fees and costs to garnishee.** In any action before the court in which a garnishee incurs attorney fees in excess of the cost of preparing and filing his answer, the court may order that the costs of the proceeding, mileage fees as a witness, and reasonable attorney fees be paid to the garnishee when the court finds that the bringing, maintaining, or defense of the action involving the garnishee was frivolous, groundless, or without reasonable basis. The award of costs and fees may be allocated among the parties as the court deems just.

**Source: L. 83:** Entire section added, p. 616, § 1, effective May 20.

#### ANNOTATION

**Attorney fees may be awarded under either this section** or C.R.C.P. 103 or C.R.C.P. 8 without a finding that the actions of the party

against whom the award is entered were frivolous or groundless. *Law Offices of Quiat v. Ellithorpe*, 917 P.2d 300 (Colo. App. 1995).

**13-16-124. Sheriff's fees charged to judicial department.** Except as provided for by section 13-16-103, in any civil action in which civil process is delivered to a county or city and county sheriff by the judicial department for service of process, the court in which the civil action is pending shall assess as costs against the party or parties requesting such service to be paid to the court the fees charged by the sheriff pursuant to section 30-1-104 (1), C.R.S. No civil action may be dismissed until such costs have been paid to the court.

**Source: L. 96:** Entire section added, p. 751, § 2, effective July 1.

**13-16-125. Limit on supersedeas bond.** (1) In any civil action brought under any legal theory, the amount of a supersedeas bond necessary to stay execution of a judgment granting legal, equitable, or any other relief during the entire course of all appeals or discretionary reviews of the judgment by all appellate courts shall be set in accordance with applicable law; except that the total amount of the supersedeas bonds that are required collectively of all appellants during the appeal of a civil action may not exceed twenty-five million dollars in the aggregate, regardless of the amount of the judgment that is appealed.

(2) Notwithstanding the provisions of subsection (1) of this section, if an appellee proves by a preponderance of the evidence that an appellant who has posted a supersedeas bond is intentionally dissipating or diverting assets outside the ordinary course of its business for the purpose of avoiding payment of the judgment, a court may enter orders that are necessary to protect the appellee or that require the appellant to post a supersedeas bond in an amount up to and including the total amount of the judgment that is appealed.

**Source: L. 2003:** Entire section added, p. 1871, § 1, effective May 20.

#### ANNOTATION

**Law reviews.** For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005).

ARTICLE 17

Attorney Fees

**Law reviews:** For article, “Attorneys’ Fees Against Parties and Attorneys”, see 13 Colo. Law. 1202 (1984); for article, “Attorney Fees: The English Rule in Colorado”, see 13 Colo. Law. 1642 (1984); for comment, “Attorney Fee Assessments for Frivolous Litigation in Colorado”, see 56 U. Colo. L. Rev. 663 (1985); for article, “Civil Rights”, which discusses Tenth Circuit decisions dealing with attorney fees in civil rights litigation, see 62 Den. U. L. Rev. 71 (1985); for article, “Federal Practice and Procedure”, which discusses a Tenth Circuit decision dealing with attorney fees under the Equal Access to Justice Act, see 62 Den. U. L. Rev. 215 (1985); for article, “Managing and Streamlining the Small Lawsuit”, see 15 Colo. Law. 1389 (1986); for article, “Revisiting the Recovery of Attorney Fees and Costs in Colorado”, see 33 Colo. Law 11 (April 2004).

PART 1			fees in certain cases.
FRIVOLOUS, GROUNDLESS, OR VEXATIOUS ACTIONS		13-17-202.	Award of actual costs and fees when offer of settlement was made.
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PART 1

FRIVOLOUS, GROUNDLESS, OR VEXATIOUS ACTIONS

**13-17-101. Legislative declaration.** The general assembly recognizes that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice. In response to this problem, the general assembly hereby sets forth provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious. All courts shall liberally construe the provisions of this article to effectuate substantial justice and comply with the intent set forth in this section.

**Source:** **L. 77:** Entire article added, p. 796, § 2, effective July 1. **L. 84:** Entire section R&RE, p. 460, § 1, effective July 1.

ANNOTATION

**Law reviews.** For article, “Recovery of Attorney Fees and Costs in Colorado”, see 23 Colo. Law. 2041 (1994). For comment, “Dazed and Confused in Colorado: The Relationship Among Malicious Prosecution, Abuse of Process, and the Noerr-Pennington Doctrine”, see 67 U. Colo. L. Rev. 675 (1996).

**Suit involving money damages.** Although the primary relief sought by the plaintiff was for specific performance of a contract of purchase,



the defendant's counterclaim sought damages for breach of contract. Thus, even though the plaintiff's claim alone would not have supported an award for attorney fees, the defendant's counterclaim for damages clearly brought the suit within the ambit of the statute. *Ault Aerial Applicators, Inc. v. Irvine*, 684 P.2d 949 (Colo. App. 1984).

**Post-dissolution decree proceedings were groundless for lack of jurisdiction.** It would be inequitable to require divorced husband to pay wife's fees for legal services when such services should not have been performed for lack of jurisdiction over the defendants against whom relief was sought. *In re Noon*, 735 P.2d 884 (Colo. App. 1986).

**A trial court retains jurisdiction over a motion for sanctions**, even if jurisdiction has

not been reserved in a stipulated motion for dismissal, because such jurisdiction is incorporated by statute in this section. *Buckhannon v. U.S. West Commc'ns*, 928 P.2d 1331 (Colo. App. 1996).

**A good faith presentation of a legal theory which is arguably meritorious is sufficient to avoid an award of attorney fees.** *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

**Applied** in *Am. Web Press, Inc. v. Harris Corp.*, 596 F.Supp. 1089 (D. Colo. 1983); *Copper v. Peoples Bank and Trust Co.*, 725 P.2d 78 (Colo. App. 1986); *In re Custody of C.J.S.*, 37 P.3d 479 (Colo. App. 2001).

**13-17-102. Attorney fees - definitions.** (1) Subject to the provisions of this section, in any civil action of any nature commenced or appealed in any court of record in this state, the court may award, except as this article otherwise provides, as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees.

(2) Subject to the limitations set forth elsewhere in this article, in any civil action of any nature commenced or appealed in any court of record in this state, the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification.

(2.1) Notwithstanding any other provision of this part 1, the filing of a certificate of review pursuant to section 13-20-602 related to any licensed health care professional shall create a rebuttable presumption that the claim or action is not frivolous or groundless, but it shall not relieve the plaintiff or his attorney from ongoing obligations under rule 11 of Colorado rules of civil procedure.

(3) When a court determines that reasonable attorney fees should be assessed, it shall allocate the payment thereof among the offending attorneys and parties, jointly or severally, as it deems most just, and may charge such amount, or portion thereof, to any offending attorney or party.

(4) The court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5 (3) that lacked substantial justification. As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(5) No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew, or reasonably should have known, that he would not prevail on said claim or action.

(6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious; except that this subsection (6) shall not apply to situations in which an attorney licensed to practice law in this state is appearing without an attorney, in which case, he shall be held to the standards established for attorneys elsewhere in this article.

(7) No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado.

(8) This section shall not apply to traffic offenses, matters brought under the provisions of the "Colorado Children's Code", title 19, C.R.S., or related juvenile matters, or matters involving violations of municipal ordinances.

**Source:** **L. 77:** Entire article added, p. 797, § 2, effective July 1. **L. 84:** Entire section R&RE, p. 460, § 2, effective July 1. **L. 86:** (4) amended, p. 681, § 4, effective July 1. **L. 90:** (2.1) added, p. 862, § 1, effective July 1. **L. 2006:** (8) amended, p. 237, § 6, effective July 1. **L. 2009:** (8) amended, (HB 09-1248), ch. 252, p. 1136, § 24, effective May 14.

**Cross references:** For award of attorney fees and other costs in actions involving garnishees, see § 13-16-123.

## ANNOTATION

**Law reviews.** For article, "Malicious Prosecution of Civil Proceedings", see 11 Colo. Law. 2388 (1982). For article, "Attorneys' Fees Awarded to the Prevailing Party: The Ghost of S.B. 258 Revisited", see 11 Colo. Law 3003 (1982). For article, "Rule 11, C.R.C.P. as a Litigation Tool", see 12 Colo. Law. 1242 (1983). For article, "Lawyers' Liability for Attorney's Fees Awarded Against Clients", see 12 Colo. Law. 1638 (1983). For article "Attorney Fees: The English Rule in Colorado", see 13 Colo. Law. 1642 (1984). For article, "Civil Rights", which discusses the attorney fees in *Ramos v. Lamm*, see 62 Den. U. L. Rev. 71 (1985). For article, "1986 Colorado Tort Reform Legislation", see 15 Colo. Law. 1363 (1986). For article, "New Role for Nonparties in Tort Actions — The Empty Chair", see 15 Colo. Law. 1650 (1986). For article, "A Trial Lawyer's View of Attorney's Fees Awards", see 17 Colo. Law. 465 (1988). For article, "1988 Update on Colorado Tort Reform Legislation — Part I", see 17 Colo. Law. 1790 (1988). For article, "The Final Judgement Rule And Attorney Fees", see 17 Colo. Law. 2139 (1988). For a discussion of Tenth Circuit decisions dealing with attorney fees, see 66 Den. U. L. Rev. 677 (1989). For a discussion of Tenth Circuit decisions dealing with attorney fees, see 67 Den. U. L. Rev. 625 (1990). For article, "1990 Update on Colorado Tort Reform Legislation", see 19 Colo. Law. 1529 (1990).

**Annotator's note.** Annotations appearing below from cases decided through 1985 were decided under former § 13-17-101 relating to frivolous or groundless suits involving money damages claims.

**"Frivolous" defined.** A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. App. 1984); *Hart & Trinen v. Surplus Elecs. Corp.*, 712 P.2d 491 (Colo. App. 1985); *Merrill Chadwick Co. v. October Oil Co.*, 725 P.2d 17 (Colo. App. 1986); *Fox v. Div. Eng. For Water Div.*, 5,

810 P.2d 644 (Colo. 1991); *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993); *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001); *E-470 Pub. Hwy. Auth. v. Jagow*, 30 P.3d 798 (Colo. App. 2001), aff'd on other grounds, 49 P.3d 1151 (Colo. 2002); *Collins v. Colo. Mountain Coll.*, 56 P.3d 1132 (Colo. App. 2002); *Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499 (Colo. App. 2003); *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

But this test does not apply to meritorious actions that prove unsuccessful, legitimate attempts to establish a new theory of law, or good-faith efforts to extend, modify, or reverse existing law. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984); *Covert v. Allen Group, Inc.*, 597 F. Supp. 1268 (D. Colo. 1984); *Hart & Trinen v. Surplus Elecs. Corp.*, 712 P.2d 491 (Colo. App. 1985); *Buttermore v. Firestone Tire & Rubber Co.*, 721 P.2d 701 (Colo. App. 1986); *Norton v. Sch. Dist. No. 1*, 807 P.2d 1160 (Colo. App. 1990); *Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499 (Colo. App. 2003).

**"Groundless" defined.** A claim or defense is groundless if the allegations of the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984); *Alt Aerial Applicators, Inc. v. Irvine*, 684 P.2d 949 (Colo. App. 1984); *Merrill Chadwick Co. v. October Oil Co.*, 725 P.2d 17 (Colo. App. 1986); *In re Marshall*, 781 P.2d 177 (Colo. App. 1989), cert. denied, 794 P.2d 1011 (Colo. 1990); *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991); *Zick v. Krob*, 872 P.2d 1290 (Colo. App. 1993); *Travers v. Rainey*, 888 P.2d 372 (Colo. App. 1994); *Engel v. Engel*, 902 P.2d 442 (Colo. App. 1995); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds,



17 P.3d 797 (Colo. 2001); E-470 Pub. Hwy. Auth. v. Jagow, 30 P.3d 798 (Colo. App. 2001), aff'd on other grounds, 49 P.3d 1151 (Colo. 2002); Collins v. Colo. Mountain Coll., 56 P.3d 1132 (Colo. App. 2002); Wheeler v. T.L. Roofing, Inc., 74 P.3d 499 (Colo. App. 2003).

Test for "groundlessness" assumes that the proponent has a valid legal theory but can offer little or nothing in the way of evidence to support the claim. Bilawsky v. Faseehudin, 916 P.2d 586 (Colo. App. 1995).

**"Groundless and frivolous" is applied in** Int'l Tech. Instruments, Inc. v. Eng'g Measurements, Inc., 678 P.2d 558 (Colo. App. 1983); Chappel v. Bonds, 677 P.2d 955 (Colo. App. 1983); E.B. Jones Constr. Co. v. City & County of Denver, 717 P.2d 1009 (Colo. App. 1986); Merrill Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. App. 1986); Ace Title Co. v. Carson Const. Co. Inc., 755 P.2d 457 (Colo. App. 1988); People in Interest of Lamb v. Large, 761 P.2d 294 (Colo. App. 1988); Foley v. Phase One Dev. of Colo., 775 P.2d 86 (Colo. App. 1989); Haney v. City Court for City of Empire, 779 P.2d 1312 (Colo. 1989); Harrison v. Luse, 760 F. Supp. 1394 (D. Colo. 1991); Platte Valley Sav. v. Crall, 821 P.2d 305 (Colo. App. 1991); Nienke v. Naiman Group, Ltd., 857 P.2d 446 (Colo. App. 1992); Sundheim v. Bd. of County Comm'rs of Douglas County, 904 P.2d 1337 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. App. 1996); Lobato v. Taylor, 13 P.3d 821 (Colo. App. 2000), rev'd on other grounds, 71 P.3d 938 (Colo. 2002); E-470 Pub. Hwy. Auth. v. Jagow, 30 P.3d 798 (Colo. App. 2001), aff'd on other grounds 49 P.3d 1151 (Colo. 2002); Remote Switch Sys., Inc. v. Delangis, 126 P.3d 269 (Colo. App. 2005).

Where there is a rational basis grounded in law and evidence for plaintiff's claim, the trial court's finding that these claims were frivolous is not sustainable. Hart & Trinen v. Surplus Elecs. Corp., 712 P.2d 491 (Colo. App. 1985).

Where plaintiffs admit they have no administrative remedy because they are not taxpayers and only taxpayers have available to them the remedies provided by the tax code, they demonstrate knowledge that the bringing of the action and appeal have no rational basis in fact or law and, thus, are groundless and frivolous. Fair v. Wise, 753 P.2d 780 (Colo. App. 1987).

**"Vexatious" claim** is one brought or maintained in bad faith to annoy or harass and may include conduct that is arbitrary, abusive, stubbornly litigious or disrespectful of truth. Bockar v. Patterson, 899 P.2d 233 (Colo. App. 1994); Engel v. Engel, 902 P.2d 442 (Colo. App. 1995); O'Neill v. Simpson, 958 P.2d 1121 (Colo. 1998); Fowler Irrevocable Trust 1992-1 v. City of Boulder, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001); City of Holyoke v. Schlachter Farms R.L.L.P., 22 P.3d 960 (Colo. App. 2001);

E-470 Pub. Hwy. Auth. v. Jagow, 30 P.3d 798 (Colo. App. 2001), aff'd on other grounds 49 P.3d 1151 (Colo. 2002); Mitchell v. Ryder, 104 P.3d 316 (Colo. App. 2004).

**An appeal "lacks substantial justification" and is "substantially frivolous"** when the appellant's brief fails to set forth, in a manner consistent with C.A.R. 28, a coherent assertion of error supported by legal authority. As a result, it is appropriate to assess attorney fees against the attorney prosecuting the appeal in this case. Castillo v. Koppes-Conway, 148 P.3d 289 (Colo. App. 2006).

**Determination that an award of attorney fees** based upon bringing and maintaining a frivolous or groundless claim is warranted is discretionary with the trial court, and such decision shall be upheld upon appeal if supported by the evidence. Schoonover v. Hedlund Abstract Co., Inc., 727 P.2d 408 (Colo. App. 1986); Romberg v. Slemon, 778 P.2d 315 (Colo. App. 1989); City of Littleton v. State, 832 P.2d 985 (Colo. App. 1991); Behr v. Burge, 940 P.2d 1084 (Colo. App. 1996); M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc., 962 P.2d 335 (Colo. App. 1998); Lockett v. Garrett, 1 P.3d 206 (Colo. App. 1999); Crissey Fowler Lumber v. FCIB, 8 P.3d 531 (Colo. App. 2000); Nielson v. Scott, 53 P.3d 777 (Colo. App. 2002); Wheeler v. T.L. Roofing, Inc., 74 P.3d 499 (Colo. App. 2003).

**Losing argument not necessarily groundless.** A treble damages action under § 38-12-103(3)(a) could not be characterized as "frivolous" or "groundless", as used in subsection (3) of former § 13-17-101, merely because the landlord prevailed on the merits of his defense. Torres v. Portillos, 638 P.2d 274 (Colo. 1981).

Although attorney fees may be awarded in the discretion of the court, they should not be awarded merely because a party does not prevail. Torres v. Portillos, 638 P.2d 274 (Colo. 1981); State Farm Mut. Auto Ins. Co. v. Sanditen, 701 P.2d 876 (Colo. App. 1985); Romberg v. Slemon, 778 P.2d 315 (Colo. App. 1989).

Mere fact that appeal was taken as a matter of right, or that appellees found it necessary to cite legal authority in their answer brief, did not save an otherwise frivolous and groundless appeal. Flexisystems, Inc. v. Am. Standards Testing Bureau, Inc., 847 P.2d 207 (Colo. App. 1992).

A determination that plaintiffs are not entitled to relief does not make their claims frivolous. Lobato v. Taylor, 13 P.3d 821 (Colo. App. 2000), rev'd on other grounds, 71 P.3d 938 (Colo. 2002); Remote Switch Sys., Inc. v. Delangis, 126 P.3d 269 (Colo. App. 2005).

**Losing position is not necessarily groundless.** Fed. Land Bank of Wichita v. Jost, 761 P.2d 270 (Colo. App. 1988).

**A claim is not frivolous, groundless, or vexatious simply because it fails to survive**

**summary judgment.** The plaintiffs attempted to present evidence in good faith in support of their claims, but simply fell short of what was required to create an issue of material fact. Court did not abuse its discretion by failing to award fees. *Munoz v. Measner*, 247 P.3d 1031 (Colo. 2011).

**Bad faith** may include conduct which is arbitrary, vexatious, abusive, or stubbornly litigious and conduct aimed at unwarranted delay or disrespectful of truth and accuracy. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff'd in part and rev'd in part on other grounds*, 17 P.3d 797 (Colo. 2001).

**Section is a fee-shifting statute** that authorizes the recovery of attorney fees from an opposing party when that party has pursued a substantially frivolous claim, defense, or position. *E-470 Pub. Hwy. Auth. v. Revenig*, 140 P.3d 227 (Colo. App. 2006).

**It is well established that a federal court may consider collateral issues after an action is no longer pending, including an award of attorney fees.** Although party voluntarily dismissed its case, federal district court still had jurisdiction to consider collateral issues, including an award of counsel fees. *Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209 (10th Cir. 2010).

**Award of attorney fees not mandated.** Because the statute, while allowing an award of attorney fees upon a finding of frivolous claims, also grants the trial court discretion in determining whether such fees are to be awarded, the statute cannot be said to mandate an award of attorney fees. *Hart & Trinen v. Surplus Elecs. Corp.*, 712 P.2d 491 (Colo. App. 1985).

**Award of attorney fees in criminal cases not provided for.** Neither former § 13-17-101 nor § 13-16-121 provides for an award of attorney fees in a criminal case. *People v. Freeman*, 196 Colo. 238, 583 P.2d 921 (1978).

**Nor in garnishment.** Neither former § 13-17-101 nor any other section or rule permits award of attorney fees for the garnishee in a garnishment. *Commercial Claims, Ltd. v. First Nat'l Bank*, 649 P.2d 736 (Colo. App. 1982).

**Attorney fee requests with contingent fee arrangements** should not be denied merely because such an arrangement is used. Rather, plaintiff must demonstrate the reasonableness of the fee requested, and the contingent fee arrangement is but one factor to consider in that determination. *Bakehouse & Assocs., Inc. v. Wilkins*, 689 P.2d 1166 (Colo. App. 1984).

**Defendant entitled to attorney fees incurred in appealing denial of attorney fees** by trial court where defendant had prevailed in trial court against plaintiff who asserted frivolous and groundless claim. *Carnal v. Dan Coleman, Inc.*, 727 P.2d 412 (Colo. App. 1986).

**Failure to appeal denial of fees.** Where the appellee, in the trial court, moved for and was denied an award of his attorney fees, but he did not file a notice of cross-appeal, the appellate court has no jurisdiction to consider his application for affirmative relief in excess of that afforded him by the trial court. *Rocky Mt. Sales & Serv., Inc. v. Havana RV, Inc.*, 635 P.2d 935 (Colo. App. 1981).

**Timeliness of request for attorney fees.** A request is best presented to the trial court before judgment, but the request should not be denied merely because presented after judgment. *Bakehouse & Assocs., Inc. v. Wilkins*, 689 P.2d 1166 (Colo. App. 1984).

**Duty of trial court.** When a party places a claim for attorney fees in issue, the trial court has a duty to conduct a hearing upon that claim. *Zarlengo v. Farrer*, 683 P.2d 1208 (Colo. App. 1984); *Alessi v. Hogue*, 689 P.2d 649 (Colo. App. 1984).

Defendant in legal malpractice action entitled to hearing on his or her claim for sanctions under this section and C.R.C.P. 11. When a party requests a hearing regarding the award of attorney fees and costs under this section, the trial court must conduct an evidentiary hearing. Because the trial court denied the motion without conducting a hearing on defendant's motion for sanctions, remand is required for a hearing. *Brown v. Silvern*, 141 P.3d 871 (Colo. App. 2005).

Determination of entitlement to attorney fees cannot be made without adequate findings of fact and conclusions of law on the issue by the trial court. *Bd. of County Comm'rs v. Auslaender*, 745 P.2d 999 (Colo. 1987); *Pedlow v. Stamp*, 776 P.2d 382 (Colo. 1989).

But a court need not conduct a hearing *sua sponte* if a hearing is not timely requested by a party. *In re Aldrich*, 945 P.2d 1370 (Colo. 1997).

**Trial court is not duty-bound to conduct a separate hearing on the issue of attorney fees before it may deny a request therefor.** *Hunter v. Colo. Mountain Jr. Coll.*, 804 P.2d 277 (Colo. App. 1990).

**This section does not require redundant hearings.** It simply prohibits a trial court from awarding attorney fees in the absence of a hearing, if requested, and detailed findings of fact. *Padilla v. Ghuman*, 183 P.3d 653 (Colo. App. 2007).

**When a trial court is requested to evaluate each claim or defense individually as substantially frivolous or groundless, it is required to do so.** It cannot deny the claim "under the totality of the circumstances". *Munoz v. Measner*, 214 P.3d 510 (Colo. App. 2009), *rev'd on other grounds*, 247 P.3d 1031 (Colo. 2011).

**Interrelationship of claims or defenses alone will not suffice to deny an award of attorney fees incurred relative to defense of a frivolous or groundless claim.** *Alessi v. Hogue*,



689 P.2d 649 (Colo. App. 1984); *Fountain v. Mojo*, 687 P.2d 496 (Colo. App. 1984); *Carnal v. Dan Coleman, Inc.*, 727 P.2d 412 (Colo. App. 1986).

**For discussion of amount of attorney fee award**, see *Ramos v. Lamm*, 539 F. Supp. 730 (D. Colo. 1982).

**Trial court was without authority to award attorney fees for plaintiff's initial appeal, absent direction to do so by the appellate court**, since subsection (1), consistent with C.A.R. 38(d), indicates that attorney fees incurred in an appeal may be awarded only by the court in which the appeal is brought. *Sullivan v. Lutz*, 827 P.2d 626 (Colo. App. 1992).

**In appeals of groundless-frivolous attorney fee awards under subsection (4)**, the appropriate standard is to award appellate attorney fees only if that aspect of the appeal itself is frivolous. *Front Range Home Enhancements, Inc. v. Stowell*, 172 P.3d 973 (Colo. App. 2007); *Padilla v. Ghuman*, 183 P.3d 653 (Colo. App. 2007).

**Under subsection (4), no award of attorney fees may be made based upon the motion of a nonparty.** *Roberts-Henry v. Richter*, 802 P.2d 1159 (Colo. App. 1990).

**Subsection (4) provides for an assessment of attorney fees in favor of an improperly subpoenaed nonparty** where the court finds that, with respect to the nonparty, the attorney or party had unnecessarily expanded the proceedings by abusing discovery procedures. In re *Ensminger*, 209 P.3d 1163 (Colo. App. 2008).

**Subsection (4) does not require a party to invoke the statute on behalf of a non-party.** An improperly subpoenaed nonparty may be awarded attorney fees pursuant to this section. In re *Ensminger*, 209 P.3d 1163 (Colo. App. 2008) (holding contrary to *Roberts-Henry v. Richter* annotated above).

**A request for attorney fees as a sanction for assertion of a frivolous claim may be requested by motion following entry of judgment and may even be awarded on the court's own motion.** *Colo. City Metro. Dist. v. Graber & Son's, Inc.*, 897 P.2d 874 (Colo. App. 1995).

**In light of holding that the trial court erred in dismissing stepfather's petition and to the extent the award of fees was entered as a sanction, it must be set aside.** In re *K.M.B.*, 80 P.3d 914 (Colo. App. 2003).

**To justify an award of attorney fees under subsection (4)**, a trial court must make a finding that a claim "lacked substantial justification", i.e., was substantially frivolous, substantially groundless, or substantially vexatious, and must state its reason for the finding. In re *Gomez*, 728 P.2d 747 (Colo. App. 1986); In re *Estate of Finkelstein*, 817 P.2d 617 (Colo. App. 1991); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff'd* in

part and *rev'd* in part on other grounds, 17 P.3d 797 (Colo. 2001); *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

**"Substantially frivolous" or "substantially groundless"** are no more demanding standards than "groundless" or "frivolous". In re *Application of Talco, Ltd.*, 769 P.2d 468 (Colo 1989); *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991).

The "no rational argument" test of *W. Realty* (679 P.2d 1063 (Colo. 1984)) will be followed in determining whether the standard has been met. *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991).

A vexatious claim is one brought or maintained in bad faith to annoy or harass. A vexatious claim includes conduct that is arbitrary, stubbornly litigious, or disrespectful of truth. *Bockar v. Patterson*, 899 P.2d 233 (Colo. App. 1994).

**Trial court erred in ruling that plaintiff was stubbornly litigious** merely because plaintiff disagreed with trial court's earlier rulings as to plaintiff's claims against two of three defendants in the case and where plaintiff refused to voluntarily dismiss similarly premised claims against third defendant. Plaintiff cannot be faulted for attempting to convince court to reconsider its view of the applicable law. *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282 (Colo. App. 2009).

**The exclusion of an expert's testimony due to lack of reliability does not subject a party to attorney fees for a groundless claim if the party reasonably relied on the expert;** courts must allow parties to reasonably rely on their experts without fear of punishment for the experts' errors in judgment. In re *Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595 (Colo. 2005).

**Aquifer storage and augmentation claims based on the natural percolation of irrigation run-off and precipitation are frivolous** under § 37-92-103, because the water has not been placed in the aquifer by other than natural means. In re *Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595 (Colo. 2005).

**The purpose of awarding attorney fees is to deter egregious conduct**, and not to discourage legal theories that, while having no support in case law, nevertheless may be persuasive because of the unique character of the case. *Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925 (Colo. 1993); *Bd. of County Comm'rs v. Colo.*, 888 P.2d 352 (Colo. App. 1994).

**When a party consistently ignored the court's admonition to not relitigate settled matters**, the court was justified in finding that the party's attorney was being stubbornly litigious and the action thus lacked substantial justification. *Spring Creek Ranchers Ass'n v. McNichols*, 165 P.3d 244 (Colo. 2007).

Trial court may determine action was "brought or defended" in a substantially groundless manner even if dismissed on the morning of trial before the trial actually commences. *Engel v. Engel*, 902 P.2d 442 (Colo. App. 1995).

**Claims involving novel questions of law** for which no determinative authority existed at time complaint was filed were not frivolous, groundless, or vexatious. *Montoya by Montoya v. Bebensee*, 761 P.2d 285 (Colo. App. 1988); *Colo. Supply Co., Inc. v. Stewart*, 797 P.2d 1303 (Colo. App. 1990); *Bd. of County Comm'rs v. Colo.*, 888 P.2d 352 (Colo. App. 1994); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff'd in part and rev'd in part on other grounds*, 17 P.3d 797 (Colo. 2001).

Trial court erred in awarding attorney fees where municipality's defense to takings claim involved a novel question of law and municipality's conduct presented factual issues upon which reasonable triers of fact might have drawn differing inferences. The fact that the municipality did not prevail in its assertions did not make them frivolous. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff'd in part and rev'd in part on other grounds*, 17 P.3d 797 (Colo. 2001).

Trial court erred in awarding attorney fees where plaintiff's claims were based largely upon federal case law and involved novel questions of law upon which there was no determinative law in this state and where the evidence presented by the plaintiff arguably supported the plaintiff's claims. *Kemp v. State Bd. of Agric.*, 790 P.2d 870 (Colo. App. 1989), *cert. denied*, 501 U.S. 1205, 111 S. Ct. 2798, 115 L. Ed.2d 972 (1990); *Pedlow v. Stamp*, 819 P.2d 1110 (Colo. App. 1991).

Issue of what constitutes receipt of a demand notice under § 7-113-209 (2) was a question of first impression; therefore the plaintiff's action was not "frivolous and without merit". *M Life Ins. Co. v. S & W*, 962 P.2d 335 (Colo. App. 1998).

**A good faith presentation of a legal theory which is arguably meritorious is sufficient to avoid an award of attorney fees.** *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

**In a condemnation action, good faith negotiations do not necessarily require the condemning authority to increase its offer** whenever the landowner makes a counteroffer. Therefore, plaintiff failed to show bad faith and vexatious conduct on the part of the defendant and was not entitled to an award of fees under this section. *City of Holyoke v. Schlachter Farms R.L.L.P.*, 22 P.3d 960 (Colo. App. 2001).

**To the extent the provisions of subsection (7) are in conflict with the provisions of § 13-17-201 concerning a good faith tort action**

**that is dismissed under C.R.C.P. 12(b), mandatory attorney fees award provision of § 13-17-201 controls** as it is specific to such action and was enacted later in time than this section. *Houdek v. Mobil Oil Corp.*, 879 P.2d 417 (Colo. App. 1994).

**A party seeking attorney fees bears the burden of proving**, by a preponderance of the evidence, his entitlement to the award. *Bd. of County Comm'rs v. Auslaender*, 745 P.2d 999 (Colo. 1987); *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991); *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994); *City of Holyoke v. Schlachter Farms R.L.L.P.*, 22 P.3d 960 (Colo. App. 2001).

**Award of attorney fees must be made after trial court determines that all factors prove by a preponderance of the evidence that a defense was frivolous or groundless.** *Marinez v. Indus. Comm'n*, 746 P.2d 552 (Colo. 1987).

**In deciding whether to award attorney fees**, a court must consider the factors set forth in § 13-17-103 (1). *In re Aldrich*, 945 P.2d 1370 (Colo. 1997); *Remote Switch Sys., Inc. v. Delangis*, 126 P.3d 269 (Colo. App. 2005).

When awarding attorney fees, a court must make findings explaining why a party's conduct was unjustified and discussing the means by which the court determined the amount of the award. Conclusory statements that a claim is frivolous, groundless, or vexatious are insufficient. *In re Aldrich*, 945 P.2d 1370 (Colo. 1997).

**Court must hold hearing and make findings on the factors prior to awarding attorney fees if requested by the party against whom fees are sought.** The court erred in granting summary judgment on wife's motion for attorney fees without giving husband the opportunity to respond to wife's allegation that his position lacked substantial justification. *In re Tognoni*, \_\_ P.3d \_\_ (Colo. App. 2011).

**Award of attorney fees is discretionary with trial court, and its decision will not be disturbed on appeal if supported by the evidence.** *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989); *Lobato v. Taylor*, 13 P.3d 821 (Colo. App. 2000), *rev'd on other grounds*, 71 P.3d 938 (Colo. 2002); *Remote Switch Sys., Inc. v. Delangis*, 126 P.3d 269 (Colo. App. 2005).

Award upheld where evidence presented to trial court with respect to father's defense against motion to change custody included findings that the mother had misled expert witnesses, that such witnesses had failed to investigate the child's circumstances with the father, that the mother had not properly assisted the child to recover from the impact of the dissolution, and that she had a scheme for obtaining custody of the child which involved actions not in the best interest of the child. *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989).

Award upheld where there was record support for the trial court's determination that plaintiff's



silence or refusal to properly clarify and communicate its position was “without substantial justification” and needlessly caused defendant to incur attorney fees. *Front Range Home Enhancements, Inc. v. Stowell*, 172 P.3d 973 (Colo. App. 2007).

Whether to award attorneys fees under this section is a matter ultimately committed to the discretion of the trial court. *City of Holyoke v. Schlachter Farms R.L.L.P.*, 22 P.3d 960 (Colo. App. 2001).

**Trial court did not abuse its discretion in denying award of attorney fees** where claims made by the county did not lack substantial justification in law or in fact and were based on a rational legal argument. *Bd. of County Comm’rs v. Colo.*, 888 P.2d 352 (Colo. App. 1994).

Findings of trial court that the plaintiff bank’s claims of fraud were not groundless or frivolous were supported by the record, and the trial court did not abuse its discretion in denying the motion for sanctions. *First Interstate Bank v. Berenbaum*, 872 P.2d 1297 (Colo. App. 1993); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff’d* in part and *rev’d* in part on other grounds, 17 P.3d 797 (Colo. 2001).

Findings of trial court that issues had been “fairly and vigorously litigated”, together with record demonstrating at least some evidence to support the challenged defenses, supported trial court’s denial of motion for sanctions under this section. *Webster v. Boone*, 992 P.2d 1183 (Colo. App. 1999).

The plaintiff’s unsuccessful claim that it was not time barred from filing a claim relied on language from the statutes as well as prior cases, and the trial court considered and denied the defendant’s motion for summary judgment three times before trial. Therefore, the trial court did not abuse its discretion in denying defendant attorney fees. *Pat’s Constr. Serv., Inc. v. Ins. Co. of the W.*, 141 P.3d 885 (Colo. App. 2005).

**Plaintiff’s action was not substantially frivolous**, and the record provided support for trial court’s implicit determination that the action was not maintained in bad faith, therefore, the trial court’s order denying attorney fees was upheld. *Berenergy Corp. v. Zab, Inc.*, 94 P.3d 1232 (Colo. App. 2004), *aff’d* on other grounds, 136 P.3d 252 (Colo. 2006).

**Trial court abused discretion in finding plaintiff’s claims frivolous where plaintiff was not successful on claims but claims were based on rational arguments.** *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282 (Colo. App. 2009).

**The party requesting attorney fees under this section must prove by a preponderance of the evidence** that the claim was without substantial justification. *Bd. of Comm’rs, County of Boulder v. Eason*, 976 P.2d 271

(Colo. App. 1998); *Remote Switch Sys., Inc. v. Delangis*, 126 P.3d 269 (Colo. App. 2005).

**Decision to award attorney fees on the ground that a claim lacks substantial justification** is soundly within the discretion of the trial court. *Engel v. Engel*, 902 P.2d 442 (Colo. App. 1995); *Bd. of Comm’rs, County of Boulder v. Eason*, 976 P.2d 271 (Colo. App. 1998); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188 (Colo. App. 1999), *aff’d* in part and *rev’d* in part on other grounds, 17 P.3d 797 (Colo. 2001).

**If a trial court’s award of attorney fees is supported by the evidence, it will not be disturbed on review.** *Lyons v. Teamsters Local Union No. 961*, 903 P.2d 1214 (Colo. App. 1995); *Bd. of Comm’rs, County of Boulder v. Eason*, 976 P.2d 271 (Colo. App. 1998); *In re Eggert*, 53 P.3d 794 (Colo. App. 2002).

Trial court finding that union pursued its claims “because [union president] agreed to testify”, that there was “animosity” between the parties, and that the union’s claims were “vexatious” was sufficient to award attorney fees. *Lyons v. Teamsters Local Union No. 961*, 903 P.2d 1214 (Colo. App. 1995).

**An award of attorney fees is supported by the record** when the attorneys reviewed their records and testified, subject to cross examination, that the claimed allocations of time were fair and reasonable. *Farmers Reservoir & Irrigation Co. v. City of Golden*, 113 P.3d 119 (Colo. 2005).

**Trial court’s award of attorney fees cannot stand** where the court failed to hold an evidentiary hearing after a party made a claim for attorney fees and a hearing was requested, because a determination of entitlement to attorney fees cannot be made without adequate findings of fact and conclusions of law. *Rogers v. Westerman Farm Co.*, 986 P.2d 967 (Colo. App. 1998), *rev’d* on other grounds, 29 P.3d 887 (Colo. 2001).

**The court “shall” assess attorney fees** if a claim lacks substantial justification. *Montrose Valley Funeral Home v. Crippin*, 835 P.2d 596 (Colo. App. 1992).

**Limitations on award of attorney fee.** A trial court has the discretion to limit its award based on a finding that a party did not take all reasonable measures to extricate himself from a frivolous or groundless lawsuit at the earliest possible time. *Ruffing v. Lincicome*, 737 P.2d 440 (Colo. App. 1987).

**Victim of a frivolous lawsuit has a duty to mitigate attorney fees incurred in defending the lawsuit** by taking reasonable measures to extricate himself or herself from the lawsuit at the earliest possible time. Consequently, trial court should not have awarded attorney fees incurred in pursuing defendant’s counterclaims after plaintiff dismissed its original complaint against defendants. *Boulder County Bd. of*

County Comm'rs v. Kraft Bldg. Contractors, 122 P.3d 1019 (Colo. App. 2005).

**Award of attorney fees and costs held excessive** where court found that use of two attorneys was justifiable but that the trial court had awarded fees based on hours in excess of those reported in their affidavits and where court had awarded costs for depositions taken for ordinary discovery purposes rather than perpetuation of testimony. *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989); *Schmidt Const. Co. v. Becker-Johnson Corp.*, 817 P.2d 625 (Colo. App. 1991).

**Trial court properly concluded that claim lacked substantial justification** where court's detailed findings established that it considered the factors set forth in this section and § 13-17-103, and where court found the constitution, statutes, and case law clearly established the claims lacked "any legal foundation", that a good faith argument had not been advanced, and that the same arguments had been advanced and rejected in prior case. *City of Littleton v. State*, 832 P.2d 985 (Colo. App. 1991).

**Award of attorney fees to the plaintiff was appropriate** where the court found that the defense employed by the defendant lacked substantial merit and was used to delay and harass the plaintiff. *Metro Nat. Bank v. Parker*, 773 P.2d 633 (Colo. App. 1989).

Plaintiff's argument was not frivolous where she alleged the existence of an agency relationship based on a business relationship between the defendant, who was a private mortgage investor, and certain mortgage brokers. However, the argument was groundless where the only evidence of the agency was a number of similar transactions between the defendant and the brokers. *Nienke v. Naiman Group, Ltd.*, 857 P.2d 446 (Colo. App. 1992).

Plaintiff's argument that her loan was a consumer loan was frivolous where a consumer loan must be incurred for a personal debt and the loan was incurred to pay taxes and expenses on an auto repair garage. Plaintiff's argument that the loan was personal because it was necessary to preserve the business for her son lacked a rational basis. *Nienke v. Naiman Group, Ltd.*, 857 P.2d 446 (Colo. App. 1992).

**Award of attorney fees proper** where defendant has opportunity to challenge reasonableness of the amount of award. Trial court may not base award on affidavit submitted after trial. *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987).

**Probate court order that administrative expenses and attorney fees be paid from petitioner's distributive share upheld.** The court so held because of petitioner's "relentless pursuit" of the same issues in three separate trial courts and in three appeals to this court. In re *Estate of Leslie*, 886 P.2d 284 (Colo. App. 1994).

**Award of attorney fees based upon a groundless claim was appropriate** where there was a lack of credible evidence presented on the essential issues of damages in negligent misrepresentation claim. *Harrison v. Smith*, 821 P.2d 832 (Colo. App. 1991).

**Award of attorney fees appropriate** where trial court properly determined that counterclaim for deficiency under a foreclosure lacked substantial justification because a review of the plain language of the contract would have revealed lack of support for the claim. *Bernhardt v. Hemphill*, 878 P.2d 107 (Colo. App. 1994).

**Attorney fees and costs associated with motion to enforce injunction proper.** Where injunction was no longer binding, motion to enforce injunction was substantially frivolous. *Anderson v. Pursell*, 244 P.3d 1188 (Colo. 2010).

**Record supported trial court's award of attorney fees** where the court found the defenses were substantially frivolous, groundless, and vexatious, that certain defenses were interposed for the sole purposes of delay, harassment, and to cause plaintiffs to incur legal expenses, and where defendant, even when proceeding without an attorney, clearly knew or should have known that the defenses asserted were substantially frivolous, groundless, or vexatious. *Behr v. Burge*, 940 P.2d 1084 (Colo. App. 1996).

**Colorado Governmental Immunity Act does not shield public entities from an award for attorney fees for the filing of a frivolous claim by such entities.** *Colo. City Metro. Dist. v. Graber & Son's, Inc.*, 897 P.2d 874 (Colo. App. 1995).

**County attorney is entitled to absolute immunity when filing guardianship petitions.** It is illogical that an attorney could be immune from suit if brought separately under 42 U.S.C. § 1983, but not immune when fees are required in the same action under this section. In re *Matter of Stepanek*, 924 P.2d 1142 (Colo. App. 1996), *aff'd*, 940 P.2d 364 (Colo. 1997).

**The constitution, statutes, and case law clearly establish** that the City of Littleton's claims lacked any legal foundation, therefore, the trial court did not err in finding that the City had not advanced a good faith argument. *City of Littleton v. State*, 832 P.2d 985 (Colo. App. 1991).

**Where city discovered mining waste on property during eminent domain proceeding but failed to disclose the presence of the waste or the potential remediation cost,** court did not abuse discretion by finding bad faith and awarding respondent attorney fees incurred after city learned of the mining waste. *City of Black Hawk v. Ficke*, 215 P.3d 1129 (Colo. App. 2008).

**The denial of an award of attorney fees may be grounded upon the evidence admitted**



**at trial upon the merits** absent a specific request by one of the parties for the opportunity to present further evidence on the issue. No fees may be awarded, however, without providing the party against whom such an award is sought an opportunity to present such further evidence upon the issue as such party desires. *Christian v. Westmoreland*, 809 P.2d 1105 (Colo. App. 1991).

**Award of attorney fees is not authorized unless** the claim or defense was substantially frivolous, substantially groundless, or substantially vexatious. Although this restriction is not explicitly provided for in the statute, the title, purpose, and subsequent provisions of the statute indicate the intent that it apply only to frivolous, groundless, or vexatious actions. *Shaw v. Baesemann*, 773 P.2d 609 (Colo. App. 1988).

**Arbitrary, vexatious, abusive, or stubbornly litigious conduct by a pro se litigant may serve as the basis for awarding attorney fees** although the action or defense is not itself frivolous or groundless. *Bockar v. Patterson*, 899 P.2d 233 (Colo. App. 1994).

**Filing of certificate of review does not preclude an attorney fee award for a vexatious claim.** *Mitchell v. Ryder*, 104 P.3d 316 (Colo. App. 2004).

**Where trial court awarded attorney fees solely because party prevailed**, the award was without a proper basis, and, since the legal issues involved had not been previously determined by binding precedent, the claims were not frivolous. *Cohen v. Empire Cas. Co.*, 771 P.2d 29 (Colo. App. 1989).

**The prevailing party for purposes of awarding attorney fees when a claim exists for a violation of a contractual obligation** is the party in whose favor the decision or verdict on liability is rendered. *Travers v. Rainey*, 888 P.2d 372 (Colo. App. 1994).

**Trial court erred in awarding fees against surety for assertion of its claim that bonds were void** where such contention was a good faith presentation of a legal theory which was arguably meritorious. *SaBell's, Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

**Pro se litigants are entitled to protection of subsection (6)** unless trial court makes an express finding that such litigants knew or reasonably should have known that their claims lacked substantial justification. Failure to respond to a motion for fees does not obviate the need for such a finding. *Artes-Roy v. Lyman*, 833 P.2d 62 (Colo. App. 1992).

**A party who successfully seeks summary judgment** is not necessarily entitled to attorney fees. *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991).

**The fact that a claim is dismissed on summary judgment** does not preclude a finding that

it was substantially groundless. A claim is groundless if there is no credible evidence to support it. *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282 (Colo. App. 2009).

**Where dismissal is reversed on appeal**, award of attorney fees under this section is not appropriate. *Bear Creek Dev. Corp. v. Dyer*, 790 P.2d 897 (Colo. App. 1990).

**Trial court determination of attorney fees will not be disturbed on appeal if the ruling is supported by the evidence.** *Nagy v. Landau*, 807 P.2d 1227 (Colo. App. 1990).

**The determination whether a claim or defense is groundless under this section is within the discretion of the trial court** and its decision will not be disturbed on appeal if supported by the record. *Travers v. Rainey*, 888 P.2d 372 (Colo. App. 1994).

**Trial court must make sufficient findings to permit meaningful appellate review of the attorney fees award.** *Bilawsky v. Faseehudin*, 916 P.2d 586 (Colo. App. 1995).

**Award of attorney fees is appropriate** after the trial court renders a decision on the merits of the case. *Forness v. Blum*, 796 P.2d 496 (Colo. App. 1990).

**Fees may be awarded even when the case is dismissed shortly before trial.** *Bilawsky v. Faseehudin*, 916 P.2d 586 (Colo. App. 1995).

**Fees may be awarded even when the trial court lacks subject matter jurisdiction.** Here, the plaintiff not only lacked standing but also persisted in pursuing the claim despite knowing that it lacked admissible evidence to support the claim. *Consumer Crusade, Inc. v. Clarion Mortgage Capital, Inc.*, 197 P.3d 285 (Colo. App. 2008).

**Section effective in civil action commenced prior to effective date.** Though dissolution of marriage proceeding was filed prior to effective date of this section, a subsequent motion to change custody of a child filed after such date which raised separate and distinct issues will be interpreted as a new civil action for the purposes of implementing the legislative intent of this section, and an award of attorney fees for costs incurred in defending the motion is proper. *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989).

**Section effective in any "part" of a civil action, including garnishment proceedings.** *Anderson Boneless Beef, Inc. v. Sunshine Health Care Ctr., Inc.*, 878 P.2d 98 (Colo. App. 1994).

**Court should allocate sanctions between attorney and client according to their relative degrees of responsibility.** Where attorney accepted "full responsibility" for decision to proceed with second writ of garnishment, after hearing on first such writ established the absence of a legal basis to do so, award against party jointly with attorney was erroneous. An-

derson Boneless Beef, Inc. v. Sunshine Health Care Ctr., Inc., 878 P.2d 98 (Colo. App. 1994).

**A principal may be liable for attorney fees based on its agent's litigation of a frivolous claim** pursuant to the express terms of a contract. In re Water Rights of Park County Sportsmen's Ranch, 105 P.3d 595 (Colo. 2005).

**Award of attorney fees was proper** where party's attorney was on notice that garnishee did not hold any property of judgment debtor, although clerical error had made it appear so in a prior attempt to garnish the same account. Anderson Boneless Beef, Inc. v. Sunshine Health Care Ctr., Inc., 878 P.2d 98 (Colo. App. 1994).

**Award of attorney fees improper** where rational argument in support of the contention that exemplary damages may be awarded for bad faith breach of contract was made. William H. White Co. v. B&A Mfg. Co., 794 P.2d 1099 (Colo. App. 1990).

Where plaintiffs' counsel offered substantial legal arguments in favor of application of "discovery rule" to overcome statutory limitation of claims of sexual abuse of minors and where some of defendant's alleged acts of abuse occurred within the applicable limitation period, award of fees improper. Cassidy v. Smith, 817 P.2d 555 (Colo. App. 1991).

**Award of attorney fees improper** in abuse of process action where plaintiffs were not represented by an attorney and trial court did not make a finding that the plaintiffs knew or reasonably should have known that filing of the suit lacked substantial justification. Artes-Roy v. Lyman, 833 P.2d 62 (Colo. App. 1992).

Where defendant made rational arguments on the law in support of its position, trial court noted that legal issue was one of first impression in Colorado, and defendant was able to cite legal authority from other jurisdictions in support of its position, award of attorney fees was improper. Eurpac Serv., Inc. v. Republic Acceptance Corp., 37 P.3d 447 (Colo. App. 2000).

Trial court abused its discretion in awarding attorney fees based largely on evidence presented in a hearing to determine whether a governmental agency or employee had immunity. Such a hearing is not a substitute trial on the merits and the claimant is not required to prove the merits of its claim at such a hearing. Hamon Contractors, Inc. v. Carter & Burgess, Inc., 229 P.3d 282 (Colo. App. 2009).

**Award of attorney fees incurred in pursuing motions for sanctions improper** where the defense to the motions, while ultimately unsuccessful, had a rational basis in fact and law and did not lack substantial justification. Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors, 122 P.3d 1019 (Colo. App. 2005).

**Award of attorney fees and costs incurred in defending abandoned appeal of motion to enforce injunction improper.** Anderson v. Purcell, 244 P.3d 1188 (Colo. 2010).

**Award of attorney fees was an abuse of the trial court's discretion** where the plaintiff's issue was one of first impression in Colorado, the plaintiff made a legitimate and reasoned attempt to extend the law, and the plaintiff presented some credible evidence to support her argument, even though the trial court found it was not sufficient to establish a prima facie case. Nienke v. Naiman Group, Ltd., 857 P.2d 446 (Colo. App. 1992).

**An award of attorney fees under this section cannot be held to be confessed by failure to respond to a motion pursuant to C.R.C.P. 121.** Artes-Roy v. Lyman, 833 P.2d 62 (Colo. App. 1992).

**Active relitigation of settled issue that was clearly the law of the case is presumed to be frivolous** and, thus, plaintiffs were entitled to attorney fees for frivolous second appeal of statute of limitations issue. Howard v. Wood Bros. Homes, Inc., 835 P.2d 556 (Colo. App. 1992).

When fees are awarded, the court is required to make evidentiary findings and must provide the opportunity for a hearing. Pedlow v. Stamp, 776 P.2d 382 (Colo. 1989); Little v. Fellman, 837 P.2d 197 (Colo. App. 1991).

**If plaintiff's only reference to attorney fees is in the prayer, he or she has not alleged a claim for such fees under § 13-17-101.** At most, the language provides notice that such fees may be requested. Township Homeowners Ass'n v. Arapahoe Roofing, 844 P.2d 1316 (Colo. App. 1992).

**The trial court did not abuse its discretion in finding that residents' claims against a charter city were frivolous and in awarding attorney fees to the city.** The trial court properly awarded attorney fees for a frivolous action where residents had no basis for a claim that the charter city's method for appointing municipal judges violated the state constitution and state statutes and no basis for a claim that the charter city violated state statutes in adopting ordinances that were of purely local concern. Artes-Roy v. City of Aspen, 856 P.2d 823 (Colo. 1993).

**Trial court did not err in failing to apportion some of the fault to the attorney's clients** where motion requested that sanctions be imposed only against the attorney, the attorney raised the defense that his clients should bear some of the responsibility for the plaintiffs' attorney fees, and the court implicitly rejected this argument by concluding that the attorney should be held fully accountable for his decision to ignore his obligations to opposing counsel. Parker v. Davis, 888 P.2d 324 (Colo. App. 1994).

**A party is not automatically entitled to recover the expenses incurred in successfully pursuing a motion for sanctions** since such fees may be awarded only if the trial court



determines that the defense to the motion lacked substantial justification; however, the need for any further proof on that issue was dispensed with by defendant's judicial admissions. *Parker v. Davis*, 888 P.2d 324 (Colo. App. 1994).

**To have standing to appeal an award of attorney fees only against a party's attorney,** the attorney must file a separate appeal or be added as an appellant to the party's appeal. *Anglum v. USAA Cas. Ins. Co.*, 166 P.3d 191 (Colo. App. 2007).

**The absence of a cash outlay is insufficient cause for denying fees to an attorney simply because there has been self-representation.** Reversing such an award would frustrate the intent of the general assembly in enacting this law to address the problem of increasing litigation which burdens the judicial system and interferes with the effective administration of justice and would reward plaintiffs who have filed frivolous or groundless actions. *Zick v. Krob*, 872 P.2d 1290 (Colo. App. 1993).

**It is not appropriate for a court to award a grant of attorney fees to a pro se litigant.** While there is an exception for pro se litigants who are attorneys under the appropriate circumstances, a pro se litigant who is not a licensed attorney has no "attorney fees". *Smith v. Furlong*, 976 P.2d 889 (Colo. App. 1999).

**A pro se attorney litigant is not necessarily precluded from an attorney fee award under either this section or C.R.C.P. 107 (d)(2) in a contempt proceeding.** Thus, a pro se attorney litigant may be entitled to attorney fees in a contempt proceeding if the trial court determines that an opposing party's conduct meets the requirements of the statutes in this part 1. *Wimmershoff v. Finger*, 74 P.3d 529 (Colo. App. 2003).

**A pro se attorney may recover attorney fees.** *Giguere v. SJS Family Enters.*, 155 P.3d 462 (Colo. App. 2006).

**The court is required to award attorney fees only if it finds that an attorney or party brought or defended an action that lacked substantial justification.** *United Guar. Residential Ins. Co. v. Dimmick*, 916 P.2d 638 (Colo. App. 1996).

**Absent a finding that the defense to a motion for fees lacks substantial justification, fees and costs may not be awarded for challenging that defense.** *Foxley v. Foxley*, 939 P.2d 455 (Colo. App. 1996); *Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors*, 122 P.3d 1019 (Colo. App. 2005).

**To the extent § 13-17-101 et seq. is inconsistent with the procedural safe-harbor provisions of Fed. R. Civ. P. 11, it is preempted.** *McCoy v. West*, 965 F. Supp. 34 (D. Colo. 1997).

**This section is preempted in a § 1983 claim brought in state court.** A claim brought pursuant to 42 U.S.C. § 1983 in state court is gov-

erned by the federal standards contained in 42 U.S.C. § 1988. *State v. Golden's Concrete Co.*, 962 P.2d 919 (Colo. 1998).

**Where plaintiff seeks attorney fees under this section and 42 U.S.C. § 1983 in a declaratory judgment action** the trial court's findings of due process violations as a matter of fact and as a matter of law are an insufficient basis to trigger a 42 U.S.C. § 1988 award of fees because the 42 U.S.C. § 1983 claim was not properly raised or litigated during the declaratory judgment action. *Bd. of Comm'rs, County of Boulder v. Eason*, 976 P.2d 271 (Colo. App. 1998).

**If a frivolous lawsuit includes both state law claims heard in state court proceedings and federal claims removed for federal court proceedings,** a state court may award attorney fees incurred in producing work product for the federal court proceedings only to the extent that the work product was also used in the state court proceedings. *Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors*, 122 P.3d 1019 (Colo. App. 2005).

**Lack of an express grant of authority in the Colorado Rules for Magistrates to award attorney fees** on review does not divest or otherwise curtail the district court's already existing authority to make such an award under this section. *In re Naekel*, 181 P.3d 1177 (Colo. App. 2008).

**Applied in** *Moore v. DeBruine*, 631 P.2d 1194 (Colo. App. 1981); *Gaddis v. McDonald*, 633 P.2d 1102 (Colo. App. 1981); *Herman v. Steamboat Springs Super 8 Motel, Inc.*, 634 P.2d 1005 (Colo. App. 1981); *Hargreaves v. Skrbina*, 635 P.2d 221 (Colo. App. 1981); *Wyatt v. United Airlines*, 638 P.2d 812 (Colo. App. 1981); *Turley v. Ball Assocs.*, 641 P.2d 286 (Colo. App. 1981); *People in Interest of W.M.*, 643 P.2d 794 (Colo. App. 1982); *Schlosky v. Mobile Premix Concrete, Inc.*, 656 P.2d 1321 (Colo. App. 1982); *Ortega v. Bd. of County Comm'rs*, 657 P.2d 989 (Colo. App. 1982); *Walters v. Linhof*, 559 F. Supp. 1231 (D. Colo. 1983); *Mission Denver Co. v. Pierson*, 674 P.2d 363 (Colo. 1984); *Montgomery Ward & Co. v. State, Dept of Rev.*, 675 P.2d 318 (Colo. App. 1983); *Citizens Bank v. Kruse*, 691 P.2d 1143 (Colo. App. 1984); *Meyer v. Landmark Universal, Inc.*, 692 P.2d 1129 (Colo. App. 1984); *Bill Manning, Inc. v. Denver West Bank and Trust*, 697 P.2d 403 (Colo. App. 1984); *Schoonover v. Hedlund Abstract Co., Inc.*, 727 P.2d 408 (Colo. App. 1986); *Seismic Int'l Research Corp. v. South Ranch Oil Co., Inc.*, 793 F.2d 227 (10th Cir. 1986), cert. denied, 479 U.S. 1089, 107 S. Ct. 1297, 94 L.Ed 2d 153 (1987); *Tripp v. Shelter Research Inc.*, 729 P.2d 1024 (Colo. App. 1986); *Martinez v. Cont'l Enter.*, 730 P.2d 308 (Colo. 1986); *Anderson v. Rosebrook*, 737 P.2d 417 (Colo. 1987); *Pietrafesa v. D.P.I., Inc.*, 757 P.2d 1113 (Colo. App. 1988); *Swanson v. Precision Sales & Serv.*,

832 P.2d 1109 (Colo. App. 1992); Rael v. Taylor, 876 P.2d 1210 (Colo. 1994); Langseth v. County of Elbert, 916 P.2d 655 (Colo. App. 1996); Van Steenhouse v. Jacor Broad., 935 P.2d 49 (Colo. App. 1996), *aff'd* in part and *rev'd* in part on

other grounds, 958 P.2d 464 (Colo. 1998); Giguere v. SJS Family Enters., 155 P.3d 462 (Colo. App. 2006); *In re Ward*, 183 P.3d 707 (Colo. App. 2008); Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

**13-17-103. Procedure for determining reasonable fee - judicial discretion.** (1) In determining the amount of an attorney fee award, the court shall exercise its sound discretion. When granting an award of attorney fees, the court shall specifically set forth the reasons for said award and shall consider the following factors, among others, in determining whether to assess attorney fees and the amount of attorney fees to be assessed against any offending attorney or party:

(a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;

(b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action;

(c) The availability of facts to assist a party in determining the validity of a claim or defense;

(d) The relative financial positions of the parties involved;

(e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;

(f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;

(g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;

(h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

**Source:** L. 77: Entire article added, p. 797, § 2, effective July 1. L. 84: Entire section R&RE, p. 461, § 3, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Civil Rights", which discusses the attorney fees in Ramos v. Lamm, see 62 Den. U. L. Rev. 71 (1985).

**For discussion of amount of attorney fee award,** see Ramos v. Lamm, 539 F. Supp. 730 (D. Colo. 1982) (decided under similar provisions of former § 13-17-102).

**Trial court properly concluded that claim lacked substantial justification** where court's detailed findings established that it considered the factors set forth in this section and § 13-17-102, and where court found the constitution, statutes, and case law clearly established the claims lacked "any legal foundation", that a good faith argument had not been advanced, and that the same arguments had been advanced and rejected in prior case. City of Littleton v. State, 832 P.2d 985 (Colo. App. 1991).

**Attorney fees awarded from assertion of affirmative defense. Attorney fees cannot be assessed against attorney from the beginning of action solely because attorney filed the action after the expiration of the statute of limitations** because statute of limitations is an affirmative defense which attorney is not re-

quired to anticipate. MacMillian v. Bruce, 900 P.2d 131 (Colo. 1995).

**The requirement of this section that the court consider specified factors** in determining whether to award attorney fees necessarily requires that a hearing be provided for the parties to address such factors and for the court to make an informed decision. Irwin v. Elam Const., Inc., 793 P.2d 609 (Colo. 1990).

**The court is not required to make specific findings** as to the factors to be determined in an order denying, rather than awarding, attorney fees. E-470 Pub. Hwy. Auth. v. Jagow, 30 P.3d 798 (Colo. App. 2001), *aff'd* on other grounds, 49 P.3d 1151 (Colo. 2002).

**Findings not necessary when request for fees is denied.** Webster v. Boone, 992 P.2d 1183 (Colo. App. 1999).

**Although this section does not require a court to make a finding of fact** when attorney fees are denied under § 13-17-102, C.R.C.P. 121 § 1-22 does. Stearns Mgmt. Co. v. Mo. River Servs., Inc., 70 P.3d 629 (Colo. App. 2003).

**Specific factual findings on enumerated factors required only when granting an**



**award of fees, not when denying an award.** *Munoz v. Measner*, 247 P.3d 1031 (Colo. 2011).

**Reference in subsection (7) to "a good faith attempt to establish a new theory of law" presumes that, in addition to filing a novel claim, the party will attempt to advance a plausible theory and argument for the adoption of the new legal principle; however, if a party fails to present plausible arguments in support of a novel claim, sanctions may be imposed under the statute, irrespective of the subjective state of mind of the party or the attorney at the time the claim was asserted.** *Sullivan v. Lutz*, 827 P.2d 626 (Colo. App. 1992).

**Trial court did not err in imposing sanctions under this section for fees incurred in defending plaintiff's claim where there was no legal or equitable principle that would rationally support plaintiff's claim that the law of constructive trusts should be extended to incorporate his claim.** *Sullivan v. Lutz*, 827 P.2d 626 (Colo. App. 1992).

**Award of attorney fees without a hearing is not proper if the reasonableness of the attorney fee award is placed in issue.** *City of Littleton v. State*, 832 P.2d 985 (Colo. App. 1991).

**Award of attorney fees under § 13-17-102 is discretionary with trial court, and its decision will not be disturbed on appeal if supported by the evidence.** Award upheld where evidence presented to trial court with respect to father's defense against motion to change custody included findings that the mother had misled expert witnesses, that they had failed to investigate the child's circumstances with the father, that the mother had not properly assisted the child to recover from the impact of the dissolution, and that she had a scheme for obtaining custody of the child which involved actions not in the best interest of the child. *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989).

**Where credible evidence existed to support plaintiff's claims but was not presented** due to counsel's failure to obtain and designate witnesses upon issue of damages, court erred in including in attorney fee award those amounts attributable to the time when evidence could have been presented through proper designation of witnesses because during this interval plaintiff's claims were not groundless. *Harrison v. Smith*, 821 P.2d 832 (Colo. App. 1991).

**Trial court's findings were adequate where order indicated it properly considered evidence as to the pertinent factors under this section and findings were sufficiently explicit to permit review of its determination.** *Sullivan v. Lutz*, 827 P.2d 626 (Colo. App. 1992).

**Court's statement that injunction was no longer valid was sufficient for a finding that motion to enforce it was without merit and to**

meet requirements of this section. *Anderson v. Pursell*, 244 P.3d 1188 (Colo. 2010).

**Attorney fee award reversed when the requisite findings required by the statute were not made.** In addition, a hearing was not conducted despite the objections of the plaintiffs to the fee award. *Maul v. Shaw*, 843 P.2d 139 (Colo. App. 1992).

**Award of reasonable attorney fees under "no fault" law.** Since § 10-4-708 (1) does not provide a specific definition of "reasonable", such compensation should be determined in light of all circumstances for the time and effort reasonably expended by the prevailing party's attorney. If trial court does not make initial determination as to reasonableness of hours expended by plaintiff's counsel, the record will be insufficient for reviewing court to resolve issue of reasonableness of fees on appeal. *Spensieri v. Farmers Alliance Mut. Ins.*, 804 P.2d 268 (Colo. App. 1990).

**In determining whether a claim or defense is substantially frivolous or groundless, a trial court must consider the factors set forth in subsection (1) and it must specify the reasons for the award.** *Pedlow v. Stamp*, 776 P.2d 382 (Colo. 1989); *Haney v. City Court*, 779 P.2d 1312 (Colo. 1989); *Sullivan v. Lutz*, 827 P.2d 626 (Colo. App. 1992).

**Order imposing sanctions was not deficient for failure to address the factors set forth in subsection (1) and to specify the reasons for the award** since none of the factors listed were placed in issue during the sanctions hearing and, consequently, the trial court was under no obligation to issue specific findings and since the order was sufficiently explicit to permit appellate review of the justification for the award. *Parker v. Davis*, 888 P.2d 324 (Colo. App. 1994).

**Doctrine of res ipsa loquitur cannot be used to avoid the requirements of this section, at least when there is no evidence or inference that the defendant had any control over the instrumentality causing the injury.** *Bilawsky v. Faseehudin*, 916 P.2d 586 (Colo. App. 1995).

**Effectively abandoning a claim by not pursuing it through trial is insufficient to constitute an effort to reduce the number of claims being asserted under subsection (1)(b).** *Ranta Constr., Inc. v. Anderson*, 190 P.3d 835 (Colo. App. 2008).

**Plaintiffs did not have standing to challenge an award of attorney fees entered pursuant to this section against plaintiffs' counsel.** Appeal properly dismissed where counsel had not filed a separate notice of appeal or added his name as an appellant to the appeal. *Henderson v. Bear*, 968 P.2d 144 (Colo. App. 1998).

**Applied in Application of Talco, Ltd.,** 769 P.2d 468 (Colo. 1989); *In re Ward*, 183 P.3d 707 (Colo. App. 2008).

**13-17-104. Fee arrangements between attorney and client.** The attorney and his client shall remain free to negotiate in private the actual fee which the client is to pay his attorney.

**Source:** L. 77: Entire article added, p. 798, § 2, effective July 1.

**13-17-105. Stipulation as to fees.** With the approval of the court, two or more parties to an action may agree, by written stipulation filed with the court or by oral stipulation in open court, to no award of attorney fees or an award of attorney fees in a manner different from that provided in this article.

**Source:** L. 77: Entire article added, p. 798, § 2, effective July 1. L. 84: Entire section R&RE, p. 462, § 4, effective July 1.

**13-17-106. Applicability.** This article shall apply in all cases covered by this article unless attorney fees are otherwise specifically provided by statute, in which case the provision allowing the greater award shall prevail.

**Source:** L. 77: Entire article added, p. 798, § 2, effective July 1. L. 84: Entire section amended, p. 462, § 5, effective July 1.

## PART 2

### ATTORNEY FEES IN CIVIL ACTIONS IN GENERAL

**13-17-201. Award of reasonable attorney fees in certain cases.** In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12 (b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action. This section shall not apply if a motion under rule 12 (b) of the Colorado rules of civil procedure is treated as a motion for summary judgment and disposed of as provided in rule 56 of the Colorado rules of civil procedure.

**Source:** L. 87: Entire part added, p. 547, § 2, effective July 1.

### ANNOTATION

**Law reviews.** For article, "1988 Update on Colorado Tort Reform Legislation — Part II", see 17 Colo. Law. 1949 (1988). For article, "Recent Developments in Governmental Immunity: Post-Trinity Broadcasting", see 25 Colo. Law. 43 (June 1996).

**Purpose of section.** In enacting this section, the general assembly sought to discourage and deter the institution or maintenance of unnecessary litigation involving tort claims. *Employers Ins. v. RREEF USA FUND-II*, 805 P.2d 1186 (Colo. App. 1991).

**Section applies only to dismissal of an entire tort action, not to dismissal of a single claim.** *First Interstate Bank v. Berenbaum*, 872 P.2d 1297 (Colo. App. 1993); *Holland v. Bd. of County Comm'rs*, 883 P.2d 500 (Colo. App. 1994); *Jaffe v. City & County of Denver*, 15 P.3d 806 (Colo. App. 2000); *Barton v. Law Offices of John W. McKendree*, 126 P.3d 313 (Colo. App. 2005).

**Section applies when a tort action is dismissed pursuant to C.R.C.P. 12(b).** Statute neither explicitly nor implicitly contemplates the existence of physical harm to a person or property. *Houdek v. Mobil Oil Corp.*, 879 P.2d 417 (Colo. App. 1994).

**Section applies when an action is dismissed pursuant to C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction under the Colorado Governmental Immunity Act (CGIA).** *Smith v. Town of Snowmass Vill.*, 919 P.2d 868 (Colo. App. 1996).

**Section applies not only to "baseless" tort claims that are dismissed under C.R.C.P. 12(b)(5), but also to any tort claim dismissed under the auspices of any provision of C.R.C.P. 12.** *Crow v. Penrose-St. Francis Healthcare Sys.*, 262 P.3d 991 (Colo. App. 2011).

**Section does not apply to claims that are pleaded in contract, but are dismissed pursu-**



ant to the CGIA because they lie in tort or could lie in tort. Courts will not read the CGIA's concern for claims that "lie or could lie in tort" into the plain language of this section. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998 (Colo. 2008).

**For purposes of applying this section**, the court relies on plaintiff's characterization of the claims in the complaint and does not consider what should or might have been pled. Although the case was dismissed based on preemption after a determination that the action was grounded on federal laws, the dismissal of plaintiff's case triggered application of this section, because plaintiff's claims were pled as torts. *Kennedy v. King Soopers Inc.*, 148 P.3d 385 (Colo. App. 2006).

**Under this section, an award of attorney fees is mandatory when a trial court dismisses an action under C.R.C.P. 12(b).** *Barnett v. Denver Publ'g Co.*, 36 P.3d 145 (Colo. App. 2001); *Wark v. Bd. of County Comm'rs*, 47 P.3d 711 (Colo. App. 2002); *Wilson v. Meyer*, 126 P.3d 276 (Colo. App. 2005); *Kreft v. Adolph Coors Co.*, 170 P.3d 854 (Colo. App. 2007).

A party who successfully defends a dismissal order under C.R.C.P. 12(b) is also entitled to recover reasonable attorney fees incurred on appeal. *Henderson v. Bear*, 968 P.2d 144 (Colo. App. 1998); *Wark v. Bd. of County Comm'rs*, 47 P.3d 711 (Colo. App. 2002); *Wilson v. Meyer*, 126 P.3d 276 (Colo. App. 2005); *Estate of Harper ex rel. Al-Hamim v. Denver Health & Hosp. Auth.*, 140 P.3d 273 (Colo. App. 2006); *Kreft v. Adolph Coors Co.*, 170 P.3d 854 (Colo. App. 2007); *Ferrel v. Colo. Dept. of Corr.*, 179 P.3d 178 (Colo. App. 2007); *Bristol Bay Prods., LLC v. Lampack*, \_\_ P.3d \_\_ (Colo. App. 2011).

**This section and § 13-16-113 mandate awards of attorney fees and costs and do not permit a reduction** for work that may be used in companion litigation. *Crandall v. City & County of Denver*, 238 P.3d 659 (Colo. 2010).

**This section is applicable where both tort and non-tort claims are pled and dismissed under Fed. R. Civ. P. 12.** This section applies in cases where all claims, both tort and non-tort, have been dismissed on Fed. R. Civ. P. 12 grounds. *Torres v. Am. Family Mut. Ins. Co.*, 606 F. Supp. 2d 1286 (D. Colo. 2009).

**Award of attorney fees is mandatory** when trial court dismisses an action under the Colorado Governmental Immunity Act for lack of subject matter jurisdiction. *Ferrel v. Colo. Dept. of Corr.*, 179 P.3d 178 (Colo. App. 2007).

**Trial court may award attorney fees and costs to a defendant when claims are still pending as to other defendants at the time of dismissal** and, thus, the entire lawsuit has not been dismissed. By using the term "defendant" in the singular, this section necessarily applies to each defendant who has an action against it dismissed pursuant to C.R.C.P. 12(b)(1).

*Stauffer v. Stegemann*, 165 P.3d 719 (Colo. App. 2006).

**Defendant may not recover attorney fees under this section when (1) the action includes both tort and nontort claims and (2) defendant has obtained dismissal of the tort claims, but not of the nontort claims, under C.R.C.P. 12.** *Sotelo v. Hutchens Trucking Co.*, 166 P.3d 285 (Colo. App. 2007).

**Section does not apply to a § 1983 claim.** Instead, 42 U.S.C. § 1988 applies, and that section does not authorize an award of fees and costs unless the claim is properly characterized as frivolous, vexatious, unreasonable, groundless, or made in bad faith. *State v. Golden's Concrete Co.*, 962 P.2d 919 (Colo. 1998); *Berg v. Shapiro*, 36 P.3d 109 (Colo. App. 2001).

**Although plaintiff's action should properly have been founded in tort** under § 13-21-115, plaintiff's claim was, nevertheless, framed as a contract claim, and it was the purported contract claim that was dismissed. Hence, this section, which authorizes attorney fee awards when a tort claim is dismissed prior to trial, is inapplicable. *Sweeney v. United Artists Theater Circuit*, 119 P.3d 538 (Colo. App. 2005).

**Contrary to plaintiff's assertion that his action was primarily a contract action**, six of eight claims against defendants, and eight of 10 claims asserted, were pleaded as tort claims within the meaning of this section. *Dubray v. Intertribal Bison Coop.*, 192 P.3d 604 (Colo. App. 2008).

**In determining whether section applies, the court should focus on the manner in which claims are pled.** Where plaintiff pled four contract claims and four tort claims, which all arose from the same nucleus of facts, and plaintiff chose to include the tort claims to obtain relief beyond what was available solely under a breach of contract theory, court did not err in determining that the section applied. *Crow v. Penrose-St. Francis Healthcare Sys.*, 262 P.3d 991 (Colo. App. 2011).

**Trial court did not err in failing to apportion attorney fees requested based on tort versus nontort claims.** Even if defendants were entitled to recover fees and costs associated with dismissal of only the tort claims, apportionment would be unwarranted because the entire action was dismissed for the same reason (lack of personal jurisdiction) and defendants would have incurred the same, or nearly the same, fees had the case involved only the tort claims. *Dubray v. Intertribal Bison Coop.*, 192 P.3d 604 (Colo. App. 2008).

**Mandatory attorney fees award provision of this section contains no express exclusion for claims brought in a good faith attempt to establish a new rule of law.** *Houdek v. Mobile Oil Corp.*, 879 P.2d 417 (Colo. App. 1994); *Tunget v. Bd. of County Comm'rs*, 992 P.2d 650 (Colo. App. 1999).

**Attorney fees mandatory when motion to dismiss for failure to join an indispensable party granted;** consideration of evidentiary matters did not convert motion to a motion for summary judgment. *Lyon v. Amoco Prod. Co.*, 923 P.2d 350 (Colo. App. 1996).

**To the extent this section and § 13-17-102 (7) are in conflict concerning a good faith tort action that is dismissed pursuant to C.R.C.P. 12(b),** this section controls as it is more specific to such action and was enacted later in time than § 13-17-102 (7). *Houdek v. Mobil Oil Corp.*, 879 P.2d 417 (Colo. App. 1994); *Hewitt v. Rice*, 119 P.3d 541 (Colo. App. 2004), *aff'd* on other grounds, 154 P.3d 408 (Colo. 2007).

**By implication, this section allows a plaintiff to escape liability for attorney fees by seeking a voluntary dismissal, filing a stipulation of dismissal, or confessing to a defense motion to dismiss under C.R.C.P. 12(b);** however, section is not applicable when plaintiffs seek to maintain state law claims unless and until federal court determines that a federal cause of action exists. *Houdek v. Mobil Oil Corp.*, 879 P.2d 417 (Colo. App. 1994).

**Trial court is not duty-bound to conduct a separate hearing on the issue of attorney fees before it may deny a request therefor.** *Hunter v. Colo. Mountain Jr. Coll.*, 804 P.2d 277 (Colo. App. 1990).

When fees are awarded, the court is required to make evidentiary findings and must provide the opportunity for a hearing. *Pedlow v. Stamp*, 776 P.2d 382 (Colo. 1989); *Little v. Fellman*, 837 P.2d 197 (Colo. App. 1991).

**Trial court did not err in treating motion to dismiss as a C.R.C.P. 56 motion for summary judgment,** despite fact that no affidavits or documents outside the pleadings were presented; thus, statute permitting award of attorney fees in actions brought as a result of death or injury to person or property, where the action is dismissed on motion of the defendant prior to trial, did not apply. *Willer v. City of Thornton*, 817 P.2d 514 (Colo. 1991).

**When a defendant has two valid defenses to a tort claim and one meets the statutory requirements for the granting of attorney fees under this section, such fees should be awarded.** Because this section precludes the recovery of attorney fees whenever a motion is converted to summary judgment, a defendant who prevails on a motion to dismiss based on first amendment immunity generally may not recover attorney fees. Here, however, because there is an alternative, independent ground upon which respondent's claim may be dismissed that comes within this section, petitioner can recover his or her attorney fees. Petitioner may recover his or her attorney fees because his or her motion to dismiss respondent's claim succeeds not only on the basis of his or her first amendment defense, but also on the independent, alternative

basis under C.R.C.P. 12(b)(5) that respondent failed to state a claim upon which relief could be granted. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004).

**Defendant not entitled to attorney fees where court converted C.R.C.P. 12(b)(1) motion to dismiss to a motion for summary judgment under C.R.C.P. 56.** The fact that the court found plaintiff's allegations of willfulness and wantonness insufficient on their face to support subject matter jurisdiction under the Governmental Immunity Act does not render the dismissal one under C.R.C.P. 12(b). In deciding the question of sovereign immunity, the court necessarily construed the act and issued a legal finding that disposed of the case. That the trial court considered no matters outside the pleadings in doing so was deemed inconsequential. *Zerr v. Johnson*, 905 F. Supp. 872 (D. Colo. 1995).

**The exception to this section's general applicability is applicable only in the case of a C.R.C.P. 12(b)(5) motion** and not in the case of a C.R.C.P. 12(b)(1) motion challenging the court's subject matter jurisdiction. *Crow v. Penrose-St. Francis Healthcare Sys.*, 262 P.3d 991 (Colo. App. 2011).

**C.R.C.P. 12(b) authorizes the court to consider evidence outside the pleadings without converting the motion into a summary judgment motion** for motions under subsection C.R.C.P. 12(b) other than C.R.C.P. 12(b)(5). *Aztec Minerals Corp. v. State*, 987 P.2d 895 (Colo. App. 1999).

**Trial court erred in refusing to award a defendant attorney fees** because facts had to be presented and determined by the court. Under the plain language of this section, an award of attorney fees is mandatory when a trial court dismisses an action under the Colorado Governmental Immunity Act for lack of subject matter jurisdiction. *Smith v. Town of Snowmass Vill.*, 919 P.2d 868 (Colo. App. 1996); *Villalpando v. Denver Health & Hosp. Auth.*, 181 P.3d 357 (Colo. App. 2007).

**Since the court declined to grant the defendant's motion to dismiss until it heard the evidence presented at trial,** this is not a situation in which a defendant delayed seeking dismissal and incurred attorney fees that a timely motion to dismiss could have avoided. Therefore, the court is right in awarding attorney fees pursuant to this section. *Abrahamson v. City of Montrose*, 77 P.3d 819 (Colo. App. 2003).

**This section not in conflict with § 6-1-113 of the Colorado Consumer Protection Act.** This section applies to a motion pursuant to C.R.C.P. 12(b) while § 6-1-113 allows attorney fees when claims are groundless and in bad faith or for the purpose of harassment. The provisions can stand side by side because they mandate awards in different circumstances. *US Fax Law*



Ctr., Inc. v. Henry Schein, Inc., 205 P.3d 512 (Colo. App. 2009).

**This section applies** only when an action is dismissed and does not apply when only a single claim is dismissed. First Interstate Bank v. Berenbaum, 872 P.2d 1297 (Colo. App. 1993); Sundheim v. Bd. of County Comm'rs of Douglas County, 904 P.2d 1337 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996); Berg v. Shapiro, 36 P.3d 109 (Colo. App. 2001); U.S. Fax Law Ctr., Inc. v. T2 Techs., Inc., 183 P.3d 626 (Colo. App. 2007); Hamon Contractors, Inc. v. Carter & Burgess, Inc., 229 P.3d 282 (Colo. App. 2009).

The defendant is not entitled to attorney fees when only a single fraud claim was dismissed under a motion to dismiss for failure to state a claim of relief. First Interstate Bank v. Berenbaum, 872 P.2d 1297 (Colo. App. 1993).

**Recovery of attorney fees not limited only to fees incurred in preparing motion to dismiss.** This section does not so limit an award

and instead expressly authorizes "attorney fees in defending the action". Dubray v. Intertribal Bison Coop., 192 P.3d 604 (Colo. App. 2008).

**Absent a finding that the defense to a motion for fees lacks substantial justification, fees and costs may not be awarded for challenging that defense.** Foxley v. Foxley, 939 P.2d 455 (Colo. App. 1996).

**Plaintiffs did not have standing to challenge an award of attorney fees entered pursuant to this section against plaintiffs' counsel.** Appeal properly dismissed where counsel had not filed a separate notice of appeal or added his name as an appellant to the appeal. Henderson v. Bear, 968 P.2d 144 (Colo. App. 1998).

**Defamation is "an injury to person or property occasioned by the tort of any other person"** and therefore an award of attorney fees is appropriate under this section upon a dismissal pursuant to C.R.C.P. 12(b). Barnett v. Denver Publ'g Co., Inc., 36 P.3d 145 (Colo. App. 2001).

### **13-17-202. Award of actual costs and fees when offer of settlement was made.**

(1) (a) Notwithstanding any other statute to the contrary, in any civil action of any nature commenced or appealed in any court of record in this state:

(I) If the plaintiff serves an offer of settlement in writing at any time more than fourteen days before the commencement of the trial that is rejected by the defendant, and the plaintiff recovers a final judgment in excess of the amount offered, then the plaintiff shall be awarded actual costs accruing after the offer of settlement to be paid by the defendant.

(II) If the defendant serves an offer of settlement in writing at any time more than fourteen days before the commencement of the trial that is rejected by the plaintiff, and the plaintiff does not recover a final judgment in excess of the amount offered, then the defendant shall be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff. However, as provided in section 13-16-104, if the plaintiff is the prevailing party in the action, the plaintiff's final judgment shall include the amount of the plaintiff's actual costs that accrued prior to the offer of settlement.

(III) If an offer of settlement is not accepted in writing within fourteen days after service of the offer, the offer shall be deemed rejected, and the party who made the offer is not precluded from making a subsequent offer. Evidence thereof is not admissible except in a proceeding to determine costs.

(IV) If an offer of settlement is accepted in writing within fourteen days after service of the offer, the offer of settlement shall constitute a binding settlement agreement, fully enforceable by the court in which the civil action is pending.

(V) An offer of settlement under this section shall remain open for at least fourteen days from the date of service unless withdrawn by service of withdrawal of the offer of settlement.

(VI) An offer of settlement served at any time fourteen days or less before the commencement of the trial shall not be subject to this section, and evidence thereof is not admissible for any purpose.

(b) For purposes of this section, "actual costs" shall not include attorney fees but shall mean costs actually paid or owed by the party, or his or her attorneys or agents, in connection with the case, including but not limited to filing fees, subpoena fees, reasonable expert witness fees, copying costs, court reporter fees, reasonable investigative expenses and fees, reasonable travel expenses, exhibit or visual aid preparation or presentation expenses, legal research expenses, and all other similar fees and expenses.

(2) When comparing the amount of any offer of settlement to the amount of a final judgment actually awarded, any amount of the final judgment representing interest subsequent to the date of the offer in settlement shall not be considered.

(3) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of settlement, which shall have the same effect as an offer made before trial (except with respect to costs already incurred) if it is served pursuant to subsection (1) of this section.

**Source:** **L. 90:** Entire section added, p. 852, § 14, effective May 31. **L. 95:** Entire section amended, p. 1194, § 1, effective July 1. **L. 2003:** (1) amended, p. 1359, § 1, effective July 1. **L. 2008:** (1)(a)(II) amended, p. 8, § 1, effective July 1.

**Cross references:** For the legislative declaration contained in the 1990 act enacting this section, see section 1 of chapter 100, Session Laws of Colorado 1990.

## ANNOTATION

**Law reviews.** For article, "Application of the 'Offer of Settlement' Statute: Less Than Legislative Intent?", see 24 Colo. Law. 2557 (1995).

**This section does not violate equal protection principles since it provides equal opportunity to plaintiffs and defendants alike.** Rubio v. Farris, 51 P.3d 992 (Colo. App. 2002).

**The 2008 amendment to subsection (1)(a)(II) effected a change to, rather than merely a clarification of, the law.** Novak v. Craven, 195 P.3d 1115 (Colo. App. 2008).

**The general assembly intended the 2008 amendment to subsection (1)(a)(II) to operate only prospectively.** Novak v. Craven, 195 P.3d 1115 (Colo. App. 2008).

**To award costs under this section, the costs must have accrued after the settlement offer, they must be actual costs, excluding attorney fees, and the costs must be reasonable.** Mallon Oil Co. v. Bowen/Edwards Assoc., 940 P.2d 1055 (Colo. App. 1996), aff'd on other grounds, 965 P.2d 105 (Colo. 1998).

**The phrase "and all other similar fees and expenses" at the end of subsection (1)(b) suggests a limitation to the categories of items that may be recovered as actual costs.** Catlin v. Tormey Bewley Corp., 219 P.3d 407 (Colo. App. 2009).

**A party challenging the reasonableness of expert fees is entitled to a hearing on the issue.** Dunlap v. Long, 902 P.2d 446 (Colo. App. 1995); Harvey v. Farmers Ins. Exch., 983 P.2d 34 (Colo. App. 1998), aff'd on other grounds sub nom. Slack v. Farmers Ins. Exch., 5 P.3d 280 (Colo. 2000); Dillen v. HealthOne, L.L.C., 108 P.3d 297 (Colo. App. 2004); Kim v. Grover C. Coors Trust, 179 P.3d 86 (Colo. App. 2007).

**The party must request a hearing, however.** Dillen v. HealthOne, L.L.C., 108 P.3d 297 (Colo. App. 2004).

**The plain language of subsection (1)(a) does not require an offer of settlement to contain a reference to this section and use of the term "offer of settlement", although the better practice might be to include such terms in such an offer.** Dillen v. HealthOne, L.L.C., 108 P.3d 297 (Colo. App. 2004).

**Subsection (1)(a)(III) does not require an offer to be "final" and specifically provides that an offeror is not precluded from making subsequent offers.** Dillen v. HealthOne, L.L.C., 108 P.3d 297 (Colo. App. 2004).

**Plaintiff entitled to award of actual costs under subsection (1)(a)(I) to the extent they constitute "costs other than attorneys' fees" under Fed. R. Civ. P. 54(d)(1) and are not preempted by a federal statute such as 28 U.S.C. § 1821 and to the extent, if at all, they constitute "related non-taxable expenses" under Fed. R. Civ. P. 54(d)(2).** Garcia v. Wal-Mart Stores, Inc., 209 F.3d 1170 (10th Cir. 2000).

**Court may not deny costs for expert witness fees under subsection (1)(a)(II) on the basis of the credibility of the witness, but rather must evaluate the costs based on the reasonableness of the fees.** Bennett v. Hickman, 992 P.2d 670 (Colo. App. 1999); Paratransit Risk Retention Group Ins. Co. v. Kamins, 160 P.3d 307 (Colo. App. 2007).

**The provisions of this section are mandatory and a trial court does not have discretion to refuse to award actual costs due to a party.** Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994).

**A determination under this section that the defendant is entitled to costs does not preclude an attorney fees award to plaintiff as the prevailing party.** Chartier v. Weinland Homes, Inc., 25 P.3d 1279 (Colo. App. 2001).

**Prevailing party is allowed to recover costs in cases where the costs are paid or advanced by an insurance company.** Hale v. Erickson, 23 P.3d 1255 (Colo. App. 2001).

**Subsection (1)(a)(II) does not apply to condemnation proceedings.** City of Westminster v. Jefferson Center Ass'n, 958 P.2d 495 (Colo. App. 1997).

**Section does not address a prevailing party who received less than its rejected offer of settlement but never rejected an offer under the statute.** Therefore, plaintiff is not barred from an award of costs under this section and is entitled to an award of reasonable costs as a



prevailing party pursuant to § 13-16-104 and C.R.C.P. 54(d). *Hall v. Frankel*, 190 P.3d 852 (Colo. App. 2008).

**Recovery pursuant to this section available to extent maximum recovery allowed under § 24-10-114 not reached.** Since plaintiff had recovered maximum allowable under § 24-10-114 for injury caused to child by negligence of pharmacy at state hospital, additional recovery for costs not available under this section. *DeCordova v. State*, 878 P.2d 73 (Colo. App. 1994).

**Offer, which did not unequivocally exclude costs but which was “exclusive of costs”, was an offer for settlement apart or separate from costs mandated by this section.** *Carpentier v. Berg*, 829 P.2d 507 (Colo. App. 1992); *Aberle v. Clark*, 916 P.2d 564 (Colo. App. 1995).

**Offer of a total amount “inclusive of all costs and interest to date” was valid under this section.** *Aberle v. Clark*, 916 P.2d 564 (Colo. App. 1995).

Subsection (3) does not require an offer of settlement to itemize separately the respective amounts being tendered for settlement of the underlying substantive claim and for costs. *Aberle v. Clark*, 916 P.2d 564 (Colo. App. 1995).

**In an offer inclusive of “all costs and interest”, trial court must consider plaintiff’s asserted preoffer costs,** and the reasonableness thereof in assessing an award of costs. *Rubio v. Farris*, 51 P.3d 992 (Colo. App. 2002).

**Ordinarily, a “final judgment” includes prejudgment interest but not costs.** Where settlement offer did not reference, much less explicitly include, costs, the trial court erred in including plaintiff’s costs as part of the “final judgment”. *Novak v. Craven*, 195 P.3d 1115 (Colo. App. 2008) (decided under law in effect prior to 2008 amendment).

**Offer of settlement as to “all claims” unambiguously includes attorney fees** if the only claim for attorney fees appears in the complaint. The offer of settlement need not explicitly reference attorney fees. *Bumbal v. Smith*, 165 P.3d 844 (Colo. App. 2007).

**In calculating whether a final judgment exceeds the amount of a settlement offer that did not specifically exclude costs,** a trial court is to exclude post-offer attorney fees awarded as costs, but include pre-offer fees awarded as costs. *Chartier v. Weinland Homes, Inc.*, 25 P.3d 1279 (Colo. App. 2001).

**A settlement offer should be presumed to imply include the amount of any post-verdict subrogation setoff.** *Ferrellgas, Inc. v. Yeiser*, 247 P.3d 1022 (Colo. 2011).

**Trial court need only award actual costs that are reasonably incurred after rejection of settlement offer.** Prior to such award, trial court must make specific finding of reasonable-

ness of costs. *Evanson v. Colo. Farm Bur. Mut. Ins. Co.*, 879 P.2d 402 (Colo. App. 1993).

**Unreasonable costs may be disallowed by the court** under subsection (1)(a)(II). *Jorgensen v. Heinz*, 847 P.2d 181 (Colo. App. 1992); *Cedar Lane Invs. v. St. Paul Fire & Marine Ins. Co.*, 883 P.2d 600 (Colo. App. 1994); *Underwood v. Dillon Co.*, 936 P.2d 612 (Colo. App. 1997); *Salazar v. Am. Sterlizer Co.*, 5 P.3d 357 (Colo. App. 2000).

When an expert is hired to testify but is precluded from doing so because his or her testimony is ruled inadmissible, the expert’s services are not reasonably necessary to the disposition of the case, and expert fees should not be awarded. *Clayton v. Snow*, 131 P.3d 1202 (Colo. App. 2006).

**No requirement that costs awarded relate to any particular phase of a lawsuit** so long as they are incurred after the offer of settlement. Reasonable costs may include answer and jury fees and trial preparation fees of expert witnesses, even when some work of expert witnesses is performed after entry of summary judgment but before experts can be notified to stop work. *Cedar Lane Invs. v. St. Paul Fire & Marine Ins. Co.*, 883 P.2d 600 (Colo. App. 1994).

**The costs for a witness’s airfare could be “reasonable travel expenses” under subsection (1)(b) of this section,** even if the airfare exceeds the mileage reimbursement rate provided in § 13-33-103, depending on the circumstances that led the witness to travel by air and the type of arrangements chosen. The same would be true of “gasoline money”, even if it exceeded the mileage fees provided in § 13-33-103. The trial court should make findings on the reasonableness of such costs claimed by plaintiff. *Catlin v. Tormey Bewley Corp.*, 219 P.3d 407 (Colo. App. 2009).

**Under unusual circumstances, traveling companion expenses could be awarded under this section** because the expenses of a traveling companion are “similar” to “reasonable travel expenses”, and this phrase in subsection (1)(b) is not limited to such expenses of a witness. In considering such an award, a trial court should make findings regarding the need for the traveling companion’s presence, as well as the reasonableness of his or her travel arrangements. *Catlin v. Tormey Bewley Corp.*, 219 P.3d 407 (Colo. App. 2009).

**Trial court did not abuse its discretion** in awarding a defendant only a portion of the actual costs incurred where such costs could have been avoided if defendant had availed itself of the procedures that would have limited the action to the resolution of a jurisdictional issue. *Smith v. Town of Snowmass Vill.*, 919 P.2d 868 (Colo. App. 1996) (decided under former law).

**Court may tax costs jointly and severally.** It is within the court's discretion to decide how to tax the costs. *Hale v. Erickson*, 23 P.3d 1255 (Colo. App. 2001).

Because the court considered the plaintiff's bill of costs and amended bill of costs in awarding minimal costs, even though both the bill and amended bill were filed more than 15 days after the entry of judgment, the trial court was required to award the plaintiff reasonable costs incurred after the offer of settlement. *Borquez v. Robert C. Ozer, P.C.*, 923 P.2d 166 (Colo. App. 1995), *aff'd in part and rev'd in part* on other grounds, 940 P.2d 371 (Colo. 1997).

**Offers of judgment are not revocable by the offeror for the statutory period of 10 days.** *Centric-Jones Co. v. Hufnagel*, 848 P.2d 942 (Colo. 1993).

**Relief under C.R.C.P. 60(b) is available for judgments entered pursuant to this section.** *Domenico v. Sw. Props. Venture*, 914 P.2d 390 (Colo. App. 1995).

**An offer of settlement made to multiple plaintiffs must be apportioned among the parties** to allow each to decide independently whether to settle and avoid a potential award of costs pursuant to this section. *Weeks v. City of Colo. Springs*, 928 P.2d 1346 (Colo. App. 1996); *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007).

**This section does not apply where an offer of settlement was made in a previous action**, involving at least some claims that are different from those asserted in the later case, and where a timely statutory offer of settlement was not made in the action in which the judgment was obtained. *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501 (Colo. App. 2009).

**Subsection (3) does not apply to an unapportioned offer to multiple plaintiffs.** Taylor by and through Taylor v. Clark, 883 P.2d 569 (Colo. App. 1994).

**Trial court erred as a matter of law in holding that the entry of summary judgment for one of two offerors of an offer of judgment voided the offer of judgment.** An offer of judgment is both irrevocable and absolute for the 10-day statutory period. *Centric-Jones Co. v. Hufnagel*, 848 P.2d 942 (Colo. 1993).

**Statutory period for accepting an offer of settlement cannot be extended by rule.** The additional three-day period established in C.R.C.P. 6(e) for service by e-filing does not apply to statutorily established time periods. *Montoya v. Connolly's Towing, Inc.*, 216 P.3d 98 (Colo. App. 2008).

**Offer made to husband and wife could only be accepted by both parties and attempt by wife to accept half constituted a material change to the terms of the offer and was therefore a rejection of the offer.** Since husband did not recover more from the jury than

was offered by defendant he is not entitled to recover costs. *Askew v. Gerace*, 851 P.2d 199 (Colo. App. 1992).

**Nothing in the statute permits one to condition an offer of settlement upon dismissal of claims against a third party whose claims would not be resolved in the settlement.** Because the settlement offer required defendant to dismiss all counterclaims against plaintiffs but all plaintiffs did not join in the offer to dismiss their claims, plaintiffs did not comply with this section. *Lawry v. Palm*, 192 P.3d 550 (Colo. App. 2008).

**Offer served less than ten days before trial** was not within statutory period and the trial court was correct in not entering judgment on such offer. *Larson v. A.T.S.I.*, 859 P.2d 273 (Colo. App. 1993).

**Defendant's offer of \$1.00 in settlement did not violate the spirit of this section and was both permissible and within the purpose of this section** since this section is designed not only to encourage settlement but also to discourage unnecessary litigation and reduce the attendant costs. *Graven v. Vail Assocs., Inc.*, 888 P.2d 310 (Colo. App. 1994).

**It is contrary to the purpose of this section to allow non-monetary conditions to be imposed as part of a settlement offer.** Therefore, any provisions extending the scope of the offer beyond the claims at issue remove the offer from the scope of the statute. *Martin v. Minnard*, 862 P.2d 1014 (Colo. App. 1993); *Tallitsch v. Child Support Servs., Inc.*, 926 P.2d 143 (Colo. App. 1996); *URS Group, Inc. v. Tetra Tech FW, Inc.*, 181 P.3d 380 (Colo. App. 2008).

By requiring a release of all "future claims" relating to the project that was the subject of litigation, defendant imposed a nonmonetary condition that took its offer outside the scope of this section. *URS Group, Inc. v. Tetra Tech FW, Inc.*, 181 P.3d 380 (Colo. App. 2008).

**Inclusion of subrogation interests and putative liens in a settlement offer did not create a nonmonetary condition.** Rather, by including those factors, defendant explained the value of the settlement offer. Thus, the settlement offer was covered by the language of this section. *Strunk v. Goldberg*, 258 P.3d 334 (Colo. App. 2011).

**A settlement offer conditioned upon confidentiality cannot be used as a basis for seeking costs because either party has the right to make an offer and acceptance part of the public records.** *Martin v. Minnard*, 862 P.2d 1014 (Colo. App. 1993).

**Settlement offer provision inapplicable to condemnation proceedings** in which the final judgment is less than the amount of the offer of settlement. *City of Westminster v. Hart*, 928 P.2d 758 (Colo. App. 1996).

**Defendant failed to establish basis for relief under C.R.C.P. 60(b)** where offer of settlement



made by defendant's insurance attorney failed to specify whether the offer addressed fewer than all of the claims between the parties. *Guevara v. Foxhoven*, 928 P.2d 793 (Colo. App. 1996).

**The intent of subsection (1)(a)(II) is to encourage the settlement of litigation** by imposing upon a party who rejects a reasonable offer of settlement but recovers less than the amount of the offer, all of the post-offer costs of the offeror. *Bennett v. Hickman*, 992 P.2d 670 (Colo. App. 1999); *Rubio v. Farris*, 51 P.3d 992 (Colo. App. 2002).

**This section modifies § 13-16-104 and C.R.C.P. 54(d) by not allowing a party who rejects a settlement offer and recovers less at trial to recover his or her costs, even though that party is determined to be the prevailing party.** *Bennett v. Hickman*, 992 P.2d 670 (Colo. App. 1999); *Rubio v. Farris*, 51 P.3d 992 (Colo. App. 2002).

**"Actual costs accruing after the offer of settlement" means due and payable or vested** and thus costs that were paid prior to making an offer of settlement to plaintiff did not accrue or become due until after the settlement date and, therefore, fall within the scope of subsection (1)(a)(II). *Bennett v. Hickman*, 992 P.2d 670 (Colo. App. 1999).

**A cost judgment under this section is to be offset from a jury award only after the pre-judgment interest has been added.** *Bennett v. Hickman*, 992 P.2d 670 (Colo. App. 1999).

**13-17-203. Limitation on attorney fees in class action litigation against public entities.** If the plaintiffs prevail in any class action litigation brought against any public entity, as defined in section 24-10-103 (5), C.R.S., the amount of attorney fees which the plaintiffs' attorney is entitled to receive out of any award to the plaintiffs shall be determined by the court; except that such amount shall not exceed two hundred fifty thousand dollars. Such limitation shall apply where the public entity pays the attorney fees directly to the plaintiffs' attorneys or where the public entity is required to pay the attorney fees indirectly through any program it administers by reducing the benefits or amounts due to the individual plaintiffs.

**Source:** L. 92: Entire section added, p. 272, § 1, effective April 28.

**Cross references:** For provisions relating to limitations on attorney fees in class action litigation against public entities under the "Colorado Governmental Immunity Act", see § 24-10-114.5.

## ANNOTATION

**Where attorneys' right to fee award out of common fund established in class action vested before the enactment of this section,** the state constitution prohibits the retrospective application of this section to defeat class counsel's right to the court-ordered fee. *Kuhn v. State*, 924 P.2d 1053 (Colo. 1996).

**This section does not violate the equal protection guarantees of the U.S. or Colorado Constitutions** because it is rationally related to the legitimate state interest of protecting class

**This section details the steps a party must take in regard to offers of settlement.** C.R.C.P. 26(a)(1)(C) and C.R.C.P. 26(e) exist, in part, to promote the exchange of sufficient information in order to encourage settlement. By binding plaintiff to the damage computations listed in plaintiff's initial disclosure statement merely because plaintiff did not designate the computations as estimates, the trial court effectively imposed a settlement on plaintiff and improperly involved the court in the settlement process. The trial court overemphasized plaintiff's failure to state that the initial disclosure of damages was an estimate, neglected to view the initial disclosures in the context of being information "now known and reasonably available," and was insufficiently attentive to the importance of an early exchange of information and the resulting need to update information under C.R.C.P. 26(a)(1)(C) and 26(e). Absent some indication plaintiff tried to mislead the defendants or the court in plaintiff's initial disclosure or tried to frustrate the settlement process, plaintiff not required to accept an offer limited to plaintiff's initial disclosures. By granting the defendants' joint motion for judgment for a specific amount of damages over the objection of plaintiff, the court abused its discretion. *Morgan v. Genesee Co.*, 86 P.3d 388 (Colo. 2004).

**Applied in** *Lasher v. Paxton*, 956 P. 2d 647 (Colo. App. 1998); *Goodwin v. Homeland Cent. Ins. Co.*, 172 P.3d 938 (Colo. App. 2007).

members' recovery for unlawful governmental action. A statute does not necessarily violate the equal protection guarantee because its classifications are imperfect. *Buckley Powder Co. v. Colo.*, 70 P.3d 547 (Colo. App. 2002).

**This section does not deny equal access to the courts.** Aggrieved individuals may sue as individuals or as a class; therefore, the statutory cap does not place an unreasonable burden on class claimants. *Buckley Powder Co. v. Colo.*, 70 P.3d 547 (Colo. App. 2002).

## PART 3

RETENTION OF ATTORNEYS BY GOVERNMENTAL ENTITIES -  
LIMITATION ON CONTINGENT FEE CONTRACTS

**13-17-301. Short title.** This part 3 shall be known and may be cited as the “Government Attorney Ethics Act”.

**Source: L. 2003:** Entire part added, p. 924, § 1, effective August 6.

**13-17-302. Legislative declaration.** (1) The general assembly hereby finds, determines, and declares that:

(a) In recent years, it has become increasingly common for governmental entities to retain attorneys pursuant to contingent fee contracts and disputes have arisen in several states regarding the amount and propriety of contingent fees;

(b) Contingent fees are intended to enable persons of modest means to obtain legal representation that they might not otherwise be able to afford but governmental entities have resources that are unavailable to individual citizens;

(c) Governmental entities should be required to fully consider the costs and risks of litigation before retaining an attorney pursuant to a contingent fee contract;

(d) The department of law ordinarily represents the interests of the state of Colorado;

(e) Governmental officials, including attorneys who represent governmental entities on a contractual basis, are entrusted to protect the health, safety, and well-being of citizens and it is the policy of the state that a person who exercises authority on behalf of a governmental entity generally should not have a personal financial stake in the outcome of litigation initiated on behalf of the governmental entity;

(f) A contingent fee contract that gives an attorney who is retained to represent a governmental entity a direct personal stake in the outcome of legal proceedings is potentially unfair to the citizens or businesses against whom the governmental entity has filed suit and may not serve the best interests of the citizens or businesses on whose behalf the governmental entity initiates legal proceedings;

(g) Because contingent fee contracts do not require the appropriation of moneys, such contracts circumvent the system of checks and balances that ordinarily provides accountability for decisions of governmental entities and it is appropriate to limit contingent fee contracts to ensure that the decision-making process is protected;

(h) A contingent fee contract may result in the payment of excessive attorney fees by a governmental entity, thereby denying citizens represented by government the full measure of justice awarded by the courts;

(i) It is in the best interest of the people of Colorado to limit the circumstances in which governmental entities may retain private attorneys pursuant to contingent fee contracts.

**Source: L. 2003:** Entire part added, p. 924, § 1, effective August 6.

**13-17-303. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Contingent fee” means a fee for legal services that is contingent in whole or in part upon the successful outcome of the matter for which the legal services were retained.

(2) “Contingent fee contract” or “contract” means a contract for legal services in which the amount of the fee to be paid for the legal services depends in whole or in part upon the successful outcome of the matter for which the services were obtained. The term also includes any contract that specifies that fees for legal services will be determined by a court or an arbitrator or any provision of a settlement agreement that requires the opposing party to pay fees for legal services directly to a private attorney retained by a governmental entity pursuant to a contingent fee contract.

(3) “Governmental entity” means the state, any department or agency of the state, and any state-sponsored institution of higher education.



**Source:** L. 2003: Entire part added, p. 925, § 1, effective August 6.

**13-17-304. Limitation on contingent fees - applicability.** (1) (a) Except as otherwise provided in subsections (2) and (3) of this section, and notwithstanding any other provision of law, a contingent fee contract between a governmental entity and a private attorney shall:

(I) Require the private attorney to maintain and provide to the governmental entity on a monthly basis a contemporaneous record of the hours of legal services provided by individual attorneys, the nature of such services, and any court costs incurred during each month and in the aggregate from the effective date of the contingent fee contract;

(II) Require the private attorney, upon the successful resolution of the matter for which the private attorney was retained, to provide to the governmental entity a statement of the hours of legal services provided by attorneys, the nature of such services, the amount of court costs incurred, the total amount of the contingent fee, and the average hourly rate for legal services provided by attorneys; and

(III) Specify an alternative hourly rate, not to exceed one thousand dollars per hour, at which the attorney shall be compensated in the event that the statement provided by the attorney indicates an average hourly rate for legal services provided by attorneys of more than one thousand dollars per hour.

(b) The average hourly rate for legal services provided by attorneys shall be determined by dividing the amount of the contingent fee, less the amount of court costs incurred if said amount is part of the contingent fee, by the number of hours of legal services provided by attorneys. Clerical work, including but not limited to transcription, photocopying, and document filing and organization, shall not be considered legal services provided by attorneys even if an attorney performs such work.

(2) The limitations and requirements of subsection (1) of this section shall not apply to any contingent fee contract entered into by a governmental entity prior to August 6, 2003.

(3) The limitations and requirements of subsection (1) of this section shall not apply to any contingent fee contract entered into by a governmental entity if the contract is for legal services performed by an attorney in connection with the collection of debts or taxes owed to a governmental entity and was entered into pursuant to section 23-3.1-104 (1) (f) or (2) (i), 23-5-113 (1), 24-30-202.4, or 39-21-114, C.R.S., or any other statutory provision that expressly authorizes or requires the payment of a portion of the moneys collected to an attorney retained to collect such debts or taxes.

(4) Compliance with this part 3 does not relieve a contracting attorney of any obligation or legal responsibility imposed by the Colorado rules of professional conduct or any provision of law.

**Source:** L. 2003: Entire part added, p. 926, § 1, effective August 6.

**ARTICLE 17.5**

**Costs - Attorney Fees -  
Inmate Lawsuits**

13-17.5-101.	Legislative declaration.	
13-17.5-102.	Definitions.	
13-17.5-102.3.	Exhaustion of remedies.	
13-17.5-102.7.	Successive claims.	
13-17.5-103.	Filing fees.	
13-17.5-104.	Stay of state judicial proceedings.	
13-17.5-105.	Proceedings before magistrate.	13-17.5-106.5. Court-ordered payment.
13-17.5-106.	Assessment of costs and attorney fees - review of inmate spending from account - recovery of costs from inmate accounts - alternative sanctions - continuing garnishment authorized.	13-17.5-107. Construction of article - severability.
		13-17.5-108. Teleconferenced hearings.

**13-17.5-101. Legislative declaration.** (1) The general assembly declares that the state has a strong interest in limiting substantially frivolous, groundless, or vexatious inmate lawsuits that impose an undue burden on the state judicial system. While recognizing an inmate's right to access the courts for relief from unlawful state actions, the general assembly finds that a significant number of inmates file substantially frivolous, groundless, or vexatious lawsuits.

(2) The general assembly, therefore, determines that it is necessary to enact legislation that promotes efficiency in the disposition of inmate lawsuits by providing for preliminary matters to be determined by magistrates and to provide for sanctions against inmates who are allowed to file claims against public defendants and whose claims are dismissed as frivolous.

**Source: L. 95:** Entire article added, p. 478, § 1, effective July 1.

**13-17.5-102. Definitions.** As used in this article only:

(1) "Civil action" means the filing of a complaint, petition, writ, or motion with any court within the state, including any appellate court; except that "civil action" does not include any criminal action or an action for habeas corpus under article 45 of this title.

(1.5) "Detaining facility" means any state correctional facility, as defined in section 17-1-102 (1.7), C.R.S., including the youthful offender system, any private correctional facility housing state prisoners pursuant to part 2 of article 1 of title 17, C.R.S., any local jail, as defined in section 16-11-308.5 (1.5), C.R.S., or any community corrections program, established in article 27 of title 17, C.R.S. A detaining facility shall not include any juvenile detention facility that detains only juveniles.

(2) "Inmate" means a person who is sentenced or is awaiting sentencing to any detaining facility.

(3) "Public defendant" means any state, county, or municipal agency, any state, county, or municipal official or employee acting within the scope of his or her authority, or any agent acting on behalf of any state, county, or municipal agency.

**Source: L. 95:** Entire article added, p. 478, § 1, effective July 1. **L. 98:** (1) amended and (1.5) added, p. 246, § 1, effective April 13.

**13-17.5-102.3. Exhaustion of remedies.** (1) No inmate shall bring a civil action based upon prison conditions under any statute or constitutional provision until all available administrative remedies have been exhausted in a timely fashion by the entity operating the detaining facility and inmate. For purposes of this subsection (1), an inmate shall be considered to have exhausted all available administrative remedies when the inmate has completed the last step in the inmate grievance process as set forth in the regulations promulgated by the entity operating the detaining facility. Failure to allege in the civil action that all available administrative remedies have been exhausted in accordance with this subsection (1) shall result in dismissal of the civil action.

(2) Notwithstanding subsection (1) of this section, if a court finds that a claim filed by an inmate is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from monetary relief, a court may dismiss the claim without first requiring exhaustion of administrative remedies.

**Source: L. 98:** Entire section added, p. 247, § 2, effective April 13. **L. 2001:** (1) amended, p. 289, § 1, effective July 1.

#### ANNOTATION

**This section requires an inmate to exhaust the last step in the inmate grievance process before proceeding to court.** *Glover v. State*, 129 P.3d 1083 (Colo. App. 2005).



This section requires an inmate seeking access to his or her mental health records to first exhaust all available administrative remedies. *Kopec v. Clements*, 271 P.3d 607 (Colo. App. 2011).

An inmate's action seeking access to such records under § 24-72-305 of the Colorado Criminal Justice Records Act (CCJRA) is not exempt from this requirement. *Kopec v. Clements*, 271 P.3d 607 (Colo. App. 2011).

**However, section does not require exhausting of administrative remedies before bringing a civil action based on prison conditions when the action consists only of claims brought under the common law.** *Adams v. Corr. Corp. of Am.*, 187 P.3d 1190 (Colo. App. 2008).

**Section neither precludes plaintiffs from bringing an action in common law nor bars them from subsequently renewing a request for punitive damages** if the prerequisites for such a request are met. *Adams v. Corr. Corp. of Am.*, 187 P.3d 1190 (Colo. App. 2008).

**Subsection (1) requires dismissal of the action for failure to allege the exhaustion of all administrative remedies**, even if the relief sought may not be available through the administrative process. *Glover v. State*, 129 P.3d 1083 (Colo. App. 2005).

**Applied in** *Graham v. Maketa*, 227 P.3d 516 (Colo. App. 2010).

**13-17.5-102.7. Successive claims.** (1) No inmate who on three or more occasions has brought a civil action based upon prison conditions that has been dismissed on the grounds that it was frivolous, groundless, or malicious or failed to state a claim upon which relief may be granted or sought monetary relief from a defendant who is immune from such relief, shall be permitted to proceed as a poor person in a civil action based upon prison conditions under any statute or constitutional provision.

(2) Notwithstanding the provisions of subsection (1) of this section, an inmate may proceed as a poor person in a civil action if the judge finds that the action alleges sufficient facts which, if assumed to be true, would demonstrate that the inmate is in imminent danger of serious physical injury.

(3) (a) A copy of any court order that dismisses an inmate's civil action on the grounds that it is frivolous, groundless, or malicious or fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief shall be mailed by the court clerk to the Colorado attorney general, whether or not the attorney general entered an appearance in the civil action, and whether or not the civil action involved a state correctional facility or state defendant. The attorney general shall monitor the dismissals described in this paragraph (a).

(b) The attorney general shall inform the state judicial department or the chief judge of each judicial district whenever the attorney general becomes aware that an inmate has been assessed three or more dismissals as described in paragraph (a) of this subsection (3). Each judicial district shall maintain a registry of such information. An inmate listed in the registry who brings a civil action shall be subject to the provisions of subsections (1) and (2) of this section.

**Source:** L. 98: Entire section added, p. 247, § 2, effective April 13. L. 2001: Entire section amended, p. 289, § 2, effective July 1.

**13-17.5-103. Filing fees.** (1) An inmate who seeks to proceed in any civil action without prepayment of fees, in addition to filing any required affidavit, shall submit a copy of the inmate's account statement for the six-month period immediately preceding the filing of the civil action, certified by an appropriate official at the detaining facility. If the inmate account demonstrates that the inmate has sufficient funds to pay the filing fee, or if the action on its face is frivolous, groundless, or malicious, or fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief, the motion to proceed as a poor person shall be denied.

(2) Any inmate who is allowed to proceed in the civil action as a poor person shall be required to pay the full amount of the filing fee and service of process fees previously paid by the court in the following installments:

(a) If the inmate has ten dollars or more in his or her inmate account, make an initial partial payment in accordance with the order of the court; and

(b) Regardless if the inmate has ten dollars in his or her inmate account at the time of the filing of the civil action, make continuing monthly payments to the court equal to twenty percent of the preceding month's deposits in the inmate's account until the filing fee and service of process fees previously paid by the court are paid in full.

(2.5) The court shall include in its order granting permission to proceed as a poor person the requirement that the inmate comply with the provisions of subsection (2) of this section.

(2.7) A copy of any order granting an inmate's motion to proceed in a civil action as a poor person shall be forwarded by the court to the detaining facility that has custody of the inmate. Upon receipt of the order, the detaining facility shall forward payments from the inmate's account to the court in accordance with the order granting leave to proceed as a poor person.

(3) In no event shall an inmate be prohibited from filing a civil action or appealing a civil or criminal judgment because the inmate has no assets and no means by which to pay the initial partial payment.

**Source:** L. 95: Entire article added, p. 479, § 1, effective July 1. L. 98: Entire section amended, p. 248, § 4, effective April 13. L. 2001: Entire section amended, p. 290, § 3, effective July 1.

#### ANNOTATION

**Statutory section not void for vagueness** since there are no words or phrases in this section that are not readily comprehensible to persons of ordinary intelligence without further definition. *Collins v. Jaquez*, 15 P.3d 299 (Colo. App. 2000).

**Nor does statutory section violate inmate's right to have access to the courts**, since inmate has opportunity to demonstrate insufficient funds to pay filing fees in order to be permitted access to the courts without incurring those fees. *Collins v. Jaquez*, 15 P.3d 299 (Colo. App. 2000).

**In addition, section does not violate constitutional rights to due process or equal protection** under a rational basis test. *Collins v. Jaquez*, 15 P.3d 299 (Colo. App. 2000).

**Being granted the ability to proceed as a poor person under this section, without prepayment of fees, does not relieve an inmate from liability for the filing fee.** Indigent inmates are not excused from paying the filing fee. The payment of the fee is merely placed on an installment schedule. *Schwartz v. Owens*, 134 P.3d 455 (Colo. App. 2005).

**Trial court was required to give copies of summons and complaint to sheriff for service of process**, unless the court concluded that the claims were frivolous or filed in bad faith. It was improper for the trial court to dismiss the action for failure to prosecute. *Edmond v. City of Colo. Springs*, 226 P.3d 1248 (Colo. App. 2010).

**Applied** in *Harrison v. Wilson*, 998 P.2d 1110 (Colo. App. 2000).

**13-17.5-104. Stay of state judicial proceedings.** If the court determines, during the course of a state civil action by an inmate against any public defendant, that a federal civil action or grievance procedure is pending that involves the inmate and any of the same issues raised in the state civil action, the court shall stay the state civil action until the federal civil action or the grievance procedure is completed and all rights of appeal have been exhausted.

**Source:** L. 95: Entire article added, p. 479, § 1, effective July 1.

**13-17.5-105. Proceedings before magistrate.** As provided by sections 13-5-201 and 13-6-501, district and county court magistrates may preside over inmate motions filed pursuant to section 13-16-103 and motions filed pursuant to the Colorado rules of civil procedure to dispose of the inmate's action without the necessity of trial.

**Source:** L. 95: Entire article added, p. 479, § 1, effective July 1.



## ANNOTATION

A magistrate may, without the consent of the parties, act upon an inmate's in forma pauperis request and dispose of the case in accordance with its ruling thereon. Therefore, it is appropriate for such action to be governed by

C.R.M. 7(a), which sets out procedures for review of a magistrate's orders and judgments that have been entered without consent of the parties. Bryan v. Neet, 85 P.3d 556 (Colo. App. 2003).

**13-17.5-106. Assessment of costs and attorney fees - review of inmate spending from account - recovery of costs from inmate accounts - alternative sanctions - continuing garnishment authorized.** (1) (a) In any action based upon prison conditions brought under any statute or constitutional provision, if attorney fees are recoverable pursuant to any state or federal statute, no attorney fees shall be awarded to an inmate, except to the extent that:

(I) The fees were directly and reasonably incurred in proving an actual violation of the inmate's rights protected by the constitution or statute; and

(II) (A) The amount of the fees is proportionately related to the court-ordered relief for the violation; or

(B) The fees were directly and reasonably incurred in enforcing the relief ordered for the violation.

(b) No award of attorney fees under paragraph (a) of this subsection (1) shall be based on an hourly rate in excess of one hundred fifty percent of the hourly rate paid to court-appointed counsel in the district in which the action was filed.

(c) Whenever a separate monetary judgment is awarded in an action in which attorney fees are awarded under paragraph (a) of this subsection (1), a portion of the judgment not to exceed twenty-five percent shall be applied to reduce the amount of attorney fees awarded against the defendant.

(d) Nothing in this subsection (1) shall prohibit an inmate from entering into an agreement to pay an attorney fee in excess of the amount authorized in this subsection (1), if the fee is paid by the individual rather than by a defendant.

(2) The court may also enter judgment against an inmate who has been allowed to proceed as a poor person pursuant to section 13-16-103 for the amount of court costs and fees that the inmate would have incurred except for the provisions of that section, if the court awards attorney fees pursuant to subsection (1) of this section. The judgment entered by the court shall be collected and applied in accordance with subsection (3) of this section.

(3) If judgment for costs and attorney fees is awarded to a public defendant or to the court, pursuant to subsection (1) or (2) of this section, the court, pursuant to section 13-54.5-102, shall issue a writ of continuing garnishment of the inmate's account with the detaining facility, which garnishment shall continue until the judgment is paid in full, notwithstanding the requirement set forth in section 13-54.5-103 that the garnishment be renewed.

**Source: L. 95:** Entire article added, p. 479, § 1, effective July 1. **L. 98:** (1) amended, p. 247, § 3, effective April 13.

**13-17.5-106.5. Court-ordered payment.** Any compensatory damages awarded to an inmate in connection with a civil action brought against any federal, state, or local jail, prison, or facility or against any official or agent of a jail, prison, or facility, after deduction for any award of attorney fees pursuant to section 13-17.5-106 (1) (c), shall be paid directly to satisfy any outstanding court-ordered payments pending against the inmate, including but not limited to restitution or child support. The remainder of the award after full payment of all pending court orders shall be forwarded to the inmate.

**Source: L. 98:** Entire section added, p. 247, § 2, effective April 13.

**13-17.5-107. Construction of article - severability.** Nothing in this article shall be construed to impede an inmate's constitutional right of access to the courts. If any provision

of this section or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this section which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this section are declared to be severable.

**Source: L. 95:** Entire article added, p. 480, § 1, effective July 1.

**13-17.5-108. Teleconferenced hearings.** The department of law, the department of corrections, and the state judicial department shall cooperate to determine the cost of and actively pursue federal funding and contributions from any public or private entity for the purpose of developing, implementing, and maintaining a teleconferencing system for conducting proceedings in connection with state or federal civil actions filed by an inmate against a public defendant. On or before December 1, 1996, the state judicial department shall inform the judiciary committees of the general assembly of the progress made in pursuing funds for the development of the system. On or before March 1, 1996, the state judicial department shall submit a detailed plan to implement the use of a teleconferencing system for all proceedings in which an inmate is a witness or a party.

**Source: L. 95:** Entire article added, p. 480, § 1, effective July 1.

**DAMAGES**

**Regulation of Actions and Proceedings**

**ARTICLE 20**

**Actions**

**Annotator’s note.** For a discussion of standing issues in a child’s claim for loss of consortium in the death of a parent, an issue of first impression in Colorado, see *Reighley v. International Playtex, Inc.*, 604 F. Supp. 1078 (D. Colo. 1985).

**Law reviews:** For article, “Section 1983 Litigation in State Courts: A Review”, see 18 Colo. Law. 27 (1989).

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PART 1

SURVIVAL OF ACTIONS

**13-20-101. What actions survive.** (1) All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the person in favor of or against whom such action has accrued, but punitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties are claimed; and, in tort actions based upon personal injury, the damages recoverable after the death of the person in whose favor such action has accrued shall be limited to loss of earnings and expenses sustained or incurred prior to death and shall not include damages for pain, suffering, or disfigurement, nor prospective profits or earnings after date of death. An action under this section shall not preclude an action for wrongful death under part 2 of article 21 of this title.

(2) Any action under this section may be brought or the court on motion may allow the action to be continued by or against the personal representative of the deceased. Such action shall be deemed a continuing one and to have accrued to or against such personal representative at the time it would have accrued to or against the deceased if he had survived. If such action is continued against the personal representative of the deceased, a notice shall be served on him as in cases of original process, but no judgment shall be collectible against a deceased person's estate or personal representative unless a claim, for the amount of such judgment as may be recovered in such continuing action, has been presented within the time and in the manner required for other claims against an estate.

**Source:** L. 73: p. 1646, § 5. C.R.S. 1963: § 41-5-1. L. 75: (2) amended, p. 587, § 4, effective July 1.

## ANNOTATION

- I. General Consideration.
- II. Damages.

**I. GENERAL CONSIDERATION.**

**Law reviews.** For article, "The Survival of Actions in Colorado", see 12 Dicta 45 (1934). For note, "The Effect of the Wrongdoer's Death Upon an Action for Wrongful Death", see 22 Rocky Mt. L. Rev. 99 (1949). For article, "Family Law, Probate Law, and Constitutional Law", see 31 Dicta 471 (1954). For article, "Highlights of the 1955 Colorado Legislative Session — Wills and Decedents' Estates", see 28 Rocky Mt. L. Rev. 83 (1955). For comment on *Kling v. Phayer*, appearing below, see 29 Rocky Mt. L. Rev. 245 (1955). For comment on *Publix Cab Co. v. Colorado Nat'l Bank*, appearing below, see 36 Dicta 371 (1959). For article, "One Year Review of Wills, Estates and Trusts", see 38 Dicta 115 (1960). For note, "Wrongful Death in Colorado", see 33 Rocky Mt. L. Rev. 393 (1961). For review, "Right-to-Die Damage Actions: Developments in the Law", see 65 Den. U. L. Rev. 181 (1988). For article, "Claims Against Decedents' Estates", see 27 Colo. Law. 45 (May 1998).

**Actions of law generally do not die with the person.** *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959); *Olmstead v. Allstate Ins. Co.*, 320 F. Supp. 1076 (D. Colo. 1971).

**Those mentioned in this section do die with the person.** All actions in law whatsoever shall survive except those specifically mentioned in the exceptions contained in the statute. *Kling v. Phayer*, 130 Colo. 158, 274 P.2d 97 (1954); *People in Interest of M.E.W.F.*, 42 Colo. App. 495, 600 P.2d 108 (1979).

**It prevents abatement of actions and causes of action.** The so-called survival statute is to prevent certain actions or causes of action already accrued from abating by reason of the death of either of the parties. *Micheletti v. Moidel*, 94 Colo. 587, 32 P.2d 266 (1934); *Brown v. Stookey*, 134 Colo. 11, 298 P.2d 955 (1956); *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**Claims of plaintiffs and defendants.** It is inconsistent that one rule should be adopted in determining the survivability of a claim as to a plaintiff and apply an opposite rule as to the defendant. *Brown v. Stookey*, 134 Colo. 11, 298 P.2d 955 (1956).

**The coincidence of death of both parties is immaterial.** Since the medieval notion that tort actions are punitive has long been abandoned, the wrongdoer's death should not end liability, and his distributees should be made to satisfy

claims against him. Since conversely, compensation is the purpose of modern tort recovery, it should accrue not only to a living person but also to his estate. On this analysis, the coincidence of the deaths of both parties is immaterial. *Kling v. Phayer*, 130 Colo. 158, 274 P.2d 97 (1954).

**A right to damages under this section survives.** *Nemer v. Anderson*, 151 Colo. 411, 378 P.2d 841 (1963).

**This section was intended to create remedies.** This section's form indicates an intention to create remedies rather than to kill or suppress them. *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959).

**This section modifies common law.** This section was intended to modify the common law and to declare that all actions survive except those excluded. *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959).

**Section to be strictly construed.** Since at common law there was no survival of personal injury actions, this section is in derogation of the common law and thus must be strictly construed. *Estate of Burron v. Edwards*, 42 Colo. App. 141, 594 P.2d 1064 (1979).

**This section does not authorize the continuance of an action against the heirs of decedent after his death.** *Mills v. Saunders*, 30 Colo. App. 462, 494 P.2d 1309 (1972).

**Where no action accrued during lifetime of decedent, no action may be brought.** *Dohaish v. Tooley*, 670 F.2d 934 (10th Cir.), cert. denied, 459 U.S. 826, 103 S. Ct. 60, 74 L. Ed.2d 63 (1982).

**Tort claim need not relate to decedent's death.** A surviving tort claim under subsection (1) need not bear a causal relation to the decedent's death. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**Of necessity, an executor stands in the old shoes of a decedent** and his right exists only if the survival statute authorizes its continued existence. This is due to the fact that at common law all injury actions died with the tortfeasor or the victim of the tort. Statutes in all of the states have modified this rule. However, if it does not embrace the action, it is not possible to avoid the provisions of a survival statute by opening an estate and allowing claims. This expedient does not operate to transform personal damage items into property damages. *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959).

**Recovery under survival statute requires suit be brought on behalf of decedent's estate.** *Hernandez v. United States*, 383 F. Supp. 168 (D. Colo. 1974).

**Estate is beneficiary of surviving cause of action.** The estate, not the deceased himself, is



the real beneficiary of the surviving cause of action, which serves to compensate the estate for actual property losses it has incurred. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**Personal representative stands in decedent's stead.** The personal representative of the decedent's estate, by necessity, stands in the decedent's shoes in a survival action. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**This section and § 13-21-201 et seq. are not in pari materia**, but relate to distinct causes of action, and provide distinct remedies. *Kelley v. Union Pac. Ry.*, 16 Colo. 455, 27 P. 1058 (1891); *Letson v. Brown*, 11 Colo. App. 11, 52 P. 287 (1898); *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959).

**If action survives, it is assignable.** The test of assignability is whether or not the cause of action would survive to the executors or administrators of the party in case of his death. If it would, then the claim would be assignable; if not, the converse would be true. This is the general rule, but not universally nor strictly true, because by statute some causes of action are made to survive which are not assignable. The general rule is that assignability and descendability go hand in hand. *Olmstead v. Allstate Ins. Co.*, 320 F. Supp. 1076 (D. Colo. 1971).

**This section is inapplicable to workers' compensation claims.** *Estate of Huey v. J.C. Trucking Co.*, 824 P.2d 89 (Colo. App. 1991).

**If a final dissolution decree affecting property rights was entered, a spouse's subsequent death during the pendency of an appeal does not abate the appeal and the court may review a property division.** *In re Piper*, 820 P.2d 1198 (Colo. App. 1991).

**The survival statute is applicable to claims filed under the Workers' Compensation Act.** The conditions of recovery under the Act were fulfilled on the date that the injury was incurred and are dependent only on whether claimant's claim is timely filed. Claimant's death by unrelated causes prior to final adjudication has no effect on the claim. *Estate of Huey v. J.C. Trucking*, 837 P.2d 1218 (Colo. 1992).

**This section does not preempt the traditional rule of abatement in divorce actions in the absence of a survivability provision under the marriage dissolution statutes.** *In Re Connell*, 870 P.2d 632 (Colo. App. 1994).

**Applied in** *Sanchez v. Marquez*, 457 F. Supp. 359 (D. Colo. 1978); *In re Dick v. Indus. Comm'n*, 197 Colo. 71, 589 P.2d 950 (1979); *Pedreya v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936 (D. Colo. 1979); *Healy v. Counts*, 536 F. Supp. 600 (D. Colo. 1982); *Jackson v. Marsh*, 551 F. Supp. 1091 (D. Colo. 1982).

## II. DAMAGES.

**Executor may sue for funeral expenses under the survival statute.** An executor may recover funeral expenses apart from a death claim, such claim being a property claim which comes into existence after the death, it being proper to claim such expenses in an action other than for the wrongful death. *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959).

Funeral expenses, though incurred after death, can be recovered under the survival statute, and are, therefore, not included in damages under the wrongful death statute. *Hernandez v. United States*, 383 F. Supp. 168 (D. Colo. 1974).

**Death resulting from defendant's negligence.** In an action for damages resulting from an automobile accident, the trial court properly included in a judgment for plaintiff funeral expenses of the party whose death resulted from the accident and was due to the alleged negligence of defendant. *Kling v. Phayer*, 130 Colo. 158, 274 P.2d 97 (1954).

**Medical expenses of decedent also recoverable.** An action, being a claim based on negligence, survives the death of a victim; therefore, medical, nursing, hospital expenses and the other damages which accrue during his lifetime and which would have been recoverable by him had he lived are recoverable by the executor of the estate. *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959).

**Loss of earning capacity.** A claimant under this section would be entitled to reimbursement for loss of time or for loss of capacity to earn, whether or not he was receiving any salary. *Nemer v. Anderson*, 151 Colo. 411, 378 P.2d 841 (1963).

Compensation for any "loss of time", as usually measured by "loss of earnings", sustained by decedent prior to his death, to the extent caused by defendant's negligence, is recoverable under the survival statute and is not subject to death statute's limits. *Hernandez v. United States*, 383 F. Supp. 168 (D. Colo. 1974).

**Damages which are too speculative are not recoverable.** In an action for damages resulting from automobile collision, a claim for loss of a wheat crop resulting from the plaintiff's inability to plant the crop in proper time due to injuries received in accident, the failure to make an effort to mitigate damages by the use of available help to plant such crop, together with variable factors affecting the yield, rendered the claim too speculative for allowance as an item of damage proximately caused by negligence of the defendant. *Nemer v. Anderson*, 151 Colo. 411, 378 P.2d 841 (1963).

**Attorney fees of conservator not recoverable.** Attorney fees incurred by a conservator in connection with the commencing of an action are not recoverable as expenses of litigation in an action by the executor of a deceased party,

such executor being limited to elements of damage which could have been asserted by the deceased had he lived. *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959).

**This section prohibits survival of claim for exemplary damages.** *Estate of Burron v. Edwards*, 42 Colo. App. 141, 594 P.2d 1064 (1979).

**A federal civil rights claim for damages under 42 U.S.C. § 1983 cannot be limited** by this section or Colorado's wrongful death statute, § 13-21-201. *White v. Talboys*, 573 F. Supp. 49 (D. Colo. 1983); *Myres v. Rask*, 602 F. Supp. 210 (D. Colo. 1985).

**13-20-102. Effect of repeal.** The repeal of part 3 of this article concerning informed consent to medical procedures shall not have the effect of invalidating any previous judicial decision relating to requirements for informed consent or liability imposed for the lack thereof.

**Source: L. 77:** Entire section added, p. 799, § 2, effective May 27.

## PART 2

### ACTIONS ABOLISHED - MARITAL

**Cross references:** For assumption of risk and fellow servant rule and the abolition thereof, see §§ 8-2-201, 8-2-205, and 8-42-101.

**13-20-201. Legislative declaration.** The remedies provided by law on or before April 27, 1937, for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction, and breach of contract to marry have been subjected to grave abuses, caused extreme annoyance, embarrassment, humiliation, and pecuniary damage to many persons wholly innocent and free of any wrongdoing who were merely the victims of circumstances, and have been exercised by unscrupulous persons for their unjust enrichment, and have furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition thereof. Consequently, in the public interest, the necessity for the enactment of this part 2 is hereby declared as a matter of legislative determination.

**Source: L. 37:** p. 404, § 4. **CSA:** C. 24A, § 4. **CRS 53:** § 41-3-3. **C.R.S. 1963:** § 41-3-3.

**13-20-202. Civil causes abolished.** All civil causes of action for breach of promise to marry, alienation of affections, criminal conversation, and seduction are hereby abolished.

**Source: L. 37:** p. 403, § 1. **CSA:** C. 24A, § 1. **CRS 53:** § 41-3-1. **C.R.S. 1963:** § 41-3-1.

## ANNOTATION

**The general assembly has abolished the legal duties and rights of actions for alienation of affection** even though they were recognized at common law. *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698 (1967).

**It can do so under inherent police power.** The general assembly had the power to abolish causes of action under the inherent police power of the state. *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698 (1967).

**This section does not violate § 6 of art. II, Colo. Const.,** for the general assembly has the

power to abolish substantive rights in order to attain a permissible legislative object. *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698 (1967).

**Heart balm statute precludes only those causes of action,** such as claims for criminal conversation, alienation of affections or seduction, that are specifically listed in the statute; thus, wife's claim against Catholic clergyman with whom she and husband had met for marriage counseling, for fiduciary breach and extreme and outrageous conduct in inducing wife to engage in sexual relationship with him, was



not barred by heart balm statute. *Destefano v. Grabrian*, 763 P. 2d 275 (Colo 1988).

**Limitation on application of section.** This section should be applied no further than to bar actions for damages suffered from loss of marriage, humiliation, and other direct consequences of the breach, and should not affect rights and duties determinable by common-law principles. In *re Heinzman*, 40 Colo. App. 262,

579 P.2d 638 (1977), *aff'd*, 198 Colo. 36, 596 P.2d 61 (1979).

**This section cannot be relied upon to disallow recovery of conditional gift**, particularly when the donee breaks the engagement to be married. In *re Heinzman*, 40 Colo. App. 262, 579 P.2d 638 (1977), *aff'd*, 198 Colo. 36, 596 P.2d 61 (1979).

**13-20-203. Breach of contract to marry not actionable.** No act done within this state shall operate to give rise, either within or without this state, to any of the rights of action abolished by this part 2. No contract to marry made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for the breach thereof, nor shall any contract to marry made in any other state give rise to any cause of action within this state for the breach thereof.

**Source:** L. 37: p. 404, § 3. CSA: C. 24A, § 3. CRS 53: § 41-3-2. C.R.S. 1963: § 41-3-2.

#### ANNOTATION

**Section not applicable to recovery of gift made on condition of marriage.** This section bars actions for damages suffered from breach of promise to marry and other direct consequences of the breach, such as humiliation, but it

should not be extended to affect common-law principles governing a gift to a fiancée made on condition of marriage, where the condition was broken by the donee. In *re Heinzman*, 198 Colo. 36, 596 P.2d 61 (1979).

**13-20-204. Certain contracts made in settlement of claims void.** (1) All contracts and instruments of every kind, name, nature, or description which may be executed within this state in payment, satisfaction, settlement, or compromise of any claim or cause of action abolished or barred by this part 2, whether such claim or cause of action arose within or without this state, are declared to be contrary to the public policy of this state and absolutely void. It is unlawful to cause, induce, or procure any person to execute such a contract or instrument; or cause, induce, or procure any person to give, pay, transfer, or deliver any money or thing of value in payment, satisfaction, settlement, or compromise of any such claim or cause of action; or to receive, take, or accept any such money or thing of value as such payment, satisfaction, settlement, or compromise. It is unlawful to commence or cause to be commenced, either as party, attorney, or agent or otherwise in behalf of either, in any court of this state any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same was executed within or without this state.

(2) This section shall not apply to the payment, satisfaction, settlement, or compromise of any causes of action which are not abolished or barred by this part 2, or any contracts or instruments executed on or before April 27, 1937, or to the bona fide holder in due course of any negotiable instrument which may be executed in pursuance of this statute.

**Source:** L. 37: p. 405, § 5. CSA: C. 24A, § 5. CRS 53: § 41-3-4. C.R.S. 1963: § 41-3-4.

**13-20-205. Unlawful to file pleading.** It is unlawful for any person, either as litigant or attorney, to file, cause to be filed, threaten to file, or threaten to cause to be filed in any court of this state any pleading or paper setting forth or seeking to recover upon any cause of action abolished or barred by this part 2, whether such cause of action arose within or without this state.

**Source:** L. 37: p. 405, § 6. CSA: C. 24A, § 6. CRS 53: § 41-3-5. C.R.S. 1963: § 41-3-5.

**13-20-206. Unlawful to name corespondent.** It is unlawful for any person, either as litigant or attorney, to file, cause to be filed, threaten to file, or threaten to cause to be filed in any court of this state any pleading or paper naming or describing in such manner as to identify any person as corespondent or participant in misconduct of the adverse party in any action for dissolution of marriage, legal separation, declaration of invalidity of marriage, or the allocation of parental responsibilities or support of children, or in any citation or proceeding ancillary or subsequent to such action. In all such cases it is sufficient for such pleader to designate any such corespondent or third party in general language that is not sufficient for identification, and such general language shall operate with the same legal effect as complete naming and identification of the person would do; except that the adverse party may file a motion for a bill of particulars to secure such name, identity, or other facts. The granting of such motion, in whole or in part, rests in the sound discretion of the court; and, if ordered granted, the bill of particulars shall set forth the information specifically required by said order, but no further, and when filed the same shall be sealed, not to be opened without an order of the court. If the motion for a bill of particulars is granted, the party named in said bill of particulars shall be given five days' notice in writing prior to the filing of the same, said notice to be given either by personal service or by registered mail addressed to his last-known address.

**Source:** L. 37: p. 406, § 7. CSA: C. 24A, § 7. CRS 53: § 41-3-6. C.R.S. 1963: § 41-3-6. L. 98: Entire section amended, p. 1392, § 26, effective February 1, 1999.

**13-20-207. Corespondent not to be disclosed - cross-examination - effect.** (1) No attorney appearing in any of the proceedings mentioned in section 13-20-206 on behalf of a party thereto asserting misconduct by the adverse party shall ask of any witness any question intended or calculated to disclose the name or identity of any third person charged as corespondent or participant in any such misconduct, nor shall any party or witness testifying on behalf of a party asserting misconduct by the adverse party name or identify any third person charged as a corespondent or participant in any such misconduct; except that, if the court in the exercise of sound discretion so orders, counsel for any party charged with any act of misconduct with a third person may be permitted to cross-examine a witness who has testified to any such act of misconduct concerning the identity of any such third person and, within such limits as the court may prescribe, such witness may make answer to questions so asked.

(2) In all testimony in such actions, proceedings, and citations, designation of such corespondent or other alleged participant in misconduct by general language not sufficient for identification operates with the same legal effect as complete identification. The discretion vested in the court by this section shall be exercised in such manner as to avoid injustice to litigants, while at the same time avoiding so far as possible the public revelation of the name or identity of such third person, and to this end the court, in all such cases, may impound pleadings or other documents in the case and hear such testimony in chambers. This section shall not be construed to change the grounds for dissolution of marriage or impair the substantive rights of parties in those cases, but to regulate pleading, practice, and testimony therein so as to eliminate criminal intimidation and public scandal. The provisions of this section apply as well to the taking of testimony by deposition as to proceedings before the court. The deposition of any corespondent or participant in misconduct shall be taken behind closed doors and, when filed in court, shall be sealed, not to be opened without the order of the court. Any willful violation of any provision of this section by any attorney, party, or witness constitutes a direct contempt of the court having jurisdiction of the proceedings in which the same occurs and may be punished by the court with a fine not exceeding five hundred dollars as the court deems proper.

**Source:** L. 37: p. 407, § 8. CSA: C. 24A, § 8. CRS 53: § 41-3-7. C.R.S. 1963: § 41-3-7. L. 72: p. 558, § 13.



**13-20-208. Penalty for violations.** Any person who violates any provision of sections 13-20-204 to 13-20-206 is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment.

**Source:** L. 37: p. 408, § 9. CSA: C. 24A, § 9. CRS 53: § 41-3-8. C.R.S. 1963: § 41-3-8.

### PART 3

#### INFORMED CONSENT TO MEDICAL PROCEDURES

##### 13-20-301 to 13-20-305. (Repealed)

**Source:** L. 77: Entire part repealed, p. 799, § 1, effective May 27.

**Editor's note:** This part 3 was added in 1976 and was not amended prior to its repeal in 1977. For the text of this part 3 prior to 1977, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**Cross references:** For the effect of the repeal of this part 3, see § 13-20-102.

### PART 4

#### WRITTEN INFORMED CONSENT TO ELECTROCONVULSIVE TREATMENTS

**Editor's note:** This part 4 was added in 1977. This part 4 was repealed and reenacted in 1979, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 4 prior to 1979, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated.

**13-20-401. Definitions.** As used in this part 4, unless the context otherwise requires:

(1) "Electroconvulsive treatment" means electroshock therapy, shock treatment, shock therapy, ECT, or EST and is the passage of electrical current through a patient's head in a voltage sufficient to induce a seizure.

(2) "Patient" means the person upon whom a proposed electroconvulsive treatment is to be performed; except that nothing in this part 4 shall be construed to supersede the provisions of article 65 of title 27, C.R.S., or any rule or regulation adopted by the department of human services pursuant to section 27-65-116 (2), C.R.S., with regard to the care and treatment of any person unable to exercise written informed consent or of a person with a mental illness.

(3) "Physician" means a person licensed to practice medicine or osteopathy.

(4) "Sufficient information relating to the proposed electroconvulsive treatment" means information provided to the patient including, but not limited to, the following:

(a) The reason for such treatment;

(b) The nature of the procedures to be used in such treatment, including its probable frequency and duration;

(c) The probable degree and duration of improvement or remission expected with or without such treatment;

(d) The nature, degree, duration, and probability of the side effects and significant risks of such treatment commonly known by the medical profession, especially noting the possible degree and duration of memory loss, the possibility of permanent irrevocable memory loss, and the remote possibility of death;

(e) The reasonable alternative treatments and why the physician is recommending electroconvulsive treatment;

(f) That the patient has the right to refuse or accept the proposed treatment and has the right to revoke his consent for any reason at any time, either orally or in writing;

(g) That there is a difference of opinion within the medical profession on the use of electroconvulsive treatment.

(5) "Written informed consent" means consent to the proposed electroconvulsive treatment which a person knowingly and intelligently, without duress of any sort, clearly and explicitly manifests to the treating physician in writing and which is otherwise given in compliance with the provisions of this part 4.

**Source:** L. 79: Entire part R&RE, p. 611, § 1, effective July 1. L. 94: (2) amended, p. 2641, § 91, effective July 1. L. 2006: (2) amended, p. 1395, § 36, effective August 7. L. 2010: (2) amended, (SB 10-175), ch. 188, p. 782, § 17, effective April 29.

**Editor's note:** This section is similar to former § 13-20-401 as it existed prior to 1979.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (2), see section 1 of chapter 345, Session Laws of Colorado 1994.

### ANNOTATION

**The need for electroconvulsive therapy for a person involuntarily committed** must be established by clear and convincing evidence.

People in Interest of M.K.M., 765 P.2d 1075 (Colo. App. 1988).

**13-20-402. Physician to provide information for written informed consent.** At any time prior to performance of electroconvulsive treatment, a physician shall provide his patient with sufficient information relating to the proposed electroconvulsive treatment to enable said patient to give written informed consent to the proposed electroconvulsive treatment. The written informed consent shall be given by such patient on a standard written consent form to be prepared by the department of human services and shall be for a maximum number of treatments over a specified period of time.

**Source:** L. 79: Entire part R&RE, p. 612, § 1, effective July 1. L. 94: Entire section amended, p. 2641, § 92, effective July 1.

**Editor's note:** This section is similar to former § 13-20-402 as it existed prior to 1979.

**Cross references:** For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994.

**13-20-403. Restrictions on electroconvulsive treatment - rights of minors.** (1) Under no circumstances shall an electroconvulsive treatment be performed on a minor under sixteen years of age.

(2) Electroconvulsive treatment may be performed on a minor who is sixteen years of age or older but under eighteen years of age only if such treatment is performed with the concurring approval of two persons licensed to practice medicine and specializing in psychiatry and a parent or guardian of such minor.

(3) Electroconvulsive treatment may be performed on a person who is eighteen years of age or older only in those cases where two or more persons licensed to practice medicine and specializing in psychiatry determine that such treatment is the most preferred form of treatment.

**Source:** L. 79: Entire part R&RE, p. 612, § 1, effective July 1.

### PART 5

#### ACTIONS AGAINST ARCHITECTS, ENGINEERS, AND LAND SURVEYORS

#### 13-20-501. (Repealed)

**Source:** L. 87: Entire part repealed, p. 550, § 2, effective July 1.



**Editor's note:** This part 5 was added in 1986 and was not amended prior to its repeal in 1987. For the text of this part 5 prior to 1987, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## PART 6

### ACTIONS AGAINST LICENSED PROFESSIONALS

**13-20-601. Legislative declaration.** The general assembly hereby declares that, in enacting this part 6, the general assembly has determined that the certificate of review requirement should be utilized in civil actions for negligence brought against those professionals who are licensed by this state to practice a particular profession and regarding whom expert testimony would be necessary to establish a prima facie case.

**Source:** L. 87: Entire part added, p. 549, § 1, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Negligence: The Construction Claim Panacea", see 15 Colo. Law. 1992 (1986). For article, "1986 Colorado Tort Reform Legislation", see 15 Colo. Law. 1363 (1986).

**Expert testimony necessary to establish standard of professional conduct** unless there is a simple factual circumstance or dereliction of duty so palpable as to be apparent without the presentation of such testimony. Where the claim

involved review of attorney's efforts to negotiate a financial transaction, the ordinary knowledge of a layperson could not be relied upon to establish standard of care. *Boigegrain v. Gilbert*, 784 P.2d 849 (Colo. App. 1989).

**No exemption for pro se litigants.** The policy expressed in this section applies equally whether or not a party is represented by an attorney. *Yadon v. Southward*, 64 P.3d 909 (Colo. App. 2002).

**13-20-602. Actions against licensed professionals and acupuncturists - certificate of review required.** (1) (a) In every action for damages or indemnity based upon the alleged professional negligence of an acupuncturist regulated pursuant to article 29.5 of title 12, C.R.S., or a licensed professional, the plaintiff's or complainant's attorney shall file with the court a certificate of review for each acupuncturist or licensed professional named as a party, as specified in subsection (3) of this section, within sixty days after the service of the complaint, counterclaim, or cross claim against such person unless the court determines that a longer period is necessary for good cause shown.

(b) A certificate of review shall be filed with respect to every action described in paragraph (a) of this subsection (1) against a company or firm that employed a person specified in such paragraph (a) at the time of the alleged negligence, even if such person is not named as a party in such action.

(2) In the event of failure to file a certificate of review in accordance with this section and if the acupuncturist or licensed professional defending the claim believes that an expert is necessary to prove the claim of professional negligence, the defense may move the court for an order requiring filing of such a certificate. The court shall give priority to deciding such a motion, and in no event shall the court allow the case to be set for trial without a decision on such motion.

(3) (a) A certificate of review shall be executed by the attorney for the plaintiff or complainant declaring:

(I) That the attorney has consulted a person who has expertise in the area of the alleged negligent conduct; and

(II) That the professional who has been consulted pursuant to subparagraph (I) of this paragraph (a) has reviewed the known facts, including such records, documents, and other materials which the professional has found to be relevant to the allegations of negligent conduct and, based on the review of such facts, has concluded that the filing of the claim, counterclaim, or cross claim does not lack substantial justification within the meaning of section 13-17-102 (4).

(b) The court, in its discretion, may require the identity of the acupuncturist or licensed professional who was consulted pursuant to subparagraph (I) of paragraph (a) of this subsection (3) to be disclosed to the court and may verify the content of such certificate of review. The identity of the professional need not be identified to the opposing party or parties in the civil action.

(c) In an action alleging professional negligence of a physician, the certificate of review shall declare that the person consulted meets the requirements of section 13-64-401; or in any action against any other professional, that the person consulted can demonstrate by competent evidence that, as a result of training, education, knowledge, and experience, the consultant is competent to express an opinion as to the negligent conduct alleged.

(4) The failure to file a certificate of review in accordance with this section shall result in the dismissal of the complaint, counterclaim, or cross claim.

(5) These provisions shall not affect the rights and obligations under section 13-17-102.

**Source:** L. 87: Entire part added, p. 549, § 1, effective July 1. L. 89: (1), (3)(a)(II), and (4) amended and (3)(c) added, p. 750, § 1, effective April 12. L. 95: (1), (2), and (3)(b) amended, p. 485, § 6, effective January 1, 1996. L. 98: (1) amended, p. 487, § 1, effective February 1, 1999.

## ANNOTATION

**Law reviews.** For article, "Colorado's Certificate of Review Statute: Considerations in Professional Negligence Cases", see 33 Colo. Law. 11 (February 2004).

**Certificate of review requirement is applicable to medical malpractice claims brought under the Federal Tort Claims Act.** Hill v. U.S., 751 F. Supp. 909 (D. Colo. 1990).

**Certificate of review requirement is applicable to claims brought under the Consumer Protection Act.** Teiken v. Reynolds, 904 P.2d 1387 (Colo. App. 1995).

**Certificate of review requirement is applicable in federal diversity cases.** Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523 (10th Cir. 1996) (decided under former law).

**Certificate of review requirement is applicable to professional negligence claims brought against the United States under the Federal Tort Claims Act.** Kikumura v. Osagie, 461 F.3d 1269 (10th Cir. 2006).

**No exemption for pro se litigants.** Although some provisions of this section refer to conduct by attorneys, the underlying policy applies equally to a person who is not represented by an attorney. Yadon v. Southward, 64 P.3d 909 (Colo. App. 2002).

**The provision in this section that a plaintiff file a certificate of review is not a jurisdictional requirement.** Rather, the court has discretion to determine if a certificate of review is required. Miller v. Rowtech, LLC, 3 P.3d 492 (Colo. App. 2000).

**Certificate of review requirement applies to claims based on the negligence of licensed professionals.** Legislative purpose and legislative history of this section establish that plaintiff was required to file a certificate of review in order to hold state liable for malpractice of

employees that are licensed professionals. State v. Nieto, 993 P.2d 493 (Colo. 2000); Hamilton v. Thompson, 23 P.3d 114 (Colo. 2001).

**Certificate of review requirement is independent** of the requirement to file initial disclosures under C.R.C.P. 26(a). Williams v. Boyle, 72 P.3d 392 (Colo. App. 2003).

**Single certificate of review was permissible for two defendants.** Claims against law firm defendant depended entirely on the alleged negligence of the lawyer defendant, and an expert qualified to evaluate the claims against one defendant would also be qualified to evaluate the claims against the other defendant. RMB Servs., Inc. v. Truhlar, 151 P.3d 673 (Colo. App. 2006).

**Dismissal of a case is authorized under either subsection (1) or (2),** but the court must determine whether expert testimony is required to establish a prima facie case of negligence before ordering dismissal. Badis v. Martinez, 819 P.2d 551 (Colo. App. 1991), aff'd in part and rev'd in part on other grounds, 842 P.2d 245 (Colo. 1992).

**Failure to file a certificate of review** stating that the plaintiff has consulted with a person with expertise in the area of the alleged negligent conduct and that an expert has concluded the claim does not lack substantial justification results in dismissal of plaintiff's complaint. Kelton v. Ramsey, 961 P.2d 569 (Colo. App. 1998).

**Dismissal of complaint proper** where plaintiff failed to file certificate of review in compliance with statute after having been granted an extended time for compliance. Rosenberg v. Grady, 843 P.2d 25 (Colo. App. 1992).

**Certificate of review is deficient as a matter of law when it alleges only causation and not all of the elements of negligence sufficient to**



**establish legal responsibility.** A party must allege the basis for believing the non-party legally liable to the extent that the non-party's acts or omissions would satisfy all of the elements of a negligence claim. *Redden v. SCI Colo. Funeral Servs., Inc.*, 38 P.3d 75 (Colo. 2001).

**Although this section provides a defense, the defense is waived if not timely asserted since the certificate is not a jurisdictional requirement.** *Miller v. Rowtech, LLC*, 3 P.3d 492 (Colo. App. 2000).

**Denial of plaintiff's motion to compel discovery until plaintiff complied with order to file certificate of review held proper.** *Rosenberg v. Grady*, 843 P.2d 25 (Colo. App. 1992).

**Plaintiff may file a motion for an order determining the necessity of a certificate under this section and requesting an extended time frame in which to file such certificate, if necessary.** *Badis v. Martinez*, 819 P.2d 551 (Colo. App. 1991), *aff'd in part and rev'd in part on other grounds*, 842 P.2d 245 (Colo. 1992).

**The language of the statute is broad enough to include every claim that requires proof of professional negligence as a predicate to recovery, whatever the formal designation of the claim might be.** *Martinez v. Badis*, 842 P.2d 245 (Colo. 1992); *Esparter v. Cramer*, 903 P.2d 1171 (Colo. App. 1995); *Baumgarten v. Coppage*, 15 P.3d 304 (Colo. App. 2000).

A certificate of review is required for a claim of negligent misrepresentation when the allegations reflect an underlying theory of professional negligence. *RMB Servs., Inc. v. Truhlar*, 151 P.3d 673 (Colo. App. 2006).

**Doctrine of res ipsa loquitur cannot be used to avoid the requirements of this section, at least when there is no evidence or inference that the defendant had any control over the instrumentality causing the injury.** *Bilawsky v. Faseehudin*, 916 P.2d 586 (Colo. App. 1995).

**The statute applies to all claims against licensed professionals wherein expert testimony is required to establish the scope of the professional's duty or the failure of the professional to reasonably conduct himself or herself in compliance with the responsibilities inherent in the assumption of the duty.** *Martinez v. Badis*, 842 P.2d 245 (Colo. 1992); *Tracz v. Centennial Peaks*, 9 P.3d 1168 (Colo. App. 2000); *Ehrlich Feedlot, Inc. v. Oldenburg*, 140 P.3d 265 (Colo. App. 2006).

A plaintiff claiming breach of fiduciary duty arising from the attorney-client relationship must establish the applicable standard of care and the defendant's failure to adhere to that standard through expert testimony. Therefore, a certificate of review is required to support a claim of breach of fiduciary duty against an attorney. *Ehrlich Feedlot, Inc. v. Oldenburg*, 140 P.3d 265 (Colo. App. 2006).

**However, no certificate of review was required where expert testimony would not be necessary to establish claims that licensed real estate brokers failed to disclose hidden damage to a home's foundation walls of which they had actual knowledge.** *Baumgarten v. Coppage*, 15 P.3d 304 (Colo. App. 2000).

No certificate of review was required to establish standard of care regarding an attorney's failure to file a case within the applicable statute of limitation or to show that a particular attorney was representing a client at a specified time. *Giron v. Koktavy*, 124 P.3d 821 (Colo. App. 2005).

**Unless the court requests supplemental information, the plaintiff is not required to describe the expert's qualifications.** *RMB Servs., Inc. v. Truhlar*, 151 P.3d 673 (Colo. App. 2006).

**Plaintiff is not required to present expert testimony if allegations against professionals do not involve claims related to their professional activities.** Claims against hospital employees for assault, false imprisonment, etc. are the types of claims where the subject matter is within the common knowledge and experience of an ordinary person. *Siepierski v. Catholic Health Initiative Mountain Region*, 37 P.3d 537 (Colo. App. 2001).

**The fact that some consideration of the reasonableness of a principal's actions may be necessary in order to define the contours of an agent's apparent authority and/or whether the estoppel doctrine should come into play does not make an imputed liability claim an "action for damages or indemnity based upon . . . alleged professional negligence", within the meaning of this section.** *Stat-Tech Liquidating Trust v. Fenster*, 981 F. Supp. 1325 (D. Colo. 1997).

**"Good cause" construed.** Lacking a specific statutory definition of "good cause" for which the 60-day time limit set forth in this section may be extended, the trial court acted properly in relying upon decisional law interpreting that phrase in the context of default judgment cases. *Hane by and through Jabalera v. Tubman*, 899 P.2d 332 (Colo. App. 1995); *Williams v. Boyle*, 72 P.3d 392 (Colo. App. 2003).

Good cause shown where: (1) Physician who initially provided a certificate of review later declined to verify it; (2) plaintiff made a timely request for an extension of time; and (3) no prejudice would have resulted. *Yadon v. Southward*, 64 P.3d 909 (Colo. App. 2002).

To determine whether good cause exists, the court must consider whether: (1) The neglect causing the late filing was excusable; (2) the moving party has alleged a meritorious claim or defense; and (3) permitting the late filing would be consistent with equitable considerations, including any prejudice to the nonmoving party.

RMB Servs., Inc. v. Truhlar, 151 P.3d 673 (Colo. App. 2006).

**Trial court determination that the plaintiff could establish a prima facie case without the use of expert testimony, and therefore need not submit a certificate of review, is not an abuse of discretion because the position of the plaintiff had arguable merit.** *Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623 (Colo. 1999).

**Trial court should not accept plaintiff's expert reports in lieu of a certificate of review, but court will not disturb verdict where such**

**acceptance had no impact on the defendant.** *Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623 (Colo. 1999).

**Where the "statement of review" was prepared and offered in the course of, and directly related to, a judicial proceeding, the preparer of the statement is entitled to immunity from civil liability.** The doctrine of absolute immunity was applicable to the "statement of review" prepared by defendant. *Merrick v. Burns, Wall, Smith & Mueller, P.C.*, 43 P.3d 712 (Colo. App. 2001).

## PART 7

### ACTIONS BASED ON ENVIRONMENTAL LIABILITY

**Law reviews:** For comment, "Stemming the Tide of Lender Liability: Judicial and Legislative Reactions", see 67 Den. U. L. Rev. 453 (1990).

**13-20-701. Legislative declaration.** Federal and state environmental laws provide that the owner of real property is liable for cleanup of property contamination and define who is the owner of such property. If a borrower defaults on a loan, a lender must decide whether to foreclose and potentially become the owner. For fear of becoming liable for conditions they did not create, lenders are showing a reluctance to foreclose, thus leaving no one responsible for the cleanup. So that lenders can predict with more certainty what their costs will be when they foreclose, it is the intent of the general assembly to limit third-party liability for lenders who comply with certain conditions to the cost of cleaning up contaminants or pollution pursuant to federal, state, and local laws. In addition such limitations may also make lenders more willing to lend to certain types of businesses.

**Source: L. 90:** Entire part added, p. 865, § 2, effective July 1.

**13-20-702. Definitions.** As used in this part 7, unless the context otherwise requires:

(1) "Contaminate or pollute", "contaminating or polluting", or "contamination or pollution" means contamination or pollution of air, water, real or personal property, animals, or human beings from a location in the state of Colorado, including, without limitation, contamination or pollution from hazardous waste and substances.

(2) "Lender-owner" means any person or entity which has a bona fide security interest in or mortgage or lien on, and which forecloses on or receives an assignment or deed in lieu of foreclosure and becomes the owner of, real or personal property and the foreclosure, deed in lieu, or assignment is not primarily for the purposes of avoiding third-party liability.

(3) "Representative" means any person or entity acting in the capacity of a receiver, conservator, guardian ad litem, personal representative of a deceased person, or trustee or fiduciary of real or personal property; except that the terms trustee and fiduciary shall be limited to entities acting as trustee or fiduciary and which are chartered by the division of banking or division of financial services, the office of the United States comptroller of the currency, or the office of thrift supervision.

(4) "Third parties" means persons or entities other than governmental entities seeking to enforce federal, state, or local environmental statutes, ordinances, regulations, permits, or orders.

(5) "Third-party liability" means liability to third parties for any claims arising out of or resulting from contamination or pollution, including, without limitation, claims for personal injury, consequential damages, lost profits, exemplary damages, or property damages, but does not include liability for the cost of cleaning up contamination or pollution.



**Source:** L. 90: Entire part added, p. 865, § 2, effective July 1.

**13-20-703. Environmental third-party liability - ownership.** (1) Except as pre-empted by federal law, no person or entity shall be deemed to be an owner or operator of real or personal property who, without participating in the management of the subject real or personal property, holds indicia of ownership primarily to protect a security or lienhold interest in the subject real or personal property or in the property in which the subject real or personal property is located.

(2) No lender-owner or representative shall, by virtue of becoming the owner of real or personal property, be liable for any third-party liability arising from contamination or pollution emanating from said property prior to the date that title vests in the lender-owner or representative.

(3) No lender-owner or representative shall, by virtue of becoming the owner of real or personal property, be liable for any third-party liability arising from contamination or pollution emanating from said property during the period of ownership so long as, and to the extent that, it does not knowingly or recklessly cause new contamination or pollution or does not knowingly or recklessly allow others to cause new contamination or pollution if lender-owner has caused an environmental professional to conduct a visual inspection of the property and a record search of the recorded chain of title documents regarding the real property for the prior fifty years to determine the presence and condition of hazardous waste or substances, obvious contamination, or pollution and, if found by the enforcing agency to be in noncompliance with federal or state laws, takes steps to assure compliance with applicable laws. This subsection (3) shall apply to the lender-owner as long as it makes reasonable efforts to resell the property.

(4) This section shall not affect any liability expressly created under federal or state health or environmental statutes, regulations, permits, or orders.

**Source:** L. 90: Entire part added, p. 865, § 2, effective July 1.

## PART 8

### CONSTRUCTION DEFECT ACTIONS FOR PROPERTY LOSS AND DAMAGE

**Law reviews:** For article, “The Construction Defect Action Reform Act of 2003”, see 32 Colo. Law. 89 (July 2003); for article, “The Homeowner Protection Act of 2007”, see 36 Colo. Law. 79 (July 2007); for article, “Construction Defects: A New Kind of Lender Liability”, see 39 Colo. Law. 51 (June 2010).

**13-20-801. Short title.** This part 8 shall be known and may be cited as the “Construction Defect Action Reform Act”.

**Source:** L. 2001: Entire part added, p. 388, § 1, effective August 8.

**13-20-802. Legislative declaration.** The general assembly hereby finds, declares, and determines that changes in the law are necessary and appropriate concerning actions claiming damages, indemnity, or contribution in connection with alleged construction defects. It is the intent of the general assembly that this part 8 apply to these types of civil actions while preserving adequate rights and remedies for property owners who bring and maintain such actions.

**Source:** L. 2001: Entire part added, p. 388, § 1, effective August 8. L. 2003: Entire section amended, p. 1361, § 1, effective April 25.

**13-20-802.5. Definitions.** As used in this part 8, unless the context otherwise requires:

(1) “Action” means a civil action or an arbitration proceeding for damages, indemnity, or contribution brought against a construction professional to assert a claim, counterclaim,

cross-claim, or third party claim for damages or loss to, or the loss of use of, real or personal property or personal injury caused by a defect in the design or construction of an improvement to real property.

(2) “Actual damages” means the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, whichever is less, together with relocation costs, and, with respect to residential property, other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law. “Actual damages” as to personal injury means those damages recoverable by law, except as limited by the provisions of section 13-20-806 (4).

(3) “Claimant” means a person other than the attorney general or the district attorneys of the several judicial districts of the state who asserts a claim against a construction professional that alleges a defect in the construction of an improvement to real property.

(4) “Construction professional” means an architect, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property. If the improvement to real property is to a commercial property, the term “construction professional” shall also include any prior owner of the commercial property, other than the claimant, at the time the work was performed. As used in this subsection (4), “commercial property” means property that is zoned to permit commercial, industrial, or office types of use.

(5) “Notice of claim” means a written notice sent by a claimant to the last known address of a construction professional against whom the claimant asserts a construction defect claim that describes the claim in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the construction that the claimant alleges to be defective and any damages claimed to have been caused by the defect.

**Source:** L. 2003: Entire section added, p. 1361, § 2, effective April 25.

#### ANNOTATION

**Law reviews.** For article, “Recovering Actual Damages Under Colorado’s Construction Defect Action Reform Act—Part I”, see 38 Colo. Law. 41 (May 2009). For article, “Recov-

ering Actual Damages Under Colorado’s Construction Defect Action Reform Act—Part II”, see 38 Colo. Law. 25 (June 2009).

**13-20-803. List of defects required.** (1) In addition to the notice of claim required by section 13-20-803.5, in every action brought against a construction professional, the claimant shall file with the court or arbitrator and serve on the construction professional an initial list of construction defects in accordance with this section.

(2) The initial list of construction defects shall contain a description of the construction that the claimant alleges to be defective. The initial list of construction defects shall be filed with the court and served on the defendant within sixty days after the commencement of the action or within such longer period as the court in its discretion may allow.

(3) The initial list of construction defects may be amended by the claimant to identify additional construction defects as they become known to the claimant. In no event shall the court allow the case to be set for trial before the initial list of construction defects is filed and served.

(4) If a subcontractor or supplier is added as a party to an action under this section, the claimant making the claim against such subcontractor or supplier shall file with the court and serve on the defendant an initial list of construction defects in accordance with this section within sixty days after service of the complaint against the subcontractor or supplier or within such longer period as the court in its discretion may allow. In no event shall the filing of a defect list under this subsection (4) delay the setting of the trial.



**Source:** **L. 2001:** Entire part added, p. 389, § 1, effective August 8. **L. 2003:** (1) amended, p. 1362, § 3, effective April 25.

## ANNOTATION

**Law reviews.** For article, "The Construction Defect Action Reform Act", see 30 Colo. Law. 121 (October 2001).

**13-20-803.5. Notice of claim process.** (1) No later than seventy-five days before filing an action against a construction professional, or no later than ninety days before filing the action in the case of a commercial property, a claimant shall send or deliver a written notice of claim to the construction professional by certified mail, return receipt requested, or by personal service.

(2) Following the mailing or delivery of the notice of claim, at the written request of the construction professional, the claimant shall provide the construction professional and its contractors or other agents reasonable access to the claimant's property during normal working hours to inspect the property and the claimed defect. The inspection shall be completed within thirty days of service of the notice of claim.

(3) Within thirty days following the completion of the inspection process conducted pursuant to subsection (2) of this section, or within forty-five days following the completion of the inspection process in the case of a commercial property, a construction professional may send or deliver to the claimant, by certified mail, return receipt requested, or personal service, an offer to settle the claim by payment of a sum certain or by agreeing to remedy the claimed defect described in the notice of claim. A written offer to remedy the construction defect shall include a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction work necessary to remedy the defect described in the notice of claim and all damage to the improvement to real property caused by the defect, and a timetable for the completion of the remedial construction work.

(4) Unless a claimant accepts an offer made pursuant to subsection (3) of this section in writing within fifteen days of the delivery of the offer, the offer shall be deemed to have been rejected.

(5) A claimant who accepts a construction professional's offer to remedy or settle by payment of a sum certain a construction defect claim shall do so by sending the construction professional a written notice of acceptance no later than fifteen days after receipt of the offer. If an offer to settle is accepted, then the monetary settlement shall be paid in accordance with the offer. If an offer to remedy is accepted by the claimant, the remedial construction work shall be completed in accordance with the timetable set forth in the offer unless the delay is caused by events beyond the reasonable control of the construction professional.

(6) If no offer is made by the construction professional or if the claimant rejects an offer, the claimant may bring an action against the construction professional for the construction defect claim described in the notice of claim, unless the parties have contractually agreed to a mediation procedure, in which case the mediation procedure shall be satisfied prior to bringing an action.

(7) If an offer by a construction professional is made and accepted, and if thereafter the construction professional does not comply with its offer to remedy or settle a claim for a construction defect, the claimant may file an action against the construction professional for claims arising out of the defect or damage described in the notice of claim without further notice.

(8) After the sending of a notice of claim, a claimant and a construction professional may, by written mutual agreement, alter the procedure for the notice of claim process described in this section.

(9) Any action commenced by a claimant who fails to comply with the requirements of this section shall be stayed, which stay shall remain in effect until the claimant has complied with the requirements of this section.

(10) A claimant may amend a notice of claim to include construction defects discovered after the service of the original notice of claim. However, the claimant must otherwise comply with the requirements of this section for the additional claims.

(11) For purposes of this section, actual receipt by any means of a written notice, offer, or response prepared pursuant to this section within the time prescribed for delivery or service of the notice, offer, or response shall be deemed to be sufficient delivery or service.

(12) Except as provided in section 13-20-806, a claimant shall not recover more than actual damages in an action.

**Source: L. 2003:** Entire section added, p. 1363, § 5, effective April 25.

#### ANNOTATION

**Plaintiff is not required to plead or prove that plaintiff complied with the notice process or that claim arose from a “construction defect”.** Act requires only that the plaintiff prove

the elements of his or her common law negligence claim. *Land-Wells v. Rain Way Sprinkler & Lands.*, 187 P.3d 1152 (Colo. App. 2008).

**13-20-804. Restriction on construction defect negligence claims.** (1) No negligence claim seeking damages for a construction defect may be asserted in an action if such claim arises from the failure to construct an improvement to real property in substantial compliance with an applicable building code or industry standard; except that such claim may be asserted if such failure results in one or more of the following:

(a) Actual damage to real or personal property;  
(b) Actual loss of the use of real or personal property;  
(c) Bodily injury or wrongful death; or  
(d) A risk of bodily injury or death to, or a threat to the life, health, or safety of, the occupants of the residential real property.

(2) Nothing in this section shall be construed to prohibit, limit, or impair the following:  
(a) The assertion of tort claims other than claims for negligence;  
(b) The assertion of contract or warranty claims; or  
(c) The assertion of claims that arise from the violation of any statute or ordinance other than claims for violation of a building code.

**Source: L. 2001:** Entire part added, p. 389, § 1, effective August 8. **L. 2003:** IP(1), (1)(a), and (1)(b) amended, p. 1362, § 4, effective April 25.

#### ANNOTATION

**Law reviews.** For article, “The Construction Defect Action Reform Act”, see 30 Colo. Law. 121 (October 2001).

**Plaintiff is not required to plead or prove that plaintiff complied with the notice process**

**or that claim arose from a “construction defect”.** Act requires only that the plaintiff prove the elements of his or her common law negligence claim. *Land-Wells v. Rain Way Sprinkler & Lands.*, 187 P.3d 1152 (Colo. App. 2008).

**13-20-805. Tolling of statutes of limitation.** If a notice of claim is sent to a construction professional in accordance with section 13-20-803.5 within the time prescribed for the filing of an action under any applicable statute of limitations or repose, then the statute of limitations or repose is tolled until sixty days after the completion of the notice of claim process described in section 13-20-803.5.

**Source: L. 2003:** Entire section added, p. 1363, § 5, effective April 25.

**13-20-806. Limitation of damages.** (1) A construction professional otherwise liable shall not be liable for more than actual damages, unless and only if the claimant otherwise prevails on the claim that a violation of the “Colorado Consumer Protection Act”, article 1 of title 6, C.R.S., has occurred; and if:



(a) The construction professional's monetary offer, made pursuant to section 13-20-803.5 (3), to settle for a sum certain a construction defect claim described in a notice of claim is less than eighty-five percent of the amount awarded to the claimant as actual damages sustained exclusive of costs, interest, and attorney fees; or

(b) The reasonable cost, as determined by the trier of fact, to complete the construction professional's offer, made pursuant to section 13-20-803.5, to remedy the construction defect described in the notice of claim is less than eighty-five percent of the amount awarded to the claimant as actual damages sustained exclusive of costs, interest, and attorney fees.

(2) If a construction professional does not substantially comply with the terms of an accepted offer to remedy or an accepted offer to settle a claim for a construction defect made pursuant to section 13-20-803.5 or if a construction professional fails to respond to a notice of claim, the construction professional shall be subject to the treble damages provision of section 6-1-113 (2) (a) (III), C.R.S.; except that a construction professional shall be subject to the treble damages provision only if the claimant otherwise prevails on the claim that a violation of the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S., has occurred.

(3) Notwithstanding any other provision of law, the aggregate amount of treble damages awarded in an action under section 6-1-113 (2) (a) (III), C.R.S., and attorney fees awarded to a claimant under section 6-1-113 (2) (b), C.R.S., shall not exceed two hundred fifty thousand dollars in any action against a construction professional.

(4) (a) In an action asserting personal injury or bodily injury as a result of a construction defect in which damages for noneconomic loss or injury or derivative noneconomic loss or injury may be awarded, such damages shall not exceed the sum of two hundred fifty thousand dollars. As used in this subsection (4), "noneconomic loss or injury" has the same meaning as set forth in section 13-21-102.5 (2) (b), and "derivative noneconomic loss or injury" has the same meaning as set forth in section 13-21-102.5 (2) (a).

(b) The limitations on noneconomic damages set forth in this subsection (4) shall be adjusted for inflation as of July 1, 2003, and as of July 1 of each year thereafter until and including July 1, 2008. The adjustment made pursuant to this paragraph (b) shall be rounded upward or downward to the nearest ten dollar increment.

(c) As used in paragraph (b) of this subsection (4), "inflation" means the annual percentage change in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Boulder, all items, all urban consumers, or its successor index.

(d) The secretary of state shall certify the adjusted limitation on damages within fourteen days after the appropriate information is available, and such adjusted limitation on damages shall be the limitation applicable to all claims for relief that accrue on or after July 1, 2003.

(5) Claims for personal injury or bodily injury as a result of a construction defect shall not be subject to the treble damages provisions of the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S.

(6) In any case in which the court determines that the issue of a violation of the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S., will be submitted to a jury, the court shall not disclose nor allow disclosure to the jury of an offer of settlement or offer to remedy made under section 13-20-803.5 that was not accepted by the claimant.

(7) (a) In order to preserve Colorado residential property owners' legal rights and remedies, in any civil action or arbitration proceeding described in section 13-20-802.5 (1), any express waiver of, or limitation on, the legal rights, remedies, or damages provided by the "Construction Defect Action Reform Act", this part 8, or provided by the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S., as described in this section, or on the ability to enforce such legal rights, remedies, or damages within the time provided by applicable statutes of limitation or repose are void as against public policy.

(b) A waiver, limitation, or release contained in a written settlement of claims, and any recorded notice of such settlement, between a residential property owner and a construction professional after such a claim has accrued shall not be rendered void by this subsection (7).

(c) This subsection (7) applies only to the legal rights, remedies, or damages of claimants asserting claims arising out of residential property and shall not apply to sales or donations of property or services by a bona fide charitable organization that is in compliance with the registration and reporting requirements of article 16 of title 6, C.R.S.

(d) Notwithstanding any provision of this subsection (7) to the contrary, this subsection (7) shall apply only to actions that are governed by the provisions of this part 8, also known as the "Construction Defect Action Reform Act", and shall not be deemed to alter or amend the limitations on damages contained in this part 8, including the limitations on treble damages and attorney fees set forth in this section.

(e) Nothing contained in this section shall be deemed to render void any requirement to participate in mediation prior to filing a suit or arbitration proceeding.

**Source:** L. 2003: Entire section added, p. 1363, § 5, effective April 25. L. 2007: (7) added, p. 610, § 2, effective April 20.

**Cross references:** In 2007, subsection (7) was added by the "Homeowner Protection Act of 2007". For the short title, see section 1 of chapter 164, Session Laws of Colorado 2007.

#### ANNOTATION

**Plain language of subsection (4) permits recovery of damages for inconvenience.** Trial court did not err by allowing inconvenience damages to go to the jury. *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159 (Colo. App. 2010).

**13-20-807. Express warranty - not affected.** The provisions of this part 8 are not intended to abrogate or limit the provisions of any express warranty or the obligations of the provider of such warranty. The provisions of this part 8 shall apply to those circumstances where an action is filed asserting one or more claims for relief including a claim for breach of warranty; except that, in any such action, section 13-20-806 (7) shall not apply to breach of express warranty claims except to the extent that provisions of the express warranty purport to waive or limit claims for relief other than the breach of express warranty claim. The provisions of this part 8 shall not be deemed to require a claimant who is the beneficiary of an express warranty to comply with the notice provisions of section 13-20-803.5 to request ordinary warranty service in accordance with the terms of such warranty. A claimant who requires warranty service shall comply with the provisions of such warranty.

**Source:** L. 2003: Entire section added, p. 1363, § 5, effective April 25. L. 2007: Entire section amended, p. 611, § 3, effective April 20.

**Cross references:** In 2007, this section was amended by the "Homeowner Protection Act of 2007". For the short title, see section 1 of chapter 164, Session Laws of Colorado 2007.

**13-20-808. Insurance policies issued to construction professionals.** (1) (a) The general assembly finds and determines that:

(I) The interpretation of insurance policies issued to construction professionals is of vital importance to the economic and social welfare of the citizens of Colorado and in furthering the purposes of this part 8.

(II) Insurance policies issued to construction professionals have become increasingly complex, often containing multiple, lengthy endorsements and exclusions conflicting with the reasonable expectations of the insured.

(III) The correct interpretation of coverage for damages arising out of construction defects is in the best interest of insurers, construction professionals, and property owners.

(b) The general assembly declares that:

(I) The policy of Colorado favors the interpretation of insurance coverage broadly for the insured.

(II) The long-standing and continuing policy of Colorado favors a broad interpretation



of an insurer's duty to defend the insured under liability insurance policies and that this duty is a first-party benefit to and claim on behalf of the insured.

(III) The decision of the Colorado court of appeals in *General Security Indemnity Company of Arizona v. Mountain States Mutual Casualty Company*, 205 P.3d 529 (Colo. App. 2009) does not properly consider a construction professional's reasonable expectation that an insurer would defend the construction professional against an action or notice of claim contemplated by this part 8.

(IV) For the purposes of guiding pending and future actions interpreting liability insurance policies issued to construction professionals, what has been and continues to be the policy of Colorado is hereby clarified and confirmed in the interpretation of insurance policies that have been and may be issued to construction professionals.

(2) For the purposes of this section:

(a) "Insurance" has the same meaning as set forth in section 10-1-102, C.R.S.

(b) "Insurance policy" means a contract of insurance.

(c) "Insurer" has the same meaning as set forth in section 10-1-102, C.R.S.

(d) "Liability insurance policy" means a contract of insurance that covers occurrences of damage or injury during the policy period and insures a construction professional for liability arising from construction-related work.

(3) In interpreting a liability insurance policy issued to a construction professional, a court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured. Nothing in this subsection (3):

(a) Requires coverage for damage to an insured's own work unless otherwise provided in the insurance policy; or

(b) Creates insurance coverage that is not included in the insurance policy.

(4) (a) Upon a finding of ambiguity in an insurance policy, a court may consider a construction professional's objective, reasonable expectations in the interpretation of an insurance policy issued to a construction professional.

(b) In construing an insurance policy to meet a construction professional's objective, reasonable expectations, the court may consider the following:

(I) The object sought to be obtained by the construction professional in the purchase of the insurance policy; and

(II) Whether a construction defect has resulted, directly or indirectly, in bodily injury, property damage, or loss of the use of property.

(c) In construing an insurance policy to meet a construction professional's objective, reasonable expectations, a court may consider and give weight to any writing concerning the insurance policy provision in dispute that is not protected from disclosure by the attorney-client privilege, work-product privilege, or article 72 of title 24, C.R.S., and that is generated, approved, adopted, or relied on by the insurer or its parent or subsidiary company; or an insurance rating or policy drafting organization, such as the insurance services office, inc., or its predecessor or successor organization; except that such writing shall not be used to restrict, limit, exclude, or condition coverage or the insurer's obligation beyond that which is reasonably inferred from the words used in the insurance policy.

(5) If an insurance policy provision that appears to grant or restore coverage conflicts with an insurance policy provision that appears to exclude or limit coverage, the court shall construe the insurance policy to favor coverage if reasonably and objectively possible.

(6) If an insurer disclaims or limits coverage under a liability insurance policy issued to a construction professional, the insurer shall bear the burden of proving by a preponderance of the evidence that:

(a) Any policy's limitation, exclusion, or condition in the insurance policy bars or limits coverage for the insured's legal liability in an action or notice of claim made pursuant to section 13-20-803.5 concerning a construction defect; and

(b) Any exception to the limitation, exclusion, or condition in the insurance policy does not restore coverage under the policy.

(7) (a) An insurer's duty to defend a construction professional or other insured under a liability insurance policy issued to a construction professional shall be triggered by a potentially covered liability described in:

- (I) A notice of claim made pursuant to section 13-20-803.5; or
- (II) A complaint, cross-claim, counterclaim, or third-party claim filed in an action against the construction professional concerning a construction defect.
- (b) (I) An insurer shall defend a construction professional who has received a notice of claim made pursuant to section 13-20-803.5 regardless of whether another insurer may also owe the insured a duty to defend the notice of claim unless authorized by law. In defending the claim, the insurer shall:
  - (A) Reasonably investigate the claim; and
  - (B) Reasonably cooperate with the insured in the notice of claims process.
- (II) This paragraph (b) does not require the insurer to retain legal counsel for the insured or to pay any sums toward settlement of the notice of claim that are not covered by the insurance policy.
- (III) An insurer shall not withdraw its defense of an insured construction professional or commence an action seeking reimbursement from an insured for expended defense cost unless authorized by law and unless the insurer has reserved such right in writing when accepting or assuming the defense obligation.

**Source: L. 2010:** Entire section added, (HB 10-1394), ch. 253, p. 1125, § 1, effective May 21.

**Editor's note:** Subsection (2)(b), enacted as subsection (2)(c) in House Bill 10-1394, and subsection (2)(c), enacted as subsection (2)(b) in House Bill 10-1394, were relettered on revision so that defined terms appear in alphabetical order.

#### ANNOTATION

**Law reviews.** For article, "H.B. 10-1394: New Law Governing Insurance Coverage for Construction Defect Claims", see 39 Colo. Law. 89 (August 2010).

**Because damage to property caused by poor workmanship is generally neither expected nor intended, it may qualify under state law as an occurrence,** and liability coverage should apply. *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272 (10th Cir. 2011).

**The definition of accident in subsection (3) does not apply retroactively to expired insurance policies that may still be subject to claims** for occurrences within the policy period. *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272 (10th Cir. 2011).

This section does not apply, therefore, to homeowners' claims because the policy periods of their insurance policies had already expired. *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272 (10th Cir. 2011).

#### PART 9

#### CLASS ACTIONS

**13-20-901. Class actions - appellate review.** (1) A court of appeals may, in its discretion, permit an interlocutory appeal of a district court's order that grants or denies class action certification under court rule so long as application is made to the court of appeals within ten days after entry of the district court's order.

(2) An appeal that is allowed under subsection (1) of this section shall not stay proceedings in the district court unless the district court or the court of appeals so orders. If a stay is ordered, all discovery and other proceedings shall be stayed during the pendency of an appeal taken pursuant to this section unless the court ordering the stay finds upon the motion of any party that specific discovery is necessary to preserve evidence or to prevent undue prejudice to such party.

**Source: L. 2003:** Entire part added, p. 845, § 1, effective July 1.



## ANNOTATION

**This section is substantially similar to Fed. R. Civ. P. 23(f) and cases applying the federal rule are instructive.** The five-factor test outlined in *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000), is the most inclusive and helpful in determining how the court should exercise its discretion. *Clark v. Farmers Ins. Exch.*, 117 P.3d 26 (Colo. App. 2004).

**The five-factor test includes:** (1) The “death knell” factor - is the trial court’s ruling dispositive of the litigation because either it effectively prevents the plaintiff from continuing to pursue the matter in that the stakes are too low or it places the defendant in such a position that it would experience irresistible pressure to settle; (2) the substantial weakness factor - has the appellant shown that the trial court’s class certification decision likely constitutes an abuse of discretion; (3) will allowing the appeal permit resolution of an unsettled legal issue important

to the particular litigation as well as important in itself; (4) the nature and status of the litigation before the trial court, including the status of discovery, the pendency of relevant motions, and the length of time the matter already has been pending; (5) the likelihood that future events could make immediate appellate review more or less appropriate as well as whether the court views its class certification decision as conditional or subject to revision. *Clark v. Farmers Ins. Exch.*, 117 P.3d 26 (Colo. App. 2004).

Test applied in *Clark v. Farmers Ins. Exch.*, 117 P.3d 26 (Colo. App. 2004).

“[U]nder court rule” in subsection (1) applies not just to C.R.C.P. 23 but also to court rules that prescribe the method of computing the time limit to appeal the grant or denial of class certification. *Garcia v. Medved Chevrolet, Inc.*, 240 P.3d 371 (Colo. App. 2009), *aff’d*, 263 P.3d 92 (Colo. 2011).

## PART 10

### INJURIES OCCURRING OUT OF STATE

**Law reviews:** For article, “Limited Availability of the Forum Non Conveniens Defense in Colorado State Courts”, see 33 Colo. Law. 83 (November 2004).

**13-20-1001. Short title.** This part 10 shall be known and may be cited as the “Colorado Citizens’ Access to Colorado Courts Act”.

**Source: L. 2004:** Entire part added, p. 401, § 1, effective August 4.

**13-20-1002. Legislative declaration.** (1) The general assembly finds and declares:

- (a) The courts of this state are overworked and subject to overloaded dockets;
- (b) Section 6 of article II of the Colorado constitution guarantees citizens of this state access to the courts of this state; and
- (c) Cases filed by nonresidents of Colorado and having no meaningful relationship to this state are clogging the dockets of the courts and causing delays in cases filed by residents of Colorado.

(2) The general assembly finds that the purposes of this part 10 are:

- (a) To ensure access of Colorado citizens to the courts of Colorado; and
- (b) To avoid burdening the courts of this state with cases involving injuries suffered outside of the state that may be resolved elsewhere.

**Source: L. 2004:** Entire part added, p. 401, § 1, effective August 4.

**13-20-1003. Definitions.** As used in this part 10, unless the context otherwise requires:

(1) (a) “Alternative forum” means a functioning governmental division with judicial powers that may provide redress for a claim, without regard to whether the redress provided is equivalent to the redress provided under Colorado law, and that may exercise jurisdiction over the parties.

(b) An alternative forum shall still be an alternative forum if the statute of limitations for that forum has expired.

(2) “Discovery” means the procedures described in chapter 4 of the Colorado rules of civil procedure.

(3) “Resident” means a resident of the state of Colorado or a person who intends to return to Colorado despite establishing temporary residency elsewhere or despite a temporary absence from Colorado, without regard to the person’s country of citizenship or national origin. “Resident” does not mean a person who adopts a residence in Colorado in whole or in part to avoid the application of this part 10.

**Source: L. 2004:** Entire part added, p. 402, § 1, effective August 4.

**13-20-1004. Forum non conveniens.** (1) In any action otherwise properly filed in a court of this state, a motion to dismiss without prejudice under the doctrine of forum non conveniens shall be granted if:

(a) The claimant or claimants named in the motion are not residents of the state of Colorado;

(b) An alternative forum exists;

(c) The injury or damage alleged to have been suffered occurred outside of the state of Colorado;

(d) A substantial portion of the witnesses and evidence is outside of the state of Colorado; and

(e) There is a significant possibility that Colorado law will not apply to some or all of the claims.

(2) In any action otherwise properly filed in a court of this state, a motion to dismiss without prejudice under the doctrine of forum non conveniens may be granted if the court finds that the factor specified in paragraph (a) of subsection (1) of this section is present and that at least one or more but fewer than all of the factors specified in paragraphs (b) to (e) of subsection (1) of this section are present, and based upon such factors, the court finds that in the interest of judicial economy or for the convenience of the parties, a party’s claim or action should be heard in a forum outside of Colorado.

(3) In determining whether the factors specified in subsection (1) of this section are present, the court may consider evidence outside of the pleadings, but no formal discovery shall be permitted.

(4) (a) The court may set conditions for dismissing a claim or action under this section as the interests of justice may require.

(b) If the statute of limitations in the alternative forum expires while the claim is pending in a court in Colorado, the court shall grant a dismissal under this section only if each defendant waives all defenses that the statute of limitation in the alternative forum has expired.

**Source: L. 2004:** Entire part added, p. 402, § 1, effective August 4.

## Damages

### ARTICLE 21

#### Damages

**Law reviews:** For article, “1988 Update on Colorado Tort Reform Legislation — Part II”, see 17 Colo. Law. 1949 (1988); for article, “Duty of Property Owners and Operators to Protect Patrons from Crime”, see 17 Colo. Law. 2143 (1988); for a discussion of Tenth Circuit decisions dealing with torts, see 67 Den. U. L. Rev. 779 (1990); for article, “A Survey of the Law of Colorado Nonprofit Entities”, see 27 Colo. Law. 5 (April 1998).



## PART 1

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		13-21-111.	Negligence cases - comparative negligence as measure of damages.
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13-21-102.	Exemplary damages.		
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13-21-107.	Damages for destruction or bodily injury caused by minors.	13-21-113.3.	Donation of firefighting equipment - exemption from civil and criminal liability - definitions - legislative declaration.
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13-21-109.	Recovery of damages for checks, drafts, or orders not paid upon presentment.	13-21-115.7.	Immunity from civil liability for directors, officers, or trustees - nonprofit corporations or nonprofit organizations.
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- 13-21-117.7. Civil actions against family foster care providers - limited liability.
- 13-21-118. Actions based on flight in aircraft.
- 13-21-119. Equine activities - llama activities - legislative declaration - exemption from civil liability.
- 13-21-120. Colorado baseball spectator safety act - legislative declaration - limitation on actions - duty to post warning notice.
- 13-21-121. Agricultural recreation activities - legislative declaration - inherent risks - limitation of civil liability - duty to post warning notice.
- 13-21-122. Civil liability for unlawful use of personal identifying information.
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## PART 1

## GENERAL PROVISIONS

**Editor's note:** Colorado recognizes "wrongful birth" claims but not "wrongful life" claims. For discussion of such claims, see *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988) and *Empire Cas. v. St. Paul Fire and Marine*, 764 P.2d 1191 (Colo. 1988).

**Cross references:** For damages recoverable for failure to comply with excavation requirements, see § 9-1.5-104.5; for the admissibility of evidence of failure to wear a safety belt system to mitigate damages resulting from a motor vehicle accident, see § 42-4-237 (7).

**Law reviews:** For article, "Using Mental Health Professionals to Maximize Damages in Personal Injury Cases", see 15 Colo. Law. 2009 (1986); for article, "1986 Colorado Tort Reform Legislation", see 15 Colo. Law. 1363 (1986); for article, "Introduction to the Tort Reform Symposium: Some Cautioning Implications of Legislative Tort Reform", see 64 Den. U. L. Rev. 613 (1988); for article, "The Assault on Injured Victims' Rights", see 64 Den. U. L. Rev. 625 (1988); for article, "The Insurance 'Crisis': Reality or Myth? A Plaintiffs' Lawyer's Perspective", see 64 Den. U. L. Rev. 641 (1988); for article, "Constitutional Challenges to Tort Reform: Equal Protection and State Constitutions", see 64 Den. U. L. Rev. 719 (1988); for article, "The Failed Tubal Ligation: Bringing a Wrongful Birth Case to Trial", see 17 Colo. Law. 849 (1988); for article, "Limiting Lender Liability through the Statute of Frauds", see 18 Colo. Law. 1725 (1989); for comment, "Stemming the Tide of Lender Liability: Judicial and Legislative Reactions", see 67 Den. U. L. Rev. 453 (1990); for comment, "Comprehensive General Liability Insurance Coverage for CERCLA Liabilities: A Recommendation for Judicial Adherence to State Canons of Insurance Contract Construction", see 61 U. Colo. L. Rev. 407 (1990); for article, "A Federal Genie from a State Bottle: § 1983 in the Colorado State Courts", see 19 Colo. Law. 617 (1990); for article, "1990 Update on Colorado Tort Reform Legislation", see 19 Colo. Law. 1529 (1990).

**13-21-101. Interest on damages.** (1) In all actions brought to recover damages for personal injuries sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or by willful intent of such other person, corporation, association, or partnership and whether such injury has resulted fatally or otherwise, it is lawful for the plaintiff in the complaint to claim interest on the damages alleged from the date said suit is filed; and, on and after July 1, 1979, it is lawful for the plaintiff in the complaint to claim interest on the damages claimed from the date the action accrued. When such interest is so claimed, it is the duty of the court in entering judgment for the plaintiff in such action to add to the amount of damages assessed by the verdict of the jury, or found by the court, interest on such amount calculated at the rate of nine percent per annum on actions filed on or after July 1, 1975, and at the legal rate on actions filed prior to such date, and calculated from the date such suit was filed

to the date of satisfying the judgment and to include the same in said judgment as a part thereof. On actions filed on or after July 1, 1979, the calculation shall include compounding of interest annually from the date such suit was filed. On and after January 1, 1983, if a judgment for money in an action brought to recover damages for personal injuries is appealed by the judgment debtor, interest, whether prejudgment or postjudgment, shall be calculated on such sum at the rate set forth in subsections (3) and (4) of this section from the date the action accrued and shall include compounding of interest annually from the date such suit was filed.

(2) (a) If a judgment for money in an action brought to recover damages for personal injuries is appealed by a judgment debtor and the judgment is affirmed, interest, as set out in subsections (3) and (4) of this section, shall be payable from the date the action accrued until satisfaction of the judgment.

(b) If a judgment for money in an action to recover damages for personal injuries is appealed by a judgment debtor and the judgment is modified or reversed with a direction that a judgment for money be entered in the trial court, interest, as set out in subsections (3) and (4) of this section, shall be payable from the date the action accrued until the judgment is satisfied. This interest shall be payable on the amount of the final judgment.

(3) The rate of interest shall be certified on each January 1 by the secretary of state to be two percentage points above the discount rate, which discount rate shall be the rate of interest a commercial bank pays to the federal reserve bank of Kansas City using a government bond or other eligible paper as security, and shall be rounded to the nearest full percent. Such annual rate of interest shall be so established as of December 31, 1982, to become effective January 1, 1983. Thereafter, as of December 31 of each year, the annual rate of interest shall be established in the same manner, to become effective on January 1 of the following year.

(4) The rate at which interest shall accrue during each year shall be the rate which the secretary of state has certified as the annual interest rate under subsection (3) of this section.

**Source:** L. 11: p. 296, § 1. C.L. § 6306. CSA: C. 50, § 5. CRS 53: § 41-2-1. C.R.S. 1963: § 41-2-1. L. 75: Entire section amended, p. 569, § 1, effective July 1. L. 79: Entire section amended, p. 316, § 3, effective July 1. L. 82: Entire section amended, p. 227, § 3, effective January 1, 1983.

**Editor's note:** Portions of subsection (1) of this section were held unconstitutional in *Rodriguez v. Schutt*, 914 P.2d 921 (Colo. 1996). As set forth in the decision, the court held that the last sentence of § 13-21-101 (1) must be read and applied as shown by the strikes and caps as follows:

(1) In all actions brought to recover damages for personal injuries sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or by willful intent of such other person, corporation, association, or partnership and whether such injury has resulted fatally or otherwise, it is lawful for the plaintiff in the complaint to claim interest on the damages alleged from the date said suit is filed; and, on and after July 1, 1979, it is lawful for the plaintiff in the complaint to claim interest on the damages claimed from the date the action accrued. When such interest is so claimed, it is the duty of the court in entering judgment for the plaintiff in such action to add to the amount of damages assessed by the verdict of the jury, or found by the court, interest on such amount calculated at the rate of nine percent per annum on actions filed on or after July 1, 1975, and at the legal rate on actions filed prior to such date, and calculated from the date such suit was filed to the date of satisfying the judgment and to include the same in said judgment as a part thereof. On actions filed on or after July 1, 1979, the calculation shall include compounding of interest annually from the date such suit was filed. On and after January 1, 1983, if a judgment for money in an action brought to recover damages for personal injuries is appealed by the judgment debtor, ~~POSTJUDGMENT interest, whether prejudgment or postjudgment, shall be calculated on such sum at the rate set forth in subsections (3) and (4) of this section from the date the action accrued and shall include compounding of interest annually from the date such suit was filed.~~

**Cross references:** For rate of interest authorized upon a judgment for damages, see § 5-12-102; for general provisions on interest, see article 12 of title 5.



## ANNOTATION

- I. General Consideration.
- II. Request in Complaint.
- III. Inapplicable Actions.

**I. GENERAL CONSIDERATION.**

**Law reviews.** For note, "Interest as Damages in Colorado", see 16 Rocky Mt. L. Rev. 162 (1944). For note, "Interest as Damages in Colorado", see 28 Dicta 285 (1951). For note, "Notes and Comments: What is a Life Worth", see 34 Dicta 41 (1957). For note, "Colorado Interest Law", see 34 Dicta 398 (1957). For case note, "Pre-Judgment Interest as an Element of Damages", see 49 U. Colo. L. Rev. 335 (1978). For article, "Rates of Interest on State and Federal Court Judgments: An Update", see 12 Colo. Law. 446 (1983). For article, "Collecting Pre- and Post-Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753 (1986). For article, "An Update of Appendices from Collecting Pre- and Post-Judgment Interest in Colorado," see 15 Colo. Law. 990 (1986). For article, "Recovery of Interest: Parts I and II", see 18 Colo. Law. 1063 and 1307 (1989). For article, "Immunities from Liability for Colorado Nonprofit Organization," see 25 Colo. Law. 37 (May 1996).

**Plain language of section** requires a nine-percent interest rate for personal injury money judgments that the judgment debtor does not appeal and a market-determined interest rate for both pre- and post-judgment interest for judgments that the judgment debtor does appeal. *Rodriguez v. Schutt*, 914 P.2d 921 (Colo. 1996).

**The receipt of interest is not a fundamental right** and this section does not affect or create a suspect class. Therefore disparate treatment of similarly situated individuals will be upheld if it has a "rational basis." *Rodriguez v. Schutt*, 914 P.2d 921 (Colo. 1996).

**For prejudgment interest, there is no rational basis in fact** to distinguish between judgment creditors and debtors depending on whether judgment debtors later appeal. Therefore, section is unconstitutional to the extent that it changes the rate of interest on prejudgment interest if the judgment debtor appeals. *Rodriguez v. Schutt*, 914 P.2d 921 (Colo. 1996).

**This section does not result in a deprivation of due process** when the trial court based its award of prejudgment interest on future damages on this section. This section does not distinguish between past and future damage awards to calculate prejudgment interest. Prejudgment interest is to compensate the injured party for loss of use of money and to encourage settlement. Therefore, there is a rational basis for awarding prejudgment interest on future damages. *Scott v. Matlack, Inc.*, 1 P.3d 185 (Colo.

App. 1999), rev'd on other grounds, 39 P.3d 1160 (Colo. 2002).

**There is a rational basis for treating postjudgment interest differently depending on whether the judgment debtor appeals.** The elimination of financial incentives or disincentives to appeal is a reasonable legislative purpose. *Rodriguez v. Schutt*, 914 P.2d 921 (Colo. 1996).

**There is a rational basis for the difference in treatment between this section and § 5-12-102.** *Colwell v. Mentzer Invs, Inc.*, 973 P.2d 631 (Colo. App. 1998).

**Where plaintiff is not entitled to prejudgment interest and the judgment debtor appeals the judgment,** plaintiff is entitled to an award of postjudgment interest calculated from the date judgment was entered to the date of satisfaction, and not from the date upon which the action accrued. *Sperry v. Field*, 133 P.3d 141 (Colo. App. 2008), aff'd, 205 P.3d 365 (Colo. 2009).

**Interest in Colorado is a creature of statute** and regulated thereby. *Denver Horse Importing Co. v. Schafer*, 58 Colo. 376, 147 P. 367 (1915); *Clark v. Hicks*, 127 Colo. 25, 252 P.2d 1067 (1953).

**Section must be strictly construed.** "Interest statutes, being in derogation of the common law, must be strictly construed". *City of Boulder v. Stewardson*, 67 Colo. 582, 189 P. 1 (1920); *Dobbs v. Sugioka*, 117 Colo. 218, 185 P.2d 784 (1947); *Clark v. Hicks*, 127 Colo. 25, 252 P.2d 1067 (1953).

**This provision imparts no discretion to the trial court;** it must be applied to any judgment resulting from an action for personal injuries. *Stemple v. Phillips Petroleum Co.*, 430 F.2d 178 (10th Cir. 1970); *Huffman v. Caterpillar Tractor Co.*, 645 F. Supp. 909 (D. Colo. 1986); *Todd v. Bear Valley Vill. Apartments*, 980 P.2d 973 (Colo. 1999).

**A judgment may be composed of both principal and interest.** *Security Ins. Co. v. Houser*, 191 Colo. 189, 552 P.2d 308 (1976).

**Court may correct judgment when requested interest is omitted.** It is mandatory on a trial court to include interest pursuant thereto when properly claimed upon entering judgment, and it is not error for a court to correct a judgment by including interest when the omission is called to its attention. *Crosby v. Kroeger*, 138 Colo. 55, 330 P.2d 958 (1958).

**Under C.R.C.P. 60(a), a failure to include interest** when entering judgment is an oversight or omission within the terms of the rule. *Crosby v. Kroeger*, 138 Colo. 55, 330 P.2d 958 (1958).

Since the statute required an award of prejudgment interest and failure to include such interest was merely a ministerial oversight, passage of five years since entry of the award would

not prevent the addition of prejudgment interest, even though the original amount of the award had been satisfied. *Brooks v. Jackson*, 813 P.2d 847 (Colo. App. 1991).

**Interest may be assessed in tort action under Governmental Immunity Act.** *Lee v. Colo. Dept. of Health*, 718 P.2d 221 (Colo. 1986).

**Interest recoverable in action for death caused by injuries.** Under the provisions of this section, a party seeking damages for the death of his wife alleged to have been occasioned by the tort of another, is entitled to interest on any amount he may recover, the section being sufficiently comprehensive to include all actions of tort founded on injuries to the person, whether nonfatal or fatal. *Am. Ins. Co. v. Naylor*, 103 Colo. 461, 87 P.2d 260 (1939).

**When injury is personal.** An injury is personal when it impairs the well-being or the mental or physical health of the victim. *Miller v. Carnation Co.*, 39 Colo. App. 1, 564 P.2d 127 (1977); *McCafferty v. Musat*, 817 P.2d 1039 (Colo. App. 1990); *Herod v. Colo. Farm Bureau Mut. Ins.*, 928 P.2d 834 (Colo. App. 1996).

**Interest is awarded from filing of first complaint when there are two trials.** Where judgment in favor of a person who had suffered personal injuries was reversed and a second docket fee had been paid and a second trial had resulted in a verdict for the injured party, he might recover interest from the time the complaint was filed for the first trial, interest having been asked for from the date of the filing of the suit. *Am. Ins. Co. v. Naylor*, 103 Colo. 461, 87 P.2d 260 (1939); *Parrish v. Smith*, 109 Colo. 132, 123 P.2d 406 (1942).

**Subsection (1) requires interest to be calculated from date action accrued and to be compounded annually from date suit is filed.** *Smith v. JBJ Ltd.*, 694 P.2d 352 (Colo. App. 1984).

**Simple interest from accrual of cause of action until filing of complaint must be included in initial base amount** on which annual compounding is calculated. To do otherwise is to deprive the plaintiff of one year's worth of compounding. *Francis v. Dahl*, 107 P.3d 1171 (Colo. App. 2005).

**Interest on an award for annoyance and discomfort** is recoverable from the date of the filing of the complaint. *Miller v. Carnation Co.*, 39 Colo. App. 1, 564 P.2d 127 (1977) (decided prior to 1979 amendment).

**Prejudgment interest is in the nature of another item of damages.** *Houser v. Eckhardt*, 35 Colo. App. 155, 532 P.2d 54 (1974), *aff'd sub nom.*, *Security Ins. Co. v. Houser*, 191 Colo. 189, 552 P.2d 308 (1976); *Heid v. Destefano*, 41 Colo. App. 436, 586 P.2d 246 (1978); *Allstate Ins. Co. v. Starke*, 797 P.2d 14 (Colo. 1990).

**The legislative purpose behind awarding interest under this section is to compensate the plaintiff for the time value of the amount**

**of his or her judgment.** An award of any additional interest above the amount of the final judgement is thus inconsistent with the compensatory purpose of the statute. *Morris v. Goodwin*, 185 P.3d 777 (Colo. 2008).

**This section must be interpreted to provide interest on the amount awarded by the final judgment, regardless of the jury's determination.** *Morris v. Goodwin*, 185 P.3d 777 (Colo. 2008).

**Interest payable only to extent of insurer's liability.** This section does not obligate an insurer to pay prejudgment interest on the judgment where it would increase the liability of the insurer to an amount over that for which it had contracted. *Houser v. Eckhardt*, 35 Colo. App. 155, 532 P.2d 54 (1974), *aff'd sub nom.*, *Security Ins. Co. v. Houser*, 191 Colo. 189, 552 P.2d 308 (1976); *Allstate Ins. Co. v. Starke*, 797 P.2d 14 (Colo. 1990); *Old Republic Ins. Co. v. Ross*, 180 P.3d 427 (Colo. 2008).

**This section applies to actions** which accrue before the effective date of this section but which are filed after such effective date. *Briggs v. Cornwell*, 676 P.2d 1252 (Colo. App. 1983); *Martinez v. Jesik*, 703 P.2d 638 (Colo. App. 1985); *McCafferty v. Musat*, 817 P.2d 1039 (Colo. App. 1990).

**An injury is not personal when inflicted on property.** *Miller v. Carnation Co.*, 39 Colo. App. 1, 564 P.2d 127 (1977).

**Injuries properly determined as "personal" and not "property"** in case where toxic contamination to property caused homeowners inconvenience and loss of peace of mind based on their fear that contaminants could be present in portions of their homes and the perceived stigma attached to homes in the neighborhood. Therefore, the trial court was correct in awarding prejudgment interest on damages at the rate allowed for cases involving "personal injuries". *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007).

**Statute applies to claims accruing before the effective date of statute.** *Briggs v. Cornwell*, 676 P.2d 1252 (Colo. App. 1983).

**Plaintiff entitled to interest on damages from date of accident** even though it occurred prior to July 1, 1979. Application of the 1979 amendments does not violate the constitutional ban on retroactive laws. *Meller v. Heil Co.*, 745 F.2d 1297 (10th Cir. 1984), *cert. denied*, 467 U.S. 1206, 104 S. Ct. 2390, 81 L. Ed.2d 347 (1984).

**Interest on damages were properly found to begin accruing from the date defendant discovered that contamination had crossed its property boundary and not from the date plaintiff learned of the contamination.** The court found that a holding to the contrary would only encourage wrongdoers to stall or hide important information in order to avoid prejudg-



ment interest. *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007).

**The award of prejudgment interest serves not only the purpose of compensating a party for the loss of use of money** but is also used to encourage the settlement of cases both pre- and post-trial. *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992).

**Statute applies to action for strict liability in tort.** *Huffman v. Caterpillar Tractor Co.*, 645 F. Supp. 909 (D. Colo. 1986).

**Subsection (1) does not distinguish for the purpose of awarding interest between future and past damage awards.** Because the statute itself does not distinguish between future and past damage awards, the general assembly did not intend that these concepts be applied. *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993).

The fact that past and future damages awards are based on separate findings under § 13-64-204 does not affect the plain language of subsection (1), which requires the court to add prejudgment interest to any personal injury verdict. *Mumford v. Hughes*, 852 P.2d 1289 (Colo. App. 1992).

**Subsection (1) does not differentiate for the purpose of awarding interest between an award of past and future damages.** The language of subsection (1) requires the court to add nine percent interest to any personal injury verdict. *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992).

**Since the interest statute does not distinguish between future and past damage awards,** and damages for past and future losses were routinely awarded at the time of its enactment, it must be assumed that the general assembly intended to award prejudgment interest in all cases in which a jury verdict award was made. *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992); *Mumford v. Hughes*, 852 P.2d 1289 (Colo. App. 1992).

Award of prejudgment interest on wrongful death damages from time of death is appropriate. *Combined Com. Corp. v. Pub. Serv. Co.*, 865 P.2d 893 (Colo. App. 1993).

**Subsection (1) does not apply to damages resulting from a breach of contract.** *Shannon v. Colo. Sch. of Mines*, 847 P.2d 210 (Colo. App. 1992).

**Even though an underinsured motorist policy is a contract and therefore would not fall under this section,** the claim under that policy may be premised upon a tort claim for bodily injury and therefore accrue interest at the nine percent interest rate dictated by this section. Here, plaintiff's underinsured motorist claim was for damages resulting from the tort of another person, even though it also involved the contract with his insurer; therefore, he was entitled to the higher interest rate set in this section

rather than that for contractual claims under § 5-12-102. *Parker v. USAA*, 216 P.3d 7 (Colo. App. 2007), *aff'd*, 200 P.3d 350 (Colo. 2009).

**Section applies to judgments based on claims for underinsured motorist benefits resulting from personal injuries.** *Parker v. USAA*, 216 P.3d 7 (Colo. App. 2007), *aff'd*, 200 P.3d 350 (Colo. 2009).

**This section unambiguously requires recalculation of interest at the variable rate set under subsections (3) and (4) if the verdict is appealed,** even though the variable rate may be less than the nine percent statutory rate. *Ackerman v. Power Equip. Co.*, 881 P.2d 451 (Colo. App. 1994).

**This section, as amended, is clear and unambiguous** in its requirement that personal injury judgment interest is to be recalculated at the variable interest rate set by the secretary of state in the event of an appeal. *Ackerman v. Power Equip. Co.*, 881 P.2d 451 (Colo. App. 1994); *Rodriguez v. Schutt*, 896 P.2d 881 (Colo. App. 1994), *rev'd* on other grounds, 914 P.2d 921 (Colo. 1996).

**The award of prejudgment interest serves not only the purpose of compensating a party for the loss of use of money but is also used to encourage the settlement of cases both pre- and post-trial.** *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076 (Colo. App. 1992).

**Prejudgment interest is an element of damages compensating the personal injury plaintiff for all injuries caused by defendant's tortious conduct, including the lost time value of his damages award.** It is not "interest" as that term is defined and generally understood. *Brabson v. United States*, 859 F. Supp. 1360 (D. Colo. 1994), *rev'd* on other grounds, 73 F.3d 1040 (10th Cir. 1996).

**Plaintiffs gave up their right to interest** against tortfeasor when they voluntarily settled with that tortfeasor and thereby avoided a double award of interest. *McKown-Katy v. Rego Co.*, 776 P.2d 1130 (Colo. App. 1989), *rev'd* in part on other grounds, 801 P.2d 536 (Colo. 1990); *Gutierrez v. Bussey*, 837 P.2d 272 (Colo. App. 1992).

**"Willful intent" standard of subsection (1)** is met upon a showing of "wanton" conduct, as specified in § 13-21-102, entitling the plaintiff to prejudgment interest on exemplary damages. *Bradley v. Guess*, 797 P.2d 749 (Colo. App. 1989), *rev'd* on other grounds, 817 P.2d 971 (Colo. 1991).

**Court erred in denying motion for prejudgment interest** as of date of accident where plaintiff's underlying injury was personal in nature and plaintiff would have been entitled to prejudgment interest absent attorney's malpractice. *McCafferty v. Musat*, 817 P.2d 1039 (Colo. App. 1990).

**Defamation is a personal injury and not an injury to property;** therefore prejudgment in-

terest shall be automatically added to an award of damages for defamation. *Brooks v. Jackson*, 813 P.2d 847 (Colo. App. 1991).

**This section authorizes interest to be compounded only on an annual basis.** Combined Com. Corp. v. Pub. Serv. Co., 865 P.2d 893 (Colo. App. 1993).

**Interest on a damage award shall be calculated** at a nine percent fixed rate per annum until the judgment is satisfied except in cases of an appeal in which case subsections (3) and (4) provide for a variable rate of interest. *Evinger v. Greeley Gas Co.*, 902 P.2d 941 (Colo. App. 1995).

**Costs not award of damages** within the meaning of this section. *Steele v. Law*, 78 P.3d 1124 (Colo. App. 2003).

**Applied in** *DeLong v. City & County of Denver*, 195 Colo. 27, 576 P.2d 537 (1978); *Equal Emp. Opportunity Comm'n v. Safeway Stores, Inc.*, 634 F.2d 1273 (10th Cir. 1980); *People v. Kluver*, 199 Colo. 511, 611 P.2d 971 (Colo. App. 1980); *Martin v. Porak*, 638 P.2d 853 (Colo. App. 1981); *Jackson v. Marsh*, 551 F. Supp. 1091 (D. Colo. 1982).

## II. REQUEST IN COMPLAINT.

**Interest will be awarded from filing of complaint if requested.** This section expressly provides for the awarding of interest from the date of the filing of the complaint in a personal injury action if requested in the complaint. *Callahan v. Slavsky*, 153 Colo. 291, 385 P.2d 674 (1963).

**If not requested in the complaint interest is waived.** Plaintiffs not having demanded interest prior to the entry of judgment, waived this demand which the section provides must be made in the complaint. *Clark v. Hicks*, 127 Colo. 25, 252 P.2d 1067 (1953).

**It is sufficient to demand interest in the prayer for relief.** A prayer is a necessary part of a claim for relief under C.R.C.P. 8 and where the prayer is for "interest and costs of suit", it is sufficient to meet the requirements of this section entitling a plaintiff to interest on the verdict from the date of filing a complaint. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**To permit an amendment of the complaint to add interest** more than 10 days after the judgment had been entered was error. *Green v. Hoffman*, 126 Colo. 104, 251 P.2d 933 (1952); *Clark v. Hicks*, 127 Colo. 25, 252 P.2d 1067 (1953).

**To permit amendment of the complaint after the verdict** but before judgment was entered was error. *Clark v. Buhring*, 761 P.2d 266 (Colo. App. 1988).

**This section does not dictate the date to which future losses must be discounted.** *Four Corners Helicopters, Inc. v. Turboneca, S.A.*, 979 F.2d 1434 (10th Cir. 1992).

## III. INAPPLICABLE ACTIONS.

**This section does not apply to property or contractual damage.** The Colorado statute distinguishes between damages arising from personal injury and contractual or property damages. Interest is not permitted from the date of filing of the complaint where property damages are involved. *Stemple v. Phillips Petroleum Co.*, 430 F.2d 178 (10th Cir. 1970).

**Even though an underinsured motorist policy is a contract and therefore would not fall under this section,** the claim under that policy may be premised upon a tort claim for bodily injury and therefore accrue interest at the nine percent interest rate dictated by this section. Here, plaintiff's underinsured motorist claim was for damages resulting from the tort of another person, even though it also involved the contract with his insurer; therefore, he was entitled to the higher interest rate set in this section rather than that for contractual claims under § 5-12-102. *Parker v. USAA*, 216 P.3d 7 (Colo. App. 2007), *aff'd*, 200 P.3d 350 (Colo. 2009).

**Court may not add prejudgment interest to accepted offer of judgment.** When, in a personal injury action, a plaintiff accepts an offer of judgment, the court is precluded from adding prejudgment interest to the amount agreed upon by the parties. *Heid v. Destefano*, 41 Colo. App. 436, 586 P.2d 246 (1978).

**When a party accepts a settlement, trial court is precluded from adding prejudgment interest** to the amount agreed upon by the parties. *Parker v. USAA*, 216 P.3d 7 (Colo. App. 2007), *aff'd* on other grounds, 200 P.3d 350 (Colo. 2009).

**Interest is not recoverable in an action for damages occasioned by fraud and deceit.** *Moreland v. Austin*, 138 Colo. 78, 330 P.2d 136 (1958); *Holland Furnace Co. v. Robson*, 157 Colo. 347, 402 P.2d 628 (1965).

**Nor in action for breach of warranty.** Interest is only recoverable in the absence of contract, in the cases enumerated in this section. An action in damage for a breach of warranty is not one of the enumerated cases. *Denver Horse Importing Co. v. Schafer*, 58 Colo. 376, 147 P. 367 (1915).

**Nor in an action for false representations.** Interest is a creature of statute, and this section makes no provision for interest on unliquidated damages which may be awarded in actions for false representations. *Moreland v. Austin*, 138 Colo. 78, 330 P.2d 136 (1958).

**Interest will not be awarded against a municipal corporation.** The word "corporation" as used in this section does not include a municipal corporation. *City of Boulder v. Stewardson*, 67 Colo. 582, 189 P. 1 (1920).

**For inapplicability to nonresident injured in his own state with Colorado merely as forum,** see *Stemple v. Phillips Petroleum Co.*, 430 F.2d 178 (10th Cir. 1970).



**This section does not apply to punitive (exemplary) component of damage award, but only to such damages as are properly deemed compensatory.** Seward Const. Co., Inc. v. Bradley, 817 P.2d 971 (Colo. 1991); Burgess v. Mid-Century Ins. Co., 841 P.2d 325 (Colo. App. 1992).

**A limited exception to the interest formula** determining the accumulation of prefilng and

prejudgment interest on an award, which formula is created in this section, can be found in § 13-64-302 (2) and applies to certain rulings under the Colorado Health Care Availability Act. Ochoa v. Vered, 212 P.3d 963 (Colo. App. 2009).

**13-21-102. Exemplary damages.** (1) (a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

(b) As used in this section, “willful and wanton conduct” means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

(1.5) (a) A claim for exemplary damages in an action governed by this section may not be included in any initial claim for relief. A claim for exemplary damages in an action governed by this section may be allowed by amendment to the pleadings only after the exchange of initial disclosures pursuant to rule 26 of the Colorado rules of civil procedure and the plaintiff establishes prima facie proof of a triable issue. After the plaintiff establishes the existence of a triable issue of exemplary damages, the court may, in its discretion, allow additional discovery on the issue of exemplary damages as the court deems appropriate.

(b) The provisions of paragraph (a) of this subsection (1.5) shall not apply to any civil action or arbitration proceeding described in section 13-21-203 (3) (c) or 13-64-302.5 (3).

(2) Notwithstanding the provisions of subsection (1) of this section, the court may reduce or disallow the award of exemplary damages to the extent that:

- (a) The deterrent effect of the damages has been accomplished; or
- (b) The conduct which resulted in the award has ceased; or
- (c) The purpose of such damages has otherwise been served.

(3) Notwithstanding the provisions of subsection (1) of this section, the court may increase any award of exemplary damages, to a sum not to exceed three times the amount of actual damages, if it is shown that:

(a) The defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or

(b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

(4) Repealed.

(5) Unless otherwise provided by law, exemplary damages shall not be awarded in administrative or arbitration proceedings, even if the award or decision is enforced or approved in an action commenced in a court.

(6) In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.

**Source:** L. 1889: p. 64, § 1. R.S. 08: § 2067. C.L. § 6307. CSA: C. 50, § 6. CRS 53: § 41-2-2. C.R.S. 1963: § 41-2-2. L. 86: Entire section amended, p. 675, § 1, effective July 1. L. 95: (4) repealed, p. 14, § 1, effective March 9. L. 2003: (1.5) added, p. 1044, § 1, effective August 6.

## ANNOTATION

- I. General Consideration.
- II. Essential Elements.
- III. Amount.
- IV. Pleading and Practice.
- V. Against Whom Awarded.

## I. GENERAL CONSIDERATION.

**Law reviews.** For comment on *Starkey v. Dameron*, appearing below, see 6 Rocky Mt. L. Rev. 81 (1933). For note, "Need Punitive Damages Be Proportionate to Compensatory Damages?", see 23 Rocky Mt. L. Rev. 206 (1950). For note, "Exemplary Damages in Colorado — Punitive or Puny?", see 35 U. Colo. L. Rev. 394 (1963). For comment on *Kohl v. Graham*, appearing below, see 36 U. Colo. L. Rev. 283 (1964). For article, "Trade Secret Litigation: Injunctions and Other Equitable Remedies", see 48 U. Colo. L. Rev. 189 (1977). For casenote, "*Palmer v. A.H. Robins Co.*: Problems with Punitive Damages in Products Liability Actions", see 57 U. Colo. L. Rev. 135 (1985). For article, "Help for Colorado Trade Secret Owners", see 15 Colo. Law, 1993 (1986). For article, "Tort Reform's Impact on Contract Law", see 15 Colo. Law, 2206 (1986). For article, "Let the Builder-Vendor Beware: Defenses and Damages in Home Builder Litigation — Part II", see 16 Colo. Law, 629 (1987). For article, "Introduction to the Tort Reform Symposium: Some Cautioning Implications of Legislative Tort Reform", see 64 Den. U. L. Rev. 613 (1988). For article, "The Assault on Injured Victims' Rights", see 64 Den. U. L. Rev. 625 (1988). For article, "The Impact of Tort Reform on Product Liability Litigation in Colorado", see 30 Colo. Law, 91 (November 2001). For article, "New Statutes Change Civil Litigation in Colorado", see 33 Colo. Law, 65 (May 2004).

**Subsection (4) held unconstitutional.** An exemplary damages award is a private property right, and the requirements of subsection (4) constitute a taking of a judgment creditor's private property without just compensation in violation of the fifth and fourteenth amendments to the United States Constitution and article II, section 15 of the Colorado Constitution. *Kirk v. Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991).

**Section does not violate due process clauses of the federal or state constitutions.** *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152 (10th Cir. 1981); *Post Office v. Portec, Inc.*, 913 F.2d 802 (10th Cir. 1990); *Estate of Korf v. A.O. Smith Harvestore Prods.*, 917 F.2d 480 (10th Cir. 1990) (all cases decided under section in effect prior to 1986 amendment).

**Legislative purpose behind this section is to avoid purely punitive civil awards.** *Wagner v.*

*Dan Unfug Motors, Inc.*, 35 Colo. App. 102, 529 P.2d 656 (1974).

**It is evident from the plain language of subsection (1)(a) that the general assembly intended to limit the punitive damages awarded on a particular tort claim to the amount of actual damages awarded on that same claim.** *Hensley v. Tri-QSI Denver Corp.*, 98 P.3d 965 (Colo. App. 2004).

**Legislative purpose behind subsection (6), as part of 1986 "tort reform" package, included mitigating and alleviating the need for parties to bring financial records into court for review by the opposing side.** *Corbetta v. Albertson's, Inc.*, 975 P.2d 718 (Colo. 1999).

**Discovery of defendant's financial records not permitted.** *Corbetta v. Albertson's, Inc.*, 975 P.2d 718 (Colo. 1999).

**Punitive damages in civil action not double punishment.** Although punitive damages are awarded in civil cases in order to punish the defendant, an award of punitive damages in a civil action does not constitute a prohibited "double punishment", as the double punishment prohibition applies only to criminal actions. *E. F. Hutton & Co. v. Anderson*, 42 Colo. App. 497, 596 P.2d 413 (1979).

**Nor violative of equal protection.** Allowing punitive damages in a civil action does not violate one's right to equal protection of the law. *E. F. Hutton & Co. v. Anderson*, 42 Colo. App. 497, 596 P.2d 413 (1979).

**Section not void for vagueness.** Statutory terms "circumstances of fraud" and "a wanton and reckless disregard" are sufficiently clear to persons of ordinary intelligence to afford a practical guide for behavior and are capable of application in an even-handed manner. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).

**Federal constitutional proscription against cruel and unusual punishment** not applicable to a civil proceeding involving a punitive damages claim ancillary to a civil cause of action. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).

**Exemplary damages are allowed, not as compensation to the injured party for the wrong done, but as a punishment of the wrongdoer as an example to others.** *Ark Valley Alfalfa Mills, Inc. v. Day*, 128 Colo. 436, 263 P.2d 815 (1953); *Frick v. Abell*, 198 Colo. 508, 602 P.2d 852 (1979); *Seward Const. Co., Inc. v. Bradley*, 817 P.2d 971 (Colo. 1991).

The purpose of punitive damages is not to compensate an injured plaintiff, but to punish the defendant and to deter others from similar conduct in the future. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

**Exemplary damages are awarded for the purpose of punishing persons who have in-**



**fllicted injuries with malice.** French v. Deane, 19 Colo. 504, 36 P. 609 (1894); Starkey v. Dameron, 92 Colo. 420, 21 P.2d 1112 (1933); Barnes v. Lehman, 118 Colo. 161, 193 P.2d 273 (1948); Wegner v. Rodeo Cowboys Ass'n, 290 F. Supp. 369 (D. Colo. 1968), aff'd and reh'g denied, 417 F.2d 881 (10th Cir. 1969), cert. denied, 398 U.S. 903, 90 S. Ct. 1688, 26 L. Ed.2d 60 (1970).

**Purpose of entering judgment for exemplary damages** against a defendant in a civil action is to punish and penalize him for certain wrongful and aggravated conduct and to serve as a warning to other possible offenders. Beebe v. Pierce, 185 Colo. 34, 521 P.2d 1263 (1974).

The general purposes of exemplary damages are punishment of the defendant and deterrence against the commission of similar offenses by the defendant or others in the future. Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980); Lexton-Ancira Real Estate Fund v. Heller, 826 P.2d 819 (Colo. 1992).

This section appears to be the general assembly's means of requiring a minimum degree of civility which is necessary for a civilized society to ensure, in some small measure, that the recourse to more violent methods is not taken by its inhabitants who feel defrauded or, in a sense, destroyed by another. Mailloux v. Bradley, 643 P.2d 797 (Colo. App. 1982).

**The nature and purposes of punitive damages** are sufficiently removed from the criminal process as to render inapplicable the traditional procedural safeguards provided to one accused of crime. Furthermore, § 13-25-127 provides an additional safeguard by requiring that the statutory elements of a punitive damages claim be proven beyond a reasonable doubt. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

**Colorado law allows, but does not compel, an award of punitive damages** under certain circumstances. King v. Horizon Corp., 701 F.2d 1313 (10th Cir. 1983); Vickery v. Vickery, \_\_\_ P.3d \_\_\_, (Colo. App. 2010), rev'd on other grounds, 266 P.3d 390 (Colo. 2011).

**Exemplary damages are available in Colorado only pursuant to statute.** Kaitz v. District Court, 650 P.2d 553 (Colo. 1982); Bennett v. Greeley Gas Co., 969 P.2d 754 (Colo. App. 1998).

**Reasonable exemplary damages may be awarded injured party in addition to actual damages.** Kresse v. Bennett, 151 Colo. 549, 379 P.2d 807 (1963).

**In order to recover exemplary damages** a plaintiff must make out a case under this section. Ark Valley Alfalfa Mills, Inc. v. Day, 128 Colo. 436, 263 P.2d 815 (1953).

**Award of exemplary damages is discretionary.** The award of exemplary damages is optional and rests in the discretion of the trier of fact. A judge or jury may find fraud, malice,

insult or wanton and reckless disregard of the injured party's rights and feelings and still not award exemplary damages. Torrez v. Rizo, 34 Bankr. 886 (Bankr. D. Colo. 1983).

In a trial to the court, the allowance or denial of exemplary damages is for the court's determination as the trier of fact. Sanders v. Knapp, 674 P.2d 385 (Colo. App. 1983).

Plaintiff has no right to any exemplary damages and award is in the discretion of the trier of fact. Montgomery Ward & Co. v. Andrews, 736 P.2d 40 (Colo. App. 1987); Cook v. Rockwell Intern. Corp., 755 F. Supp. 1468 (D. Colo. 1991).

There is record support for court's findings that landlord acted with wanton and reckless disregard. Accordingly, no abuse of discretion in court's award of punitive damages. Boulder Meadows v. Saville, 2 P.3d 131 (Colo. App. 2000).

**One-to-one limitation in subsection (1)(a) of exemplary damages to actual damages applies equally to bench and jury trials.** No language in relevant statutory provision compels construction that only a jury may try the issue of exemplary damages. Sky Fun 1 v. Schuttloffel, 27 P.3d 361 (Colo. 2001).

**Plaintiff must show actual damages.** What are reasonable exemplary damages in Colorado is determined by reference to the actual damages awarded. In order to be entitled to exemplary damages, it is necessary for plaintiffs to prove that the defendant's misconduct caused them to suffer actual damages to their person or property. Failure to prove the existence of actual damages means that no exemplary damages may be recovered. Leo Payne Pontiac, Inc. v. Ratliff, 29 Colo. App. 386, 486 P.2d 477 (1971); W. Cities Broad. v. Schueller, 830 P.2d 1074 (Colo. App. 1991), aff'd in part and rev'd in part on other grounds, 849 P.2d 44 (Colo. 1993).

An award of exemplary damages cannot stand unless there has been an award of "actual damages". Wagner v. Dan Unfug Motors, Inc., 35 Colo. App. 102, 529 P.2d 656 (1974).

Punitive damages may not be awarded absent an award of actual damages. Defeyter v. Riley, 671 P.2d 995 (Colo. App. 1983); Kimmey v. Peek, 678 P.2d 1021 (Colo. App. 1983).

This section permits an award for punitive damages only in conjunction with an underlying and independent civil action in which actual damages are assessed for some legal wrong to the injured party. Palmer v. A.H. Robins, Co., Inc., 684 P.2d 187 (Colo. 1984); Vogel v. Carolina Intern., Inc., 711 P.2d 708 (Colo. App. 1985); Denman v. Burlington Northern R. Co., 761 P.2d 244 (Colo. App. 1988); Bradley v. Guess, 797 P.2d 749 (Colo. App. 1989), rev'd on other grounds, 817 P.2d 971 (Colo. 1991).

**Actual damages normally contemplated both general and special damages.** Wagner v.

Dan Unfug Motors, Inc., 35 Colo. App. 102, 529 P.2d 656 (1974).

**Exemplary damages predicated upon either special or general damages.** Purpose of this section is as well fulfilled when exemplary damages are predicated upon special damages as it is when they are awarded in conjunction with general damages. *Wagner v. Dan Unfug Motors, Inc.*, 35 Colo. App. 102, 529 P.2d 656 (1974).

**Section applies only when a civil wrong has been attended by aggravating circumstances.** By its own terms, it has no application in the absence of a successful underlying claim for actual damages. *Harding Glass Co. v. Jones*, 44 Colo. 437, 640 P.2d 1123 (1982); *Adams v. Paine, Webber, Jackson & Curtis, Inc.*, 686 P.2d 797 (Colo. App. 1983); *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917 (1984), cert. denied, 469 U.S. 853, 105 S. Ct. 176, 83 L. Ed.2d 110 (1984).

**Not every action entitling a plaintiff to actual damages gives rise to a claim for exemplary damages.** *Ristine v. Blocker*, 15 Colo. App. 224, 61 P. 486 (1900); *Ark Valley Alfalfa Mills, Inc. v. Day*, 128 Colo. 436, 263 P.2d 815 (1953).

**Where an action is not an action in damages, exemplary damages cannot be recovered.** *Aaberg v. H.A. Harman Co.*, 144 Colo. 579, 358 P.2d 601 (1960).

**An action of a successor trustee against a former trustee for misappropriation of trust funds is suit in law that permits exemplary damages.** The former trustee is under a duty to pay money immediately and unconditionally, which is one of the instances where a trust action is an action in law, not equity. Since the suit is in law, the plaintiff may recover exemplary damages. *Peterson v. McMahon*, 99 P.3d 594 (Colo. 2004).

**Strict liability in tort.** Punitive damages are recoverable in connection with a strict liability claim founded on section 402A of the Restatement (Second) of Torts where an injury results from the marketing of a product in flagrant disregard of consumer safety. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).

**Trademark infringement.** The jury finding of punitive damages on claim of trademark infringement is supported if the evidence is sufficient to warrant a determination beyond a reasonable doubt that the infringer acted with a wanton and reckless disregard of the rights of the plaintiff. *Big O Tire Dealers, Inc. v. Good-year Tire & Rubber Co.*, 408 F. Supp. 1219 (D. Colo. 1976), modified on other grounds and aff'd, 561 F.2d 1365 (10th Cir. 1977), cert. dismissed, 434 U.S. 1052, 98 S. Ct. 905, 54 L. Ed.2d 805 (1978).

**The Ski Safety Act of 1979** does not preclude exemplary damages in civil actions arising out of skiing injuries. *Pizza v. Wolf Creek Ski Dev. Corp.*, 711 P.2d 671 (Colo. 1985).

**The cap on damages cap in the Ski Safety Act of 1979** does not apply to exemplary damages awarded under this section in skiing-related wrongful death actions. *Stamp v. Vail Corp.*, 172 P.3d 437 (Colo. 2007).

**In an action in contract exemplary damages are not allowable.** *Westesen v. Olathe State Bank*, 75 Colo. 340, 225 P. 837 (1924); *Williams v. Speedster, Inc.*, 175 Colo. 73, 485 P.2d 728 (1971); *Postal Instant Press v. Jackson*, 658 F. Supp. 739 (D. Colo. 1987) (federal district court disagreeing with Colorado court of appeals decision allowing such damages in contract actions in *Davies v. Bradley*, 676 P.2d 1242 (1983); *Collister v. Ashland Oil Co., Inc.*, 687 P.2d 525 (1984); *Podleski v. Mortgage Finance, Inc.*, 709 P.2d 18 (1985); *Denver Publ'g Co. v. Kirk*, 729 P.2d 1004 (1986); *Cox v. Bertsch*, 730 P.2d 889 (1986); *Mortgage Fin., Inc. v. Podleski*, 742 P.2d 900 (Colo. 1987).

**No exemplary damages in rescission action based on fraud.** Under this section, the recovery of exemplary damages is limited to civil actions in which damages shall be assessed, hence an action for rescission of a contract on the ground of fraud and for return of the consideration paid is not an action in damages and exemplary damages cannot be recovered. *Aaberg v. H.A. Harman Co.*, 144 Colo. 579, 358 P.2d 601 (1960).

**Exemplary damages may be awarded though the action sounds in contract.** *Davies v. Bradley*, 676 P.2d 1242 (Colo. App. 1983); *Riva Ridge Apts. v. Robert G. Fisher Co.*, 745 P.2d 1034 (Colo. App. 1987).

**Plaintiff's claim transcended the contract, and was not precluded by the economic loss rule,** where a triable issue of fact existed regarding alarm company's willful and wanton failure to respond to a burglary and fire. *U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.*, 192 P.3d 543 (Colo. App. 2008).

**Exemplary damages awarded in breach of contract action** where defendant's actions constituted a wrongful act in reckless disregard of plaintiff's rights and feelings. *Collister v. Ashland Oil Co., Inc.*, 687 P.2d 525 (Colo. App. 1984).

**Taking property under claim of right will not justify exemplary damages.** The mere taking of property under a claim of right over the protest of one in possession is not sufficient to establish grounds for exemplary damages in a conversion action. *Am. Nat'l Bank v. Etter*, 28 Colo. App. 511, 476 P.2d 287 (1970).

**But refusal of insurer to return stolen automobile does.** Where, upon the recovery of a stolen automobile, the insurer against loss by theft refused to deliver it to the owner unless the latter accepted its terms of settlement, it was held that this constituted "a wanton and reckless disregard of the injured party's rights" as those words are used in this section. *Pennsylvania Fire*



Ins. Co. v. Levy, 85 Colo. 565, 277 P. 779 (1929).

**Exemplary damage award upheld in a conversion action** where the taking constituted a wrongful act in reckless disregard of the injured party's rights. *Clark v. Morris*, 710 P.2d 1130 (Colo. App. 1985).

**Since eminent domain statute nowhere provides for exemplary damages, such damages are not to be allowed** in a special statutory proceeding for condemnation. *Ossman v. Mountain States Tel. & Tel. Co.*, 184 Colo. 360, 520 P.2d 738 (1974).

**Nor are they allowed in inverse condemnation action.** An inverse condemnation action is in the nature of a special statutory proceeding and is to be tried as if it were an eminent domain proceeding. Thus, the exemplary damages statute, which authorizes the award of exemplary damages in "all civil actions", is not applicable to an inverse condemnation action. *Ossman v. Mountain States Tel. & Tel. Co.*, 184 Colo. 360, 520 P.2d 738 (1974).

**Exemplary damages are available in a suit for loss of consortium.** The words, "wrong done to the person, or to personal or real property" were unquestionably intended to apply to any type of tort, and no reason is apparent why such damages should not be recoverable where the injury complained of is loss of consortium. *Kohl v. Graham*, 202 F. Supp. 895 (D. Colo. 1962).

**The wrong done need not be a physical injury.** Any one who wrongfully induces a husband to desert and abandon his wife commits an actionable injury against the wife. Such injury is a wrong done to the wife as an individual — as a person. This section does not specify that the wrong shall be a physical or bodily injury. On the contrary, it allows exemplary damages when "the injury complained of shall be attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings". These words clearly import wrongs and injuries other than mere bodily wounds or pecuniary losses. They include as well injuries affecting the mind and sensibilities of the individual which are often more grievous and painful than mere material injuries. The whole language of this section, construed together, forbids that the words "wrong done to the person", should be restricted to physical or bodily injuries. *Williams v. Williams*, 20 Colo. 51, 37 P. 614 (1894).

**Exemplary damages not available in an equitable action.** The award of exemplary damages in equity actions, or incidental equitable relief, is generally not allowable. *Miller v. Kaiser*, 164 Colo. 206, 433 P.2d 772 (1967).

**Punitive damages are not recoverable in actions in equity.** *Kaitz v. District Court*, 650 P.2d 553 (Colo. 1982).

**Plaintiff could not recover damages under this section and also recover damages under § 6-1-113 (2)(a),** where purposes of both statutes are to punish and deter. *Lexton-Ancira Real Estate Fund v. Heller*, 826 P.2d 819 (Colo. 1992).

**Exemplary damages recoverable where conduct constituting breach of contract is also a tort for which exemplary damages are recoverable.** *McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body*, 799 P.2d 394 (Colo. App. 1989).

**The standard for awarding punitive damages is not the same as that for the tort of outrageous conduct,** therefore, the court did not err in granting a motion to dismiss the outrageous conduct claim while denying the motion to dismiss the punitive damage claim. *Orjias v. Stevenson*, 31 F.3d 995 (10th Cir. 1994) (decided under law in effect prior to the 1986 amendment).

**No question but that an invasion of privacy claim is for "a wrong done to the person,"** and exemplary damages were properly awarded. *Borquez v. Robert C. Ozer, P.C.*, 923 P.2d 166 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 940 P.2d 371 (Colo. 1997).

Exemplary damages may be awarded on civil conspiracy claim, an independent tort that seeks actual damages. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

**Exemplary damages may be awarded if the injury is attended by circumstances of fraud, malice, or willful and wanton conduct.** Where plaintiff testified that she believed the defendant was holding her money and that it would be available for her future medical and burial expenses and her other daughter's medical expenses, but where defendant put plaintiff's money into her own account and then used it to buy an annuity in her own name and to make a loan to a third party, the court properly awarded exemplary damages. *Eads v. Dearing*, 874 P.2d 474 (Colo. App. 1993).

**Evidence supports jury's finding that manufacturer acted with wanton and reckless disregard of injured plaintiff's rights.** *Gruntmeir v. Mayrath Indus., Inc.*, 841 F.2d 1037 (10th Cir. 1988) (decided prior to 1986 amendment).

**Disallowance of punitive damages under the theory that the award would serve no purpose cannot take place until such damages have actually been awarded.** *Cook v. Rockwell Intern. Corp.*, 755 F. Supp. 1468 (D. Colo. 1991).

**Portion of exemplary damage award from malicious prosecution suit that was awarded to state pursuant to subsection (4) was not subject to attorney fee claim under equitable common fund doctrine.** Since state had no legal interest in award until after judgment, it was not afforded any opportunity to intervene

before judgment. *Schenck v. Minolta Office Sys., Inc.*, 873 P.2d 18 (Colo. App. 1993).

**Employer waived statutory right to be free from arbitral award of punitive damages.** Employer sought order compelling arbitration under rules of national association of security dealers, which permitted arbitrator to award damages and other relief, and did not challenge employee's right to recover punitive damages through the arbitration proceedings. *Padilla v. D.E. Frey & Co., Inc.*, 939 P.2d 475 (Colo. App. 1997).

**Court is given authority to increase the award if defendant is shown to have continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner during the pendency of the case,** thus the court may consider actions of the defendant after the alleged negligence, but only actions that occurred during the pendency of the case. *Bennett v. Greeley Gas Co.*, 969 P.2d 754 (Colo. App. 1998).

To increase an award of exemplary damages under subsection (3)(b), the actions of defendant need not relate to "the action which is the subject of the claim". *Martin v. Union Pac. R.R.*, 186 P.3d 61 (Colo. App. 2007), rev'd on other grounds, 209 P.3d 185 (Colo. 2009).

**Despite supreme court decision that subsection (4) was unconstitutional, plaintiff's attorney, who failed to cross-appeal the award, was not entitled to claim a right to attorney fees payable from award granted to state.** *Schenck v. Minolta Office Sys., Inc.*, 873 P.2d 18 (Colo. App. 1993).

**This section does not preclude an award against one who has also been charged with criminal misconduct.** Moreover, because an exemplary damages award is authorized in order to serve as an example to others, a finding by the trial court that the defendant will not repeat the conduct does not preclude the trial court from exercising its discretion to award exemplary damages. *Razi v. Schmitt*, 36 P.3d 102 (Colo. App. 2001).

**Applied** in *Miller v. Carnation Co.*, 33 Colo. App. 62, 516 P.2d 661 (1973); *Butler v. Behaeghe*, 37 Colo. App. 282, 548 P.2d 934 (1976); *Roberts v. Bucher*, 41 Colo. App. 138, 584 P.2d 97 (1978); *Campbell v. Jenkins*, 43 Colo. App. 458, 608 P.2d 363 (1979); *Dorney v. Harris*, 482 F. Supp. 323 (D. Colo. 1980); *Rodriguez v. Bar-S Food Co.*, 539 F. Supp. 710 (D. Colo. 1982); *Winters v. City of Commerce City*, 648 P.2d 175 (Colo. App. 1982); *Shriver v. Carter*, 651 P.2d 436 (Colo. App. 1982); *H & K Auto. Supply Co. v. Moore & Co.*, 657 P.2d 986 (Colo. App. 1982); *Sunward Corp. v. Dun & Bradstreet, Inc.*, 568 F. Supp. 602 (D. Colo. 1983); *Asplin v. Mueller*, 34 Bankr. 869 (Bankr. D. Colo. 1983); *Dodds v. Frontier Chevrolet Sales & Serv. Inc.*, 676 P.2d 1237 (Colo. App.

1983); *Holter v. Moore and Co.*, 681 P.2d 962 (Colo. App. 1983); *Bill Manning, Inc. v. Denver West Bank and Trust*, 697 P.2d 403 (Colo. App. 1984); *Florey v. District Court*, 713 P.2d 840 (Colo. 1985); *Francis v. Steve Johnson Pontiac-GMC-Jeep*, 724 P.2d 84 (Colo. App. 1986); *Padilla v. Ghuman*, 183 P.3d 653 (Colo. App. 2007).

## II. ESSENTIAL ELEMENTS.

**To justify exemplary damages there must be some wrong motive accompanying the wrongful act, or a reckless disregard of plaintiff's rights.** *Eisenhart v. Ordean*, 3 Colo. App. 162, 32 P. 495 (1893); *French v. Deane*, 19 Colo. 504, 36 P. 609 (1894); *Republican Publ'g Co. v. Conroy*, 5 Colo. App. 262, 38 P. 423 (1894); *Gray v. Linton*, 38 Colo. 175, 88 P. 749 (1906); *Carlson v. McNeil*, 114 Colo. 78, 162 P.2d 226 (1945); *Ellis v. Buckley*, 790 P.2d 875 (Colo. App. 1989), cert. denied, 498 U.S. 920, 111 S. Ct. 296, 112 L. Ed.2d 249 (1990).

The act causing the injuries must be done with an evil intent and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidences a wrongful motive. *Frick v. Abell*, 198 Colo. 508, 602 P.2d 852 (1979); *Mari v. Wagner Equip. Co., Inc.*, 721 P.2d 1208 (Colo. App. 1986).

**Malice may be inferred from reckless and wanton acts.** Malice, as used in this section, may be found by the jury or the court from the reckless and wanton acts of the injuring party, such as disclose an utter disregard of consequences, aside from any intentional malice in its odious or malevolent sense. *Cohen v. Fox*, 26 Colo. App. 55, 141 P. 504 (1914).

**Or willful misconduct or an entire want of care.** Willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences is necessary to support a claim for punitive damages. *Kansas Pac. Ry. v. Lundin*, 3 Colo. 94 (1876) (decided prior to the earliest source of § 13-21-102, L. 1899, p. 64, § 1).

**Malice may be actual or implied,** and in general it may be implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse. *Williams v. Williams*, 20 Colo. 51, 37 P. 614 (1894).

Where the defendant was conscious of his conduct and the existing conditions, and knew or should have known that injury would result, the statutory requirements of this section are met. *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005).

**Conduct which is merely negligent cannot serve as basis for exemplary damages.** *Frick v. Abell*, 198 Colo. 508, 602 P.2d 852 (1979).

**An assumption that malice is an essential element in a finding of exemplary damages is**



**incorrect.** *Clark v. Small*, 80 Colo. 227, 250 P. 385 (1926).

**It is sufficient if defendant knew or should have known injury would probably result.**

"If, conscious of his conduct and existing conditions, defendant knew, or should have known, that the injury would probably result, the requirements of this section (wanton and reckless disregard) are met". *Clark v. Small*, 80 Colo. 227, 250 P. 385 (1926); *Foster v. Redding*, 97 Colo. 4, 45 P.2d 940 (1935); *Frick v. Abell*, 198 Colo. 508, 602 P.2d 852 (1979); *Bodah v. Montgomery Ward & Co., Inc.*, 724 P.2d 102 (Colo. App. 1986).

**Evidence showing a reckless disregard for plaintiff's rights and feelings.** From the language of this section it will be seen that that part of the verdict assessing exemplary damages could be upheld if malice, fraud, or insult were entirely wanting. It would be sufficient if the jury believed that the injury inflicted on defendant was attended by circumstances showing a wanton and reckless disregard of his rights and feelings. *Coryell v. Lawson*, 25 Colo. App. 432, 139 P. 25 (1914).

**Evidence of conduct occurring after the event creating liability is material to the jury's assessment of punitive damages** if the entire course of conduct, including the portion that occurred after the accident, tended to show that the defendant had acted heedlessly, recklessly, and without regard to the consequences or the safety of others. *Jones v. Cruzan*, 33 P.3d 1262 (Colo. App. 2001).

**The feelings mentioned in this section may be physical as well as mental, and "wanton" means wilful and intentional.** *Clark v. Small*, 80 Colo. 227, 250 P. 385 (1926).

**"Wanton and reckless" disregard** as used in this statute means conduct that creates a substantial risk of harm to another and is purposefully performed with an awareness of the risk in disregard of the consequences. *Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484 (Colo. 1986); *Juarez v. United States*, 798 F.2d 1341 (10th Cir. 1986); *Miller v. Solaglas California, Inc.*, 870 P.2d 559 (Colo. App. 1993); *Archer v. Farmer Bros. Co.*, 70 P.3d 495 (Colo. App. 2002), *aff'd* on other grounds, 90 P.3d 228 (Colo. 2004).

Employer's act of sending supervisors to deliver employee's notice of termination at home where he was recovering from an apparent heart attack, of which the employer knew and stated that he did not care, and without prior warning to or discussion with the employee, supported an award of exemplary damages. *Archer v. Farmer Bros. Co.*, 70 P.3d 495 (Colo. App. 2002), *aff'd* on other grounds, 90 P.3d 228 (Colo. 2004).

**"Wanton and reckless disregard" question for jury.** Whether a defendant's intoxication constitutes wanton and reckless disregard for the

rights and safety of others is generally a question of fact for the jury, and, where there is supportive evidence, the court should instruct the jury on this issue. *Butters v. Mince*, 43 Colo. App. 89, 605 P.2d 922 (1979), *rev'd* on other grounds, 200 Colo. 501, 616 P.2d 127 (1980); *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005).

The sufficiency of evidence to justify an award of punitive damage is a question of law, in which the totality of the evidence should be viewed in the light most supportive of the verdict. *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005).

**Malice not element of trademark infringement claim.** Viewing the award of punitive damages as relating to a trademark infringement claim, it is not necessary that there be proof of "evil intent" because malice is not an element of that claim. *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219 (D. Colo. 1976), modified on other grounds and *aff'd*, 561 F.2d 1365 (10th Cir. 1977), cert. dismissed, 434 U.S. 1052, 98 S. Ct. 905, 54 L. Ed.2d 805 (1978).

**Prima facie proof of triable issue on liability for punitive damages is necessary** to discover information relating to the defendant's financial status, and it may be established through discovery, by evidentiary means, or by an offer of proof. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

**Relevancy threshold for evidence in punitive damages claim.** In the context of a punitive damages claim, the relevancy threshold is satisfied if the offered evidence tends to make more probable than not the existence of any of the statutory elements. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).

Evidence that manufacturer hired an advertising agency to encourage media publicity favorable to all of its products, including its intrauterine device, demonstrated a motive on the part of the manufacturer to profit by making exaggerated statements regarding the safety and efficacy of its product and therefore such evidence of the lay publicity campaign was relevant in establishing the statutory predicate for an award of punitive damages. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).

**Standard of proof.** Evidence in consolidated actions for injuries arising from the use of intrauterine contraceptive devices manufactured and marketed by the defendant supported findings that the devices were defective and were misrepresented with respect to safety and efficacy and that the defendant was negligent, but did not support a finding beyond a reasonable doubt, as required by § 13-25-127 (2), that the defendant caused injury to plaintiffs by fraud, malice or insult, or wanton and reckless disregard of their rights and feelings so as to award exemplary damages to the plaintiffs. *Hawkinson*

v. A.H. Robins Co., Inc., 595 F. Supp. 1290 (D. Colo. 1984).

**Allowance or denial of exemplary damages rests in discretion of trier of fact.** While the question of the sufficiency of evidence to justify an award of exemplary damages is a question of law, the allowance or denial of such damages rests in the discretion of the trier of fact. *Mince v. Butters*, 200 Colo. 501, 616 P.2d 127 (1980).

**While mere negligence cannot support an award of exemplary damages**, repeated failure to correct a known dangerous condition may convert mere negligence into wanton and reckless disregard. *Jacob v. Commonwealth Highland Theatres, Inc.*, 738 P.2d 6 (Colo. App. 1986); *Concord Realty v. Cont'l Funding*, 776 P.2d 1114 (Colo. 1989).

This is so if the failure to act creates a substantial risk of harm to another and purposefully occurs with awareness of the risk in disregard of consequences or if the defendant, while conscious of its conduct and cognizant of existing conditions, knew or should have known that injury would probably result from its omission. *Jacob v. Commonwealth Highland Theatres, Inc.*, 738 P.2d 6 (Colo. App. 1986).

**Evidence regarding a defendant's economic status is not an essential element of proof for an award of exemplary damages.** *Evans v. Thompson*, 762 P.2d 754 (Colo. App. 1988).

**Court shall submit the question of punitive damages to the jury** where the plaintiff has shown evidence of fraud, malice, or wanton and reckless conduct on the part of the defendant. There is no need to show proof of the defendant's financial condition to make out a claim for punitive damages. *Amber Props. v. Howard Elec. & Mech.*, 775 P.2d 43 (Colo. App. 1988).

Evidence held sufficient to support finding of "willful and wanton" misconduct. Hence, directed verdict for defendant was improper. *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995).

**Wrongful motive was shown**, in case alleging bad-faith breach of insurance contract, by evidence that defendant insurer knew or should have known that injury would result from its actions. *S. Park Aggregates, Inc. v. Nw. Nat. Ins. Co.*, 847 P.2d 218 (Colo. App. 1992).

**The "circumstances of fraud" required for punitive damages under subsection (1)(a) are established** if, in a fraudulent concealment case, a jury finds that the elements of fraud are established. *Berger v. Sec. Pac. Info. Sys., Inc.*, 795 P.2d 1380 (Colo. App. 1990).

**Willful and wanton conduct includes conduct that creates a substantial risk of harm to another and is purposefully performed with an awareness of the risk in disregard of the consequences.** *Messler v. Phillips*, 867 P.2d 128 (Colo. App. 1993).

**"Willful and wanton" standard held satisfied** where evidence supported a finding that

defendant negotiated liability releases for himself to the detriment of a corporation of which he was a director, and disregarded the corporation's solvency on the date of a distribution of assets. *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267 (Colo. App. 2000).

**"Wanton and reckless" standard held satisfied** by defendants' conduct in supervision (or lack of supervision) of company-sponsored Christmas party at which plaintiff was injured in a fight. *Bradley v. Guess*, 797 P.2d 749 (Colo. App. 1989).

**Wanton and reckless disregard of tenant's rights and feelings shown** where mobile park owner continued to request tenant to perform maintenance it knew she was unable to perform and made no attempt to accommodate her before posting notice to quit. Punitive damages award necessary to deter landlord and other landlords from discriminating against persons with disabilities. *Boulder Meadows v. Saville*, 2 P.3d 131 (Colo. App. 2000).

**Award of exemplary damages against defendant cannot stand since verdict was for defendant** based on the jury's finding that plaintiff was more than fifty percent negligent. *White v. Hansen*, 837 P.2d 1229 (Colo. 1992).

An award of exemplary damages rests in the discretion of the trier of fact, be that the jury or the trial court. *Messler v. Phillips*, 867 P.2d 128 (Colo. App. 1993).

**In an action based upon the unintentional conduct of the defendant, it is not relevant that the trier of fact decides that the defendant engaged in willful and wanton conduct for purposes of awarding exemplary damages under this section.** If the trier of fact determines the plaintiff's negligence is greater or equal to defendant's negligence, judgment must be entered in favor of the defendant. *White v. Hansen*, 837 P.2d 1229 (Colo. 1992).

**The statutory reference to damages assessed is synonymous with the total compensatory amount prior to adjustments for any negligence of the plaintiff** and the reference to damages awarded equates to the reduced compensatory amount. *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**Exemplary damages are limited to damages recovered in accordance with an order for judgment, or the reduced compensatory amount.** *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**Subsection (1) mandates a one-to-one limitation of exemplary damages to "actual damages awarded"**, measured by the amount of compensatory damages after reduction for comparative negligence and pro rata liability by the court. *Sprung v. Adcock*, 903 P.2d 1224 (Colo. App. 1995).

**While evidence of a continuing course of conduct** may buttress a claim for exemplary damages, the absence of such evidence does not



preclude such an award if the statutory elements are met by other sufficient proof. *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 186 P.3d 80 (Colo. App. 2008).

### III. AMOUNT.

**Exemplary damages cannot be accurately measured.** *Carlson v. McNeil*, 114 Colo. 78, 162 P.2d 226 (1945).

**There is no definite, precise ratio** governing the relationship of actual damages to exemplary damages. *Mailloux v. Bradley*, 643 P.2d 797 (Colo. App. 1982).

**Jury may apportion exemplary damages** among multiple defendants, recognizing the differing degree of culpability or the existence or nonexistence of malice on an individual basis. The amounts need not be identical. *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267 (Colo. App. 2000).

**Exemplary damages must bear some relation to the compensatory damages awarded.** *Starkey v. Dameron*, 92 Colo. 420, 22 P.2d 640 (1933); *Barnes v. Lehman*, 118 Colo. 161, 193 P.2d 273 (1948); *Ark Valley Alfalfa Mills, Inc. v. Day*, 128 Colo. 436, 263 P.2d 815 (1953); *Montgomery v. Tufford*, 165 Colo. 18, 437 P.2d 36 (1968); *Wegner v. Rodeo Cowboys Ass'n*, 290 F. Supp. 369 (D. Colo. 1968), aff'd and reh'g denied, 417 F.2d 881 (10th Cir. 1969), cert. denied, 398 U.S. 903, 90 S. Ct. 1688, 26 L. Ed.2d 60 (1970); *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365 (10th Cir. 1977), cert. dismissed, 434 U.S. 1052, 98 S. Ct. 905, 54 L. Ed.2d 805 (1978); *Frick v. Abell*, 198 Colo. 508, 602 P.2d 852 (1979).

**Nominal damages alone are sufficient to support an award of exemplary damages.** *Carey v. After the Gold Rush*, 715 P.2d 803 (Colo. App. 1986).

**Factors which guide determination of reasonable award.** Although no precise formula can be utilized in the determination of the reasonableness of an award of exemplary damages the factors which guide the determination are: (1) The nature of the act which caused the injury; (2) the economic status of the defendant; and (3) the deterrent effect of the award on others. *Frick v. Abell*, 198 Colo. 508, 602 P.2d 852 (1979); *Mailloux v. Bradley*, 643 P.2d 797 (Colo. App. 1982); *Vogel v. Carolina Intern., Inc.*, 711 P.2d 708 (Colo. App. 1985).

In determining the amount which should be awarded as punitive damages, the severity of the defendant's wrong, as well as the extent of the defendant's assets, must be considered to ensure that the award will punish the defendant. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980); *Mailloux v. Bradley*, 643 P.2d 797 (Colo. App. 1982).

Reasonableness of the award must be ascertained by examining the facts of the case to discover if the jury was impermissibly moti-

vated by prejudice or properly guided by the purposes for exemplary damages, namely to deter and punish wrongful conduct. *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984); *Vogel v. Carolina Intern, Inc.*, 711 P.2d 708 (Colo. App. 1985).

**Test for excessiveness of award.** The crucial question is whether the punitive award is so excessive that it shocks the judicial conscience or leads to an inescapable inference that it resulted from improper passion or prejudice on the part of the jury. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152 (10th Cir. 1981), cert. denied, 464 U.S. 824, 104 S. Ct. 92, 78 L. Ed.2d 99 (1983).

Test applied in *Post Office v. Portec, Inc.*, 913 F.2d 802 (10th Cir. 1990); *Estate of Korf v. A.O. Smith Harvestore Prods.*, 917 F.2d 480 (10th Cir. 1990) (both cases decided under section in effect prior to 1986 amendment).

**Costs of litigation and attorney fees** which were the consequence of the aggravated nature of the offense may under certain circumstances be considered in setting the amount of exemplary damages. *Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974); *Davies v. Bradley*, 676 P.2d 1242 (Colo. App. 1983).

**Behavior during the pendency of the case may be considered.** *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005).

**Widely disproportionate exemplary damages indicate jury prejudice.** Exemplary damages must be fairly proportionate to actual damages and if there is a wide disproportion, it shows that the jury was motivated by prejudice. *Wegner v. Rodeo Cowboys Ass'n*, 290 F. Supp. 369 (D. Colo. 1968), aff'd and reh'g denied, 417 F.2d 881 (10th Cir. 1969), cert. denied, 398 U.S. 903, 90 S. Ct. 1688, 26 L. Ed.2d 60 (1970).

**This rule requires that a verdict for exemplary damages be separately stated**, in order to provide a basis for determining its reasonableness. *Montgomery v. Tufford*, 165 Colo. 18, 437 P.2d 36 (1968).

**In most jurisdictions the requirement that there be proportion between the general award and the exemplary award is used as a test** so as to allow the court to set aside verdicts which it regards as excessive under the facts and the evidence presented. *Wegner v. Rodeo Cowboys Ass'n*, 290 F. Supp. 369 (D. Colo. 1968), aff'd and reh'g denied, 417 F.2d 881 (10th Cir. 1969), cert. denied, 398 U.S. 903, 90 S. Ct. 1688, 26 L. Ed.2d 60 (1970).

**The proportion must be substantially equal but it does not have to be a fixed or definite mathematical ratio.** The courts invariably examine and use the ratio, together with the particular facts presented, in order to ascertain whether the exemplary damage award seems unreasonable. *Wegner v. Rodeo Cowboys Ass'n*, 290 F. Supp. 369 (D. Colo. 1968), aff'd and reh'g denied, 417 F.2d 881 (10th Cir. 1969),

cert. denied, 398 U.S. 903, 90 S. Ct. 1688, 26 L. Ed.2d 60 (1970).

**Generally greater exemplary damages are allowed in defamation cases.** There is no definitive Colorado case dealing with defamation. Other jurisdictions which generally require a reasonable relationship between exemplary and general damages have upheld exemplary award in libel cases in much higher proportion than the 4 to 1 ratio awarded. The Colorado court has not laid down a hard and fast rule which requires that the present verdict be upset. The jury was at liberty to conclude that the defendants deliberately and premeditatedly set out to discredit the plaintiff so as to deter him in his effort to establish a competing organization. There is no basis for concluding that the jury verdict resulted from passion or prejudice, and the disproportion in the award does not by itself or in conjunction with the other evidence raise any such inference. *Wegner v. Rodeo Cowboys Ass'n*, 290 F. Supp. 369 (D. Colo. 1968), *aff'd* and *reh'g* denied, 417 F.2d 881 (10th Cir. 1969), cert. denied, 398 U.S. 903, 90 S. Ct. 1688, L. Ed.2d 60 (1970).

**Defendant's financial status inadmissible in assessing compensating damages.** In suits involving the assessment of compensatory damages, evidence of a defendant's financial status is inadmissible. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

**Discovery of defendant's financial records not permitted.** In view of legislative intent to end practice of requiring parties to bring financial records into court for review by the opposing side, in connection with punitive damages as well as with compensatory damages, discovery of the defendant's tax returns could not have led to admissible evidence and should not have been allowed. *Corbetta v. Albertson's, Inc.*, 975 P.2d 718 (Colo. 1999).

**New trial warranted where verdict manifestly inadequate.** If the verdict is manifestly inadequate, or so small in amount as to clearly and definitely indicate that the jury neglected to take into consideration evidence of the plaintiff's injuries, pain and suffering, and resulting disability, if any; or if the record indicates that the jury was influenced by prejudice, passion, or other improper considerations; or if the jury was improperly instructed on the elements of compensatory damages, then a new trial on the issue of damages would be warranted. *Mince v. Butters*, 200 Colo. 501, 616 P.2d 127 (1980).

**If damages are excessive plaintiff may consent to reduction and avoid reversal.** It is not error in such a case to rule that a judgment be reversed and the cause remanded for a new trial; provided, however, that if plaintiff so elect he may consent to the reduction of said damages and final amended judgment will then be entered accordingly. *Barnes v. Lehman*, 118 Colo. 161, 193 P.2d 273 (1948).

**For when unreasonable exemplary damages will not be sustained;** see *Starkey v. Dameron*, 92 Colo. 420, 21 P.2d 1112 (1933); *Kresse v. Bennett*, 151 Colo. 549, 379 P.2d 807 (1963); *Leo Payne Pontiac, Inc. v. Ratliff*, 29 Colo. App. 386, 486 P.2d 477 (1971); *W. Cities Broad. v. Schueller*, 830 P.2d 1074 (Colo. App. 1991), *aff'd* in part and *rev'd* in part on other grounds, 849 P.2d 44 (Colo. 1993).

**Evidence regarding a defendant's economic status is not an essential element of proof for an award of exemplary damages** but merely a factor to be considered. *Evans v. Thompson*, 762 P.2d 754 (Colo. App. 1988).

**"Wanton" conduct under subsection (1)(a) is equivalent to "willful" conduct under § 13-21-101 (1).** *Bradley v. Guess*, 797 P.2d 749 (Colo. App. 1989), *rev'd* on other grounds, 817 P.2d 971 (Colo. 1991).

**But prejudgment interest may not be added to exemplary component of damage award.** The victim's right to compensation for an injury suffered accrues before judgment, making prejudgment interest appropriate; however, the right to an award of punitive damages, which serves an entirely different purpose, does not exist until time of judgment. The fact that both components are part of a single claim tied to a single act of the defendant does not alter their separate character. *Seward Const. Co., Inc. v. Bradley*, 817 P.2d 971 (Colo. 1991); *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**Exemplary damages are not directly subject to reduction under comparative negligence statute.** Reduction of award under § 13-21-111 is based on plaintiff's own conduct, whereas an award of exemplary damages under this section is based on the defendant's misconduct and different principles apply. However, interplay among this section, § 13-21-111, and § 13-21-111.5 may produce a similar result. *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**The plaintiff's comparative negligence should not be directly applied to reduce exemplary damages.** *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**The amount of reasonable exemplary damages may not exceed the amount of the actual damages awarded.** *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020 (Colo. App. 1993).

**The amount of exemplary damages — statutorily limited to the amount of "actual damages awarded" — should not exceed the amount of compensatory damages** after such damages have been reduced by judicial application of the comparative negligence and pro rata damages statutes. *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**Exemplary damages are not subject to prejudgment interest.** *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**Amount of actual damages awarded includes prejudgment interest.** The award of



compensatory damages includes the application of statutorily mandated additions and reductions to the jury's assessment of total damages. *Vickery v. Evans*, 266 P.3d 390 (Colo. 2011).

**Trial court erred by increasing exemplary damages award without granting a hearing to defendant.** Under subsection (3)(a), exemplary damages can be increased only if defendant continued the behavior in a willful and wanton manner. Without a hearing concerning conduct during the pendency of the case, the trial court could not have determined whether "willful and wanton manner" had been proven beyond a reasonable doubt. *Blood v. Qwest Servs. Corp.*, 224 P.3d 301 (Colo. App. 2009), *aff'd*, 252 P.3d 1071 (Colo. 2011).

**Trial court committed error when it considered, over defendant's objections, evidence of defendant's income and net worth in its determination of punitive damages.** This section expressly prohibits consideration of a party's net worth or income in deciding whether exemplary damages are appropriate. Accordingly, upon remand, such evidence may not be considered. *Razi v. Schmitt*, 36 P.3d 102 (Colo. App. 2001).

#### IV. PLEADING AND PRACTICE.

**The one-year limitation of former § 13-80-104 applied to prayers for punitive damages.** *Sherwood v. Graco, Inc.*, 427 F. Supp. 155 (D. Colo. 1977).

**Punitive damages can only be obtained in action for wrongful death upon proper averment and proof under this section.** *Hayes v. Williams*, 17 Colo. 465, 30 P. 352 (1892).

**The jury is charged with the responsibility of determining the proper amount of exemplary damages.** *Leo Payne Pontiac, Inc. v. Ratliff*, 29 Colo. App. 386, 486 P.2d 477 (1971).

**The award of exemplary damages may be excessive or unreasonable as a matter of law.** *Leo Payne Pontiac, Inc. v. Ratliff*, 29 Colo. App. 386, 480 P.2d 477 (1971).

**Whether there is any evidence to justify the finding of exemplary damages, is a question for the court.** If there is none, it is error to submit the question to the jury. *Eisenhart v. Ordean*, 3 Colo. App. 162, 32 P. 495 (1893); *Moody v. Sindlinger*, 27 Colo. App. 290, 149 P. 263 (1915); *Reyher v. Mayne*, 90 Colo. 586, 10 P.2d 1109 (1932).

Where record demonstrated sufficient evidence from which a juror could conclude, beyond a reasonable doubt, that insurer's actions were willful and wanton, decision of trial court to submit question of punitive damages to jury would be upheld. *Surdyka v. DeWitt*, 784 P.2d 819 (Colo. App. 1989).

**Because reliance on advice of counsel or consultants was only relevant to, not dispositive of, the element of intent in engaging in**

**the acts that led to damages, and proof of such reliance would not require that defendant prevail on, or the court dismiss, plaintiffs' claim, it was not an affirmative defense.** Trial court did not err, therefore, in admitting the reliance evidence and instructing the jury that it could consider that evidence in regard to punitive damages. *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007).

**It is error to submit the question of punitive damages to the determination of the jury in the absence of evidence of any requisite element for the application of the rule.** *Reyher v. Mayne*, 90 Colo. 586, 10 P.2d 1109 (1932).

**Bifurcated trial on issue of liability for punitive damages in products liability suit.** In products liability claim, defendant did not make an adequate showing of past punitive damages awards arising out of the same course of conduct to warrant granting a bifurcated trial on the issue of punitive damages in order to avoid any prejudice to the defendant on the issue of liability. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).

**Court's following instruction to jury approved:** "Malice may be implied when there is a deliberate intention to do a grievous wrong without legal justification or excuse". *McAllister v. McAllister*, 72 Colo. 28, 209 P. 788 (1922).

**Erroneous instruction.** An instruction that "in law a wrongful act done intentionally, without a legal justification, is done maliciously", is erroneous. To justify exemplary damages there must be some wrong motive accompanying the wrongful act, or a reckless disregard of plaintiff's rights. *French v. Deane*, 19 Colo. 504, 36 P. 609 (1894).

**When an action for damages is tried to the court without a jury by consent of the parties, the court may, in a proper case, award exemplary damages under this section.** *Calvat v. Franklin*, 90 Colo. 444, 9 P.2d 1061 (1932).

**Evidence of malice met the requirement of this section in an action for injuries allegedly sustained in an assault upon plaintiff by defendant.** *Minowitz v. Failing*, 109 Colo. 182, 123 P.2d 417 (1942).

**Evidence held insufficient.** Evidence of "fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings", held insufficient to support a judgment for exemplary damages under this section. *Rosenbaum v. Mathews*, 113 Colo. 307, 156 P.2d 843 (1945); *Spurlock v. United Airlines*, 330 F. Supp. 228 (D. Colo. 1971).

**Admissibility of evidence in libel action to mitigate exemplary damages.** Where the plaintiff in a libel action seeks exemplary damages he can recover such damages only upon proof of actual malice upon the part of the defendant, or a reckless disregard by him of the plaintiff's rights and feelings and in such case, the defen-

dant, not as a justification, but for the sole purpose of mitigating exemplary damages, may introduce evidence to the contrary. *Bearman v. People*, 91 Colo. 486, 16 P.2d 425 (1932).

**Evidence of potential nonparty harm may be considered in a reprehensibility analysis** as part of a due process test for exemplary damages awards, as set forth in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). The decision of the U.S. supreme court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), does not preclude such use of potential nonparty harm evidence. *Blood v. Qwest Servs. Corp.*, 224 P.3d 301 (Colo. App. 2009), *aff'd*, 252 P.3d 1071 (Colo. 2011).

**Right to damages under this section must be proved beyond a reasonable doubt.** *S. Park Aggregates, Inc. v. Nw. Nat. Ins. Co.*, 847 P.2d 218 (Colo. App. 1992); *Sky Fun 1, Inc. v. Schuttloffel*, 8 P.3d 570 (Colo. App. 2000), *rev'd* on other grounds, 27 P.3d 361 (Colo. 2001).

**Failure of trial court to specifically state that the evidence supported findings leading to imposition of punitive damages beyond a reasonable doubt was not fatal**, where the findings otherwise led inexorably to that conclusion. *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005).

**Where evidence supported findings leading to imposition of punitive damages under this section, as well as under another statute**, the fact that the other statute was held not to apply did not affect the validity of the award. *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005).

**Award of punitive damages was proper**, and punitive damages were not impermissibly awarded on a breach-of-contract claim, where the complaint alleged not only breach of a contract of sale but also conversion of the property subject to the contract and where the trial court specifically found that the defendants had acted willfully and wantonly in connection with the conversion claim. *Flexisystems, Inc. v. Am. Standards Testing Bureau, Inc.*, 847 P.2d 207 (Colo. App. 1992).

**Sufficient evidence was shown to uphold the award of exemplary damages** where there was evidence that defendant, a nursing home administration firm, actively sought to recruit its clients' patients for defendants' own facility. *Life Care Centers v. E. Hampden Assoc.*, 903 P.2d 1180 (Colo. App. 1995).

**Evidence was sufficient to uphold jury award of exemplary damages** against creditor to company whose goods were held in debtor's warehouse for sale on consignment where: Creditor who had seized and sold all goods in the warehouse had not relied on the consigned goods in extending credit to debtor; creditor knew of debtor's consignment business and required debtor to keep separate inventories of owned goods and consignment goods; creditor

knew that goods seized included consigned goods; creditor kept no records of seized goods it sold despite actual knowledge that others claimed ownership of such goods; creditor had sent letters containing false and misleading information to consigners; and creditor had withheld information from its own attorneys when seeking advice on how to proceed. However, trebling of exemplary damages was improper because creditor's retention of sale proceeds under a claim of right was not a continuation of objectionable behavior during the pendency of the lawsuit. *Eurpac Serv. Inc. v. Republic Acceptance Corp.*, 37 P.3d 447 (Colo. App. 2000).

**No abuse of discretion** where trial court denied a motion for a mistrial made on the ground of references to insurer's assets where jury did not award exemplary damages, the statement was made on cross examination, the question was not repeated, and the court directed the jury to disregard the question. *Lunsford v. W. States Life Ins.*, 919 P.2d 899 (Colo. App. 1996).

**Trial court abused its discretion** when it denied plaintiffs' motion to amend their complaint to add a claim for exemplary damages where amended complaint satisfied the burden of proof set forth in § 13-21-203 (3)(c)(I). *Stamp v. Vail Corp.*, 172 P.3d 437 (Colo. 2007).

**Summary judgment was improper** where a triable issue of fact existed on alarm company's willful and wanton failure to respond to burglary and fire, notwithstanding contractual limitation of liability that precluded a claim based on simple negligence. *U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.*, 192 P.3d 543 (Colo. App. 2008).

## V. AGAINST WHOM AWARDED.

**Exemplary damages cannot be awarded against one who has not participated** in the offense. *Ristine v. Blocker*, 15 Colo. App. 224, 61 P. 486 (1900).

**A principal is not liable for such damages because of the acts of his agent.** All the cases discussing the question proceed on the hypothesis that punitive damages are not awarded by way of compensation to the sufferer, but are visited as a punishment on the offender and to serve as a warning to subsequent wrongdoers. Such being the fundamental basis of the doctrine it has always been adjudged and we have been cited to no case, and know of none, wherein a principal has been held liable for exemplary damages because of the wanton and oppressive act or of the malicious intent of his agent. *Ristine v. Blocker*, 15 Colo. App. 224, 61 P. 486 (1900); *Holland Furnace Co. v. Robson*, 157 Colo. 347, 402 P.2d 628 (1965).

**Unless such acts are authorized or ratified.** The general assembly did not intend to enact that in all civil actions for wrongs done to the person or to property, exemplary damages might be assessed, but only in those cases where the



circumstances show fraud, malice, insult or a wanton reckless disregard of the injured party's rights or feelings. On well settled principles, this can only occur where the suit is brought directly against the wrongdoer who alone can exhibit the intent, and to whom alone can be imputed, and against whom only can be proved the fraud, the malice, the insult or the wantonness which is a condition precedent to the assessment of such damages. This section therefore, does not extend to actions brought against a principal for wrongs committed by his servant unless the record exhibits a mandate from which the authority to thus act can be deduced or the principal afterwards confirms what has been done. *Ristine v. Blocker*, 15 Colo. App. 224, 61 P. 486 (1900).

**When principal may be liable for act of agent.** A principal cannot be held liable in exemplary damages for the act of an agent unless it is shown that it (a) authorized or approved the servant's tortious act; or (b) approved of or participated in the act; or (c) failed to exercise proper care in the selection of its servant. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152 (10th Cir. 1981), cert. denied, 464 U.S. 824, 104 S. Ct. 92, 78 L. Ed.2d 99 (1983).

**This rule applies to actions against railroads.** This section neither directs nor permits the assessment of exemplary damages against a principal for the wrong done by his agent, and it follows the same rule should be applied, the same principle invoked, and the same result reached in an action brought against a railroad company when the basis for the assessment of exemplary damages is to be found only in circumstances showing fraud, malice, insult or reckless disregard of consequences by the agent in which the employer, the railroad company, could not participate. Admitting always the exception unless there be some order, direction or affirmance which is a prerequisite in the case of a suit against an individual principal, the rule must be the same in both cases. *Ristine v. Blocker*, 15 Colo. App. 224, 61 P. 486 (1900).

**Absent an agreement by the parties that state arbitration law should govern, subsection (5) restricting an arbitrator's power to award punitive damages does not apply to an action under the Federal Arbitration Act.** *Pyle v. Sec. U.S.A., Inc.*, 758 F. Supp. 638 (D. Colo. 1990).

**13-21-102.5. Limitations on damages for noneconomic loss or injury.** (1) The general assembly finds, determines, and declares that awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state; therefore, for the protection of the public peace, health, and welfare, the general assembly enacts this section placing monetary limitations on such damages for noneconomic losses or injuries.

(2) As used in this section:

(a) "Derivative noneconomic loss or injury" means nonpecuniary harm or emotional stress to persons other than the person suffering the direct or primary loss or injury.

(b) "Noneconomic loss or injury" means nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life. "Noneconomic loss or injury" includes a damage recovery for nonpecuniary harm for actions brought under section 13-21-201 or 13-21-202.

(3) (a) In any civil action other than medical malpractice actions in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars, unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of noneconomic loss or injury damages exceed five hundred thousand dollars. The damages for noneconomic loss or injury in a medical malpractice action shall not exceed the limitations on noneconomic loss or injury specified in section 13-64-302.

(b) In any civil action, no damages for derivative noneconomic loss or injury may be awarded unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of such damages exceed two hundred fifty thousand dollars.

(c) (I) The limitations on damages set forth in paragraphs (a) and (b) of this subsection (3) shall be adjusted for inflation as of January 1, 1998, and January 1, 2008. The adjustments made on January 1, 1998, and January 1, 2008, shall be based on the cumulative annual adjustment for inflation for each year since the effective date of the damages limitations in paragraphs (a) and (b) of this subsection (3). The adjustments made pursuant to this subparagraph (I) shall be rounded upward or downward to the nearest ten-dollar increment.

(II) As used in this paragraph (c), “inflation” means the annual percentage change in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Boulder, all items, all urban consumers, or its successor index.

(III) The secretary of state shall certify the adjusted limitation on damages within fourteen days after the appropriate information is available, and:

(A) The adjusted limitation on damages shall be the limitation applicable to all claims for relief that accrue on or after January 1, 1998, and before January 1, 2008; and

(B) The adjusted limitation on damages as of January 1, 2008, shall be the limitation applicable to all claims for relief that accrue on and after January 1, 2008.

(IV) Nothing in this subsection (3) shall change the limitations on damages set forth in section 13-64-302, or the limitation on damages set forth in section 33-44-113, C.R.S.

(4) The limitations specified in subsection (3) of this section shall not be disclosed to a jury in any such action, but shall be imposed by the court before judgment.

(5) Nothing in this section shall be construed to limit the recovery of compensatory damages for physical impairment or disfigurement.

(6) (a) (I) In any claim for breach of contract, damages for noneconomic loss or injury or for derivative noneconomic loss or injury are recoverable only if:

(A) The recovery for such damages is specifically authorized in the contract that is the subject of the claim; or

(B) In any first-party claim brought against an insurer for breach of an insurance contract, the plaintiff demonstrates by clear and convincing evidence that the defendant committed willful and wanton breach of contract.

(II) For purposes of this paragraph (a), “willful and wanton breach of contract” means that:

(A) The defendant intended to breach the contract;

(B) The defendant breached the contract without any reasonable justification; and

(C) The contract clearly indicated that damages for noneconomic loss or injury or for derivative noneconomic damages or loss were within the contemplation or expectation of the parties.

(b) Except for the breach of contract damages that are permitted pursuant to subparagraph (B) of subparagraph (I) of paragraph (a) of this subsection (6), nothing in this subsection (6) shall be construed to prohibit one or more parties from waiving the recovery of damages for noneconomic loss or injury or for derivative noneconomic loss or injury on a breach of contract claim so long as the waiver is explicit and in writing.

(c) The limitations on damages set forth in subsection (3) of this section shall apply in any civil action to the aggregate sum of any noneconomic damages awarded under this section for breach of contract including but not limited to bad faith breach of contract.

(d) In any civil action in which an award of damages for noneconomic loss or injury or for derivative noneconomic loss or injury is made on a breach of contract claim, the court shall state such award in the judgment separately from any other damages award.

(e) Except as otherwise provided in paragraph (c) of this subsection (6), nothing in this subsection (6) shall be construed to govern the recovery of noneconomic damages on a tort claim for bad faith breach of contract.

**Source:** **L. 86:** Entire section added, p. 677, § 1, effective July 1. **L. 89:** (2)(b) amended, p. 752, § 1, effective July 1. **L. 97:** (3)(c) added, p. 923, § 4, effective August 6. **L. 2003:** (3)(a) amended, p. 1787, § 1, effective July 1. **L. 2004:** (6) added, p. 770, § 2, effective July 1. **L. 2007:** (3)(c)(I) and (3)(c)(III) amended, p. 329, § 3, effective July 1.

**Cross references:** (1) For the legislative declaration contained in the 1997 act enacting subsection (3)(c), see section 1 of chapter 172, Session Laws of Colorado 1997. For the legislative declaration contained in the 2004 act enacting subsection (6), see section 1 of chapter 232, Session Laws of Colorado 2004. For the legislative declaration contained in the 2007 act amending subsections (3)(c)(I) and (3)(c)(III), see section 1 of chapter 83, Session Laws of Colorado 2007.

(2) For the legislative declaration stating the purpose of and the provision directing legislative staff agencies to conduct a post-enactment review pursuant to § 2-2-1201 scheduled in 2009, see sections 1 and 5 of chapter 83, Session Laws of Colorado 2007. To obtain a copy of the review, once completed, view Colorado Legislative Council’s web site.



## ANNOTATION

**Law reviews.** For article, "Legal Aspects of Health and Fitness Clubs: A Healthy and Dangerous Industry", see 15 Colo. Law. 1787 (1986). For article, "Introduction to the Tort Reform Symposium: Some Cautioning Implications of Legislative Tort Reform", see 64 Den. U. L. Rev. 613 (1988). For article, "Emotional Distress, The First Amendment, and 'This kind of speech': A Heretical Perspective on Hustler Magazine v. Falwell", see 50 U. Colo. L. Rev. 315 (1989). For article, "Recovery of Interest: Part I — Personal Injury", see 18 Colo. Law. 1063 (1989). For article, "Physical Impairment and Disfigurement Under the Health Care Availability Act", see 28 Colo. Law. 65 (May 1999). For article, "The Impact of Tort Reform on Product Liability Litigation in Colorado", see 30 Colo. Law. 91 (November 2001).

**Constitutionality of limitation.** The provisions of subsection (3) limiting the amount recoverable for noneconomic damages does not violate equal protection or due process under either the state or federal constitutions or access to the courts under the state constitution. *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. App. 1997); *Stewart v. Rice*, 25 P.3d 1233 (Colo. App. 2000), rev'd on other grounds, 47 P.3d 316 (Colo. 2002).

**Limitation in this section is subject to waiver.** Where defendant insurance company did not argue for applicability of this section at trial, did not object to a jury instruction on special damages, and made no significant argument concerning the issue on appeal, the issue was deemed waived and the jury's award of \$900,000 in special damages was allowed to stand. *Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230 (Colo. 2003).

**Cap on noneconomic damages imposed by this section applies to the liability share of each defendant and does not act as cap on the total amount a plaintiff may recover.** *General Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994).

**Defendant cannot be held liable for more than its pro rata share of damages even where it is permissible to exceed the damages cap.** *Hoffman v. Ford Motor Co.*, 690 F. Supp. 2d 1179 (D. Colo. 2010).

**In cases involving multiple defendants or where plaintiff is partly at fault pro rata liability of defendants and plaintiff must be ascertained before applying statutory cap on noneconomic damages.** *General Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994).

**The intent of this section is to limit the amount of damages for which each party must account, not to allow persons to escape accountability.** *Niemet v. General Elec. Co.*, 843 P.2d 87 (Colo. App. 1992).

**Section does not limit a defendant's liability based upon the number of plaintiffs.** Several claimants, each of whom suffered separate and distinct injuries caused by the same tortious conduct of the same liable party, may each recover noneconomic damages up to the statutory cap. *Palmer v. Diaz*, 214 P.3d 546 (Colo. App. 2009).

**In order to harmonize subsections (2)(b) and (3)(a) with (5), it is necessary to determine separately damages of a noneconomic nature for physical impairment and disfigurement from the noneconomic loss or injury defined in subsection (2)(b).** By such means, the limitation on recoverable damages contained in subsection (3)(a) and the unlimited recovery for physical impairment and disfigurement as provided for in subsection (5) can be harmonized. *Herrera v. Gene's Towing*, 827 P.2d 619 (Colo. App. 1992); *Ledstrom by and through Ledstrom v. Keeling*, 10 F. Supp.2d 1195 (D. Colo. 1998).

**"Thin-skulled plaintiff" rule applies to damages under this section.** Award of damages for non-economic loss should not have been reduced because of the plaintiff's unique psychological makeup or preexisting degenerative bone condition. *Giampapa v. Am. Family Mut. Ins. Co.*, 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

**"Thin skull" instruction is appropriate in a breach of insurance contract action.** *Giampapa v. Am. Family Mut. Ins. Co.*, 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

**The Health Care Availability Act, §§ 13-64-101 through 13-64-503, limits the total recovery for all noneconomic loss or injury to \$250,000, including any such loss or injury resulting from physical impairment or disfigurement.** Plaintiffs may not recover for a separate category of damages for physical impairment and disfigurement in addition to the statutory categories set forth in §13-64-204. *Ledstrom by and through Ledstrom v. Keeling*, 10 F. Supp.2d 1195 (D. Colo. 1998) (disagreed in *Preston v. Dupont*, 35 P.3d 433 (Colo. 2001), where Colorado supreme court disagreed with federal court).

**However, damages for physical impairment and disfigurement are subject to the Health Care Availability Act's one million dollar damages limitation.** *Wallbank v. Rothenberg*, 74 P.3d 413 (Colo. App. 2003).

**Noneconomic damages in the Health Care Availability Act in § 13-64-302 are not limited by the general damages cap in this section nor by the damages cap in § 13-64-302.** Damages for physical impairment and disfigurement in a medical malpractice action are not limited and properly constitute a separate cate-

gory for the jury's deliberation. *Preston v. Dupont*, 35 P.3d 433 (Colo. 2001).

**Enhanced award not available in wrongful death actions** pursuant to § 13-21-203 (1). *Aiken v. Peters*, 899 P.2d 382 (Colo. App. 1995).

**Pro rata liability, provided for in § 13-21-111.5, should be apportioned before damages are capped as required by this section.** A construction of this section that caps each separate noneconomic award, rather than awards for entire actions, averts subversion of the intended effect of § 13-21-111.5 (2). *Niemet v. General Elec. Co.*, 843 P.2d 87 (Colo. App. 1992).

**Where award for noneconomic loss exceeded total allowable by subsection (3) but a reduction of the award was to be calculated to allow for the negligence of persons other than defendant, proper method of calculation of award was to reduce award by negligence attributed to others first without regard to total allowable in subsection (3).** *Cooley v. Paraho Dev. Corp.*, 851 P.2d 207 (Colo. App. 1992).

**Neither this section nor C.R.C.P. 52 required the trial court to make specific findings of clear and convincing evidence for not reducing the award of noneconomic damages.** *Herrera v. Gene's Towing*, 827 P.2d 619 (Colo. App. 1992).

**13-21-103. Damages for selling liquor to drunkard.** Every husband, wife, child, parent, guardian, employer, or other person who is injured in person, or property, or means of support by any intoxicated person, or in consequence of the intoxication of any person, has a right of action, in his name, against any person who, by selling or giving away intoxicating liquors to any habitual drunkard, causes the intoxication, in whole or in part, of such habitual drunkard; and all damages recovered by a minor under this section shall be paid either to the minor or to his parent, guardian, or next friend, as the court directs. The unlawful sale or giving away of intoxicating liquors works a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises. No liability shall accrue against any such person as provided unless the husband, wife, child, parent, guardian, or employer first, by written or printed notice, has notified such person, or his agents or employees, not to sell or give away any intoxicating liquors to any habitual drunkard.

**Source:** L. 1879: p. 92, § 1. G.S. § 1034. R.S. 08: § 2068. C.L. § 6308. CSA: C. 50, § 7. CRS 53: § 41-2-3. C.R.S. 1963: § 41-2-3.

**Cross references:** For provisions concerning the liability of persons who sell or serve alcoholic beverages to intoxicated persons or minors, see § 12-47-801.

## ANNOTATION

**Law reviews.** For comment, "Crespin v. Largo Corporation and the Legislative Response: The Turbulent State of Dram Shop Liability in Colorado", see 57 U. Colo. L. Rev. 419 (1986).

**This section does not supersede common law actions.** The statutory "dram shop" or civil damage act contained in this section does not

**The fact that a plaintiff may or should be able to prove noneconomic losses in many or most cases in which the threshold for medical expenses under the no fault law has been reached does not mean that the plaintiff actually will prove or has proven noneconomic damages in any particular case** since circumstances vary as does the proof presented in each case and to hold otherwise is likely to have the unintended consequence of encouraging needless litigation. *Lee's Mobile Wash v. Campbell*, 853 P.2d 1140 (Colo. 1993) (disagreeing with *Villandry v. Gregerson*, 824 P.2d 829 (Colo. App. 1991)).

**There was evidence in the record to support the jury award of zero noneconomic damages, and the fact that the jury instruction mandated that the jury "shall determine" the amount of noneconomic damages did not necessarily require an affirmative award of damages since an award of such damages was required only if the damages were caused by the petitioners' negligence.** *Lee's Mobile Wash v. Campbell*, 853 P.2d 1140 (Colo. 1993).

**Personal representative cannot recover noneconomic damages** such as emotional stress or loss of enjoyment of life. *Hill v. Boatright*, 890 P.2d 180 (Colo. App. 1994), aff'd sub nom. *Boatright v. Derr*, 919 P.2d 221 (Colo. 1996).

preclude a common law dram shop action. *Crespin v. Largo Corp.*, 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

**The right of recovery under this section is not limited to only victims who had a personal or employment relationship with the drunk driver before he injured them.** *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986).



**13-21-104. Damages for using animal left for keeping.** If any person keeping a public ranch or stable uses or allows to be used, without the consent of the owner, any horse, ox, mule, or ass that may have been left with him to be ranched or fed, he shall forfeit to the owner all ranch or stable fees that may be due upon such animal used and the additional sum of five dollars for each day such animal has been used, to be collected in the same manner as other debts.

**Source:** R.S. p. 234, § 175. G.L. § 775. G.S. § 1035. R.S. 08: § 2069. C.L. § 6309. CSA: C. 50, § 8. CRS 53: § 41-2-4. C.R.S. 1963: § 41-2-4.

#### ANNOTATION

This section evidently aims at people who keep public places. Its specific language is "a public ranch or stable". This language can only be taken as intended by the general assembly to apply to those who keep stables or ranches for general use, and take, the contract being otherwise acceptable, whatever stock may be offered and by whomsoever it may be offered, so long as the parties are unobjectionable and willing to pay. Manifestly, it does not include all ranchmen nor all stable keepers. *Harper v. Lockhart*, 9 Colo. App. 430, 48 P. 901 (1897).

A keeper who has used some of the animals entrusted to him may nevertheless retain a lien

upon those not used. *Harper v. Lockart*, 9 Colo. App. 430, 43 P. 901 (1897).

**Burden of proving reduction in amount of lien is on plaintiff in replevin.** A plaintiff in replevin, to recover animals from an agister, who desires to rely on the provision of this section, is bound to state the number of animals used, and to offer his proof for the definite purpose of reducing the amount of the lien which the defendant would be entitled to insist on. *Harper v. Lockhart*, 9 Colo. App. 430, 48 P. 901 (1897).

**13-21-105. Damages from fire set in woods or prairie - treble damages during drought conditions.** (1) If any person sets fire to any woods or prairie so as to damage any other person, such person shall make satisfaction for the damage to the party injured, to be recovered in an action before any court of competent jurisdiction.

(2) (a) If a state of emergency or disaster due to drought has been declared by the governor at the time a person knowingly sets fire to any woods or prairie as described in subsection (1) of this section, such person may be held liable for treble damages to any injured party.

(b) (I) The provisions of paragraph (a) of this subsection (2) shall not apply to any open burning conducted in the course of agricultural operations or to any state, municipal, or county fire management operations.

(II) The provisions of paragraph (a) of this subsection (2) shall not apply to any other person seeking to conduct other prescribed or controlled fires such as grassland, forest, or habitat management activities, if such person has first obtained written authority from the state forester.

**Source:** G.L. § 2150. G.S. § 1036. R.S. 08: § 2070. C.L. § 6310. CSA: C. 50, § 9. CRS 53: § 41-2-5. C.R.S. 1963: § 41-2-5. L. 2002, 3rd Ex. Sess.: Entire section amended, p. 45, § 2, effective July 18.

**Cross references:** For the criminal penalty for setting fire to woods or prairie, see § 18-13-109.

#### ANNOTATION

**Statutory interpretation.** "Sets fire to" may be words of strict liability, but the phrase refers to setting fire as an act whose purpose is to start a fire, not to an act whose purpose is otherwise. This section contains no language indicating that the general assembly intended to impose liability on those who do not seek to start a fire.

*Minto v. Sprague*, 124 P.3d 881 (Colo. App. 2005).

**Section available to United States as landowner.** No reason appears why the United States as a landowner should not avail itself of Colorado statutory provisions which are available to other landowners under like circumstances, in-

cluding this section. *United States v. Boone*, 476 F.2d 276 (10th Cir. 1973).

**In cases of this character exemplary or punitive damages have no place.** Recovery can only be had for damages actually sustained. *Spencer v. Murphy*, 6 Colo. App. 453, 41 P. 841 (1895).

**Attorney fees and compensation for plaintiff's services in fighting fire are not recover-**

**able.** The damage must be confined to loss by fire, and could not include compensation for services. In regard to the second, attorney's fees are no part of the damage. There is no law for such allowance. They are only given when provided for by statute, and courts are averse to extending the rule, even legally permissible. *Spencer v. Murphy*, 6 Colo. App. 453, 41 P. 841 (1895).

**13-21-105.5. Infant crib safety act - legislative declaration - definitions - safety standards - exemptions - action for damages.** (1) This section shall be known and may be cited as the "Infant Used Crib Safety Act of 1998".

(2) The general assembly hereby finds that parents' use of used infant cribs occasionally results in crib accidents that may lead to infants' injuries or deaths, and therefore such used cribs pose a serious threat to the public health, safety, and welfare. The general assembly further finds that the majority of parents use secondhand, hand-me-down, or heirloom cribs for their infants and therefore it is especially important to raise public awareness of the dangers of used cribs in order to prevent the injuries or deaths that may result from their use. The general assembly finds that the design and construction of infant cribs must ensure that they are safe for an infant's use, thereby providing the infant's parent or other caregiver some degree of confidence in using the crib. The general assembly therefore concludes that discouraging the sale, lease, or subletting of unsafe used cribs will significantly reduce the number of injuries and deaths caused by used infant cribs.

(3) As used in this section, unless the context otherwise requires:

(a) "Commercial dealer" means any person or entity who:

(I) Regularly deals in used full-size or nonfull-size cribs; or

(II) Regularly sells, leases, sublets, or otherwise places in the stream of commerce used full-size or nonfull-size cribs; or

(III) Purchases one or more used full-size or nonfull-size cribs for the purpose of resale.

(b) "Crib" means a bed or containment designed to accommodate an infant.

(c) "Full-size crib" means a full-size crib as defined in 16 CFR sec. 1508.1 (a), regarding the requirements for full-size cribs.

(d) "Infant" means any person less than thirty-five inches tall and less than three years of age.

(e) "Nonfull-size crib" means a nonfull-size crib as defined in 16 CFR sec. 1509.2 (b), regarding the requirements for nonfull-size cribs.

(f) "Used" means previously owned by a consumer.

(4) No commercial dealer may sell, contract to sell or resell, lease, sublet, or otherwise place in the stream of commerce a used full-size or nonfull-size crib that is unsafe at the time of sale or lease, as provided in subsection (6) of this section.

(5) (a) The consumer protection division of the Colorado department of public health and environment shall make available to the public a copy of the federal standards and a copy of the voluntary standards of the American society for testing materials as specified in paragraph (b) of this subsection (5). One copy shall also be provided to the state publications depository and distribution center. The state librarian shall retain a copy of the material and shall make a copy available for interlibrary loans.

(b) The provisions of this subsection (5) apply to the following materials:

(I) 16 CFR sec. 1508 et seq., and any subsequent amendments or additions to said sections;

(II) 16 CFR sec. 1509 et seq., and any subsequent amendments or additions to said sections;

(III) 16 CFR sec. 1303 et seq., and any subsequent amendments or additions to said sections; and

(IV) The voluntary standards of the American society for testing materials or any successor organization.

(6) Any used crib that has any of the following dangerous features or characteristics at the time of sale or lease shall be presumed to be unsafe pursuant to this section:



- (a) Corner posts that extend more than one-sixteenth of an inch;
  - (b) Spaces between side slats that are wider than two and three-eighths inches;
  - (c) Mattress supports that may be easily dislodged from any point of the crib. A mattress segment may be easily dislodged if it cannot withstand at least a twenty-five pound upward force from underneath the crib.
  - (d) Cutout designs on the end panels of the crib;
  - (e) Rail height dimensions that do not conform to the following:
    - (I) The height of the rail and end panel as measured from the top of the rail or panel in its lowest position to the top of the mattress support in its highest position is at least twenty-two and eight tenths centimeters or nine inches;
    - (II) The height of the rail and end panel as measured from the top of the rail or panel in its highest position to the top of the mattress support in its lowest position is at least sixty-six centimeters or twenty-six inches;
  - (f) Any screws, bolts, or hardware that are loose and not secured;
  - (g) Sharp edges, points, or rough surfaces or any wood surfaces that are not smooth and free from splinters, splits, or cracks;
  - (h) Nonfull-size cribs with tears in mesh or fabric sides.
- (7) A crib is exempt from the provisions of this section if:
- (a) It is not intended for use by an infant; and
  - (b) At the time of selling, reselling, leasing, or subletting the crib or otherwise placing the crib in the stream of commerce, the commercial dealer attaches a written notice to the crib declaring that it is not intended to be used for an infant and is unsafe for use by an infant.

(8) (a) A person who is a parent or guardian of an infant and who purchases a used crib on or after July 1, 1998, that, at the time of sale or lease, is presumed to be unsafe as provided in subsection (6) of this section may bring an action, on the parent's or guardian's own behalf and on behalf of the infant, against the commercial dealer from whom the parent or guardian purchased the used crib. In such action, the parent or guardian may seek to enjoin the commercial dealer from selling, contracting to sell, contracting to resell, leasing, or subletting any used full-size or nonfull-size crib that, at the time of sale or lease, is presumed to be unsafe as provided in subsection (6) of this section.

(b) In addition to an injunction, the parent or guardian may seek return of the purchase price of the crib, reasonable attorney fees and costs, and, if the infant has sustained injury or death as a result of using the crib, such additional damages as are provided by law.

**Source: L. 98:** Entire section added, p. 1366, § 1, effective July 1.

**13-21-106. Broadcasting defamatory statements.** The owner, licensee, or operator of a visual or sound radio broadcasting station or network of stations and the agent or employees of any such owner, licensee, or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast by one other than such owner, licensee, or operator, or agent or employee thereof, if, in any action brought to recover such damages, such owner, licensee, or operator, or agent or employee thereof, alleges and proves that he exercised due care to prevent the publication or utterance of such statement in such broadcast; except that, in no event shall any owner, licensee, or operator, or the agents or employees thereof, be held liable for any damages for any defamatory statement uttered over the facilities of such station or network of stations by any candidate for public office or by any other person speaking for, or on behalf of, any candidate for public office where, by any federal law, rule, or regulation censorship of such political statements in advance of such utterance or publication is prohibited.

**Source: L. 47:** p. 718, § 1. **CSA: C. 138B,** § 1. **CRS 53:** § 41-2-6. **C.R.S. 1963:** § 41-2-6.

## ANNOTATION

**Law reviews.** For article, "The Law of Libel in Colorado", see 28 Dicta 121 (1951).

**Annotator's note.** For political speeches, compare Farmer's Educ. & Coop. Union v.

WDAY, Inc., 360 U.S. 525, 79 S. Ct. 1302, 3 L. Ed.2d 1407 (1959).

**13-21-106.5. Civil damages for destruction or bodily injury caused by a bias-motivated crime.** (1) The victim, or a member of the victim's immediate family, is entitled to recover damages from any person, organization, or association that commits or incites others to commit the offense of a bias-motivated crime as described in section 18-9-121 (2), C.R.S. Such person, organization, or association shall be civilly liable to the victim or a member of the victim's immediate family for the actual damages, costs, and expenses incurred in connection with said action. For purposes of this section, "immediate family" includes the victim's spouse and the victim's parent, sibling, or child who is living with the victim.

(2) A conviction for a criminal bias-motivated crime pursuant to section 18-9-121, C.R.S., shall not be a condition precedent to maintaining a civil action pursuant to the provisions of this section.

(3) In any civil action brought pursuant to this section in which damages are assessed by a jury, upon proof of the knowledge and intent described in section 18-9-121 (2), C.R.S., in addition to the actual damages, the jury may award punitive damages. Said punitive damages shall not be subject to the limitations in section 13-21-102 or section 13-21-102.5.

**Source:** L. 91: Entire section added, p. 350, § 1, effective April 19. L. 2006: Entire section amended, p. 1492, § 20, effective June 1.

**13-21-106.7. Civil damages for preventing passage to and from a health care facility and engaging in prohibited activity near facility.** (1) A person is entitled to recover damages and to obtain injunctive relief from any person who commits or incites others to commit the offense of preventing passage to or from a health care facility or engaging in prohibited activity near a health care facility, as defined in section 18-9-122 (2), C.R.S.

(2) A conviction for criminal obstruction of passage to or from a health care facility pursuant to section 18-9-122, C.R.S., shall not be a condition precedent to maintaining a civil action pursuant to the provisions of this section.

**Source:** L. 93: Entire section added, p. 401, § 2, effective April 19.

**13-21-107. Damages for destruction or bodily injury caused by minors.** (1) The state or any county, city, town, school district, or other political subdivision of the state, or any person, partnership, corporation, association, or religious organization, whether incorporated or unincorporated, is entitled to recover damages in an amount not to exceed three thousand five hundred dollars in a court of competent jurisdiction from the parents of each minor under the age of eighteen years, living with such parents, who maliciously or willfully damages or destroys property, real, personal, or mixed, belonging to the state, or to any such county, city, town, or other political subdivision of the state, or to any such person, partnership, corporation, association, or religious organization or who maliciously or willfully damages or destroys any such property belonging to or used by such school district. The recovery shall be the actual damages in an amount not to exceed three thousand five hundred dollars, in addition to court costs and reasonable attorney fees.

(2) Any person is entitled to recover damages in an amount not to exceed three thousand five hundred dollars in a court of competent jurisdiction from the parents of each minor under the age of eighteen years, living with such parents, who knowingly causes bodily injury to that person, including bodily injury occurring on property belonging to or



used by a school district. The recovery shall be the actual damages in an amount not to exceed three thousand five hundred dollars, in addition to court costs and reasonable attorney fees.

**Source:** **L. 59:** p. 376, § 1. **CRS 53:** § 41-2-7. **C.R.S. 1963:** § 41-2-7. **L. 69:** p. 331, § 1. **L. 77:** Entire section amended, p. 802, § 1, effective July 1. **L. 79:** Entire section amended, p. 766, § 1, effective July 1. **L. 83:** Entire section amended, p. 617, § 1, effective April 12; entire section amended, p. 618, § 1, effective July 1. **L. 84:** (1) amended, p. 1117, § 7, effective June 7.

**Cross references:** For restitution by delinquent children under the “Colorado Children’s Code”, see § 19-2-918.

## ANNOTATION

**Law reviews.** For article, “The Enterprise Liability Theory of Torts”, see 47 U. Colo. L. Rev. 153 (1976). For article, “Recovery of Interest: Part I — Personal Injury”, see 18 Colo. Law. 1063 (1989). For article, “Parental Financial Liability for Juvenile Delinquents”, see 37 Colo. Law. 49 (November 2008).

**When willful destruction of property results.** In the context of this section a willful destruction of property results from an action done for the purpose of causing such injury or with knowledge that the injury is substantially

certain to follow. *Crum v. Groce*, 192 Colo. 185, 556 P.2d 1223 (1976).

**Subsection (2) and § 19-2-703 (4) do not limit a parent’s restitution obligation to \$3,500 per delinquent act;** rather, the “one delinquent act” limitation in that statute, when read in conjunction with the “any person” language in subsection (2) provides that parental restitution payments cannot exceed \$3,500 to each person entitled to restitution as a result of each delinquent act. *People in Interest of J.L.R.*, 895 P.2d 1151 (Colo. App. 1995).

**13-21-107.5. Civil damages for loss caused by theft.** (1) As used in this section, unless the context otherwise requires:

(a) “Emancipated minor” means an individual under the age of eighteen years whose parents or guardian have surrendered parental responsibilities or custody, the right to the care, and earnings of such individual and are no longer under a duty to support or maintain such individual.

(b) “Mercantile establishment” means any place where merchandise is displayed, held, or offered for sale either at retail or at wholesale.

(c) “Merchandise” means all things movable and capable of manual delivery and offered for sale either at retail or wholesale.

(2) An adult or an emancipated minor who takes possession of any merchandise from any mercantile establishment without the consent of the owner, without paying the purchase price, and with the intention of converting such merchandise to his own use or who alters the price indicia of any merchandise shall be civilly liable to the owner for actual damages plus a penalty payable to the owner of not less than one hundred dollars nor more than two hundred fifty dollars.

(3) The parents or guardian having custody of or parental responsibilities with respect to an unemancipated minor who takes possession of any merchandise from any mercantile establishment without the consent of the owner, without paying the purchase price, and with the intention of converting such merchandise to his own use or who alters the price indicia of any merchandise shall be civilly liable to the owner for actual damages plus a penalty payable to the owner of not less than one hundred dollars nor more than two hundred fifty dollars.

(4) Notwithstanding the provisions of subsections (2) and (3) of this section, any person who, without the consent of the owner, takes possession of a shopping cart from any mercantile establishment with the intent to convert such shopping cart to his own use or the use of another shall be civilly liable to the owner for actual damages plus a penalty payable to the owner of one hundred dollars.

(5) A conviction for theft pursuant to part 4 of article 4 of title 18, C.R.S., shall not be a condition precedent to maintaining a civil action pursuant to the provisions of this section.

(6) Civil liability pursuant to the provisions of this section shall not be subject to the limitations on liability in section 13-21-107 or any other law that limits the liability of parents of an unemancipated minor for damages caused by such unemancipated minor.

**Source:** **L. 85:** Entire section added, p. 573, § 1, effective July 1. **L. 98:** (1)(a) and (3) amended, p. 1393, § 27, effective February 1, 1999.

**13-21-108. Persons rendering emergency assistance exempt from civil liability.**

(1) Any person licensed as a physician and surgeon under the laws of the state of Colorado, or any other person, who in good faith renders emergency care or emergency assistance to a person not presently his patient without compensation at the place of an emergency or accident, including a health care institution as defined in section 13-64-202 (3), shall not be liable for any civil damages for acts or omissions made in good faith as a result of the rendering of such emergency care or emergency assistance during the emergency, unless the acts or omissions were grossly negligent or willful and wanton. This section shall not apply to any person who renders such emergency care or emergency assistance to a patient he is otherwise obligated to cover.

(2) Any person while acting as a volunteer member of a rescue unit, as defined in section 25-3.5-103 (11), C.R.S., notwithstanding the fact that such organization may recover actual costs incurred in the rendering of emergency care or assistance to a person, who in good faith renders emergency care or assistance without compensation at the place of an emergency or accident shall not be liable for any civil damages for acts or omissions in good faith.

(3) Any person, including a licensed physician, surgeon, or other medical personnel, while acting as a volunteer member of a ski patrol or ski area rescue unit, notwithstanding the fact that such person may receive free skiing privileges or other benefits as a result of his volunteer status, who in good faith renders emergency care or assistance without other compensation at the place of an emergency or accident shall not be liable for any civil damages for acts or omissions in good faith.

(4) (a) Notwithstanding the fact that the person may be reimbursed for the person's costs or that the nonprofit organization may receive a grant or other funding, any person who, while acting as a volunteer for any nonprofit organization operating a telephone hotline, answers questions of or provides counseling to members of the public in crisis situations shall not be liable for any civil damages for acts or omissions made in good faith as a result of discussions or counseling provided on the hotline.

(b) As used in this subsection (4), unless the context otherwise requires, "hotline" means a telephone line staffed by individuals who provide immediate assistance to callers in emergency or crisis situations.

(5) An employer shall not be liable for any civil damages for acts or omissions made by an employee while rendering emergency care or emergency assistance if the employee:

(a) Renders the emergency care or emergency assistance in the course of his or her employment for the employer; and

(b) Is personally exempt from liability for civil damages for the acts or omissions under subsection (1) of this section.

**Source:** **L. 65:** p. 527, § 1. **C.R.S. 1963:** § 41-2-8. **L. 75:** Entire section amended, p. 285, § 21, effective July 25. **L. 77:** Entire section R&RE, p. 1278, § 1, effective January 1, 1978. **L. 83:** Entire section amended, p. 621, § 1, effective May 26. **L. 90:** (1) amended and (3) added, pp. 862, 1544, §§ 2, 8, effective July 1. **L. 2004:** (4) added, p. 115, § 1, effective August 4. **L. 2005:** (5) added, p. 204, § 1, effective August 8.

**Cross references:** (1) For the exemption from civil liability for veterinarians providing emergency care or treatment to an animal, see § 12-64-118; for the exemption from civil liability for persons administering tests to persons suspected of drunken or drugged driving, see § 42-4-1301.1 (6)(b); for the exemption from civil or criminal liability for physicians examining or treating minor victims of sexual assault, see § 13-22-106 (4); for the exemption from civil or criminal liability for



physicians acting pursuant to a declaration under the “Colorado Medical Treatment Decision Act”, see § 15-18-110 (1)(b).

(2) For the legislative declaration contained in the 1990 act enacting subsection (3), see section 1 of chapter 256, Session Laws of Colorado 1990.

**13-21-108.1. Persons rendering emergency assistance through the use of automated external defibrillators - limited immunity.** (1) The general assembly hereby declares that it is the intent of the general assembly to encourage the use of automated external defibrillators for the purpose of saving the lives of people in cardiac arrest.

(2) As used in this section, unless the context otherwise requires:

(a) “AED” or “defibrillator” means an automated external defibrillator that:

(I) Has received approval of its premarket notification filed pursuant to 21 U.S.C. sec. 360 (k), from the federal food and drug administration;

(II) Is capable of recognizing the presence or absence of ventricular fibrillation or rapid ventricular tachycardia, and is capable of determining, without intervention by an operator, whether defibrillation should be performed; and

(III) Upon determining that defibrillation should be performed, automatically charges and requests delivery of an electrical impulse to an individual’s heart.

(b) “Licensed physician” means a physician licensed to practice medicine in this state.

(3) (a) In order to ensure public health and safety, a person or entity who acquires an AED shall ensure that:

(I) Expected AED users receive training in cardiopulmonary resuscitation (CPR) and AED use through a course that meets nationally recognized standards and is approved by the department of public health and environment;

(II) The defibrillator is maintained and tested according to the manufacturer’s operational guidelines and that written records are maintained of this maintenance and testing;

(III) (Deleted by amendment, L. 2009, (SB 09-010), ch. 52, p. 186, § 1, effective March 25, 2009.)

(IV) Written plans are in place concerning the placement of AEDs, training of personnel, pre-planned coordination with the emergency medical services system, medical oversight, AED maintenance, identification of personnel authorized to use AEDs, and reporting of AED utilization, which written plans have been reviewed and approved by a licensed physician; and

(V) Any person who renders emergency care or treatment to a person in cardiac arrest by using an AED activates the emergency medical services system as soon as possible.

(b) Any person or entity that acquires an AED shall notify an agent of the applicable emergency communications or vehicle dispatch center of the existence, location, and type of AED.

(4) (a) Any person or entity whose primary duties do not include the provision of health care and who, in good faith and without compensation, renders emergency care or treatment by the use of an AED shall not be liable for any civil damages for acts or omissions made in good faith as a result of such care or treatment or as a result of any act or failure to act in providing or arranging further medical treatment, unless the acts or omissions were grossly negligent or willful and wanton.

(b) The limited immunity provided in paragraph (a) of this subsection (4) extends to:

(I) The licensed physician who reviewed and approved the written plans described in subparagraph (IV) of paragraph (a) of subsection (3) of this section;

(II) The person or entity who provides the CPR and AED site placement;

(III) Any person or entity that provides teaching or training programs for CPR to the site at which the AED is placed, which programs include training in the use of an AED; and

(IV) The person or entity responsible for the site where the AED is located.

(c) The limited immunity provided in this subsection (4) applies regardless of whether the requirements of subsection (3) of this section are met; except that the person or entity responsible for the site where the AED is located shall receive the limited immunity only if the requirements of subparagraph (II) of paragraph (a) of subsection (3) of this section are met.

(5) The requirements of subsection (3) of this section shall not apply to any individual using an AED during a medical emergency if that individual is acting as a good samaritan under section 13-21-108.

**Source:** **L. 99:** Entire section added, p. 349, § 1, effective April 16. **L. 2005:** (3)(a)(I) amended, p. 384, § 2, effective August 8. **L. 2009:** (3)(a)(III), (3)(a)(IV), (3)(a)(V), (4)(b), and (4)(c) amended, (SB 09-010), ch. 52, p. 186, § 1, effective March 25.

**13-21-108.2. Persons rendering emergency assistance - competitive sports - exemption from civil liability.** (1) (a) Except as provided in subsection (2) of this section, a person licensed as a physician, osteopath, chiropractor, nurse, physical therapist, podiatrist, dentist, or optometrist or certified as an emergency medical service provider under part 2 of article 3.5 of title 25, C.R.S., who, in good faith and without compensation, renders emergency care or emergency assistance, including sideline or on-field care as a team health care provider, to an individual requiring emergency care or emergency assistance as a result of having engaged in a competitive sport is not liable for civil damages as a result of acts or omissions by the physician, osteopath, chiropractor, nurse, physical therapist, podiatrist, dentist, or optometrist or person certified as an emergency medical service provider under part 2 of article 3.5 of title 25, C.R.S.

(b) The provisions of this subsection (1) apply to the rendering of emergency care or emergency assistance to a minor even if the physician, osteopath, chiropractor, nurse, physical therapist, podiatrist, dentist, or optometrist or the person certified as an emergency service provider under part 2 of article 3.5 of title 25, C.R.S., does not obtain permission from the parent or legal guardian of the minor before rendering the care or assistance; except that, if a parent or guardian refuses the rendering of emergency care, this subsection (1) does not apply.

(2) The exemption from civil liability described in subsection (1) of this section does not apply to:

(a) Acts or omissions that constitute gross negligence or willful and wanton conduct; or

(b) Acts or omissions that are outside the scope of the license held by the physician, osteopath, chiropractor, nurse, physical therapist, podiatrist, dentist, or optometrist or outside the scope of the certificate held by a person who is certified as an emergency medical service provider under part 2 of article 3.5 of title 25, C.R.S.

(3) As used in this section, “competitive sport” means a sport conducted as part of a program sponsored by a public or private school that provides instruction in any grade from kindergarten through twelfth grade or sponsored by a public or private college or university or by any league, club, or organization that promotes sporting events.

(4) The general assembly declares that the intent of this section is to clarify and not to expand or limit the scope of section 13-21-108.

**Source:** **L. 2007:** Entire section added, p. 321, § 1, effective July 1; (1) and (2)(b) amended, p. 2024, § 24, effective July 1. **L. 2012:** (1), IP(2), and (2)(b) amended, (HB 12-1059), ch. 271, p. 1432, § 8, effective July 1.

**Editor’s note:** Section 26 of chapter 271, Session Laws of Colorado 2012, provides that the act amending subsection (1), the introductory portion to subsection (2), and subsection (2)(b) applies to acts committed on or after July 1, 2012.

**13-21-108.3. Architects, building code officials, professional engineers, and professional land surveyors rendering assistance during emergency or disaster - qualified immunity from civil liability.** (1) An architect licensed pursuant to part 3 of article 25 of title 12, C.R.S., a building code official, a professional engineer licensed pursuant to part 1 of article 25 of title 12, C.R.S., or a professional land surveyor licensed pursuant to part 2 of article 25 of title 12, C.R.S., who voluntarily and without compensation provides architectural, damage assessment, engineering, or surveying services, respectively, at the scene of an emergency shall not be liable for any personal injury, wrongful death, property



damage, or other loss caused by an act or omission of the architect, building code official, engineer, or surveyor in performing such services.

(2) As used in this section, unless the context otherwise requires:

(a) "Building code official" means an individual maintaining a building inspector, building code official, or certified building official certification in good standing by the international code council or similar association of building code officials.

(b) "Emergency" means a disaster emergency declared by executive order or proclamation of the governor pursuant to section 24-32-2104 (4), C.R.S.

(3) The immunity provided in subsection (1) of this section applies only to an architectural, damage assessment, or engineering service that:

(a) Concerns an identified building, structure, or other architectural or engineering system, whether publicly or privately owned;

(b) Relates to the structural integrity of the building, structure, or system or to a nonstructural element thereof affecting life safety; and

(c) Is rendered during the time in which a state of disaster emergency exists, as provided in section 24-32-2104 (4), C.R.S.

(4) Nothing in this section shall provide immunity for gross negligence or willful misconduct.

(5) Nothing in this section shall be construed to abrogate any provision of the "Colorado Governmental Immunity Act", provided in article 10 of title 24, C.R.S.

**Source: L. 98:** Entire section added, p. 236, § 1, effective July 1. **L. 2006:** (1) amended, p. 762, § 20, effective July 1. **L. 2009:** Entire section amended, (HB 09-1080), ch. 37, p. 149, § 1, effective March 20.

**13-21-108.5. Persons rendering assistance relating to discharges of hazardous materials - legislative declaration - exemption from civil liability.** (1) The general assembly hereby finds and declares that knowledgeable individuals and organizations should be encouraged to lend expert assistance in the event of accidental or threatened discharges of hazardous materials. The purpose of this section is to so encourage such individuals and organizations to lend assistance by providing them with limited immunity from civil liability.

(2) As used in this section:

(a) "Discharge" includes any spill, leakage, seepage, or other release.

(b) "Hazardous material" includes any material or substance which is designated or defined as hazardous by state or federal law or regulation.

(c) "Person" means individual, government or governmental subdivision or agency, corporation, partnership, or association or any other legal entity.

(3) (a) Notwithstanding any provision of law to the contrary, any person who provides assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge of hazardous material, or in preventing, cleaning up, or disposing of or in attempting to prevent, clean up, or dispose of any such discharge, shall not be subject to civil liability for such assistance or advice, except as provided in subsection (4) of this section.

(b) Notwithstanding any provision of law to the contrary, any person who provides assistance upon request of any police agency, fire department, rescue or emergency squad, or governmental agency in the event of an accident or other emergency involving the use, handling, transportation, transmission, or storage of hazardous material, when the reasonably apparent circumstances require prompt decisions and actions, shall not be liable for any civil damages resulting from any act of commission or omission on his part in the course of his rendering such assistance, except as provided in subsection (4) of this section.

(4) The exemption from civil liability provided for in this section shall not apply to:

(a) Any person whose act or omission caused in whole or in part such discharge and who would otherwise be liable therefor;

(b) Any person other than the employee of a governmental subdivision or agency who receives compensation other than reimbursement for out-of-pocket expenses for his assistance or advice;

(c) Any person's gross negligence or reckless, wanton, or intentional misconduct.

(5) Nothing in this section shall be construed to abrogate or limit the sovereign immunity granted to public entities pursuant to article 10 of title 24, C.R.S., the "Colorado Governmental Immunity Act".

**Source:** L. 83: Entire section added, p. 622, § 1, effective June 1.

**13-21-109. Recovery of damages for checks, drafts, or orders not paid upon presentment.** (1) Any person who obtains money, merchandise, property, or other thing of value, or who makes any payment of any obligation other than an obligation on a consumer credit transaction as defined in section 5-1-301, C.R.S., by means of making any check, draft, or order for the payment of money upon any bank, depository, person, firm, or corporation which is not paid upon its presentment is liable to the holder of such check, draft, or order or any assignee for collection for one of the following amounts, at the option of the holder or such assignee:

(a) The face amount of the check, draft, or order plus actual damages determined in accordance with the provisions of the "Uniform Commercial Code", title 4, C.R.S.; or

(b) An amount equal to the face amount of the check, draft, or order and:

(I) The amount of any reasonable posted or contractual charge not exceeding twenty dollars; and

(II) If the check, draft, or order has been assigned for collection to a person licensed as a collection agency pursuant to article 14 of title 12, C.R.S., as costs of collection, twenty percent of the face amount of the check, draft, or order but not less than twenty dollars; or

(c) An amount as provided in subsection (2) of this section.

(2) (a) If notice of nonpayment on presentment of the check, draft, or order has been given in accordance with subsections (3) and (4) of this section and the total amount due as set forth in the notice has not been paid within fifteen days after such notice is given, instead of the amounts set forth in paragraph (a) or (b) of subsection (1) of this section, the person shall be liable to the holder or any assignee for collection for three times the face amount of the check but not less than one hundred dollars and, with regard to a paycheck, actual damages caused by the nonpayment, including associated late fees.

(b) The person, also referred to in this section as the "maker", shall not be liable in accordance with the provisions of paragraph (a) of this subsection (2) if he establishes any one of the following:

(I) That the account contained sufficient funds or credit to cover the check, draft, or order at the time the check, draft, or order was made, plus all other checks, drafts, and orders on the account then outstanding and unpaid;

(II) That the check, draft, or order was not paid because a paycheck, deposited in the account in an amount sufficient to cover the check, draft, or order, was not paid upon presentment;

(III) That funds sufficient to cover the check, draft, or order were garnished, attached, or set off and the maker had no notice of such garnishment, attachment, or setoff at the time the check, draft, or order was made;

(IV) That the maker of the check, draft, or order was not competent or of full age to enter into a legal contractual obligation at the time the check, draft, or order was made;

(V) That the making of the check, draft, or order was induced by fraud or duress;

(VI) That the transaction which gave rise to the obligation for which the check, draft, or order was given lacked consideration or was illegal.

(3) Notice that a check, draft, or order has not been paid upon presentment shall be in writing and given in person and receipted for, or by personal service, or by depositing the notice by certified mail, return receipt requested and postage prepaid, or by regular mail supported by an affidavit of mailing sworn and retained by the sender, in the United States mail and addressed to the recipient's most recent address known to the sender. If the notice is mailed and not returned as undeliverable by the United States postal service, notice shall be conclusively presumed to have been given on the date of mailing. For the purpose of this subsection (3), "undeliverable" does not include unclaimed or refused.



(4) The notice given pursuant to subsection (3) of this section shall include the following information regarding the unpaid check, draft, or order:

- (a) The date the check, draft, or order was issued;
- (b) The name of the bank, depository, person, firm, or corporation on which it was drawn;
- (c) The name of the payee;
- (d) The face amount;
- (e) A statement of the total amount due, which shall be itemized and shall not exceed the amount permitted under paragraph (a) or (b) of subsection (1) of this section;
- (f) A statement that the maker has fifteen days from the date notice was given to make payment in full of the total amount due; and
- (g) A statement that, if the total amount due is not paid within fifteen days after the date notice was given, the maker may be liable in a civil action for three times the face amount of the check but not less than one hundred dollars and that, in such civil action, the court may award court costs and reasonable attorney fees to the prevailing party.

(5) No holder or assignee for collection shall assert that any maker has liability for any amount set forth under subsection (2) of this section unless such liability has been determined by entry of a final judgment by a court of competent jurisdiction.

(6) In any civil action brought under this section, the prevailing party may recover court costs and reasonable attorney fees. In addition, in an action brought under paragraph (b) of subsection (1) of this section, if the holder or assignee for collection prevails, actual costs of collection may be recovered by the holder or assignee for collection if such actual costs of collection are greater than the costs of collection provided under such paragraph (b).

(7) Nothing in this section shall be deemed to apply to any check, draft, or order on which payment has been stopped by the maker by reason of a dispute relating to the money, merchandise, property, or other thing of value obtained by the maker.

(8) Nothing in this section applies to any criminal case or affects eligibility or terms of probation.

(9) Any limitation on a cause of action under this section, except a cause of action under subsection (2) of this section, shall be governed by the provisions of section 13-80-103.5. Any limitation on a cause of action under subsection (2) of this section shall be governed by the provisions of section 13-80-102.

**Source:** L. 67: pp. 827, 828, §§ 1, 3. C.R.S. 1963: § 41-2-9. L. 84: (1) amended, p. 463, § 1, effective July 1. L. 89: Entire section R&RE, p. 754, § 1, effective July 1. L. 2002: (3) amended, p. 310, § 1, effective August 7. L. 2009: (2)(a) amended, (HB 09-1108), ch. 161, p. 696, § 2, effective August 5.

#### ANNOTATION

The commonly understood meaning of the term “any person”, which is not defined in this section, could include either an individual or a corporation, as well as a person signing on behalf of a corporation. *Mountain States Commercial v. 99¢ Liquid.*, 940 P.2d 934 (Colo. App. 1996).

If the general assembly had intended to limit the liability of a person signing a check in a representative capacity, it could have so stated. This section provides no such exception, however. Thus, a corporate officer could be found individually liable under this section. *Mountain States Commercial v. 99¢ Liquid.*, 940 P.2d 934 (Colo. App. 1996) (decided under § 13-21-109 prior to enactment of § 4-3-402 (c)).

The general assembly’s enactment of § 4-3-402 (c) directs that an authorized corporate

officer who signs his or her name to a check issued on an account of a corporation is not liable for that check so long as the corporation is identified as the owner of the account on the check, and it would be incongruous for a corporate officer to be relieved of personal liability on a check pursuant to § 4-3-402 (c), but still be liable for three times the face amount of the check pursuant to subsection (2) of this section. *Kunz v. Cycles West, Inc.*, 969 P.2d 781 (Colo. App. 1998).

The general assembly intended the phrases “any person”, “the person”, and “the maker” in this section to refer to the corporation when the owner of the account is a corporation and the signature on the check is that of an authorized corporate officer. *Kunz v. Cycles West, Inc.*, 969 P.2d 781 (Colo. App. 1998).

The general assembly intended the word “made” to mean when a check is written, not when the check was delivered, mailed, or drawn. *Suncor Energy (USA) v. Aspen Petroleum*, 178 P.3d 1263 (Colo. App. 2007).

**The maker’s liability for damages under subsection (2) is not affected by subsection (5) nor by the doctrine of election of remedies.** Where the maker satisfies the underlying debt after the 15-day deadline, liability for the statutory penalty is partially offset but is not negated. *Singer v. Strauss*, 851 P.2d 256 (Colo. App. 1993).

Trial court erred in finding that a letter returned as “unknown” was not “returned as undeliverable” under subsection (3). *Stadler v. DeVito*, 931 P.2d 573 (Colo. App. 1996).

**Even assuming that markings of “attempted, unknown” and “moved” on notice**

**of presentment means that notice was undeliverable, the only consequence of assumption is that assignee of debt cannot avail itself of conclusive presumption under subsection (3) that notice was given on the date of mailing.** *Mountain States Commercial v. 99¢ Liquid*, 940 P.2d 934 (Colo. App. 1996).

**Strict compliance with notice requirements in this section is necessary.** *Group, Inc. v. Spanier*, 940 P.2d 1120 (Colo. App. 1997).

**Failure to comply with notice provisions precludes the collection of treble damages.** *Group, Inc. v. Spanier*, 940 P.2d 1120 (Colo. App. 1997).

**Attorney fees are not “collection costs”** under this section. *Group, Inc. v. Spanier*, 940 P.2d 1120 (Colo. App. 1997).

**Applied in** *Berckefeldt v. Hammer*, 44 Colo. App. 320, 616 P.2d 183 (1980).

### **13-21-109.5. Recovery of damages for fraudulent use of social security numbers.**

(1) No person shall buy or otherwise obtain or sell, offer for sale, take or give in exchange, pledge or give in pledge, or use any individual’s social security account number, or any derivative of such number, for the purpose of committing fraud or fraudulently using or assuming said individual’s identity.

(2) Any individual aggrieved by the act of any person in violation of subsection (1) of this section may bring a civil action in a court of competent jurisdiction to recover:

- (a) Such preliminary and equitable relief as the court determines to be appropriate; and
- (b) The greater of:
  - (I) Actual damages; or
  - (II) Liquidated damages of up to ten thousand dollars.

(3) In addition to any damages and other relief awarded pursuant to subsection (2) of this section, if the aggrieved individual prevails, the court may assess against the defendant reasonable attorney fees and any other litigation costs and expenses, including expert fees, reasonably incurred by the aggrieved individual.

(4) Any action brought pursuant to this section shall be in addition to, and not in lieu of, any criminal prosecution that may be brought under any state or federal law.

**Source: L. 98:** Entire section added, p. 134, § 1, effective August 5.

### **13-21-110. Medical committee - privileged communication - limitation on liability.**

(1) Any information, data, reports, or records made available to a utilization review committee of a hospital or other health care facility, as required by state or federal law, is confidential and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee. It shall not be a violation of a privileged communication for any physician, dentist, podiatrist, hospital, or other health care facility or person to furnish information, data, reports, or records to any such utilization review committee concerning any patient examined or treated by the same or confined in such hospital or facility, which information, data, reports, or records relate to the proper functions of the utilization review committee. No member of such a committee shall be liable for damages to or for any such patient by reason of recommendations made by the committee in the exercise of the proper function of the committee, except for willful or reckless disregard of the patient’s safety.

(2) As used in this section, “utilization review committee” means a committee established for the purpose of evaluating the quantity, quality, and timeliness of health care services rendered under the “Colorado Medical Assistance Act” and in compliance with Titles XVIII and XIX of the federal “Social Security Act”, as amended.



(3) The privilege created by subsection (1) of this section shall not prevent any such information, data, reports, or records which have been made available to a utilization review committee from being admitted in evidence or otherwise made available for use in the review process referred to in section 13-90-107 (1) (d) (III) and (1) (d) (IV).

**Source:** L. 70: p. 161, § 1. C.R.S. 1963: § 41-2-10. L. 76: (3) added, p. 525, § 1, effective July 1. L. 2007: (2) amended, p. 2025, § 25, effective June 1.

**Cross references:** For the Colorado Medical Assistance Act, see article 4 of title 25.5.

## ANNOTATION

**Requirements for privilege.** To be privileged under this section the information sought must meet two requirements: (1) It must be furnished to a utilization review committee, defined as a committee formed for the purpose of evaluating the quantity, quality and timeliness of services rendered under the Colorado medical assistance

act and Titles XVIII and XIX of the federal Social Security Act; and (2) it must be information provided to that utilization review committee in order to satisfy requirements of state or federal law. *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981).

### 13-21-111. Negligence cases - comparative negligence as measure of damages.

(1) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.

(2) In any action to which subsection (1) of this section applies, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:

(a) The amount of the damages which would have been recoverable if there had been no contributory negligence; and

(b) The degree of negligence of each party, expressed as a percentage.

(3) Upon the making of the finding of fact or the return of a special verdict, as is required by subsection (2) of this section, the court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made; but, if the said proportion is equal to or greater than the negligence of the person against whom recovery is sought, then, in such event, the court shall enter a judgment for the defendant.

(3.5) and (4) Repealed.

**Source:** L. 71: p. 496, § 1. C.R.S. 1963: § 41-2-14. L. 75: (4) added, p. 570, § 1, effective July 1. L. 85: (3.5) added, p. 575, § 1, effective July 1. L. 86: (3.5) repealed, p. 682, § 6, effective July 1; (4) repealed, p. 679, § 5, effective July 1.

## ANNOTATION

- I. General Consideration.
- II. Applicability.
- III. Degree of Negligence.
- IV. Award.
- V. Procedure.
- VI. Scope of Review.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Colorado Comparative Negligence and Assumption of Risk",

see 46 U. Colo. L. Rev. 509 (1974-75). For note, "The Seat Belt Defense: Should Coloradoans Buckle up for Safety?", see 50 U. Colo. L. Rev. 375 (1979). For article, "Immunity to Direct Action: Is it a Defense to a Contribution Claim?", see 52 U. Colo. L. Rev. 151 (1980). For note, "Res Ipsa Loquitur — The Effect of Comparative Negligence", see 53 U. Colo. L. Rev. 777 (1982). For article "Application of Comparative Negligence and Contribution Statutes to Third-Party Defendants", see 13 Colo.

Law. 626 (1984). For article, "Indemnification or Contribution Among Counsel in Legal Malpractice Actions", see 14 Colo. Law. 563 (1985). For article, "The Apportionment of Tort Responsibility", see 14 Colo. Law. 741 (1985). For comment, "Multiple Defendants in Negligence Actions: Mountain Mobile Mix, Inc. v. Gifford", see 56 U. Colo. L. Rev. 303 (1985). For article, "Colorado Mandatory Seatbelt Act Revives the Seatbelt Defense", see 16 Colo. Law. 1210 (1987). For article, "Joint and Several Liability: A Case for Reform", see 64 Den. U. L. Rev. 651 (1988). For article, "Allocation of the Risks of Skiing: A Call for the Reapplication of Fundamental Common Law Principles", see 67 Den. U. L. Rev. 165 (1990). For article, "Application of the Pro Rata Liability, Comparative Negligence and Contribution Statutes", see 23 Colo. Law. 1717 (1994). For article, "Overview of Comparative Fault", see 29 Colo. Law. 95 (July 2000).

**Traditional theories of loss allocation in tort altered.** The general assembly has altered traditional theories of loss allocation in tort with the passage of the uniform contribution among tortfeasors act, §§ 13-50.5-101 to 13-50.5-106, and with the introduction of a comparative negligence scheme into Colorado law by this section. Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

**General assembly has decided that comparative negligence rule is more just.** By the enactment of this act, the general assembly has given legislative recognition to the argument that the comparative negligence rule is superior to the contributory negligence rule in tending to effect more just results in negligence actions. Heafer v. Denver-Boulder Bus Co., 176 Colo. 157, 489 P.2d 315 (1971).

**Ameliorates harsh results of contributory negligence doctrine.** Comparative negligence statutes have been enacted to ameliorate the harsh results which sometimes occur under the doctrine of contributory negligence. Darnell Photographs, Inc. v. Great Am. Ins. Co., 33 Colo. App. 256, 519 P.2d 1225 (1974).

This section eliminates the requirement that the plaintiff be free from contributory negligence in a suit based on *res ipsa loquitur*. Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980).

**This section precludes the plaintiff's recovery if his negligence was as great as or greater than the defendant's.** Graf v. Tracy, 194 Colo. 1, 568 P.2d 467 (1977).

**Applicability to res ipsa doctrine.** Even if the jury were to find that plaintiff was negligent and that his negligence contributed to his injury, plaintiff's negligence does not preclude the operation of the *res ipsa* doctrine because, under the comparative negligence system, the jury could infer from the circumstances that the defendant's negligence exceeded the plaintiff's

negligence, thus permitting plaintiff to recover in spite of his contributing negligence. Gordon v. Westinghouse Elec. Corp., 42 Colo. App. 426, 599 P.2d 953 (1979), *aff'd sub nom.* Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980).

This section eliminates the requirements that the plaintiff be free from contributory negligence in a suit based on *res ipsa loquitur*. Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980).

**Choice of laws analysis.** In applying the particular interests and policies of Colorado to comparative negligence controversies, and in endeavoring to minimize a case-by-case, *ad hoc*, approach for the solution of comparative negligence conflicts questions, the specific approach to applying the choice of law rule should be that the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centered, are to be weighed more heavily and are to be given more importance in such a choice of law determination, than the contacts of the place where the injury occurred, and the place where the conduct causing the injury occurred. Sabell v. Pacific Intermountain Express Co., 36 Colo. App. 60, 536 P.2d 1160 (1975).

Although there are no Colorado cases holding that the comparative negligence statute is applicable to accidents occurring outside of the state of Colorado, neither are there any cases requiring the Colorado courts to follow the public policy of another state in determining the relative quanta of negligent conduct between the parties as it relates to the recovery of damages. Sabell v. Pacific Intermountain Express Co., 36 Colo. App. 60, 536 P.2d 1160 (1975).

**Imputed comparative negligence is based upon a legal fiction in direct opposition to valid policy considerations.** Comparative negligence applies to an owner-passenger of a vehicle only when the owner-passenger is negligent and such negligence is the proximate cause of owner-passenger's injuries. Watson v. Reg'l Transp. Dist., 762 P.2d 133 (Colo. 1988) (overruling Moore v. Skiles, 130 Colo. 191, 274 P.2d 311 (1954), and the cases following the Moore holding).

**Doctrine of momentary forgetfulness or justifiable distraction no longer applicable.** Comparative negligence statute did away with need for doctrine that was used under former contributory negligence law. Rodriguez v. Morgan County R.E.A., Inc., 878 P.2d 77 (Colo. App. 1994).

**Applied in Hover v. Clamp,** 40 Colo. App. 410, 579 P.2d 1181 (1978); Bloxson v. San Luis Valley Crop Care, Inc., 198 Colo. 113, 596 P.2d 1189 (1979); Rael v. Motor Vehicle Div., 42 Colo. App. 66, 589 P.2d 515 (1979); Huydts v. Dixon, 199 Colo. 260, 606 P.2d 1303 (1980);



Padilla v. Warren, 44 Colo. App. 189, 610 P.2d 1352 (1980); Fay v. Kroblin Refrigerated Xpress, Inc., 644 P.2d 68 (Colo. App. 1981); Welch v. F.R. Stokes, Inc., 555 F. Supp. 1054 (D. Colo. 1983); Conlin v. Hutcheon, 560 F. Supp. 934 (D. Colo. 1983); Colo. Flying Academy, Inc. v. United States, 724 F.2d 871 (10th Cir. 1984); Cruz v. Union Pacific R. Co., 707 P.2d 360 (Colo. App. 1985); Tex-Ark Joist Co. v. Derr and Gruenewald Const., 719 P.2d 384 (Colo. App. 1986); Williams v. White Mountain Const. Co., 749 P.2d 423 (Colo. 1988); Inland/Riggle Oil Co. v. Painter, 925 P.2d 1083 (Colo. 1996); Huntoon v. TCI Cablevision of Colo., 969 P.2d 681 (Colo. 1998); McCall v. Meyers, 94 P.3d 1271 (Colo. App. 2004).

## II. APPLICABILITY.

**Law reviews.** For article, "Health Care Litigation in Colorado: A Survey of Recent Decisions", see 30 Colo. Law. 91 (August 2001).

**Evidence must substantiate that both parties are at fault before comparative negligence rule is used.** Comparative negligence rules are applicable only where there is evidence presented which would substantiate a finding that both parties are at fault, and the inability to prove any negligence on the part of plaintiff eliminates the operation of the rule. Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973); Gordon v. Benson, 925 P.2d 775 (Colo. 1996).

**Contributory negligence principles apply to the recipient of a negligent misrepresentation.** Robinson v. Poudre Valley Fed. Credit Union, 654 P.2d 861 (Colo. App. 1982).

**And to negligence resulting in pecuniary loss.** Comparative negligence principles set forth in this section also apply to negligence which results in pecuniary loss. Robinson v. Poudre Valley Fed. Credit Union, 654 P.2d 861 (Colo. App. 1982).

**In an action arising out of a rear-end automobile collision,** evidence that the plaintiff negligently backed her car into defendant's vehicle was sufficient to entitle defendant to an instruction on comparative negligence. Gordon v. Benson, 925 P.2d 775 (Colo. 1996).

**The comparative negligence statute is inapplicable where no negligence on the part of the plaintiff can be proven.** Dunham v. Kampman, 37 Colo. App. 233, 547 P.2d 263 (1975), *aff'd*, 192 Colo. 448, 560 P.2d 91 (1977).

This section has no application where an innocent party seeks recovery from a party adjudged negligent. Kampman v. Dunham, 192 Colo. 448, 560 P.2d 91 (1977).

**Section inapplicable to products liability cases.** Comparative negligence as embodied in this section has no application to products liability cases under restatement (second) of torts

§ 402A. Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976).

**Section inapplicable to exemplary damages.** Bodah v. Montgomery Ward & Co., Inc., 724 P.2d 102 (Colo. App. 1986).

**And finding of intentional wrongdoing on part of defendant renders statute inapplicable.** Carman v. Heber, 43 Colo. App. 5, 601 P.2d 646 (1979).

**This section does not deal with relationship between tortfeasors** but only provides for the reduction of the amount of damages owed by the tortfeasor to the injured party in proportion to the percentage of fault attributed to the injured party by the jury. Bass v. United States, 379 F. Supp. 1208 (D. Colo. 1974).

This section has no relation to the apportionment of damages among joint tortfeasors. Bass v. United States, 379 F. Supp. 1208 (D. Colo. 1974).

**Joint and several liability still viable.** The common-law doctrine of joint and several liability is not inconsistent with this section's system of comparative negligence, but rather, the doctrine of joint and several liability in the context of comparative negligence continues to ensure that negligently injured persons will be able to obtain adequate compensation for their injuries from those tortfeasors who have negligently inflicted the harm. Martinez v. Stefanich, 195 Colo. 341, 577 P.2d 1099 (1978).

**Liability of joint tortfeasors remains joint and several with respect to a third party injured by their actions.** Kampman v. Dunham, 192 Colo. 448, 560 P.2d 91 (1977).

**Judgment against joint tortfeasors is enforced jointly and severally,** rather than apportioned according to percentage of fault attributed to each tortfeasor. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 645 P.2d 1321 (Colo. App. 1981).

**An innocent plaintiff can recover the entirety of the damages** suffered from any of the individuals whose negligent acts resulted in a single indivisible injury. Dunham v. Kampman, 37 Colo. App. 233, 547 P.2d 263 (1975), *aff'd*, 192 Colo. 448, 560 P.2d 91 (1977).

**Comparative negligence rule inapplicable where plaintiff is not negligent.** Issue of minor counselee's comparative negligence as a defense to claim that church was negligent in hiring and supervising church counselor should not have been submitted to the jury because the evidence failed to establish, as a matter of law, any negligence on the minor's part. DeBose v. Bear Valley Church of Christ, 890 P.2d 214 (Colo. App. 1994), *rev'd* on other grounds, 928 P.2d 1315 (Colo. 1996).

**When the evidence would support a finding that both parties are at fault, the court must instruct the jury on comparative negligence** and allow the jury to assess the relative degrees

of the parties' fault. *Gordon v. Benson*, 925 P.2d 775 (Colo. 1996).

**Patient who is treated by health care providers for suicidal ideations, and who later commits suicide, may be found comparatively negligent or at fault** in a subsequent wrongful death action based upon that treatment. *Sheron v. Lutheran Med. Center*, 18 P.3d 796 (Colo. App. 2000).

**Where common-law claim was permitted against tavern owner for serving intoxicated person who injures himself**, comparative negligence principles may be asserted as a defense by tavern owner, and the issue of comparative negligence should, absent extraordinary circumstances, be submitted to a jury. *Lyons v. Nasby*, 770 P.2d 1250 (Colo. 1989).

**The degree of the parties' fault is to be determined by the fact-finder** and only in the clearest of cases, when the facts are undisputed and reasonable minds can draw but one inference, should relative degrees of fault be determined as a matter of law. *Bennett v. Greeley Gas Co.*, 969 P.2d 754 (Colo. App. 1998).

**A passenger in an automobile driven by an intoxicated person may be negligent for having entered the automobile** in the first place. Thus, an instruction on comparative negligence is proper when a plaintiff is injured while a passenger in an automobile driven by someone who the plaintiff has reason to know is intoxicated. *Wark v. McClellan*, 68 P.3d 574 (Colo. App. 2003).

**This section applies to tort actions based on all forms of negligent conduct.** Failure of the general assembly to preclude application of this section in cases involving willful and wanton negligence leads to the conclusion that this section requires the comparison of each party's fault irrespective of whether such fault is attributable to simple negligence, gross negligence, or willful and reckless negligence. *G.E.C. Minerals v. Harrison Western*, 781 P.2d 115 (Colo. App. 1989); *White v. Hansen*, 813 P.2d 750 (Colo. App. 1990).

**Exemplary damages are not directly subject to reduction under this section.** Reduction of award under this section is based on plaintiff's own conduct, whereas an award of exemplary damages under § 13-21-102 is based on the defendant's misconduct and different principles apply. However, interplay among this section, § 13-21-102, and § 13-21-111.5 may produce a similar result. *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**Exemplary damages are not subject to reduction by application of the comparative negligence statute.** *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**The solatium award of \$50,000 pursuant to § 13-21-203.5 is exempt from reduction** by operation of the comparative fault statute. *Dewey v. Hardy*, 917 P.2d 305 (Colo. App.

1995); *B.G.'s Inc. v. Gross*, 23 P.3d 691 (Colo. 2001).

### III. DEGREE OF NEGLIGENCE.

**"Negligence" construed.** Negligence is a deviation by the defendant from the reasonable standards of care owed to the plaintiff, which naturally and foreseeably results in injury to the plaintiff; it is failure to act as a reasonably prudent person would under the same or similar circumstances. *McCormick v. United States*, 539 F. Supp. 1179 (D. Colo. 1982).

**Violation of statute is negligence as matter of law.** The violation of a statute or ordinance regulating the use of roadways, proximately resulting in injury to one for whom the statute was designed to protect, is negligence as a matter of law. *McCormick v. United States*, 539 F. Supp. 1179 (D. Colo. 1982).

**Injury to property defined.** "Injury to property" in this section is not necessarily limited to a physical injury to tangible property, but rather includes any damage resulting from invasion of one's property rights by actionable negligence. *Darnell Photographs, Inc. v. Great Am. Ins. Co.*, 33 Colo. App. 256, 519 P.2d 1225 (1974).

Where a landlord has actual knowledge of the vicious actions of a tenant's animal prior to entering into a rental agreement, and where the animal's vicious actions have created a clear potential for injury, the landlord has a duty to take reasonable precautions to protect third persons from the animal. *Vigil v. Payne*, 725 P.2d 1155 (Colo. App. 1986).

**The negligence of multiple defendants or designated nonparties must be combined and compared with the plaintiff's negligence.** *Painter v. Inland/Riggle Oil Co.*, 911 P.2d 716 (Colo. App. 1995).

**Comparison of negligence only between parties.** Colorado's comparative negligence statute contemplates that the comparison of negligence be made only between parties to the tort action. *Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 645 P.2d 1321 (Colo. App. 1981); *Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 650 P.2d 571 (Colo. App. 1981), aff'd, 662 P.2d 1056 (Colo. 1983).

The interrelation of this section and § 13-50.5-101 et seq., does not allow an insurer of a tortfeasor found liable in a prior action to recover contribution from a nonparty to that prior action. *Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 650 P.2d 571 (Colo. App. 1981), aff'd, 662 P.2d 1056 (Colo. 1983).

This section precludes consideration of the negligence of absent tortfeasors by the trier of fact. *Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056 (Colo. 1983).

**Degree of fault of multiple defendants combined for comparison with plaintiff's negligence.** In cases where there are multiple defen-



dants who proximately cause the injury, the degree of fault of each defendant will be combined and compared with the degree of fault of the plaintiff. If the plaintiff is less than 50 percent at fault, each defendant will be jointly and severally liable for the plaintiff's damages even if the degree of fault of a particular defendant is less than that of the plaintiff. *Mountain Mobile Mix, Inc. v. Gifford*, 660 P.2d 883 (Colo. 1983).

**Seat belt defense is not available for purposes of determining degree of plaintiff's negligence** under this section. *Churning v. Staples*, 628 P.2d 180 (Colo. App. 1981).

**Evidence of motorcyclist's failure to wear helmet inadmissible.** In a wrongful death suit, evidence of plaintiff's failure to wear a protective helmet while riding a motorcycle is inadmissible to show negligence on the part of the injured party or to mitigate damages. *Dare v. Sobule*, 674 P.2d 960 (Colo. 1984).

**This section applies only to the degree of negligence of the parties to the suit**, and therefore it does not require allocation of negligence to nonparties not properly designated. *Thompson v. Colo. and Eastern R.R. Co.*, 852 P.2d 1328 (Colo. App. 1993).

#### IV. AWARD.

**An award of zero damages** is consistent with the view that the jury intended that plaintiffs recover no award because jury found that plaintiff's negligence was at least equal to that of the defendant. *Lonardo v. Litvak Meat Co.*, 676 P.2d 1229 (Colo. App. 1983).

**Trial court's failure to determine degree of negligence of parties not error** where trial court concluded that plaintiff's negligence was equal to that of defendant. *Comcast v. Express Concrete, Inc.*, 196 P.3d 269 (Colo. App. 2007).

**Fact that jury found plaintiff 70% at fault would have precluded his recovery under this section.** *Graf v. Tracy*, 194 Colo. 1, 568 P.2d 467 (1977).

**Verdict held inadequate.** Where the damages set by the jury were no greater than the special damages, in light of the undisputed evidence of pain, suffering, and permanent disability, the verdict was manifestly inadequate and indicates that the jury disregarded the court's instruction on damages. *Reynolds v. Farber*, 40 Colo. App. 467, 577 P.2d 318 (1978).

**Consortium claim is derivative for purposes of determining recovery under comparative negligence.** *Lee v. Colo. Dept. of Health*, 718 P.2d 221 (Colo. 1986).

**Juries are required to fix the precise, mathematical degree of fault** under this comparative negligence statute. *Zimmerman v. Baca*, 346 F. Supp. 172 (D. Colo. 1972).

**"Person against whom recovery is sought" includes a settling non-party defendant.** *Wong v. Sharp*, 734 F. Supp. 943 (D. Colo. 1990).

#### V. PROCEDURE.

**Responsibility for result divided between jury and judge.** The general assembly, when it enacted this section, intended to establish a system in negligence cases which divides the responsibility for a fair and good result between the jury and the judge. *Avery v. Wadlington*, 186 Colo. 158, 526 P.2d 295 (1974).

**Percentage of negligence issue for jury, usually.** The issue of percentage of negligence is one for the jury, and only in the clearest of cases where the facts are undisputed and reasonable minds can draw but one inference from them should such issues be determined as a matter of law. *Transamerica Ins. Co. v. Pueblo Gas & Fuel Co.*, 33 Colo. App. 92, 519 P.2d 1201 (1973).

Once the trial court rules that the doctrine is of *res ipsa loquitur* is applicable, the jury must then compare any evidence of negligency of the plaintiff with the inferred negligence of the defendant and decide what percentage of negligence is attributable to each party. *Montgomery Elevator Co. v. Gordon*, 619 P.2d 66 (Colo. 1980).

**The issue of relative fault is one for the jury** and only in the clearest of cases where the facts are undisputed and reasonable minds can draw only one inference from them should relative fault be determined as a matter of law. *Whitlock v. Univ. of Denver*, 712 P.2d 1072 (Colo. App. 1985), *rev'd on other grounds in Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987); *Gordon v. Benson*, 925 P.2d 775 (Colo. 1996).

**Stipulation of total damages substitute for jury determination.** Where the total damages are stipulated, the stipulation operates as a substitute for the jury's determination of damages under subsection (2)(b). *Darnell Photographs, Inc. v. Great Am. Ins. Co.*, 33 Colo. App. 256, 519 P.2d 1225 (1974).

**Effect of 1975 amendment.** The 1975 amendment, which added subsection (4), imposes an independent duty upon the court to instruct the jury on the statute's effect. Use of the word "shall" is mandatory in effect. *Appelgren v. Agri Chem, Inc.*, 39 Colo. App. 158, 562 P.2d 766 (1977).

It is now incumbent upon the trial court in a comparative negligence case to give instructions that apprise the jury on the effects of its findings. *Loup-Miller v. Brauer & Associates-Rocky Mt.*, 40 Colo. App. 67, 572 P.2d 845 (1977).

**The failure of a party's attorney to request an instruction on the effects of the comparative negligence statute does not waive this right** which the statute requires the court to protect — the right to an informed jury. *Appelgren v. Agri Chem, Inc.*, 39 Colo. App. 158, 562 P.2d 766 (1977).

**Defendant's failure to assert a contributory negligence defense in the theory of the case instruction and his failure to object to**

**the theory of the case instruction did not constitute a waiver of his contributory negligence defense** where defendant properly requested the trial court to submit a contributory negligence instruction to the jury. *Gordon v. Benson*, 925 P.2d 775 (Colo. 1996).

**It is improper to instruct the jury on assumption of risk** in a case tried under this section. *Loup-Miller v. Brauer & Associates-Rocky Mt.*, 40 Colo. App. 67, 572 P.2d 845 (1977).

**Special verdict form not required in FELA cases.** In Federal Employers Liability Act cases brought in Colorado, a special verdict form is not required by either statute or necessity. *Felder v. Union Pac. R.R.*, 660 P.2d 911 (Colo. App. 1982).

**Defendant is not required to present evidence of his or her own negligence or to argue that he or she was negligent** in order to avoid a finding of abandonment of a comparative negligence defense. *Gordon v. Benson*, 925 P.2d 775 (Colo. 1996).

## VI. SCOPE OF REVIEW.

**Scope of review.** The scope of review is limited to a determination as to whether the jury

acted capriciously or arbitrarily, or was swayed by emotion in assessing the damages incurred. *Dunham v. Kampman*, 37 Colo. App. 233, 547 P.2d 263 (1975), *aff'd*, 192 Colo. 448, 560 P.2d 91 (1977); *Robinson v. Poudre Valley Fed. Credit Union*, 680 P.2d 241 (Colo. App. 1984).

**Jury determination on appeal.** An appeal court may only overturn the jury's allocation where reasonable minds could not have apportioned the negligence of the parties in the manner in which it was done. *Dunham v. Kampman*, 37 Colo. App. 233, 547 P.2d 263 (1975), *aff'd*, 192 Colo. 448, 560 P.2d 91 (1977).

The issue of the percentage of negligence is for the jury's determination and is not to be disturbed in the absence of a clear showing of passion or prejudice. *Dunham v. Kampman*, 37 Colo. App. 233, 547 P.2d 263 (1975), *aff'd*, 192 Colo. 448, 560 P.2d 91 (1977).

**In comparative negligence cases, a jury's verdict can be set aside on the ground of inadequate damages.** *Reynolds v. Farber*, 40 Colo. App. 467, 577 P.2d 318 (1978).

### 13-21-111.5. Civil liability cases - pro rata liability of defendants - shifting financial responsibility for negligence in construction agreements - legislative declaration.

(1) In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss, except as provided in subsection (4) of this section.

(2) The jury shall return a special verdict, or, in the absence of a jury, the court shall make special findings determining the percentage of negligence or fault attributable to each of the parties and any persons not parties to the action of whom notice has been given pursuant to paragraph (b) of subsection (3) of this section to whom some negligence or fault is found and determining the total amount of damages sustained by each claimant. The entry of judgment shall be made by the court based on the special findings, and no general verdict shall be returned by the jury.

(3) (a) Any provision of the law to the contrary notwithstanding, the finder of fact in a civil action may consider the degree or percentage of negligence or fault of a person not a party to the action, based upon evidence thereof, which shall be admissible, in determining the degree or percentage of negligence or fault of those persons who are parties to such action. Any finding of a degree or percentage of fault or negligence of a nonparty shall not constitute a presumptive or conclusive finding as to such nonparty for the purposes of a prior or subsequent action involving that nonparty.

(b) Negligence or fault of a nonparty may be considered if the claimant entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault within ninety days following commencement of the action unless the court determines that a longer period is necessary. The notice shall be given by filing a pleading in the action designating such nonparty and setting forth such nonparty's name and last-known address, or the best identification of such nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault. Designation of a nonparty shall be subject to the provisions of section 13-17-102. If the designated nonparty is a licensed health care professional and the defendant designating such nonparty alleges professional negligence by such nonparty, the requirements and procedures of section 13-20-602 shall apply.



(4) Joint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act. Any person held jointly liable under this subsection (4) shall have a right of contribution from his fellow defendants acting in concert. A defendant shall be held responsible under this subsection (4) only for the degree or percentage of fault assessed to those persons who are held jointly liable pursuant to this subsection (4).

(5) In a jury trial in any civil action in which contributory negligence or comparative fault is an issue for determination by the jury, the trial court shall instruct the jury on the effect of its finding as to the degree or percentage of negligence or fault as between the plaintiff or plaintiffs and the defendant or defendants. However, the jury shall not be informed as to the effect of its finding as to the allocation of fault among two or more defendants. The attorneys for each party shall be allowed to argue the effect of the instruction on the facts which are before the jury.

(6) (a) The general assembly hereby finds, determines, and declares that:

(I) It is in the best interests of this state and its citizens and consumers to ensure that every construction business in the state is financially responsible under the tort liability system for losses that a business has caused;

(II) The provisions of this subsection (6) will promote competition and safety in the construction industry, thereby benefitting Colorado consumers;

(III) Construction businesses in recent years have begun to use contract provisions to shift the financial responsibility for their negligence to others, thereby circumventing the intent of tort law;

(IV) It is the intent of the general assembly that the duty of a business to be responsible for its own negligence be nondelegable;

(V) Construction businesses must be able to obtain liability insurance in order to meet their responsibilities;

(VI) The intent of this subsection (6) is to create an economic climate that will promote safety in construction, foster the availability and affordability of insurance, and ensure fairness among businesses;

(VII) If all businesses, large and small, are responsible for their own actions, then construction companies will be able to obtain adequate insurance, the quality of construction will be improved, and workplace safety will be enhanced.

(b) Except as otherwise provided in paragraphs (c) and (d) of this subsection (6), any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable.

(c) The provisions of this subsection (6) shall not affect any provision in a construction agreement that requires a person to indemnify and insure another person against liability for damage, including but not limited to the reimbursement of attorney fees and costs, if provided for by contract or statute, arising out of death or bodily injury to persons or damage to property, but not for any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitor or the indemnitor's agents, representatives, subcontractors, or suppliers.

(d) (I) This subsection (6) does not apply to contract clauses that require the indemnitor to purchase, maintain, and carry insurance covering the acts or omissions of the indemnitor, nor shall it apply to contract provisions that require the indemnitor to name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insured coverage provides coverage to the indemnitee for liability due to the acts or omissions of the indemnitor. Any provision in a construction agreement that requires the purchase of additional insured coverage for damage arising out of death or bodily injury to persons or damage to property from any acts or omissions that are not caused by the negligence or fault of the party providing such additional insured coverage is void as against public policy.

(II) This subsection (6) also does not apply to builder's risk insurance.

(e) (I) As used in this subsection (6) and except as otherwise provided in subparagraph (II) of this paragraph (e), “construction agreement” means a contract, subcontract, or agreement for materials or labor for the construction, alteration, renovation, repair, maintenance, design, planning, supervision, inspection, testing, or observation of any building, building site, structure, highway, street, roadway bridge, viaduct, water or sewer system, gas or other distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction.

(II) “Construction agreement” does not include:

(A) A contract, subcontract, or agreement that concerns or affects property owned or operated by a railroad, a sanitation district, as defined in section 32-1-103 (18), C.R.S., a water district, as defined in section 32-1-103 (25), C.R.S., a water and sanitation district, as defined in section 32-1-103 (24), C.R.S., a municipal water enterprise, a water conservancy district, a water conservation district, or a metropolitan sewage disposal district, as defined in section 32-4-502 (18), C.R.S.; or

(B) Any real property lease or rental agreement between a landlord and tenant regardless of whether any provision of the lease or rental agreement concerns construction, alteration, repair, improvement, or maintenance of real property.

(f) Nothing in this subsection (6) shall be construed to:

(I) Abrogate or affect the doctrine of respondeat superior, vicarious liability, or other nondelegable duties at common law;

(II) Affect the liability for the negligence of an at-fault party; or

(III) Abrogate or affect the exclusive remedy available under the workers’ compensation laws or the immunity provided to general contractors and owners under the workers’ compensation laws.

(g) **Choice of law.** Notwithstanding any contractual provision to the contrary, the laws of the state of Colorado shall apply to every construction agreement affecting improvements to real property within the state of Colorado.

**Source:** **L. 86:** Entire section added, p. 680, § 1, effective July 1. **L. 87:** (1) amended and (4) and (5) added, p. 551, § 1, effective July 1. **L. 90:** (3)(b) amended, p. 863, § 3, effective July 1. **L. 2007:** (6) added, p. 446, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For article, “New Role for Nonparties in Tort Actions — The Empty Chair”, see 15 Colo. Law. 1650 (1986). For article, “Negligent Entrustment”, see 16 Colo. Law. 642 (1987). For article, “Joint and Several Liability: A Case for Reform”, see 64 Den. U. L. Rev. 651 (1988). For article, “Designation of Immune, Nonliable and Unknown Nonparties”, see 22 Colo. Law. 31 (1993). For article, “Designating Immune Nonparties: Fair Or Foul?”, see 22 Colo. Law. 759 (1993). For article, “Application of the Pro Rata Liability, Comparative Negligence and Contribution Statutes”, see 23 Colo. Law. 1717 (1994). For comment, “Settlements with Nonparties: A Closer Look at Colorado’s Collateral Source and Contribution Statutes”, see 66 U. Colo. L. Rev. 195 (1995). For article, “Overview of Comparative Fault”, see 29 Colo. Law. 95 (July 2000). For article, “Fifteen Years of Colorado Legislative Tort Reform: Where Are We Now?”, see 30 Colo. Law. 5 (February 2001). For article, “Health Care Litigation in Colorado: A Survey of Recent Decisions”, see 30 Colo. Law. 91 (August 2001). For article, “The Impact of Tort Reform on Product

Liability Litigation in Colorado”, see 30 Colo. Law. 91 (November 2001). For article, “Theories of Homebuilder Liability for Subcontractor Negligence Part I”, see 34 Colo. Law. 69 (June 2005). For article, “S.B. 07-087 and the Enforceability of Indemnification Provisions in Colorado Construction Contracts”, see 36 Colo. Law. 59 (September 2007). For article, “Additional Insured and Insured Contract Liability Insurance Coverage for General Contractors”, see 36 Colo. Law. 45 (November 2007). For article, “Deconstructing Construction Defect Fault Allocation and Damages Apportionment Part I”, see 40 Colo. Law. 37 (November 2011).

**Pro rata liability statute does not violate due process**, as it provides plaintiffs notice and an opportunity to be heard regarding nonparties’ alleged fault and there is a rational basis between the means utilized by the statute and the legitimate state purpose of adjusting the inequitable common law rule of joint and several liability. Salazar v. Am. Sterilizer Co., 5 P.3d 357 (Colo. App. 2000).

**The primary purpose of this section** was to abolish the harsh effects of joint and several



liability. *Watters v. Pelican Intern., Inc.*, 706 F. Supp. 1452 (D. Colo. 1989); *Moody v. A.G. Edwards & Sons, Inc.*, 847 P.2d 215 (Colo. App. 1992); *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995).

**The adoption of this statute was intended to cure the perceived inequity under the common law concept of joint and several liability** whereby wrongdoers could be held fully responsible for a plaintiff's entire loss, despite the fact that another wrongdoer, who was not held accountable, contributed to the result. *Barton v. Adams Rental, Inc.*, 938 P.2d 532 (Colo. 1997); *Loughridge v. Goodyear Tire & Rubber Co.*, 207 F. Supp.2d 1187 (D. Colo. 2002).

**Provisions of this section are not limited to negligence actions.** Rather, it specifically applies to "an action brought as a result of . . . an injury to person or property." Such actions may include, for example, a strict products liability action. *O'Quinn v. Wedco Tech., Inc.*, 746 F.Supp. 38 (D. Colo. 1990); *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995).

**The general assembly clearly intended that this section apply to product liability actions.** *Loughridge v. Goodyear Tire & Rubber Co.*, 207 F. Supp.2d 1187 (D. Colo. 2002).

The use of the word "action" in subsection (1) indicates that the statute is applicable to non-tort claims. *Loughridge v. Goodyear Tire & Rubber Co.*, 207 F. Supp.2d 1187 (D. Colo. 2002).

**Pro rata liability applies to product liability claims.** *Loughridge v. Goodyear Tire & Rubber Co.*, 207 F. Supp.2d 1187 (D. Colo. 2002).

**This section does not differentiate between intentional acts and negligent acts in its mandate to apportion liability among tortfeasors.** The general assembly intended that liability may be apportioned not only between negligent tortfeasors, but also between a negligent tortfeasor and an intentional tortfeasor. Thus, the provisions of this section apply even when one of several tortfeasors commits an intentional tort that contributes to an indivisible injury. *Harvey v. Farmers Ins. Exch.*, 983 P.2d 34 (Colo. App. 1998), *aff'd sub nom. Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000).

**A loss of consortium claim qualifies as an "action brought as a result of a death or an injury to person or property" under subsection (1),** and thus, the apportionment rules contained in this statute apply to such claim. *Harvey v. Farmers Ins. Exch.*, 983 P.2d 34 (Colo. App. 1998), *aff'd sub nom. Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000).

**Term, "attributable," as used in this section, means assignable, ascribable, or imputable in the sense of an obligation or duty.** While nonparties who are immune from suit may properly be designated, those who owed no duty to the plaintiff may not. *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995).

**In a negligence by omission case,** the factors to be considered in determining whether the law should impose a duty are the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the defendant. *Whitlock v. Univ. of Denver*, 712 P.2d 1072 (Colo. App. 1985), *rev'd on other grounds*, 744 P.2d 54 (Colo. 1987).

**Pro rata liability of defendants and plaintiff must be ascertained before applying statutory cap on noneconomic damages** in cases involving multiple defendants or where plaintiff is partially at fault. *Gen. Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994).

**Defendant cannot be held liable for more than its pro rata share of damages even where it is permissible to exceed the damages cap.** *Hoffman v. Ford Motor Co.*, 690 F. Supp. 2d 1179 (D. Colo. 2010).

**The limitation of joint and several liability under this section is irrelevant in applying the setoff amounts and limits of uninsured and underinsured coverage under § 10-4-609 (5),** where an insurer under that section may offset against the uninsured and underinsured limits the amount received by the insured from all parties liable for the injuries. *Farmers Ins. Exch. v. Star*, 952 P.2d 809 (Colo. App. 1997); *Am. Family Mut. Ins. Co. v. Murakami*, 169 P.3d 192 (Colo. App. 2007).

**Defendant must properly designate a nonparty in a pleading which complies with the requirements of this section** in order for a court to allow the finder of fact to consider the negligence or fault of such nonparty. *Thompson v. Colo. & Eastern R.R. Co.*, 852 P.2d 1328 (Colo. App. 1993); *Chavez v. Parkview Episcopal Med. Ctr.*, 32 P.3d 609 (Colo. App. 2001).

**Subsection (3)(b) expressly permits a court to accept nonparty designations filed outside the 90-day period when it determines that a "longer period is necessary,"** so the provisions of C.R.C.P. 6(b)(2) concerning demonstration of "excusable neglect" do not apply. *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007).

**Instruction informing jury that an emergency room physician who treated plaintiff had the exclusive authority to either admit or discharge plaintiff was properly denied** because plaintiff had failed to designate the emergency room physician as a responsible nonparty pursuant to this section, and such an instruction could have confused or misled the jury. *Sheron v. Lutheran Med. Ctr.*, 18 P.3d 796 (Colo. App. 2000).

**This section does not accommodate post-trial motions.** Where defendant had knowledge of former co-defendants' settlements with plaintiffs before trial, defense counsel should have alerted the court that former co-defendants' pro-

portionate fault would be an issue when the judgment was rendered. *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994).

**The effect of this proportionate liability statute on the goal of full recovery of the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 is minimal and does not necessitate the formulation of a uniform national law of joint and several liability.** Therefore this statute is not preempted by a federal common law rule of joint and several liability. *Resolution Trust Corp. v. Heiserman*, 856 F. Supp. 578 (D. Colo. 1994).

**Since the federal Americans with Disabilities Act, the Fair Housing Amendments Act, and the Rehabilitation Act of 1973 do not provide for comparative fault, subsection (1) does not apply to federal question claims brought pursuant to those statutes.** *Roe v. Hous. Auth. of City of Boulder*, 909 F. Supp. 814 (D. Colo. 1995).

**Section not exclusive remedy.** Nothing in the language of this section indicates it is intended to be the exclusive mechanism for litigating the relative fault of all joint tortfeasors. A claim for contribution may be made under § 13-50.5-102 when a party has not been formally designated in the action under this section. *Watters v. Pelican Intern., Inc.*, 706 F. Supp. 1452 (D. Colo. 1989).

**Defendants designation of non-parties by category held not the "best identification" possible under the circumstances and therefore stricken.** *Federal Deposit Ins. Corp. v. Isham*, 782 F. Supp. 524 (D. Colo. 1992).

**Section does not apply** to cases commenced prior to the enactment of the section. *Mladjan v. Pub. Serv. Co.*, 797 P.2d 1299 (Colo. App. 1990).

**Exemplary damages are not subject to reduction by application of the comparative negligence statute.** *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

**And a solatium award recoverable by a wrongful death plaintiff is not subject to reduction by operation of this section.** *B.G.'s, Inc. v. Gross*, 23 P.3d 691 (Colo. 2001); *Smith v. Vincent*, 77 P.3d 927 (Colo. App. 2003).

**This section does not permit a recovery against a defendant on a joint/concerted action theory for cases filed after July 1, 1986 and before July 1, 1987.** *Voelker v. Cherry Creek Sch. Dist. 5*, 840 P.2d 353 (Colo. App. 1992).

**This section has the effect of eliminating liability of a physician for the negligent acts of another physician absent a showing that the physicians "acted in concert", as provided in subsection (4), or that the physicians were in an employment, partnership, or joint venture relationship with one another.** *Freyer v. Albin*, 5 P.3d 329 (Colo. App. 1999).

**This section does not abrogate the well-established rule that partners are jointly and severally liable for the wrongs of the partnership,** absent an explicit and express revision of § 7-60-113 by the Colorado legislature. *Bank of Denver v. Se. Capital Group, Inc.*, 763 F. Supp. 1552 (D. Colo. 1991).

**Section does not abrogate the statute under which an individual partner can be held vicariously liable for wrongful acts or omissions of a partner in the ordinary course of partnership business.** *Hughes v. Johnson*, 764 F. Supp. 1412 (D. Colo. 1991).

**This section does not apply to a lawsuit filed prior to July 1, 1986,** and amended pleading relating back to filing of lawsuit prior to July 1, 1986, does not make this section applicable to the lawsuit. *Halliburton v. Pub. Serv. Co.*, 804 P.2d 213 (Colo. App. 1990).

**The abolition of joint and several liability by this section does not extinguish a defendant's right to contribution from joint tortfeasors.** The language of § 13-50.5-102 does not evince an intention by the general assembly to require a defendant to establish both joint liability and several liability as a prerequisite to the defendant's right of contribution. A defendant is permitted to establish the several liability of one or more parties as a cause of the same injury to the plaintiff. *Graber v. Westaway*, 809 P.2d 1126 (Colo. App. 1991).

**Joint and several liability may be imposed** where the tortious act is based on negligence or the breach of fiduciary duty of due care or loyalty. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995).

**Joint and several liability may be imposed** based on evidence of a course of conduct from which a tacit agreement to act in concert can be implied. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995).

The elements of civil conspiracy are that: (1) Two or more persons; (2) come to a meeting of the minds; (3) on an object to be accomplished or a course of action to be followed; (4) and one or more overt unlawful acts are performed; (5) with damages as the proximate result thereof. *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989); *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp.2d 1175 (D. Colo. 2002).

**The elements necessary to find aiding and abetting liability do not, as a matter of law, include the elements necessary to find joint liability under subsection (4).** *Anstine v. Alexander*, 128 P.3d 249 (Colo. App. 2005), rev'd on other grounds, 152 P.3d 497 (Colo. 2007).

**To impose joint liability, jury must be required to find that defendants consciously and deliberately pursued a common plan or design to commit a tortious act.** Jury could find that defendants engaged in conduct that lent substantial assistance so as to have aided and abetted another, yet did not conspire with an-



other and knowingly pursue a common plan to commit a civil wrong. *Anstine v. Alexander*, 128 P.3d 249 (Colo. App. 2005), rev'd on other grounds, 152 P.3d 497 (Colo. 2007).

**Under subsection (3)(b), "[p]ersons against whom recovery is sought" includes designated nonparties.** *Painter v. Inland/Riggles Oil Co.*, 911 P.2d 716 (Colo. App. 1995); *Barton v. Adams Rental, Inc.*, 938 P.2d 532 (Colo. 1997).

**Even a person who is immune from suit may be a nonparty designee so long as the person owes a duty of care to the injured plaintiff.** *Doering ex rel. Barrett v. Copper Mountain, Inc.*, 259 F.3d 1202 (10th Cir. 2001).

**Designation of unidentified or unknown party allowed** where the designation alleged a sufficient basis for believing the nonparty to be wholly or partially at fault. *Pedge v. RM Holdings, Inc.*, 75 P.3d 1126 (Colo. App. 2002).

**Parental immunity does not bar designation as nonparty under this section.** It does not undermine the policy of qualified parental immunity to forbid the allocation of financial responsibility for the otherwise non-recoverable negligence of that parent to another defendant. *Paris ex rel. Paris v. Dance*, 194 P.3d 404 (Colo. App. 2008).

**That negligence of parent is not imputable to child does not bar parent's nonparty designation under this section.** Nonparty designation concerns the independent negligence of a parent; it does not attribute the negligence of the parent to the child. *Paris ex rel. Paris v. Dance*, 194 P.3d 404 (Colo. App. 2008).

**As used in subsection (4), "tortious act" means** any conduct other than breach of contract that constitutes a civil wrong and causes injury or damages; therefore, any negligent conduct resulting in injury or damage is sufficient to give rise to joint liability. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995); *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp.2d 1175 (D. Colo. 2002).

There is no basis to assume that by using the term "tortious act" in subsection (4) the general assembly intended to exclude one or more forms of wrongful conduct from the scope of that term. Thus, "tortious act" encompasses any wrongful conduct. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995); *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003).

**Both negligent and intentional acts are sufficient to give rise to joint liability for purposes of subsection (4).** *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp.2d 1175 (D. Colo. 2002).

**There need not be a "specific intent" to commit a tortious act for the actors to be subject to joint liability.** *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995).

**Nonparty's acts need not be the same as those of a defendant** to reduce the defendant's

liability under this section. Except to the extent joint liability is retained in subsection (4), this section establishes a pure several liability regime under which liability for an injury caused by separate torts, as well as by separate tortfeasors, may be apportioned among the persons responsible. *Moody v. A.G. Edwards & Sons, Inc.*, 847 P.2d 215 (Colo. App. 1992).

**Subsection (4) does not require an express agreement to cause injury in order to sustain a claim for civil conspiracy.** *Schneider v. Midtown Motor Co.*, 854 P.2d 1322 (Colo. App. 1992); *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp.2d 1175 (D. Colo. 2002).

**The evidence must reveal some indicia of an agreement sufficient to prove that the defendants consciously conspired and deliberately pursued a common plan or design that resulted in a tortious act.** *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp.2d 1175 (D. Colo. 2002).

Therefore, summary judgment not appropriate where there is a question as to whether the requisite nexus existed that would establish a tacit agreement between a car dealer, in its various forms, and its agents to provide vehicles to "dangerous," "mean" driver, who injured plaintiff, in exchange for payment in cash and motivation for repeat business. *Schneider v. Midtown Motor Co.*, 854 P.2d 1322 (Colo. App. 1992).

**The tort of negligent entrustment can constitute the predicate "tortious act" required to establish joint liability pursuant to subsection (4).** *Schneider v. Midtown Motor Co.*, 854 P.2d 1322 (Colo. App. 1992).

**Section 13-50.5-105 does not apply to reduce a defendant's liability under subsection (4).** The joint liability provision, as the more recently enacted statute, must be deemed controlling to the extent of any inconsistency. *Pierce v. Wiglesworth*, 903 P.2d 656 (Colo. App. 1994); *Toothman v. Freeborn & Peters*, 80 P.3d 804 (Colo. App. 2002).

**Plaintiff's fault may not reduce an intentional tortfeasor's liability.** *Toothman v. Freeborn & Peters*, 80 P.3d 804 (Colo. App. 2002).

**Colorado approaches an attorney's breach of implied warranty as a hybrid of the standard tort claim for malpractice, sounding in negligence, and subject to this proportionate liability statute.** *Federal Deposit Ins. Corp. v. Clark*, 978 F.2d 1541 (10th Cir. 1992).

**In a negligence action, a nonparty designation will be struck unless evidence demonstrating a prima facie case of nonparty liability is set forth.** *Stone v. Satriana*, 41 P.3d 705 (Colo. 2002); *Anstine v. Alexander*, 128 P.3d 249 (Colo. App. 2005), rev'd on other grounds, 152 P.3d 497 (Colo. 2007).

Where defendants did not present expert testimony or any other evidence to establish the duty of care applicable to nonparty attorneys,

defendants failed to establish a prima facie case of negligence. *Anstine v. Alexander*, 128 P.3d 249 (Colo. App. 2005), rev'd on other grounds, 152 P.3d 497 (Colo. 2007).

**Designation of a plaintiff's current legal counsel as a nonparty in a legal malpractice action by opposing counsel** is subject to strong public policy considerations and opposing counsel must allege a cognizable malpractice claim. In determining whether designation of current counsel is appropriate, the court evaluated: The danger of joining successor counsel as either a nonparty or third-party as an unfair litigation tactic; the adverse effect it would have on the client's ability to pursue a malpractice action; and the interference such designation would have on attorney-client confidences. *Stone v. Satriana*, 41 P.3d 705 (Colo. 2002).

There is no legal duty for a legal malpractice plaintiff's counsel to ameliorate the injury effected by predecessor counsel. *Stone v. Satriana*, 41 P.3d 705 (Colo. 2002).

A failure to appeal can never be a failure to mitigate damages caused by malpractice at trial. Litigation is too uncertain and costly to impose such a duty on a party. *Stone v. Satriana*, 41 P.3d 705 (Colo. 2002).

**There being no concerted action by the two tortfeasors, the trier of fact must apportion negligence or fault between them.** While defendant's negligence ultimately combined with the actions of another party to cause plaintiff's loss, there is no support for the proposition that the parties consciously conspired and deliberately pursued a common plan to commit a tortious act or to cause the loss. The court does not perceive that it is possible to conspire to be negligent. *Messler v. Phillips*, 867 P.2d 128 (Colo. App. 1993).

**13-21-111.6. Civil actions - reduction of damages for payment from collateral source.** In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained; except that the verdict shall not be reduced by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person. The court shall enter judgment on such reduced amount.

**Source:** L. 86: Entire section added, p. 679, § 3, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Recovery of Interest: Part I — Personal Injury", see 18 Colo. Law. 1063 (1989). For article, "Set-Off Under the Contribution and Collateral Source Stat-

**Even though the imposition of costs is required by this section**, the apportionment of costs among multiple defendants is not prescribed. It remains at the discretion of the court. *Bohrer v. DeHart*, 943 P.2d 1220 (Colo. App. 1996), rev'd on other grounds, 961 P.2d 472 (Colo. 1998).

**Trial court erroneously computed the compensatory damages** to which plaintiff was entitled by setting off amounts that plaintiff had received from settling defendants from the gross compensatory damage award for the breach of warranty and misrepresentation claims. *Sprung v. Adcock*, 903 P.2d 1224 (Colo. App. 1995).

**Erroneous jury instruction.** Negligence per se jury instruction on alleged nonparty's statutory violation should not have been given when there was no evidence that another person or vehicle was involved. *Ramirez v. Mixsooke*, 907 P.2d 617 (Colo. App. 1994).

**District court's failure to provide the jury with computational verdict forms in compliance with this section was error.** The error was harmless, however, because the court properly instructed the jury on apportionment of damages, and the verdict forms did not demonstrate that the jury ignored the instructions. *Bohrer v. DeHart*, 961 P.2d 472 (Colo. 1998).

**Where plaintiff seeks damages for aggravation of a pre-existing condition, the doctrine of apportionment should be applied in conjunction with determining pro rata liability.** Conduct that originally created the condition cannot be prorated with conduct that aggravated the condition. The jury must apportion damages between those arising from the pre-existing condition and those arising from aggravation of the condition. Pro rata liability then provides the method for determining legal responsibility for the damages after they are separated. *Fried v. Leong*, 946 P.2d 487 (Colo. App. 1997).

utes", see 21 Colo. Law. 1421 (1992). For article, "Partial Settlements in Multiparty Tort Actions: The Latest Chapter", see 22 Colo. Law. 2529 (1993). For comment, "Settlements with



Nonparties: A Closer Look at Colorado's Collateral Source and Contribution Statutes", see 66 U. Colo. L. Rev. 195 (1995). For article, "Recovery of Medical Expenses by Insured Medical Malpractice Victims", see 33 Colo. Law. 113 (July 2004).

**This section sets forth a general rule that damages for which a claimant has been wholly or partially indemnified or compensated by another cannot be recovered in a tort action against the tortfeasor involving the same injury.** *Miller v. Brannon*, 207 P.3d 923 (Colo. App. 2009).

**The clear and plain meaning of this section** is that a determination of liability is not required for a setoff; the only requirement is that compensation made be in relation to the injury or damage sustained. *U.S. Fidelity and Guarantee Co. v. Salida Gas Serv. Co.*, 793 P.2d 602 (Colo. App. 1989).

**The intent of this section** is to prevent double recovery by an injured party. *U.S. Fidelity and Guarantee Co. v. Salida Gas Serv. Co.*, 793 P.2d 602 (Colo. App. 1989); *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994).

**This section does not apply to payments made by settling tortfeasors**, but only to payments from collateral sources independent of any alleged tort liability. *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994); *Smith v. Vincent*, 77 P.3d 927 (Colo. App. 2003).

**Intent of this section was not to deny compensation** to which a claimant was entitled under a contract the claimant or someone on the claimant's behalf entered into and paid for with the expectation of receiving the contract benefits in the future. The purpose of excluding such contractual benefits is to allow recovery to a claimant who contracted for and purchased, either directly or indirectly, some type of insurance or other protection against accident-induced losses without penalizing the person for prudence and thereby providing a windfall for a culpable tortfeasor. *Van Waters & Rodgers, Inc. v. Keelan*, 840 P.2d 1070 (Colo. 1992); *Frost v. Schroeder & Co., Inc.*, 876 P.2d 126 (Colo. App. 1994).

**The intent of the contract exception of this section** is to ensure that a defendant does not receive a windfall by avoiding payment of damages because the plaintiff had the foresight to purchase insurance, or enter into a contract that compensates the plaintiff for injury caused by the defendant. When, however, the payor of the compensation pursuant to the contract is also liable for the plaintiff's judgment, the rationale for the contract exception disappears. In such a case, offset pursuant to this section is required. *Colo. Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218 (Colo. 1996); *Levy v. Am. Family Mut. Ins. Co.*, \_\_ P.3d \_\_ (Colo. App. 2011).

**This section controls over § 13-50.5-105**, since it was passed last. *U.S. Fidelity and Guarantee Co. v. Salida Gas Serv. Co.*, 793 P.2d 602 (Colo. App. 1989).

**This section and § 13-50.5-105 must be reconciled, if possible, to give effect to both sections.** Therefore, § 13-50.5-105 should apply when a percentage of negligence has been attributed by the fact finder to the non-party while this section should control if the fact finder attributes no fault to the non-party. *Gutierrez v. Bussey*, 837 P.2d 272 (Colo. App. 1992).

**Collateral source rule is not applicable to personal injury protection benefit payments (PIP).** A jury instruction to not award damages for losses that are eligible for coverage under the Colorado Auto Accident Reparations Act (§ 10-4-701) sets forth a proper statement of the law. *Martinez v. Shapland*, 833 P.2d 837 (Colo. App. 1992) (decided under law as it existed prior to the 2003 repeal of § 10-4-713).

**Under the common law collateral source rule, evidence of the amount paid by third-party payors, and conversely, the amount discounted (or written off) from the billed amount due under a contract between the third-party payor and the provider, is inadmissible**, even to show the reasonable value of services rendered, because these payments and discounts constitute collateral sources. *Crossgrove v. Wal-Mart Stores, Inc.*, \_\_ P.3d \_\_ (Colo. App. 2010).

**Colorado's common law collateral source rule is not limited to protecting merely the cash amounts paid to providers for services rendered;** rather, the rule is broad enough to encompass the amount by which a medical provider's bill is discounted pursuant to a contractual arrangement between the provider and third-party payor. *Crossgrove v. Wal-Mart Stores, Inc.*, \_\_ P.3d \_\_ (Colo. App. 2010).

**This section does not address the evidentiary prohibition of the collateral source rule;** however, the admission of the evidence is still prohibited by the common law collateral source rule. *Crossgrove v. Wal-Mart Stores, Inc.*, \_\_ P.3d \_\_ (Colo. App. 2010).

**This section has no effect until the finder of fact returns a verdict;** accordingly, it has no impact on the admissibility of evidence during trial. Because the general assembly spoke with exactitude in altering the application of the collateral source rule after the verdict is received from the fact finder, but expressed no intention to alter the jury's function in assessing the damages, this section does not abrogate the common law rule prohibiting evidence of collateral sources at trial. *Crossgrove v. Wal-Mart Stores, Inc.*, \_\_ P.3d \_\_ (Colo. App. 2010).

**The contract exception to the collateral source rule applies to PIP benefits of an automobile insurance policy.** Because the Colo-

rado Auto Accident Reparations Act (former §§ 10-4-701 to 10-4-726) (“no-fault insurance act”), under which losses resulting from an automobile accident that were eligible for PIP coverage under an insurance policy were not recoverable in a tort action against the tortfeasor who caused the losses, was repealed before the automobile accident occurred, the contract exception to the collateral source rule applied to plaintiff’s claim for lost earnings. *Miller v. Brannon*, 207 P.3d 923 (Colo. App. 2009) (decided under law as it existed prior to the 2003 repeal of § 10-4-713).

There is nothing in the language of the contract exception that would exclude PIP benefits because the no-fault insurance act required a person to purchase such benefits. *Miller v. Brannon*, 207 P.3d 923 (Colo. App. 2009) (decided under law as it existed prior to the 2003 repeal of § 10-4-713).

**The scope of this section is not entirely clear.** Therefore, the courts must look beyond the plain language to determine legislative intent. The court is to look at the object sought to be attained by the general assembly and at the legislative history. *Van Waters and Rogers, Inc. v. Keelen*, 840 P.2d 1070 (Colo. 1992).

**A settlement accompanied by a release or covenant not to execute falls within the scope of the “contract” exception.** *Simon v. Coppola*, 876 P.2d 10 (Colo. App. 1993).

**Collateral source rule is not applicable to benefits under a fire and police pension plan contract.** This section was part of sweeping legislation designed to limit amounts that plaintiffs can recover. However, legislative history indicates that the exemptions to the collateral source rule include benefits received under a fire and police pension plan contract, regardless of whether consideration paid for benefits is in the form of money or services. *Van Waters and Rogers, Inc. v. Keelen*, 840 P.2d 1070 (Colo. 1992).

**The contract exception to this section applies to a contract between plaintiff’s insurer and health care providers** that decreased the amount actually paid for plaintiff’s medical care and thereby injured to plaintiff’s benefit. The trial court erred by reducing plaintiff’s damages award by the amount in excess of the medical bills actually paid on plaintiff’s behalf. *Tucker v. Volunteers of Am. Colo. Branch*, 211 P.3d 708 (Colo. App. 2008), *aff’d sub nom. Volunteers of Am. v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010).

**Under the collateral source rule, a plaintiff may recover damages for the full amount of medical expenses incurred.** *Volunteers of Am. v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010).

**The discounted medical rates paid by plaintiff’s insurance company are a direct result of his health insurance contract.** Therefore, tortfeasor may not claim these discounts to

reduce its liability for the medical care plaintiff received. *Volunteers of Am. v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010).

**This section is subject to former § 10-4-713 (1) of the no-fault insurance act**, which prohibits recovery of PIP benefits in tort actions, notwithstanding that such benefits may qualify as “benefit[s] paid as a result of a contract entered into and paid for by” the plaintiff. *Martinez v. Shapland*, 833 P.2d 837 (Colo. App. 1992) (decided under law as it existed prior to the 2003 repeal of § 10-4-713).

**Benefits that result from an employment contract are protected by the exception clause of this section.** An employee’s services are something of value given in exchange for an employment contract and its derivative benefits. Disability payments received as part of the compensation for such services are entitled to the same protection against offset as proceeds from private insurance contracts. *Van Waters & Rogers, Inc. v. Keelen*, 840 P.2d 1070 (Colo. 1992).

**When the jury assigns fault to a settling party as a nonparty pursuant to this section, the trial verdict shall be reduced by an amount equal to the cumulative percentage of fault attributed to the settling nonparties.** The amount to be reduced from the trial verdict shall be calculated by multiplying the total percentage of liability attributed to the settling nonparties by the total trial verdict awarded the plaintiff. *Smith v. Zufelt*, 880 P.2d 1178 (Colo. 1994).

**However, the amount of a solatium award made under § 13-21-203.5 may not be reduced according to general principles of pro-rata liability.** *Smith v. Vincent*, 77 P.3d 927 (Colo. App. 2003).

**Trial court erred in an action for negligence** for gas explosion that destroyed the home of insurance company’s client by not allowing the judgment against joint tortfeasors to be offset by the amount paid to the insurance company by a plumbing company, even though the plumbing company was found not to be negligent. *U.S. Fidelity and Guarantee Co. v. Salida Gas Serv. Co.*, 793 P.2d 602 (Colo. App. 1989).

**Unemployment compensation benefits are not deductible** by employer to mitigate damages in an action for damages for breach of an employment contract. *Technical Computer Serv. v. Buckley*, 844 P.2d 1249 (Colo. App. 1992).

**Court was correct in ordering that any future payments paid to homeowners** from homeowners’ warranty insurance policy should be credited against judgment under collateral source rule. *Howard v. Wood Bros. Homes, Inc.*, 835 P.2d 556 (Colo. App. 1992).

**The indirect payment of insurance premiums by real property purchasers through the sellers** pursuant to a wrap-around agreement is a contract entered into and paid for by or on behalf of the purchasers that falls within the exception clause in this section. The trial court



erred in setting off the insurance proceeds against the jury verdict in favor of the purchasers. *Frost v. Schroeder & Co., Inc.*, 876 P.2d 126 (Colo. App. 1994).

**Social security disability insurance benefits should not be set off against UM/UIM insurance benefits** because SSDI benefits arise from a "contract entered into and paid for" by the injured party. *Barnett v. Am. Family Mut. Ins. Co.*, 843 P.2d 1302 (Colo. 1993).

**Nothing in this section would impermissibly limit an insured's recovery of UM/UIM coverage**, where insurer aggregates amounts re-

ceived by insured from all parties liable for his or her injuries. *Carlisle v. Farmers Ins. Exch.*, 946 P.2d 555 (Colo. App. 1997).

**Benefits paid pursuant to employment contract are not subject to statutory setoff.** *Combined Com. Corp. v. Pub. Serv. Co.*, 865 P.2d 893 (Colo. App. 1993).

**In a contract case, the common law collateral source rule applies rather than this section.** *Yeiser v. Ferrellgas, Inc.*, 214 P.3d 458 (Colo. App. 2009), rev'd on other grounds, 247 P.3d 1022 (Colo. 2011).

**13-21-111.7. Assumption of risk - consideration by trier of fact.** Assumption of a risk by a person shall be considered by the trier of fact in apportioning negligence pursuant to section 13-21-111. For the purposes of this section, a person assumes the risk of injury or damage if he voluntarily or unreasonably exposes himself to injury or damage with knowledge or appreciation of the danger and risk involved. In any trial to a jury in which the defense of assumption of risk is an issue for determination by the jury, the court shall instruct the jury on the elements as described in this section.

**Source: L. 86:** Entire section added, p. 679, § 3, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Legal Aspects of Health and Fitness Clubs: A Healthy and Dangerous Industry", see 15 Colo. Law. 1787 (1986).

**This section satisfies the rational basis in fact standard of equal protection analysis** since the statutory definition under this section is based on the long-standing legal principle that there are significant differences between plaintiffs and defendants such that different legal consequences may be attributed to their respective conduct solely on the basis of their status as either plaintiff or defendant in a negligence action. *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991).

**This section satisfies equal protection analysis under the rational basis standard of review** since one of the purposes is to make clear that both the voluntary and the unreasonable exposure to a known danger are species of assumption of risk under the comparative negligence statutory scheme. *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991).

**By defining "assumption of risk" in disjunctive terms of "voluntary" or "unreasonable" conduct**, this section includes within the definition a plaintiff's voluntary but not necessarily unreasonable, as well as a plaintiff's unreasonable, exposure to a known danger. *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991); *Carter v. Lovelace*, 844 P.2d 1288 (Colo. App. 1992).

**Assumption of risk requires knowledge of the danger and consent to it.** *Carter v. Lovelace*, 844 P.2d 1288 (Colo. App. 1992);

*Scott v. City of Greeley*, 931 P.2d 525 (Colo. App. 1996).

**Attempt to pass vehicles involved negligence and assumption of some risks, but not the known risk that someone would turn immediately in front of him.** To hold otherwise would be to hold that all drivers presume the risk of any accident when passing another automobile. *Carter v. Lovelace*, 844 P.2d 1288 (Colo. App. 1992).

**This section defines the term "assumption of risk" in language that gives clear notice of the conduct encompassed within the term** — that is, the voluntary or unreasonable exposure to injury or damage with knowledge or appreciation of the danger and risk involved — and provides meaningful guidance to courts and juries in resolving issues of liability and damages by directing them to factor the plaintiff's assumption of risk into the comparative negligence calculus. *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991).

**A passenger in an automobile driven by an intoxicated person may be negligent for having entered the automobile in the first place.** Thus, an instruction on assumption of risk is proper when a plaintiff is injured while a passenger in an automobile driven by someone who the plaintiff has reason to know is intoxicated. *Wark v. McClellan*, 68 P.3d 574 (Colo. App. 2003).

**No error in failing to instruct jury on assumption of risk.** *Howard v. Wood Bros. Homes, Inc.*, 835 P.2d 556 (Colo. App. 1992).

**13-21-111.8. Assumption of risk - shooting ranges.** (1) Any person who engages in sport shooting activities at a qualifying sport shooting range, as defined under section 25-12-109 (2) (d), C.R.S., assumes the risk of injury or damage associated with sport shooting activities as set forth in section 13-21-111.7.

(2) For purposes of this section, “engages in sport shooting activities” means entering and exiting a qualifying sport shooting range, preparing to shoot, waiting to shoot, shooting, or assisting another person in shooting at a qualifying sport shooting range. The term includes being a spectator at a qualifying sport shooting range and being present in the range for any reason.

**Source: L. 98:** Entire section added, p. 242, § 2, effective April 13.

**13-21-112. Ad damnum clauses in professional liability actions.** In any professional liability action for damages, the ad damnum clause or prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court.

**Source: L. 77:** Entire section added, p. 803, § 1, effective May 26.

**13-21-113. Donation of items of food - exemption from civil and criminal liability.** (1) No farmer, retail food establishment, or processor, distributor, wholesaler, or retailer of food who donates items of food to a nonprofit organization for use or distribution in providing assistance to needy or poor persons nor any nonprofit organization in receipt of such gleaned or donated food who transfers said food to another nonprofit organization for use or distribution in providing assistance to needy or poor persons shall be liable for damages in any civil action or subject to prosecution in any criminal proceeding resulting from the nature, age, condition, or packaging of such donated foods; except that this exemption shall not apply to the willful, wanton, or reckless acts of donors which result in injury to recipients of such donated foods. For the purposes of this section, “retail food establishment” shall have the same meaning as set forth in section 25-4-1602 (14), C.R.S., and “nonprofit organization” means any organization which is exempt from the income tax imposed under article 22 of title 39, C.R.S.; except that the term “nonprofit organization” does not include organizations which sell or offer to sell such donated items of food.

(2) Nothing in this section relieves any nonprofit organization that serves or provides food to needy persons for their consumption from any liability for any injury, including, but not limited to, injury resulting from ingesting donated foods, as a result of receiving, accepting, gathering, or removing any foods donated under this section; except that a nonprofit organization is not liable for any injury caused by donated food produced pursuant to the “Colorado Cottage Foods Act”, section 25-4-1614, C.R.S., unless the nonprofit organization acted unreasonably.

(3) Any nonprofit organization that receives any donated items of food pursuant to this section shall not sell or offer to sell any such donated items of food. This prohibition shall not affect the transfer of such donated items of gleaned or donated food between nonprofit organizations, without contemplation of remuneration, for ultimate disposition in accordance with the provisions of this section.

(4) Nothing in this section is intended to restrict the authority of any appropriate agency to regulate or ban the use of such donated foods for human consumption.

**Source: L. 80:** Entire section added, p. 513, § 1, effective April 6. **L. 82:** (1) and (3) amended, p. 291, § 1, effective April 2. **L. 89:** (1) amended, p. 758, § 1, effective April 10. **L. 2000:** (1) amended, p. 1844, § 23, effective August 2. **L. 2012:** (2) amended, (SB 12-048), ch. 16, p. 41, § 2, effective March 15.

**Cross references:** For the legislative declaration in the 2012 act amending subsection (2), see section 1 of chapter 16, Session Laws of Colorado 2012.



**13-21-113.3. Donation of firefighting equipment - exemption from civil and criminal liability - definitions - legislative declaration.** (1) A fire department or other person or entity that donates surplus firefighting equipment to a fire department shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding resulting from the nature, age, condition, or packaging of such equipment; except that this exemption shall not apply to the grossly negligent, willful, wanton, or reckless acts of donors that result in injury to recipients of such equipment.

(2) As used in this section:

(a) "Fire department" has the meaning set forth in section 24-33.5-1202, C.R.S., and includes a fire department that uses paid firefighters, volunteer firefighters, or both. The term includes, without limitation, not-for-profit nongovernmental entities that are organized to provide firefighting services.

(b) "Firefighting equipment" means any and all equipment designed for or typically used in the prevention and suppression of fire, the protection of firefighters, or the rescue and extrication of victims of fire or other emergencies, including without limitation hoses, fire trucks, rescue vehicles, extrication equipment, protective clothing, and breathing apparatus.

(3) A fire department that receives donated firefighting equipment pursuant to this section shall not sell or offer to sell any such donated equipment. This prohibition shall not affect the transfer of such donated equipment, without contemplation of remuneration, between fire departments for future use.

(4) Nothing in this section limits the authority of any appropriate agency to regulate, prohibit, or place conditions on the use of specific firefighting equipment.

(5) The general assembly intends that the provisions of this section and of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., be read together and harmonized. If any provision of this section is construed to conflict with a provision of the "Colorado Governmental Immunity Act", the provision that grants the greatest immunity shall prevail.

**Source: L. 2009:** Entire section added, (SB 09-013), ch. 413, p. 2284, § 2, effective June 3.

**13-21-113.5. Use of school or nonprofit organization kitchen - exemption from civil and criminal liability.** A school or nonprofit organization that provides one or more community kitchens used by producers to bake or process goods for sale pursuant to the "Colorado Cottage Foods Act", section 25-4-1614, C.R.S., is not liable for damages in any civil action or subject to prosecution in any criminal proceeding resulting from the use of its kitchens by producers preparing goods for direct sale to consumers, unless the school or nonprofit organization acted unreasonably. A school or nonprofit organization may require anyone using its kitchens for this purpose to show proof of liability insurance before using the kitchen. This section does not apply to an injury or death of the ultimate user of the product that results from an act or omission of the school or nonprofit organization constituting gross negligence or intentional misconduct.

**Source: L. 2012:** Entire section added, (SB 12-048), ch. 16, p. 41, § 3, effective March 15.

**Cross references:** For the legislative declaration in the 2012 act adding this section, see section 1 of chapter 16, Session Laws of Colorado 2012.

**13-21-113.7. Immunity of volunteer firefighters, incident management teams, and their employers or organizations - definitions - legislative declaration.** (1) A volunteer firefighter who, in good faith, takes part in firefighting efforts or provides emergency care, rescue, assistance, or recovery services at the scene of an emergency, any incident management team, and any person who, in good faith, commands, directs, employs, sponsors, or represents any such volunteer firefighter or incident management team shall not

be liable for civil damages as a result of an act or omission by such volunteer firefighter, incident management team, or other person in connection with the emergency; except that this exemption shall not apply to grossly negligent, willful, wanton, or reckless acts or omissions.

(2) As used in this section:

(a) "Emergency" means any incident to which a response by a fire department or incident management team is appropriate or requested, including, without limitation:

(I) A fire, fire alarm response, motor vehicle accident, rescue call, or hazardous materials incident;

(II) A natural or man-made disaster such as an earthquake, flood, or severe weather event;

(III) A terrorist attack; or

(IV) An outbreak of a harmful biological agent or infectious disease.

(b) "Fire department" has the meaning set forth in section 24-33.5-1202, C.R.S., and includes a fire department that uses paid firefighters, volunteer firefighters, or both. The term includes, without limitation, not-for-profit nongovernmental entities that are organized to provide firefighting services.

(c) "Incident management team" means an ad hoc or standing team of trained personnel from different departments, organizations, agencies, and jurisdictions activated to manage the logistical, fiscal, planning, operational, safety, and community issues related to an emergency or other incident.

(d) "Volunteer firefighter" has the meaning set forth in section 31-30-1102, C.R.S., and includes volunteer firefighters of not-for-profit nongovernmental entities that are organized to provide firefighting services.

(3) The general assembly intends that the provisions of this section and of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., be read together and harmonized. If any provision of this section is construed to conflict with a provision of the "Colorado Governmental Immunity Act", the provision that grants the greatest immunity shall prevail.

**Source: L. 2009:** Entire section added, (SB 09-013), ch. 413, p. 2284, § 2, effective June 3.

**13-21-114. Immunity of mine rescue participants and their employers or organizations.** No person engaged in mine rescue or recovery work who, in good faith, renders emergency care, rescue, assistance, or recovery services at the scene of any emergency at or in a mine in this state or who employs, sponsors, or represents any person rendering emergency care, rescue, assistance, or recovery services shall be liable for any civil damages as a result of any act or omission by any person in rendering emergency care, rescue, assistance, or recovery service.

**Source: L. 82:** Entire section added, p. 293, § 1, effective April 23.

**13-21-115. Actions against landowners.** (1) For the purposes of this section, "landowner" includes, without limitation, an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property.

(1.5) The general assembly hereby finds and declares:

(a) That the provisions of this section were enacted in 1986 to promote a state policy of responsibility by both landowners and those upon the land as well as to assure that the ability of an injured party to recover is correlated with his status as a trespasser, licensee, or invitee;

(b) That these objectives were characterized by the Colorado supreme court as "legitimate governmental interests" in **Gallegos v. Phipps**, No. 88 SA 141 (September 18, 1989);

(c) That the purpose of amending this section in the 1990 legislative session is to assure that the language of this section effectuates these legitimate governmental interests by



imposing on landowners a higher standard of care with respect to an invitee than a licensee, and a higher standard of care with respect to a licensee than a trespasser;

(d) That the purpose of this section is also to create a legal climate which will promote private property rights and commercial enterprise and will foster the availability and affordability of insurance;

(e) That the general assembly recognizes that by amending this section it is not reinstating the common law status categories as they existed immediately prior to **Mile Hi Fence v. Radovich**, 175 Colo. 537, 489 P.2d 308 (1971) but that its purpose is to protect landowners from liability in some circumstances when they were not protected at common law and to define the instances when liability will be imposed in the manner most consistent with the policies set forth in paragraphs (a), (c), and (d) of this subsection (1.5).

(2) In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable only as provided in subsection (3) of this section. Sections 13-21-111, 13-21-111.5, and 13-21-111.7 shall apply to an action to which this section applies. This subsection (2) shall not be construed to abrogate the doctrine of attractive nuisance as applied to persons under fourteen years of age. A person who is at least fourteen years of age but is less than eighteen years of age shall be presumed competent for purposes of the application of this section.

(3) (a) A trespasser may recover only for damages willfully or deliberately caused by the landowner.

(b) A licensee may recover only for damages caused:

(I) By the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or

(II) By the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew.

(c) (I) Except as otherwise provided in subparagraph (II) of this paragraph (c), an invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known.

(II) If the landowner's real property is classified for property tax purposes as agricultural land or vacant land, an invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew.

(3.5) It is the intent of the general assembly in enacting the provisions of subsection (3) of this section that the circumstances under which a licensee may recover include all of the circumstances under which a trespasser could recover and that the circumstances under which an invitee may recover include all of the circumstances under which a trespasser or a licensee could recover.

(4) In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

(5) As used in this section:

(a) "Invitee" means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain.

(b) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest.

(c) "Trespasser" means a person who enters or remains on the land of another without the landowner's consent.

(6) If any provision of this section is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the section shall be deemed valid.

**Source:** **L. 86:** Entire section added, p. 683, § 1, effective May 16. **L. 90:** (1.5), (3.5), (5), and (6) added and (3) and (4) amended, p. 867, § 1, effective April 20. **L. 2006:** (2) amended, p. 344, § 1, effective April 5.

**Editor's note:** Subsections (5)(a) and (5)(c), as they were enacted in House Bill 90-1107, were relettered on revision in 2002 as (5)(c) and (5)(a), respectively.

## ANNOTATION

**Law reviews.** For article, "Legal Aspects of Health and Fitness Clubs: A Healthy and Dangerous Industry", see 15 Colo. Law. 1787 (1986). For article, "The Landowners' Liability Statute", see 18 Colo. Law. 208 (1989). For article, "The Changing Boundaries of Premises Liability after Gallegos", see 18 Colo. Law. 2121 (1989). For article, "Recreational Use Of Agricultural Lands", see 23 Colo. Law. 529 (1994). For article, "The Colorado Premises Liability Statute", see 25 Colo. Law. 71 (May 1996). For article, "Stealth Statute: The Unexpected Reach of the Colorado Premises Liability Act", see 40 Colo. Law. 27 (March 2011).

**Constitutionality.** The phrase "deliberate failure to exercise reasonable care" found in subsection (3)(c) is not unconstitutionally vague. *Giebink v. Fischer*, 709 F. Supp. 1012 (D. Colo. 1989).

This section does not violate article II, § 6, of the state constitution since that provision is a mandate to the judiciary and not the legislature. *Giebink v. Fischer*, 709 F. Supp. 1012 (D. Colo. 1989).

This section does not violate article V, section 25 of the state constitution since this provision applies uniformly to all landowners. *Giebink v. Fischer*, 709 F. Supp. 1012 (D. Colo. 1989).

This section does not violate equal protection since the provision of limited protection to landowners is reasonably related to the protection of the state economy. *Giebink v. Fischer*, 709 F. Supp. 1012 (D. Colo. 1989).

**Unconstitutionality.** This section violates both the federal and state constitutional guarantees of equal protection of the laws. *Gallegos v. Phipps*, 779 P.2d 856 (Colo. 1989); *Klausz v. Dillion Co., Inc.*, 779 P.2d 863 (Colo. 1989) (disagreeing with *Giebink v. Fischer* cited above) (decided prior to 1990 amendments).

**The Colorado Premises Liability Act provides the exclusive remedy against a landowner for physical injuries sustained on the landowner's property.** *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003); *Vigil v. Franklin*, 103 P.3d 322 (Colo. 2004); *Anderson v. Hyland Hills Park & Recreation Dist.*, 119 P.3d 533 (Colo. App. 2004); *Sweeney v. United Artists Theater Circuit*, 119 P.3d 538 (Colo. App. 2005).

**This section preempts the common law creation of both landowner duties and defenses to those duties.** Consequently, the open and obvious danger doctrine cannot be asserted by a landowner as a defense to a premises liability law suit. *Vigil v. Franklin*, 103 P.3d 322 (Colo. 2004).

**Section does not require that damages resulting from landowner's negligence be assessed without regard to negligence of the injured party or fault of a nonparty.** *Union Pac. R.R. v. Martin*, 209 P.3d 185 (Colo. 2009).

**Section does not abrogate statutorily created defenses, which were available to landowners before the 2006 amendment and afterward.** The trial court correctly allowed defendants' affirmative defenses of comparative negligence and assumption of the risk. *Tucker v. Volunteers of Am. Colo. Branch*, 211 P.3d 708 (Colo. App. 2008), *aff'd* on other grounds sub nom. *Volunteers of Am. v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010).

**Premises Liability Act never expressly excluded the statutory defense of comparative negligence from its coverage, and limiting the statutory protection provided to landowners would tend to increase liability rather than protect landowners from liability.** *DeWitt v. Tara Woods Ltd. P'ship*, 214 P.3d 466 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment).

**Statute does not have to expressly bar waiver by contract for the contract provision to be invalid because it is contrary to public policy.** *Stanley v. Creighton Co.*, 911 P.2d 705 (Colo. App. 1996).

**Holding title to property is not dispositive in determining who is a landowner under subsection (1).** *Wark v. U.S.*, 269 F.3d 1185 (10th Cir. 2001).

**The term "landowner" is no more expansive than the common law definition.** *Wark v. U.S.*, 269 F.3d 1185 (10th Cir. 2001).

**A landowner is any person in possession of real property and such possession need not necessarily be to the exclusion of all others.** Therefore, for purposes of this section, a landowner can be an independent contractor. *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215 (Colo. 2002).



**This section offers its protection to a person who is legally conducting an activity on the property or legally creating a condition on the property.** Such person or entity is responsible for the activity or condition and, therefore, prospectively liable to an entrant onto the property. *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215 (Colo. 2002); *Wycoff v. Grace Cmty. Church*, 251 P.3d 1260 (Colo. App. 2010).

**The test for determining if a victim is an invitee is whether she or he was on the premises to transact business in which the parties are mutually interested.** *Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551 (Colo. App. 2003).

**Trial court erred in ruling that plaintiff was defendant's licensee rather than invitee.** Therefore, jury instructions minimized the duties defendant owed to plaintiff under the Premises Liability Act. *Wycoff v. Seventh Day Adventist Ass'n*, 251 P.3d 1258 (Colo. App. 2010).

**If the victim was on the premises at an employee's invitation for either the employee's benefit, victim's benefit, or their mutual benefit, then she or he was a licensee or trespasser not an invitee.** *Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551 (Colo. App. 2003).

**So long as a landowner retains possession of its property, it cannot delegate the duties imposed on it by subsection (1).** *Jules v. Embassy Props., Inc.*, 905 P.2d 13 (Colo. App. 1995).

**But possession of property is not dependent upon title and need not be exclusive.** Under this section, a party not an owner or lessee may nevertheless be a "landowner" if the party either maintains control over the property or is legally responsible for either the condition of the property or for activities conducted on the property. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003).

**However, a contractor who would otherwise be categorized as a "landowner" during time of work on property is not liable if, at the time of the accident in question, the contractor was neither in possession of the property nor conducting any activity related to the property.** In such a case, the plaintiff is not required to prove that defendant contractor had actual knowledge of the alleged dangerous condition. *Land-Wells v. Rain Way Sprinkler & Lands.*, 187 P.3d 1152 (Colo. App. 2008).

**Contractor who had a legal responsibility for the condition of the premises and who was potentially liable for injuries resulting from that condition held to be a "landowner" for purposes of this section.** *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003).

**When a public entity provides a public building for public use, it owes a nondelegable duty to protect invitees from an unreasonable risk to their health and safety due to a negligent act or omission in constructing or**

**maintaining the facility.** *Springer v. City & County of Denver*, 13 P.3d 794 (Colo. 2000).

**Owner of property adjacent to public sidewalk does not have a duty to pedestrians to clear sidewalk of snow merely because it complied with snow removal ordinance from time to time and on a voluntary basis in order to avoid the imposition of penalties.** *Burbach v. Canwest Invs., LLC*, 224 P.3d 437 (Colo. App. 2009).

**Snow removal ordinance does not make public sidewalks the "property of" adjacent property owners.** The court therefore properly granted summary judgement since owner of property adjacent to public sidewalk was not legally responsible for the condition of the sidewalk. *Burbach v. Canwest Invs., LLC*, 224 P.3d 437 (Colo. App. 2009).

**A landlord retaining sufficient control over an area or instrumentality has a duty to exercise due care in maintaining that area or instrumentality.** *Nordin v. Madden*, 148 P.3d 218 (Colo. App. 2006).

**In effect, this section establishes two separate elements for landowner liability:** (1) Breach of a duty to use reasonable care to protect against a danger on the property, and (2) actual or constructive knowledge of the danger. *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459 (D. Colo. 1997).

**Statute's requirement that the landowner "knew or should have known" of the danger can be satisfied by actual or constructive knowledge.** *Lombard v. Colo. Outdoor Educ. Ctr.*, 187 P.3d 565 (Colo. 2008).

**Plaintiff presented sufficient evidence to overcome defendant's motion for summary judgment on the issue of knowledge because, as the builder, defendant had actual or constructive knowledge of the violation of a building code provision that was intended to ensure the safety of those on the premises, such as plaintiff.** *Lombard v. Colo. Outdoor Educ. Ctr.*, 187 P.3d 565 (Colo. 2008).

**Plaintiff may overcome summary judgment on the issue of a landowner's unreasonable failure to exercise reasonable care by presenting evidence that the landowner violated a statute or ordinance that was intended to protect the plaintiff from the type of injury plaintiff suffered.** *Lombard v. Colo. Outdoor Educ. Ctr.*, 187 P.3d 565 (Colo. 2008).

**A plaintiff may recover against the landowner pursuant to the statute only and not under any other theory of negligence.** The language of the premises liability statute makes clear that a party may no longer bring a negligence per se claim against a landowner to recover for damages caused on the premises. *Lombard v. Colo. Outdoor Educ. Ctr.*, 187 P.3d 565 (Colo. 2008).

**Building code violation may be evidence**

**that owners failed to use reasonable care.** Trial court did not err in tendering to a jury an instruction that included this statement, while rejecting other jury instructions that misstated the relationship between the common law and the premises liability act. *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 266 P.3d 412 (Colo. App. 2011).

**No lessor liability for injuries.** Under this section, as under common law, a lessor who has transferred possession and control over the leased premises to a lessee has no liability for injuries resulting from a dangerous condition of the premises absent proof as to one of the exceptions. *Perez v. Grovert*, 962 P.2d 996 (Colo. App. 1998).

Under this section, a landlord who has transferred control of the premises to a tenant is no longer a "person in possession" of the real property and is not liable for injuries resulting from a danger on the premises unless the landlord had actual knowledge of the danger before the transfer. *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005).

**And no landowner liability for injuries occurring on that portion of an easement exclusively owned, maintained, and controlled by easement holder.** *deBoer v. Jones*, 996 P.2d 754 (Colo. App. 2000); *deBoer v. Ute Water Conservancy Dist.*, 17 P.3d 187 (Colo. App. 2000).

**The reservation of the right of inspection and the right of maintenance and repairs is generally not a sufficient attribute of control to support imposition of tort liability on the lessor for injuries to the tenant or third parties.** *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005).

**This section does not reflect an intention to extend the application of the premises liability doctrine to the negligent supply of a chattel by a landowner.** *Geringer v. Wildhorn Ranch, Inc.*, 706 F.Supp. 1442 (D. Colo. 1988).

**This section does not apply to ski accident cases which are governed by the Ski Safety Act, article 44 of title 33, C.R.S.** *Calvert v. Aspen Skiing Co.*, 700 F.Supp. 520 (D. Colo. 1988).

**This section would apply to ski accident cases which involve dangerous conditions that are not ordinarily present at ski areas since the Ski Safety Act, article 44 of title 33, C.R.S., protects skiers against only those dangerous conditions that are commonly present at ski areas.** *Giebink v. Fischer*, 709 F. Supp. 1012 (D. Colo. 1989).

**Claim of spectator injured by flying puck at hockey rink governed by this section.** The common law "no duty" rule for injuries suffered by spectators at sporting events was superseded by this section. *Teneyck v. Roller Hockey Colo., Ltd.*, 10 P.3d 707 (Colo. App. 2000).

**Subsection (2) does not apply when plaintiff is a co-owner of the area where the injuries were sustained, because the injury could**

not have occurred on the real property of another. *Acierno v. Trailside Townhome Ass'n, Inc.*, 862 P.2d 975 (Colo. App. 1993).

**Jury instructions presenting a general negligence theory with regard to an invitee was not prejudicial error, even if there is a meaningful difference between a failure to exercise reasonable care, in the instruction, and an unreasonable failure to exercise reasonable care, from the statute.** *Lawson v. Safeway, Inc.*, 878 P.2d 127 (Colo. App. 1994); *Thornbury v. Allen*, 991 P.2d 335 (Colo. App. 1999).

**Because plaintiff is a landowner, trial court should have applied the standard of care in this section rather than the standard of care for operators of amusement devices contained in the jury instructions.** *Anderson v. Hyland Hills Park & Recreation Dist.*, 119 P.3d 533 (Colo. App. 2004).

**The provisions of this act do not apply to the common areas of a townhome complex that are owned by a townhome owners association, because the townhome owners have a continuing right of access to the common areas in the townhome complex by virtue of their status as owners, regardless of whether the association has give consent.** *Trailside Townhome Ass'n, Inc. v. Acierno*, 880 P.2d 1197 (Colo. 1994).

Rather, the relationship between the townhome owners association and the townhome owners is controlled by the duties specified in the operative documents creating the townhome complex and the association, to the extent those duties are consistent with public policy. *Trailside Townhome Ass'n, Inc. v. Acierno*, 880 P.2d 1197 (Colo. 1994).

**Under this section, a tenant is classified as an invitee, as a customer of the landlord in a continuing business relationship that is mutually beneficial, regardless of the particular activity in which the tenant was engaged when injured.** *Maes v. Lakeview Assocs., Ltd.*, 892 P.2d 375 (Colo. App. 1994), *aff'd*, 907 P.2d 580 (Colo. 1995); *Pedge v. RM Holdings, Inc.*, 75 P.3d 1126 (Colo. App. 2002).

**Plaintiff who paid admission was invitee and not a social guest.** Social hosts do not typically require their guests to sign permission slips and pay for their hospitality. *Wycoff v. Grace Cmty. Church*, 251 P.3d 1260 (Colo. App. 2010).

**A social guest of a tenant is a licensee absent a showing that the guest entered the premises to transact business with the landlord or that the landlord represented that the guest was expected to enter or remain.** *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005).

**Contractor with legal responsibility for the condition of the premises owes an employee of a lessor of the premises a duty of care which this section imposes upon a landowner with respect to an invitee.** *Henderson v. Master*



Klean Janitorial, Inc., 70 P.3d 612 (Colo. App. 2003).

**The liability of a landowner to a licensee** under this section is to be limited to situations in which the landowner possesses an active awareness of the dangerous condition. *Wright v. Vail Run Resort Cmty. Ass'n*, 917 P.2d 364 (Colo. App. 1996); *Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551 (Colo. App. 2003).

**Summary judgment in favor of landlord proper** in absence of any evidence concerning landlord's knowledge of alleged defect. *Casey v. Christie Lodge Owners Ass'n*, 923 P.2d 365 (Colo. App. 1996).

**Section covers claims for negligent supervision and retention** when a claim relates to the condition of property. *Casey v. Christie Lodge Owners Ass'n*, 923 P.2d 365 (Colo. App. 1996).

**13-21-115.5. Volunteer service act - immunity - exception for operation of motor vehicles.** (1) This section shall be known and may be cited as the "Volunteer Service Act".

(2) The general assembly finds and declares that:

(a) The willingness of volunteers to offer their services has been increasingly deterred by a perception that they put personal assets at risk in the event of tort actions seeking damages arising from their activities as volunteers;

(b) The contributions of programs, activities, and services to communities is diminished and worthwhile programs, activities, and services are deterred by the unwillingness of volunteers to serve as volunteers of nonprofit public and private organizations;

(c) It is in the public interest to strike a balance between the right of a person to seek redress for injury and the right of an individual to freely give time and energy without compensation as a volunteer in service to the community without fear of personal liability for acts undertaken in good faith absent willful and wanton conduct on the part of the volunteer; and

(d) The provisions of this section are intended to encourage volunteers to contribute their services for the good of their communities and at the same time provide a reasonable basis for redress of claims which may arise relating to those services.

(3) As used in this section, unless the context otherwise requires:

(a) "Nonprofit corporation" means any corporation which is exempt from taxation pursuant to section 501(a) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(a), as amended, or which is listed as an exempt organization in section 501(c) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(c), as amended. The term includes a not-for-profit corporation.

(b) "Nonprofit organization" means any organization which is exempt from taxation pursuant to section 501(a) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(a), as amended, or which is listed as an exempt organization in section 501(c) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(c), as amended, and any homeowners association, as defined in and which is exempt from taxation pursuant to section 528 of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 528.

(c) (I) "Volunteer" means a person performing services for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital without compensation, other than reimbursement for actual expenses incurred. The term excludes a volunteer serving as a director, officer, or trustee who shall be protected from civil liability in accordance with the provisions of sections 13-21-116 and 13-21-115.7.

(II) "Volunteer" includes:

(A) A licensed physician, a licensed physician assistant, and a licensed anesthesiologist assistant governed by article 36 of title 12, C.R.S., performing the practice of medicine, as defined in section 12-36-106, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(B) A licensed chiropractor governed by article 33 of title 12, C.R.S., performing chiropractic, as defined in section 12-33-102, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(C) A registered midwife governed by article 37 of title 12, C.R.S., performing the practice of direct-entry midwifery, as defined in section 12-37-102, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(D) A licensed nurse governed by the "Nurse Practice Act", article 38 of title 12, C.R.S., performing the practice of practical nursing or the practice of professional nursing,

as defined in section 12-38-103 (9) and (10), C.R.S., respectively, as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(E) A registered advance practice nurse governed by the “Nurse Practice Act”, article 38 of title 12, C.R.S., performing nursing tasks within the scope of the person’s nursing license and performing advanced practice under authority granted by the state board of nursing pursuant to sections 12-38-111.5 and 12-38-111.6, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(F) A licensed retired volunteer nurse governed by the provisions of article 38 of title 12, C.R.S., performing volunteer nursing tasks within the scope of the person’s nursing license, as described in section 12-38-112.5, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(G) A certified nurse aide governed by the provisions of article 38.1 of title 12, C.R.S., performing the practice of a nurse aide, as defined in section 12-38.1-102 (5), C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(H) A licensed nursing home administrator and registered nursing home administrator-in-training governed by the provisions of article 39 of title 12, C.R.S., performing the practice of nursing home administration, as defined in section 12-39-102 (5), C.R.S., and the training of an administrator-in-training, as described in section 12-39-107, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(I) A licensed optometrist governed by the provisions of article 40 of title 12, C.R.S., performing the practice of optometry, as defined in section 12-40-102, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(J) A licensed physical therapist governed by the “Physical Therapy Practice Act”, article 41 of title 12, C.R.S., performing physical therapy, as defined in section 12-41-103 (6), C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(K) A licensed respiratory therapist governed by the “Respiratory Therapy Practice Act”, article 41.5 of title 12, C.R.S., performing respiratory therapy, as defined in section 12-41.5-103 (6), C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(L) A licensed psychiatric technician governed by the provisions of article 42 of title 12, C.R.S., performing the practice as a psychiatric technician, as defined in section 12-42-102 (4), C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(M) A licensed psychologist governed by the provisions of article 43 of title 12, C.R.S., performing the practice of psychology, as defined in section 12-43-303, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(N) A licensed social worker and licensed clinical social worker governed by the provisions of article 43 of title 12, C.R.S., performing social work practice, as defined in section 12-43-403, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(O) A licensed marriage and family therapist governed by the provisions of article 43 of title 12, C.R.S., performing marriage and family therapy practice, as defined in section 12-43-503, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(P) A licensed professional counselor governed by article 43 of title 12, C.R.S., practicing professional counseling as defined in section 12-43-602.5, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(Q) A licensed pharmacist governed by article 42.5 of title 12, C.R.S., performing the practice of pharmacy, as defined in section 12-42.5-102 (31), C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital;

(R) A licensed dentist or dental hygienist governed by article 35 of title 12, C.R.S., performing the practice of dentistry or dental hygiene, as defined in section 12-35-103,



C.R.S., and as described in section 12-35-113, C.R.S., as a volunteer for a nonprofit organization, nonprofit corporation, governmental entity, or hospital; or a dentist or dental hygienist who holds a license in good standing from another state performing the practice of dentistry or dental hygiene, as defined in section 12-35-103, C.R.S., and as described in section 12-35-113, C.R.S., as a volunteer for a nonprofit organization, nonprofit corporation, governmental entity, or hospital pursuant to section 12-35-115 (1) (k), C.R.S.; and

(S) A licensed or certified addiction counselor governed by article 43 of title 12, C.R.S., performing addiction counseling, as defined in section 12-43-803, C.R.S., as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital.

(III) The nonprofit organization, nonprofit corporation, governmental entity, or hospital for which a volunteer performs shall annually verify that the volunteer holds an unrestricted Colorado license, registration, or certification to practice his or her respective profession.

(4) (a) Any volunteer shall be immune from civil liability in any action on the basis of any act or omission of a volunteer resulting in damage or injury if:

(I) The volunteer is immune from liability for the act or omission under the federal “Volunteer Protection Act of 1997”, as from time to time may be amended, codified at 42 U.S.C. sec. 14501 et seq.; and

(II) The damage or injury was not caused by misconduct or other circumstances that would preclude immunity for such volunteer under the federal law described in subparagraph (I) of this paragraph (a).

(III) (Deleted by amendment, L. 2006, p. 531, § 1, effective July 1, 2006.)

(b) (I) Except as otherwise provided in subparagraph (II) of this paragraph (b), nothing in this section shall be construed to bar any cause of action against a nonprofit organization, nonprofit corporation, governmental entity, or hospital or change the liability otherwise provided by law of a nonprofit organization, nonprofit corporation, governmental entity, or hospital arising out of an act or omission of a volunteer exempt from liability for negligence under this section.

(II) A nonprofit organization, nonprofit corporation, governmental entity, or hospital that is formed for the sole purpose of facilitating the volunteer provision of health care shall be immune from liability arising out of an act or omission of a volunteer who is immune from liability under this subsection (4).

(5) Notwithstanding the provisions of subsection (4) of this section, a plaintiff may sue and recover civil damages from a volunteer based upon a negligent act or omission involving the operation of a motor vehicle during an activity; except that the amount recovered from such volunteer shall not exceed the limits of applicable insurance coverage maintained by or on behalf of such volunteer with respect to the negligent operation of a motor vehicle in such circumstances. However, nothing in this section shall be construed to limit the right of a plaintiff to recover from a policy of uninsured or underinsured motorist coverage available to the plaintiff as a result of a motor vehicle accident.

**Source:** L. 92: Entire section added, p. 278, § 1, effective July 1. L. 99: (3)(c) and (4)(a) amended, p. 399, § 1, effective April 22. L. 2006: (3)(c), (4)(a), and (4)(b) amended, p. 531, § 1, effective July 1. L. 2007: (4)(a)(I) amended, p. 2025, § 26, effective June 1; (3)(c)(II)(R) amended, p. 691, § 2, effective August 3. L. 2008: (3)(c)(II)(S) added, p. 426, § 26, effective August 5. L. 2009: (3)(c)(II)(B) amended, (SB 09-167), ch. 366, p. 1924, § 11, effective June 1. L. 2011: (3)(c)(II)(C) amended, (SB 11-088), ch. 283, p. 1269, § 14, effective July 1; (3)(c)(II)(P) and (3)(c)(II)(S) amended, (SB 11-187), ch. 285, p. 1326, § 67, effective July 1. L. 2012: (3)(c)(II)(Q) amended, (HB 12-1311), ch. 281, p. 1617, § 34, effective July 1; (3)(c)(II)(A) amended, (HB 12-1332), ch. 238, p. 1059, § 14, effective August 8.

#### ANNOTATION

The immunity granted pursuant to this section extends to an unlimited variety of volunteer activities and applies to injury claims by third parties, but protects only in-

dividual volunteers. In contrast, the immunity granted in § 13-21-116 extends only to volunteers who assist specifically with youth programs and sporting activities and does not apply

to claims by third parties, but protects corporate as well as individual volunteers. *Jones v. Westernaires, Inc.*, 876 P.2d 50 (Colo. App. 1993), overruled in *Concerned Parents of Pueblo, Inc. v. Gilmore*, 47 P.3d 311 (Colo. 2002).

### **13-21-115.6. Immunity from civil liability for school crossing guards and sponsors.**

(1) As used in this section:

(a) "School crossing guard" means any person eighteen years of age and older acting with or without compensation who supervises, directs, monitors, or otherwise assists school children at a street or intersection.

(b) "School crossing guard sponsor" means any governmental agency or subdivision, including but not limited to any county, city, city and county, town, or school district, and any individual, volunteer group, club, or nonprofit corporation that sponsors, organizes, or provides for school crossing guards.

(2) Any school crossing guard and any school crossing guard sponsor shall be immune from civil liability for any act or omission that results in damage or injury if the school crossing guard was acting within the scope of such person's official functions and duties as a school crossing guard unless the damage or injury was caused by a willful and wanton act or omission of the school crossing guard.

(3) Nothing in this section shall be construed to abrogate or limit the sovereign immunity granted to public entities pursuant to the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

**Source: L. 96:** Entire section added, p. 1593, § 1, effective June 3.

**13-21-115.7. Immunity from civil liability for directors, officers, or trustees - nonprofit corporations or nonprofit organizations.** (1) As used in this section, unless the context otherwise requires:

(a) "Nonprofit corporation" means any corporation which is exempt from taxation pursuant to section 501(a) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(a), as amended, and listed as an exempt organization in section 501(c) (2), (3), (4), (5), (6), (7), (8), (11), or (19) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(c), as amended. The term includes a not-for-profit corporation. The term includes a public hospital certified pursuant to section 25-1.5-103 (1) (a), C.R.S.

(b) "Nonprofit organization" means any organization which is exempt from taxation pursuant to section 501(a) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(a), as amended, and listed as an exempt organization in section 501(c) (2), (3), (4), (5), (6), (7), (8), (11), or (19) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(c), as amended.

(2) In addition to the provisions of section 13-21-116 (2) (b), on and after April 23, 1992, any person who serves as a director, officer, or trustee of a nonprofit corporation or nonprofit organization and who is not compensated for serving as a director, officer, or trustee on a salary or prorated equivalent basis shall be immune from civil liability for any act or omission which results in damage or injury if such person was acting within the scope of such person's official functions and duties as a director, officer, or trustee unless such damage or injury was caused by the willful and wanton act or omission of such director, officer, or trustee.

(3) Nothing in this section shall be construed to establish, diminish, or abrogate any duties that a director, officer, or trustee of a nonprofit corporation or nonprofit organization has to the nonprofit corporation or nonprofit organization for which the director, officer, or trustee serves.

(4) For purposes of this section, a director, officer, or trustee shall not be considered compensated solely by reason of:

(a) The payment of such person's actual expenses incurred in attending meetings or in executing such office;

(b) The receipt of meals at meetings; or

(c) The receipt of gifts up to but not exceeding a total value of one thousand dollars in any twelve consecutive months.



(5) The individual immunity granted by subsection (2) of this section shall not extend to any act or omission of such director, officer, or trustee which results in damage or injury caused by such director, officer, or trustee during the operation of any motor vehicle, airplane, or boat.

**Source:** L. 92: Entire section added, p. 296, § 2, effective April 23. L. 2003: (1)(a) amended, p. 703, § 21, effective July 1.

**13-21-116. Actions not constituting an assumption of duty - board member immunity - immunity for volunteers assisting organizations for young persons.** (1) It is the intent of the general assembly to encourage the provision of services or assistance by persons on a voluntary basis to enhance the public safety rather than to allow judicial decisions to establish precedents which discourage such services or assistance to the detriment of public safety.

(2) (a) To encourage the provision of services or assistance by persons on a voluntary basis, a person shall not be deemed to have assumed a duty of care where none otherwise existed when he performs a service or an act of assistance, without compensation or expectation of compensation, for the benefit of another person, or adopts or enforces a policy or a regulation to protect another person's health or safety. Such person providing such services or assistance or adopting or enforcing such a policy or regulation shall not be liable for any civil damages for acts or omissions in good faith. Such performance of a service or an act of assistance for the benefit of another person or adoption or enforcement of a policy or regulation for the protection of another person's health or safety shall not create any duty of care with respect to a third person, nor shall it create a duty for any person to perform such a service or an act of assistance nor to adopt or enforce such a policy or regulation.

(b) (I) No member of the board of directors of a nonprofit corporation or nonprofit organization shall be held liable for actions taken or omissions made in the performance of his or her duties as a board member except for wanton and willful acts or omissions. For purposes of this paragraph (b), "the board of directors of a nonprofit corporation or nonprofit organization" shall include, but not be limited to, the board of directors of a public hospital certified pursuant to section 25-1.5-103 (1) (a), C.R.S.

(II) For purposes of this paragraph (b), unless the context otherwise requires:

(A) "Nonprofit corporation" means any corporation which is exempt from taxation pursuant to section 501(a) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(a), as amended, and listed as an exempt organization in section 501(c) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(c), as amended. The term includes a not-for-profit corporation.

(B) "Nonprofit organization" means any organization which is exempt from taxation pursuant to section 501(a) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(a), as amended, and listed as an exempt organization in section 501(c) of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 501(c), as amended.

(2.5) (a) No person who performs a service or an act of assistance, without compensation or expectation of compensation, as a leader, assistant, teacher, coach, or trainer for any program, organization, association, service group, educational, social, or recreational group, or nonprofit corporation serving young persons or providing sporting programs or activities for young persons shall be held liable for actions taken or omissions made in the performance of his duties except for wanton and willful acts or omissions; except that such immunity from liability shall not extend to protect such person from liability for acts or omissions which harm third persons.

(b) For the purposes of this subsection (2.5), "young persons" means persons who are eighteen years of age or younger.

(3) Nothing in this section shall be construed to supersede, abrogate, or limit any immunities or limitations of liability otherwise provided by law.

(4) As used in this section, "person" means an individual, corporation, partnership, or association.

**Source:** L. 86: Entire section added, p. 685, § 1, effective July 1. L. 87: (2.5) added, p. 553, § 1, effective April 30; (2)(b) amended, p. 372, § 17, effective May 20. L. 92: (2) amended, p. 295, § 1, effective April 23. L. 2003: (2)(b)(I) amended, p. 704, § 22, effective July 1.

### ANNOTATION

**“Good samaritan” provisions of this section do not apply where a pre-existing duty exists.** Combined Com. Corp. v. Pub. Serv. Co., 865 P.2d 893 (Colo. App. 1993).

**Section is inapplicable to real estate broker found to have breached duty of care to plaintiff** because defendant’s actions did not pertain to “public safety” and were not performed gratuitously as an act of a good Samaritan. Rather, the actions were undertaken in order to receive compensation in the form of real estate brokerage commissions. Messler v. Phillips, 867 P.2d 128 (Colo. App. 1993).

**A non-profit corporation receiving compensation, even if it does not realize a profit, is liable** for personal injuries sustained by a

volunteer working for the corporation. Where there is a contractual exchange of money in return for specific services to be rendered and the services rendered are for the benefit of the entity paying the funds, the entity has received compensation. Gilmore v. Concerned Parents of Pueblo, 28 P.3d 963 (Colo. App. 2000), aff’d on other grounds, 47 P.3d 311 (Colo. 2002).

**Subsection (2.5) protects from liability people who work as volunteers for designated types of non-profit organizations;** it does not, however, insulate those organizations themselves from liability. Concerned Parents of Pueblo, Inc. v. Gilmore, 47 P.3d 311 (Colo. 2002) (overruling Jones v. Westernaires, Inc., 876 P.2d 50 (Colo. App. 1993)).

**13-21-117. Civil liability - mental health care providers - no duty.** A physician, social worker, psychiatric nurse, psychologist, or other mental health professional and a mental health hospital, community mental health center or clinic, institution, or their staff shall not be liable for damages in any civil action for failure to warn or protect any person against a mental health patient’s violent behavior, and any such person shall not be held civilly liable for failure to predict such violent behavior, except where the patient has communicated to the mental health care provider a serious threat of imminent physical violence against a specific person or persons. When there is a duty to warn and protect under the circumstances specified above, the duty shall be discharged by the mental health care provider making reasonable and timely efforts to notify any person or persons specifically threatened, as well as notifying an appropriate law enforcement agency or by taking other appropriate action including, but not limited to, hospitalizing the patient. A physician, social worker, psychiatric nurse, psychologist, or other mental health professional and a mental health hospital, community mental health center or clinic, institution, or their staff shall not be liable for damages in any civil action for warning any person against or predicting a mental health patient’s violent behavior, and any such person shall not be subject to professional discipline for such warning or prediction. For the purposes of this section, “psychiatric nurse” means a registered professional nurse as defined in section 12-38-103 (11), C.R.S., who by virtue of postgraduate education and additional nursing preparation has gained knowledge, judgment, and skill in psychiatric or mental health nursing. The provisions of this section shall not apply to the negligent release of a mental health patient from any mental health hospital or ward or to the negligent failure to initiate involuntary seventy-two-hour treatment and evaluation after a personal patient evaluation determining that the person appears to have a mental illness and, as a result of the mental illness, appears to be an imminent danger to others.

**Source:** L. 86: Entire section added, p. 687, § 1, effective May 22. L. 2006: Entire section amended, p. 1396, § 37, effective August 7.

### ANNOTATION

**Law reviews.** For article, “The Duty to Warn and the Liability of Mental Health Care Providers”, see 16 Colo. Law. 70 (1987). For article,

“New Definitions of Therapist Confidentiality”, see 18 Colo. Law. 251 (1989). For article, “Perreira v. Colorado — A Psychiatrist’s Duty



to Protect Others”, see 18 Colo. Law. 2323 (1989). For comment, “A Proposal to Adopt a Professional Judgment Standard of Care in Determining the Duty of a Psychiatrist to Third Persons”, see 62 U. Colo. L. Rev. 237 (1991).

**Because the declared intent in subsection (1) is to encourage “persons” to volunteer services and assistance and because subsection (4) defines “person” to include a corporation, the statute provides immunity for a volunteer providing services as a leader, assistant, teacher, coach, or trainer for a program serving young persons or providing sporting programs or activities for young persons, even if that volunteer is a corporation.** *Jones v. Westernaires, Inc.*, 876 P.2d 50 (Colo. App. 1993), overruled in *Concerned Parents of Pueblo, Inc. v. Gilmore*, 47 P.3d 311 (Colo. 2002).

**The immunity granted pursuant to § 13-21-115.5 extends to an unlimited variety of volunteer activities and applies to injury claims by third parties, but protects only individual volunteers.** In contrast, the immunity granted in this section extends only to volunteers who assist specifically with youth programs and sporting activities and does not apply to claims by third parties, but protects corporate as well as individual volunteers. *Jones v. Westernaires, Inc.*, 876 P.2d 50 (Colo. App. 1993), overruled in *Concerned Parents of Pueblo, Inc. v. Gilmore*, 47 P.3d 311 (Colo. 2002).

**Limits on liability not confined to context of confidential, therapeutic relationship.** Section applies to psychologist who evaluated individual even though psychologist did not treat the individual. *Fredericks v. Jonsson*, 609 F.3d 1096 (10th Cir. 2010).

**Victim rights statute (§§ 24-4.1-301 to 24-4.1-304) does not support any expansion of liability of mental health providers** because it imposes no duty on those providers or liability for damages. *Fredericks v. Jonsson*, 609 F.3d 1096 (10th Cir. 2010).

**13-21-117.5. Civil liability - developmental disability service providers. (1) Legislative declaration.** (a) In recognition of the varied, extensive, and substantial needs of persons with developmental disabilities, the general assembly hereby finds and declares that the purposes of this section are:

(I) To reaffirm the high value Colorado places on the rights of persons with developmental disabilities to receive services and supports that enable them to live in integrated community settings, to participate fully in community life, and to exercise choice and self-direction in their lives;

(II) To recognize that there are inherent risks in such integration, participation, and self-direction due to the cognitive limitations experienced by persons with developmental disabilities;

(III) To recognize that providers to such persons are exposed to risk of liability when they assist or permit persons with developmental disabilities to experience community integration, participation, and self-direction;

(IV) To recognize that providers provide essential services and functions and that

**Exception to immunity for acts of hospitalized patients.** Although immunity is expressly extended to mental health hospitals and their staff members who fail to warn or protect others against a mental health patient’s violent propensities, tendencies, or generalized threats of potential violence, there is an exception where hospital is aware of hospitalized patient’s aggressive behavior towards plaintiff. *Halverson v. Pikes Peak Fam. Counseling*, 795 P.2d 1352 (Colo. App. 1990).

**Exception does not only apply when attacked victim communicates violent threat to hospital** and is broad enough to apply when the violent patient’s threats have been communicated to the health care provider. *Halverson v. Pikes Peak Fam. Counseling*, 851 P.2d 233 (Colo. App. 1992).

**Mental health provider has a duty to warn a person or persons of patient’s violent behavior only when patient himself predicts his violent behavior by communicating or expressing his threat to the mental health provider.** *Fredericks v. Jonsson*, 609 F.3d 1096 (10th Cir. 2010).

**A psychologist’s immunity for warning a possible victim is not dependent upon a subsequent determination that the patient was in fact a threat.** Otherwise, the immunity would have little value if the psychologist would be exposed to liability after the threat failed to manifest harm, which may be the result of such a warning. In addition, immunity is not discharged by hospitalization. *McCarty v. Kaiser-Hill Co., L.L.C.*, 15 P.3d 1122 (Colo. App. 2000).

**Section inapplicable to wrongful death action based upon alleged negligence in the treatment of a suicidal patient who later does commit suicide;** instead, section contemplates and describes the duty to protect third persons from a mental health patient’s behavior. *Sheron v. Lutheran Med. Center*, 18 P.3d 796 (Colo. App. 2000).

unlimited liability could disrupt or make prohibitively expensive the provision of such essential services;

(V) To recognize that providers should be provided with protection from unlimited liability so that providers are not discouraged from providing such services and functions.

(b) The general assembly, therefore, declares that it is the intent of the general assembly to mitigate the risk of liability to providers to the developmentally disabled to the extent that such mitigation is reasonable and possible.

(2) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Community centered board" means a private corporation, for profit or not for profit, which, when designated pursuant to section 27-10.5-105, C.R.S., provides case management to persons with developmental disabilities, is authorized to determine eligibility of such persons within a specified geographical area, serves as the single point of entry for persons to receive services and supports under article 10.5 of title 27, C.R.S., and provides authorized services and supports to such persons either directly or by purchasing such services and supports from service agencies.

(b) "Department" means the department of human services.

(c) "Developmental disability" shall have the same meaning as defined in section 27-10.5-102 (11), C.R.S.

(d) "Family provider" means a member of a family of a person with a developmental disability who provides services to persons with developmental disabilities as a contractor under programs of the department.

(e) "Host home" means a private home that houses up to three persons with developmental disabilities and whose owner or renter provides residential services, as described in section 27-10.5-104 (1) (f), C.R.S., to those persons as an independent contractor of a community centered board or service agency.

(f) "Provider" means any community centered board, service agency, host home, family provider, and the directors, officers, and employees of these entities, who provide services or supports to persons with developmental disabilities pursuant to article 10.5 of title 27, C.R.S.

(g) "Service agency" means a privately operated program-approved service agency designated pursuant to the rules of the department.

(3) A person filing an action against a provider for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant shall demonstrate liability by a preponderance of the evidence. If a provider raises the issue that a claimant cannot demonstrate liability by a preponderance of the evidence or raises any other limitation on liability pursuant to this section prior to or after the commencement of discovery, the court shall suspend discovery, except any discovery necessary to decide the issue of limitation of liability, and shall decide such issue on motion. The court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal.

(4) **Duty of care.** The performance of a service or an act of assistance for the benefit of a person with a developmental disability or adoption or enforcement of a policy, procedure, guideline, or practice for the protection of any such person's health or safety by a provider shall not create any duty of care with respect to a third person, nor shall it create a duty for any provider to perform or sustain such a service or an act of assistance nor to adopt or enforce such a policy, procedure, guideline, or practice; however, nothing in this section shall be construed to relieve a provider of a duty of care expressly imposed by federal or state law or department rule, nor shall anything in this section be deemed to create any duty of care.

(5) No action in tort under this section may be maintained on behalf of, for, or by a person with a developmental disability or by a family member of a person with a developmental disability against a provider unless that person claiming to have suffered an injury or grievance or that person's guardian or representative has filed for dispute resolution or other applicable intervention, if any, by the department or community centered board pursuant to department rules promulgated under article 10.5 of title 27, C.R.S., within one year after the date of the discovery of the injury or grievance, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury or



grievance. Compliance with the provisions of this subsection (5), documented by a letter from the department certifying that any and all such interventions and dispute resolution procedures, with either the department or the community centered board, applicable to the matter at hand have been exhausted, or by submission of evidence that such an intervention or dispute resolution request has been filed and no action has been taken by the department within ninety days, shall be a jurisdictional prerequisite to any action brought under the provisions of this section, and failure of compliance shall forever bar any such action and shall result in a dismissal of any claim with prejudice. Certification by the department that all applicable interventions and dispute resolution procedures have been exhausted shall not result in the department becoming a party to the tort claim action.

(6) A provider shall not be liable for damages in any civil action for failure to warn or protect any person against the violent, assaultive, disorderly, or harassing behavior of a person with a developmental disability, nor shall any such provider be held civilly liable for failure to predict or prevent such behavior, except there shall be a duty to warn where the person with the developmental disability has communicated to the provider a serious and credible threat of imminent physical violence and serious bodily injury against a specific person or persons. If there is a duty to warn as specified in this subsection (6), the duty shall be discharged by the provider making reasonable and timely efforts to notify any person or persons specifically threatened, except that if the person or persons threatened with imminent physical violence and serious bodily injury is a person with a developmental disability under the care of a provider, the provider shall take reasonable action to protect such person from serious bodily injury until the threat can reasonably be deemed to have abated. A provider shall not be liable for damages in any civil action for warning a person against or predicting violent, assaultive, disorderly, or harassing behavior of a person with a developmental disability, nor shall a provider be subject to professional discipline for such warning or prediction.

(7) In any civil action brought against a provider, a person with a developmental disability who is served in a residential setting owned or leased by a provider shall not be considered a tenant of the provider and statutes regarding landlord-tenant relationships shall not apply. The owner of a property leased by a provider for the purpose of providing services pursuant to article 10.5 of title 27, C.R.S., shall not be responsible for the provision or monitoring of such services. No real property rights shall accrue to a person with a developmental disability by virtue of placement in a residential setting.

(8) If a person with a developmental disability residing in a residential program operated by the department is referred by the department for community placement, the provider shall not be subject to civil liability for accepting that person for community placement.

(9) Claims predicated on an alleged deceptive trade practice pursuant to article 1 of title 6, C.R.S., shall not apply to providers engaged in the provision of services pursuant article 10.5 of title 27, C.R.S.

(10) Community centered boards and service agencies shall have the authority to remove a person with a developmental disability from any residential setting that they operate or for which they contract, directly or indirectly, if the community centered board or service agency believes that the person with a developmental disability may be at risk of abuse, neglect, mistreatment, exploitation, or other harm in such setting. In the absence of willful and wanton acts or omissions, community centered boards and service agencies shall have no civil liability for exercising such authority or for termination of any related contracts if such risk is substantiated by investigation pursuant to the rules of the department.

(11) In the absence of willful and wanton acts or omissions, a provider shall not have civil liability for injurious consequences to a person with a developmental disability in the provider's care when that person having the legal capacity for such decisions at the time such decisions were made, or the person's guardian or other person or entity duly authorized to make medication or treatment decisions for the person, declines or obstructs the administration of prescribed medication or other treatment recommended by a licensed physician, licensed psychologist, or certified therapist.

(12) When a person with a developmental disability who has the legal capacity to make decisions, or that person's guardian, refuses to comply with restrictions established pursuant to an interdisciplinary team process that are designed to safeguard the health and safety of the person or others, and it can be shown that a provider has made reasonable efforts to secure such compliance from the person or has taken other reasonable actions to safeguard the person or others, a provider of services shall not have civil liability for injuries or damages to the person with a developmental disability that may arise from the refusal by the person with a developmental disability, or that person's guardian, to comply with such restrictions.

**Source:** L. 92: Entire section added, p. 1396, § 53, effective July 1. L. 2003: Entire section R&RE, p. 1963, § 1, effective May 22.

#### ANNOTATION

**Defendants are immune from liability to third persons as providers of services to persons with developmental disabilities.** Subsections (4) and (6) create an affirmative duty only where the person with the developmental disability has communicated to the provider a se-

rious and credible threat against a specific person, or where a federal or state law or a department of human services rule expressly imposes a duty of care. J.C. v. Dungarvin Colo., LLC, 252 P.3d 41 (Colo. App. 2010).

#### **13-21-117.7. Civil actions against family foster care providers - limited liability.**

(1) A foster care provider shall be immune from civil liability for any acts or omissions committed by a foster child in his or her care, unless a court of competent jurisdiction determines that acts or omissions on the part of the foster care provider were negligent and that such foster care provider's acts or omissions were a cause of injuries, damages, or losses.

(2) If a plaintiff in a civil liability action described in subsection (1) of this section is a biological or adoptive parent or other relative of the foster child and such plaintiff is successful against the foster care provider for any actions or omissions regarding foster care, any monetary compensation received by the plaintiff as a result of the civil action shall be deposited in a trust account at a federally licensed and insured financial institution to be held in trust for the benefit of the foster care child. The amount so deposited shall be subject to the jurisdiction and oversight of the court having probate jurisdiction.

(3) For purposes of this section, "foster care provider" means a foster care parent or a family member living in a foster care home who provides care to one or more foster children in that home.

**Source:** L. 2000: Entire section added, p. 1403, § 1, effective May 30.

**13-21-118. Actions based on flight in aircraft.** No cause of action at law or in equity based upon flight in aircraft over lands or waters of this state shall be maintained unless other than nominal damages result therefrom or unless irreparable damage will probably result therefrom.

**Source:** L. 88: Entire section added, p. 1094, § 12, effective January 1, 1989.

**13-21-119. Equine activities - llama activities - legislative declaration - exemption from civil liability.** (1) The general assembly recognizes that persons who participate in equine activities or llama activities may incur injuries as a result of the risks involved in such activities. The general assembly also finds that the state and its citizens derive numerous economic and personal benefits from such activities. It is, therefore, the intent of the general assembly to encourage equine activities and llama activities by limiting the civil liability of those involved in such activities.

(2) As used in this section, unless the context otherwise requires:



(a) “Engages in a llama activity” means riding, training, assisting in medical treatment of, driving, or being a passenger upon a llama, whether mounted or unmounted or any person assisting a participant or show management. The term “engages in a llama activity” does not include being a spectator at a llama activity, except in cases where the spectator places himself in an unauthorized area and in immediate proximity to the llama activity.

(a.5) “Engages in an equine activity” means riding, training, assisting in medical treatment of, driving, or being a passenger upon an equine, whether mounted or unmounted or any person assisting a participant or show management. The term “engages in an equine activity” does not include being a spectator at an equine activity, except in cases where the spectator places himself in an unauthorized area and in immediate proximity to the equine activity.

(b) “Equine” means a horse, pony, mule, donkey, or hinny.

(c) “Equine activity” means:

(I) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including, but not limited to, dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, English and western performance riding, endurance trail riding and western games, and hunting;

(II) Equine training or teaching activities or both;

(III) Boarding equines;

(IV) Riding, inspecting, or evaluating an equine belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine;

(V) Rides, trips, hunts, or other equine activities of any type however informal or impromptu that are sponsored by an equine activity sponsor; and

(VI) Placing or replacing horseshoes on an equine.

(d) “Equine activity sponsor” means an individual, group, club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, an equine activity, including but not limited to: Pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college-sponsored classes, programs and activities, therapeutic riding programs, and operators, instructors, and promoters of equine facilities, including but not limited to stables, clubhouses, ponyride strings, fairs, and arenas at which the activity is held.

(e) “Equine professional” means a person engaged for compensation:

(I) In instructing a participant or renting to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine; or

(II) In renting equipment or tack to a participant.

(f) “Inherent risks of equine activities” and “inherent risks of llama activities” means those dangers or conditions which are an integral part of equine activities or llama activities, as the case may be, including, but not limited to:

(I) The propensity of the animal to behave in ways that may result in injury, harm, or death to persons on or around them;

(II) The unpredictability of the animal’s reaction to such things as sounds, sudden movement, and unfamiliar objects, persons, or other animals;

(III) Certain hazards such as surface and subsurface conditions;

(IV) Collisions with other animals or objects;

(V) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability.

(f.1) “Llama” means a South American camelid which is an animal of the genus llama, commonly referred to as a “one llama”, including llamas, alpacas, guanacos, and vicunas.

(f.2) “Llama activity” means:

(I) Llama shows, fairs, competitions, performances, packing events, or parades that involve any or all breeds of llamas;

(II) Using llamas to pull carts or to carry packs or other items;

(III) Using llamas to pull travois-type carriers during rescue or emergency situations;

- (IV) Llama training or teaching activities or both;
- (V) Taking llamas on public relations trips or visits to schools or nursing homes;
- (VI) Participating in commercial packing trips in which participants pay a llama professional to be a guide on a hike leading llamas;
- (VII) Boarding llamas;
- (VIII) Riding, inspecting, or evaluating a llama belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the llama or is permitting a prospective purchaser of the llama to ride, inspect, or evaluate the llama;
- (IX) Using llamas in wool production;
- (X) Rides, trips, or other llama activities of any type however informal or impromptu that are sponsored by a llama activity sponsor; and
- (XI) Trimming the nails of a llama.

(f.3) "Llama activity sponsor" means an individual, group, club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, a llama activity, including but not limited to: Llama clubs, 4-H clubs, hunt clubs, riding clubs, school and college-sponsored classes, programs and activities, therapeutic riding programs, and operators, instructors, and promoters of llama facilities, including but not limited to stables, clubhouses, fairs, and arenas at which the activity is held.

(f.4) "Llama professional" means a person engaged for compensation:

(I) In instructing a participant or renting to a participant a llama for the purpose of riding, driving, or being a passenger upon the llama; or

(II) In renting equipment or tack to a participant.

(g) "Participant" means any person, whether amateur or professional, who engages in an equine activity or who engages in a llama activity, whether or not a fee is paid to participate in such activity.

(3) Except as provided in subsection (4) of this section, an equine activity sponsor, an equine professional, a llama activity sponsor, a llama professional, a doctor of veterinary medicine, or any other person, which shall include a corporation or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities, or from the inherent risks of llama activities and, except as provided in subsection (4) of this section, no participant nor participant's representative shall make any claim against, maintain an action against, or recover from an equine activity sponsor, an equine professional, a llama activity sponsor, a llama professional, a doctor of veterinary medicine, or any other person for injury, loss, damage, or death of the participant resulting from any of the inherent risks of equine activities or resulting from any of the inherent risks of llama activities.

(4) (a) This section shall not apply to the horse racing industry as regulated in article 60 of title 12, C.R.S.

(b) Nothing in subsection (3) of this section shall prevent or limit the liability of an equine activity sponsor, an equine professional, a llama activity sponsor, a llama professional, or any other person if the equine activity sponsor, equine professional, llama activity sponsor, llama professional, or person:

(I) (A) Provided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury; or

(B) Provided the animal and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity or llama activity and determine the ability of the participant to safely manage the particular animal based on the participant's representations of his ability;

(II) Owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known to the equine activity sponsor, equine professional, llama activity sponsor, llama professional, or person and for which warning signs have not been conspicuously posted;



(III) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission caused the injury;

(IV) Intentionally injures the participant.

(c) Nothing in subsection (3) of this section shall prevent or limit the liability of an equine activity sponsor, equine professional, llama activity sponsor, or llama professional:

(I) Under liability provisions as set forth in the products liability laws; or

(II) Under liability provisions in section 35-46-102, C.R.S.

(5) (a) Every equine professional shall post and maintain signs which contain the warning notice specified in paragraph (b) of this subsection (5). Such signs shall be placed in a clearly visible location on or near stables, corrals, or arenas where the equine professional conducts equine activities if such stables, corrals, or arenas are owned, managed, or controlled by the equine professional. The warning notice specified in paragraph (b) of this subsection (5) shall appear on the sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by an equine professional for the providing of professional services, instruction, or the rental of equipment or tack or an equine to a participant, whether or not the contract involves equine activities on or off the location or site of the equine professional's business, shall contain in clearly readable print the warning notice specified in paragraph (b) of this subsection (5).

(b) The signs and contracts described in paragraph (a) of this subsection (5) shall contain the following warning notice:

#### WARNING

Under Colorado Law, an equine professional is not liable for an injury to or the death of a participant in equine activities resulting from the inherent risks of equine activities, pursuant to section 13-21-119, Colorado Revised Statutes.

(6) (a) Every llama professional shall post and maintain signs which contain the warning notice specified in paragraph (b) of this subsection (6). Such signs shall be placed in a clearly visible location on or near stables, corrals, pens, or arenas where the llama professional conducts llama activities if such stables, corrals, pens, or arenas are owned, managed, or controlled by the llama professional. The warning notice specified in paragraph (b) of this subsection (6) shall appear on the sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by a llama professional for the providing of professional services, instruction, or the rental of equipment or tack or a llama to a participant, whether or not the contract involves llama activities on or off the location or site of the llama professional's business, shall contain in clearly readable print the warning notice specified in paragraph (b) of this subsection (6).

(b) The signs and contracts described in paragraph (a) of this subsection (6) shall contain the following warning notice:

#### WARNING

Under Colorado Law, a llama professional is not liable for an injury to or the death of a participant in llama activities resulting from the inherent risks of llama activities, pursuant to section 13-21-119, Colorado Revised Statutes.

**Source:** **L. 90:** Entire section added, p. 870, § 1, effective July 1. **L. 92:** Entire section amended, p. 283, § 1, effective March 16; (3) amended, p. 268, § 1, effective April 9.

**Editor's note:** (1) This section was enacted by Senate Bill 90-84, Session Laws of Colorado 1990, chapter 108, as § 13-21-120 but was renumbered on revision for ease of location.

(2) Amendments to this section by House Bill 92-1064 and Senate Bill 92-58 were harmonized.

## ANNOTATION

**Law reviews.** For article, "Recreational Use Of Agricultural Lands", see 23 Colo. Law. 529 (1994).

**This section recognizes the inherent risks involved in equine activities and protects sponsors of such activities by limiting their liability, except under specified circumstances.** The section itself imposes no liability on the sponsors for injuries beyond those for which liability is specifically limited. *Chadwick v. Colt Ross Outfitters*, 100 P.3d 465 (Colo. 2004).

**Thus, parties may, consistent with this section, contract separately to release sponsors even from negligent conduct** so long as the parties' intent is clearly expressed in the contract and the contract does not violate public policy. *Chadwick v. Colt Ross Outfitters*, 100 P.3d 465 (Colo. 2004).

**Defendant was not granted limited immunity under this section because according to subsection (4)(b)(I)(A) it provided the faulty equipment which caused plaintiff's injury, and it was unclear whether defendant knew the equipment was faulty.** *Day v. Snowmass Stables, Inc.*, 810 F. Supp. 289 (D. Colo. 1993).

**Pursuant to subsection (4)(b)(I)(B), defendant may be exempt from civil liability** if he or she provided the animal and made reasonable

and prudent efforts to determine both the ability of a participant to engage safely in the equine activity and the ability of the participant to safely manage the particular animal based on the participant's representation of his or her ability. *Waneka v. Clynce*, 157 P.3d 1072 (Colo. 2007).

**Because every equine release agreement limiting liability must contain the mandatory warning under this section,** the insertion of a broader clause further limiting liability does not make the agreement ambiguous per se. *B & B Livery, Inc. v. Riehl*, 960 P.2d 134 (Colo. 1998).

**Because injury resulted from wrangler's negligence in failing to take precautions that a reasonable and prudent person in the same or similar circumstances would have taken by removing intermittently screaming child from horse before it bolted,** injury did not result from inherent risk of equine activity and immunity related to injuries resulting from the inherent risks of equine activity did not apply. *Fielder v. Acad. Riding Stables*, 49 P.3d 349 (Colo. App. 2002).

**Protection afforded "any other person" pursuant to subsection (3) extends to owners of horses who allow their use for equine activities.** *Culver v. Samuels*, 37 P.3d 535 (Colo. App. 2001).

**Applied in** *Hamill v. Cheley Colo. Camps, Inc.*, 262 P.3d 945 (Colo. App. 2011).

**13-21-120. Colorado baseball spectator safety act - legislative declaration - limitation on actions - duty to post warning notice.** (1) This section shall be known and may be cited as the "Colorado Baseball Spectator Safety Act of 1993".

(2) The general assembly recognizes that persons who attend professional baseball games may incur injuries as a result of the risks involved in being a spectator at such baseball games. However, the general assembly also finds that attendance at such professional baseball games provides a wholesome and healthy family activity which should be encouraged. The general assembly further finds that the state will derive economic benefit from spectators attending professional baseball games. It is therefore the intent of the general assembly to encourage attendance at professional baseball games. Limiting the civil liability of those who own professional baseball teams and those who own stadiums where professional baseball games are played will help contain costs, keeping ticket prices more affordable.

(3) As used in this section, unless the context otherwise requires:

(a) "Owner" means a person, including a corporation, partnership, or limited liability company, who is in lawful possession and control of a professional baseball team or a person, including a corporation, partnership, or limited liability company, who is in lawful possession and control of a stadium in which a professional baseball game is played. "Owner" shall also include the owner's shareholders, partners, directors, officers, employees, and agents.

(b) "Professional baseball game" means any baseball game, whether for exhibition or competition, in which the participating baseball teams are members of a league of professional baseball clubs, commonly known as a major league or a minor league, and which teams are comprised of paid baseball players. "Professional baseball game" shall also include pregame activities and shall include any baseball game or pregame activity regardless of the time of day when the game is played.

(c) "Spectator" means a person who is present at a professional baseball game for the purpose of observing such game, whether or not a fee is paid by such "spectator".



(4) (a) Spectators of professional baseball games are presumed to have knowledge of and to assume the inherent risks of observing professional baseball games, insofar as those risks are obvious and necessary. These risks include, but are not limited to, injuries which result from being struck by a baseball or a baseball bat.

(b) Except as provided in subsection (5) of this section, the assumption of risk set forth in this subsection (4) shall be a complete bar to suit and shall serve as a complete defense to a suit against an owner by a spectator for injuries resulting from the assumed risks, notwithstanding the provisions of sections 13-21-111 and 13-21-111.5. Except as provided in subsection (5) of this section, an owner shall not be liable for an injury to a spectator resulting from the inherent risks of attending a professional baseball game, and, except as provided in subsection (5) of this section, no spectator nor spectator's representative shall make any claim against, maintain an action against, or recover from an owner for injury, loss, or damage to the spectator resulting from any of the inherent risks of attending a professional baseball game.

(c) Nothing in this section shall preclude a spectator from suing another spectator for any injury to person or property resulting from such other spectator's acts or omissions.

(5) Nothing in subsection (4) of this section shall prevent or limit the liability of an owner who:

(a) Fails to make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in reasonably safe condition relative to the nature of the game of baseball;

(b) Intentionally injures a spectator; or

(c) Fails to post and maintain the warning signs required pursuant to subsection (6) of this section.

(6) (a) Every owner of a stadium where professional baseball games are played shall post and maintain signs which contain the warning notice specified in paragraph (b) of this subsection (6). Such signs shall be placed in conspicuous places at the entrances outside the stadium and at stadium facilities where tickets to professional baseball games are sold. The warning notice specified in paragraph (b) of this subsection (6) shall appear on the sign in black letters, with each letter to be a minimum of one inch in height.

(b) The signs described in paragraph (a) of this subsection (6) shall contain the following warning notice:

### WARNING

UNDER COLORADO LAW, A SPECTATOR OF PROFESSIONAL BASEBALL ASSUMES THE RISK OF ANY INJURY TO PERSON OR PROPERTY RESULTING FROM ANY OF THE INHERENT DANGERS AND RISKS OF SUCH ACTIVITY AND MAY NOT RECOVER FROM AN OWNER OF A BASEBALL TEAM OR AN OWNER OF A STADIUM WHERE PROFESSIONAL BASEBALL IS PLAYED FOR INJURY RESULTING FROM THE INHERENT DANGERS AND RISKS OF OBSERVING PROFESSIONAL BASEBALL, INCLUDING BUT NOT LIMITED TO, BEING STRUCK BY A BASEBALL OR A BASEBALL BAT.

(7) Insofar as any provision of law or statute is inconsistent with the provisions of this section, this section shall control.

**Source:** L. 93: Entire section added, p. 2043, § 1, effective January 1, 1994.

**13-21-121. Agricultural recreation activities - legislative declaration - inherent risks - limitation of civil liability - duty to post warning notice.** (1) The general assembly recognizes that persons who participate in certain agricultural recreation activities may incur injuries as a result of the inherent risks involved with these activities. The general assembly also finds that the state and its citizens derive numerous economic and personal benefits from these activities. It is, therefore, the intent of the general assembly to encourage

these activities by limiting the civil liability of certain persons involved in providing the opportunity to participate in these activities.

(2) As used in this section, unless the context otherwise requires:

(a) "Activity instructor or equipment provider" means an individual, facility person, group, club, association, partnership, or corporation, whether or not engaged for compensation, that instructs a participant or that rents, sells, or otherwise provides equipment to a participant for the purpose of engaging in an agricultural recreation activity.

(b) "Agricultural recreation activity" means an activity related to the normal course of agriculture, as defined in section 35-1-102 (1), C.R.S., which activity is engaged in by participants for entertainment, pleasure, or other recreational purposes, or for educational purposes, regardless of whether a fee is charged to the participants. "Agricultural recreation activity" also means hunting, shooting, swimming, diving, tubing, and riding or operating a motorized recreational vehicle that occurs on or in proximity to the property of an agricultural operation or an adjacent roadway. "Agricultural recreation activity" includes, but is not limited to planting, cultivation, irrigation, or harvesting of crops; acceptable practices of animal husbandry; rodeo and livestock activities; and maintenance of farm or ranch equipment.

(c) "Equipment" means a device used to engage in an agricultural recreation activity.

(d) "Facility" means a privately owned and operated farm, ranch, or a public property that is leased or rented and under the control of the person defined in paragraph (e) of this subsection (2) on which the opportunity to engage in one or more agricultural recreation activities is offered to a participant, regardless of whether it is situated in an incorporated area or unincorporated area.

(e) "Facility person" means a person who owns, leases, operates, manages, or is employed at or who volunteers at a facility. For purposes of this paragraph (e) only, "person" includes any individual, corporation, partnership, association, cooperative, or commercial entity.

(f) "Inherent risks of agricultural recreation activities" means those dangers or conditions that are an integral part of such activities, including but not limited to:

(I) The varied degrees of the skill and experience of the participants;

(II) The nature of the activity, including but not limited to the equipment used and the location where the activity is conducted;

(III) Certain hazards, such as ground conditions, surface grade, weather conditions, and animal behavior;

(IV) Collisions with other persons or objects;

(V) The types and the complexity of equipment used by the participants;

(VI) Malfunctions with equipment used by the participants;

(VII) The potential of a participant to act in a negligent manner that may contribute to injury incurred by the participant or others, such as imprudent showmanship, failing to maintain control over his or her equipment, or not acting within his or her ability.

(g) "Participant" means a person who engages in an agricultural recreation activity, whether or not a fee is paid to participate in the activity.

(3) Except as provided in subsections (4) and (5) of this section, an activity instructor or equipment provider or facility person shall not be civilly liable for an injury to or the death of a participant resulting from the inherent risks of agricultural recreation activities performed or conducted on or in a facility. A participant or a participant's representative may not make any claim against, maintain an action against, or recover from an activity instructor or equipment provider or facility person for injury, loss, damage, or death of the participant resulting from any of the inherent risks of agricultural recreation activities performed or conducted on or in a facility.

(4) (a) Nothing in subsection (3) of this section shall prevent or limit the liability of an activity instructor or equipment provider or facility person if the activity instructor or equipment provider or facility person:

(I) Rented, sold, or otherwise provided equipment to a participant, and knew that the equipment was faulty, and such equipment was faulty to the extent that it caused the injury;



(II) Committed an act or omission that constituted gross negligence or willful or wanton disregard for the safety of the participant, and the act or omission was the cause of the injury; or

(III) Intentionally injured the participant.

(b) Nothing in subsection (3) of this section shall prevent or limit the liability of an activity instructor or equipment provider or facility person under liability provisions set forth in the product liability laws.

(c) A participant is not precluded under this section from suing and recovering from another participant for injury to person or property resulting from the other participant's act or omission. Notwithstanding any provision of law to the contrary, the risk of injury from another participant shall not be considered an inherent risk or a risk assumed by a participant in an action by the participant against another participant.

(5) The operator of a facility shall exercise reasonable care to protect against dangers of which he or she actually knew or shall give warning of any dangers that are ordinarily present on the property.

**Source: L. 2003:** Entire section added, p. 1742, § 1, effective July 1.

**13-21-122. Civil liability for unlawful use of personal identifying information.**

(1) Notwithstanding any other remedies provided under this article, a person who suffers damages as a result of a crime described in article 5 of title 18, C.R.S., in which personal identifying information was used in the commission of the crime, shall have a private civil right of action against the perpetrator who committed the crime, regardless of whether the perpetrator was convicted of the crime. In such action, the plaintiff shall be entitled to actual damages, including, but not limited to damage to reputation or credit rating, punitive damages, and attorney fees and costs.

(2) For purposes of this section, "personal identifying information" means any information that may be used, alone or in conjunction with any other information, to identify a specific individual, including but not limited to: Name; date of birth; social security number; personal identification number; password; pass code; official state-issued or government-issued driver's license or identification card number; government passport number; biometric data; employer, student, or military identification number; or financial transaction device as defined in section 18-5-701 (3), C.R.S.

**Source: L. 2004:** Entire section added, p. 658, § 2, effective July 1.

**13-21-122.5. Civil liability for trading in telephone records.** (1) In addition to any other remedies provided under this article, a person who suffers damages as a result of a violation of section 18-13-125, C.R.S., shall have a private civil right of action against the perpetrator who committed the crime, regardless of whether the perpetrator was convicted of the crime. In such action, the plaintiff shall be entitled to actual damages, including, but not limited to, damage to reputation or credit rating, punitive damages, and attorney fees and costs. If such damages are less than five thousand dollars per telephone record, the plaintiff shall be entitled to statutory damages of five thousand dollars per telephone record procured, bought, sold, possessed, or received in violation of section 18-13-125, C.R.S.

(2) No telecommunications provider shall be liable for damages in a claim based, in whole or in part, on acts of third parties that violate section 18-13-125, C.R.S.

(3) This section shall not be construed to create a new duty or expand the existing duty of a telecommunications provider to protect telephone records beyond those otherwise established by Colorado law, any other state law, or federal law, including, without limitation, the rules promulgated by the federal communications commission.

(4) This section shall not apply to a telecommunications provider or its agents or representatives who reasonably and in good faith act pursuant to Colorado law, any other state law, or federal law, including, without limitation, the rules promulgated by the federal communications commission, notwithstanding a later determination that the act was not authorized by such law.

**Source: L. 2006:** Entire section added, p. 586, § 2, effective July 1.

**13-21-123. Civil liability for newspaper theft.** Notwithstanding any other remedies provided under this section, a newspaper publisher who is the victim of newspaper theft as described in section 18-4-419, C.R.S., or who had compensatory newspapers stolen, an advertiser who placed an advertisement in a newspaper that was subject to newspaper theft or a compensatory newspaper that was stolen, or a newspaper reader who regularly reads a newspaper subject to newspaper theft or a compensatory newspaper that was stolen shall have a private civil right of action against the party who stole the newspapers. In any such action, the newspaper publisher shall be entitled to actual damages, a civil penalty of ten dollars for each newspaper obtained in violation of section 18-4-419, C.R.S., and attorney fees and costs, and the advertiser or newspaper reader shall be entitled to actual damages and attorney fees and costs.

**Source:** L. 2004: Entire section added, p. 446, § 3, effective July 1.

**Cross references:** For the legislative declaration contained in the 2004 act enacting this section, see section 1 of chapter 147, Session Laws of Colorado 2004.

**13-21-124. Civil actions against dog owners.** (1) As used in this section, unless the context otherwise requires:

(a) “Bodily injury” means any physical injury that results in severe bruising, muscle tears, or skin lacerations requiring professional medical treatment or any physical injury that requires corrective or cosmetic surgery.

(b) “Dog” means any domesticated animal related to the fox, wolf, coyote, or jackal.

(c) “Dog owner” means a person, firm, corporation, or organization owning, possessing, harboring, keeping, having financial or property interest in, or having control or custody of, a dog.

(d) “Serious bodily injury” has the same meaning as set forth in section 18-1-901 (3) (p), C.R.S.

(2) A person or a personal representative of a person who suffers serious bodily injury or death from being bitten by a dog while lawfully on public or private property shall be entitled to bring a civil action to recover economic damages against the dog owner regardless of the viciousness or dangerous propensities of the dog or the dog owner’s knowledge or lack of knowledge of the dog’s viciousness or dangerous propensities.

(3) In any case described in subsection (2) of this section in which it is alleged and proved that the dog owner had knowledge or notice of the dog’s viciousness or dangerous propensities, the court, upon a motion made by the victim or the personal representative of the victim, may enter an order that the dog be euthanized by a licensed veterinarian or licensed shelter at the expense of the dog owner.

(4) For purposes of this section, a person shall be deemed to be lawfully on public or private property if he or she is in the performance of a duty imposed upon him or her by local, state, or federal laws or regulations or if he or she is on property upon express or implied invitation of the owner of the property or is on his or her own property.

(5) A dog owner shall not be liable to a person who suffers bodily injury, serious bodily injury, or death from being bitten by the dog:

(a) While the person is unlawfully on public or private property;

(b) While the person is on property of the dog owner and the property is clearly and conspicuously marked with one or more posted signs stating “no trespassing” or “beware of dog”;

(c) While the dog is being used by a peace officer or military personnel in the performance of peace officer or military personnel duties;

(d) As a result of the person knowingly provoking the dog;

(e) If the person is a veterinary health care worker, dog groomer, humane agency staff person, professional dog handler, trainer, or dog show judge acting in the performance of his or her respective duties; or

(f) While the dog is working as a hunting dog, herding dog, farm or ranch dog, or predator control dog on the property of or under the control of the dog’s owner.

(6) Nothing in this section shall be construed to:



- (a) Affect any other cause of action predicated on other negligence, intentional tort, outrageous conduct, or other theories;
- (b) Affect the provisions of any other criminal or civil statute governing the regulation of dogs; or
- (c) Abrogate any provision of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

**Source: L. 2004:** Entire section added, p. 507, § 1, effective April 21.

**13-21-125. Civil actions for theft in the mortgage lending process.** A person who suffers damages as a result of a violation of section 18-4-401, C.R.S., in the mortgage lending process, as defined by section 18-4-401 (9) (e) (I), C.R.S., shall have a private civil right of action against the perpetrator, regardless of whether the perpetrator was convicted of the crime. A claim arising under this section shall not be asserted against a bona fide purchaser of a mortgage contract.

**Source: L. 2006:** Entire section added, p. 1328, § 3, effective July 1.

**Cross references:** For the legislative declaration contained in the 2006 act enacting this section, see section 1 of chapter 290, Session Laws of Colorado 2006.

**13-21-126. Funeral picketing - legislative declaration - definitions - damages.**

- (1) The general assembly finds and declares that:
  - (a) One of the fundamental reasons we humans organize ourselves into societies is to ritually assist in and recognize the grieving process;
  - (b) Funeral picketing disrupts that fundamental grieving process;
  - (c) Funeral picketing intentionally inflicts severe emotional distress on the mourners; and
  - (d) Full opportunity exists under the terms and provisions of this section for the exercise of freedom of speech and other constitutional rights other than at and during the funeral.
- (2) The general assembly, therefore, determines it is necessary to enact this section in order to:
  - (a) Protect the privacy of the mourners during the funeral; and
  - (b) Preserve a funeral-site atmosphere that enhances the grieving process.
- (3) As used in this section:
  - (a) "Funeral" means the ceremonies, rituals, processions, and memorial services held in connection with the burial, cremation, or memorial of a deceased person, including the assembly and dispersal of the mourners.
  - (b) "Funeral picketing" means a public demonstration at a funeral site during the funeral that is reasonably calculated to inflict severe emotional distress on the mourners.
  - (c) "Funeral site" means a church, synagogue, mosque, funeral home, mortuary, gravesite, mausoleum, or other place where a funeral is being conducted.
  - (d) "Mourner" means a member of the decedent's immediate family at the funeral.
- (4) It is unlawful for a person to knowingly engage in funeral picketing within one hundred feet of the funeral site or to engage in electronically amplified funeral picketing within one hundred fifty feet of the funeral site.
- (5) (a) Each mourner shall be entitled to recover reasonable damages, but not less than one thousand dollars, together with reasonable attorney fees and costs from each person who violates subsection (4) of this section.
  - (b) The court shall impose joint and several liability on any person who:
    - (I) Violates subsection (4) of this section by acting in concert with one or more other persons; or
    - (II) Consciously conspires with one or more other persons and deliberately pursues a common plan or design to commit a violation of subsection (4) of this section.

**Source: L. 2006:** Entire section added, p. 1200, § 8, effective May 26.

**Editor's note:** (1) This section was originally numbered as 13-21-125 in House Bill 06-1382 but has been renumbered on revision for ease of location.

(2) In *Snyder v. Phelps*, \_\_\_ U.S. \_\_\_ (2011), the United States Supreme Court held that the first amendment shields military funeral protesters from tort liability for picketing because picketing constitutes protected speech on matters of public concern and because the father of the deceased was not a member of a captive audience.

**Cross references:** For the legislative declaration and short title contained in the 2006 act enacting this section, see section 1 of chapter 262, Session Laws of Colorado 2006.

**13-21-127. Civil damages for human trafficking and involuntary servitude.** (1) A person is entitled to recover damages and to obtain injunctive relief from any person who commits trafficking in adults, as described in section 18-3-501, C.R.S.; trafficking in children, as described in section 18-3-502, C.R.S.; or coercion of involuntary servitude, as described in section 18-3-503, C.R.S.

(2) A conviction for trafficking in adults, as described in section 18-3-501, C.R.S.; trafficking in children, as described in section 18-3-502, C.R.S.; or coercion of involuntary servitude, as described in section 18-3-503, C.R.S., shall not be a condition precedent to maintaining a civil action pursuant to the provisions of this section.

**Source: L. 2012:** Entire section added, (HB 12-1151), ch. 174, p. 621, § 2, effective August 8.

**Law reviews:** For article, "Calculating Net Pecuniary Loss Under Colorado Wrongful Death Law", see 24 Colo. Law. 1257 (1995); for article, "The Colorado Wrongful Death Act", see 40 Colo. Law. 63 (May 2011).

## PART 2

### DAMAGES FOR DEATH BY NEGLIGENCE

**Law reviews:** For article, "Calculating Net Pecuniary Loss Under Colorado Wrongful Death Law", see 24 Colo. Law. 1257 (1995).

**13-21-201. Damages for death.** (1) When any person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay for every person and passenger so injured the sum of not exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

- (a) In the first year after such death:
  - (I) By the spouse of the deceased;
  - (II) Upon the written election of the spouse, by the spouse and the heir or heirs of the deceased;
  - (III) Upon the written election of the spouse, by the heir or heirs of the deceased; or
  - (IV) If there is no spouse, by the heir or heirs of the deceased or the designated beneficiary, if there is one designated pursuant to article 22 of title 15, C.R.S., with the right to bring an action pursuant to this section, and if there is no designated beneficiary, by the heir or heirs of the deceased;



(b) (I) In the second year after such death:

(A) By the spouse of the deceased;

(B) By the heir or heirs of the deceased;

(C) By the spouse and the heir or heirs of the deceased; or

(D) By the designated beneficiary of the deceased, if there is one designated pursuant to article 22 of title 15, C.R.S., with the right to bring an action pursuant to this section, and the heir or heirs of the deceased.

(II) However, if the heir or heirs of the deceased commence an action under the provisions of sub-subparagraph (B) of subparagraph (I) of this paragraph (b), the spouse or the designated beneficiary of the deceased, if there is one designated pursuant to article 22 of title 15, C.R.S., with the right to bring an action pursuant to this section, upon motion filed within ninety days after service of written notice of the commencement of the action upon the spouse or designated beneficiary, shall be allowed to join the action as a party plaintiff.

(c) (I) If the deceased is an unmarried minor without descendants or an unmarried adult without descendants and without a designated beneficiary pursuant to article 22 of title 15, C.R.S., by the father or mother who may join in the suit. Except as provided in subparagraphs (II) and (III) of this paragraph (c), the father and mother shall have an equal interest in the judgment, or if either of them is dead, then the surviving parent shall have an exclusive interest in the judgment.

(II) For cases in which the father and mother are divorced, separated, or living apart, a motion may be filed by either the father or the mother prior to trial requesting the court to apportion fairly any judgment awarded in the case. Where such a motion is filed, the court shall conduct a post-judgment hearing at which the father and the mother shall have the opportunity to be heard and to produce evidence regarding each parent's relationship with the deceased child.

(III) On conclusion of the post-judgment hearing conducted pursuant to subparagraph (II) of this paragraph (c), the court shall fairly determine the percentage of the judgment to be awarded to each parent. In making such a determination, the court shall consider each parent's relationship with the deceased, including custody, control, support, parental responsibility, and any other factors the court deems pertinent. The court's determination of the percentage of the judgment awarded to each parent shall not be disturbed absent an abuse of discretion.

(d) For purposes of this section, "father or mother" means a natural parent of the deceased or a parent of the deceased by adoption. "Father or mother" does not include a person whose parental rights concerning the deceased were terminated pursuant to the provisions of title 19, C.R.S.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. The judgment obtained in an action under this section shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution.

**Source:** G.L. § 877. G.S. § 1030. L. 07: p. 296, § 1. R.S. 08: § 2056. C.L. § 6302. CSA: C. 50, § 1. L. 51: p. 338, § 1. CRS 53: § 41-1-1. C.R.S. 1963: § 41-1-1. L. 88: (1)(a), (1)(b), and (1)(c) R&RE and (2) amended, pp. 603, 604, §§ 1, 2, effective July 1. L. 2000: (1)(c) amended and (1)(d) added, p. 169, § 1, effective July 1. L. 2009: (1) amended, (HB 09-1260), ch. 107, p. 441, § 6, effective July 1.

**Cross references:** For determination of death, see § 12-36-136.

## ANNOTATION

- I. General Consideration.
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- II. Who May Recover.
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## I. GENERAL CONSIDERATION.

## A. In General.

**Law reviews.** For article, "Double Recovery for Wrongful Death by Public Carrier?", see 28 Dicta 131 (1951). For comment on McEntyre v. Jones, appearing below, see 31 Dicta 198 (1954). For article, "Damages for Death — Limited or Unlimited", see 34 Dicta 32 (1957). For article, "In Defense of the Colorado Guest Statute", see 35 Dicta 174 (1958). For note, "Notes and Comments: What is a Life Worth?", see 34 Dicta 41 (1957). For article, "One Year Review of Torts", see 38 Dicta 93 (1961). For note, "Wrongful Death in Colorado", see 33 Rocky Mt. L. Rev. 393 (1961). For comment on Clint v. Stolworthy appearing below, see 33 Rocky Mt. L. Rev. 443 (1961). For note, "Personal Injury Damages in Colorado", see 35 U. Colo. L. Rev. 332 (1963). For comment on Herbertson v. Russell appearing below, see 35 U. Colo. L. Rev. 463 (1963). For comment, "Preconception Torts", see 48 U. Colo. L. Rev. 621 (1977). For case note, "Wrongful Death Recovery in Colorado — A Reward for a Timely Demise", see 49 U. Colo. L. Rev. 431 (1978). For article, "Measures of Economic Loss in the Wrongful Death of a Child", see 14 Colo. Law. 392 (1985). For case note, "The Fetus as a Person in Wrongful Death Actions", 57 U. Colo. L. Rev. 895 (1986).

**The statute is constitutional.** Mollie Gibson Consol. Mining & Milling Co. v. Sharp, 5 Colo. App. 321, 38 P. 850 (1894).

**All the provisions of the act are clearly expressed in the title.** Mollie Gibson Consol. Mining & Milling Co. v. Sharp, 23 Colo. 259, 47 P. 266 (1894).

**Purpose of the wrongful death statute** is to compensate those who sustain pecuniary injury by the loss of the life of a spouse or parent. Niven v. Falkenburg, 553 F. Supp. 1021 (D. Colo. 1983).

**This section largely extends the right of recovery for injuries resulting in the death of the injured party** against the surviving wrongdoer, and specifically makes it applicable to transportation companies, and designates the persons who are entitled to bring suits, and who may reap the benefits of the recovery. It does not in terms cause the action against the wrongdoer

to survive, for it is silent on the subject. Letson v. Brown, 11 Colo. App. 11, 52 P. 287 (1898).

**This section creates a new cause of action.** Denver & R. G. R. v. Frederic, 57 Colo. 90, 140 P. 463 (1914); Lindsay v. Chicago, B & Q. R. R., 226 F. 23 (7th Cir. 1915); Taylor v. Welle, 143 Colo. 37, 352 P.2d 106 (1960).

**Right of action does not depend on whether injured person could have recovered.** That the right of action under this section does not depend upon whether the injured person, if death had not ensued, could have recovered for personal injury, is one of the essential characteristics which distinguishes it from §§ 13-21-202 and 13-21-203, where the right exists only on the theory that the person injured would have had a cause of action had he not been killed. Denver & R. G. R. v. Frederic, 57 Colo. 90, 140 P. 463 (1914).

**Such action did not exist at common law.** No right of action for damages resulting from death through wrongful act or negligence was given by the common law, and such right exists only by virtue of this section. Martin v. Cuellar, 131 Colo. 117, 279 P.2d 843 (1955).

Wrongful death recovery did not exist at common law, but is purely a creature of statute. Niven v. Falkenburg, 553 F. Supp. 1021 (D. Colo. 1983); Hale v. Morris, 725 P.2d 26 (Colo. App. 1986).

**This section must be strictly construed.** Martin v. Cuellar, 131 Colo. 117, 279 P.2d 843 (1955); Estate of Kronmeyer v. Meinig, 948 P.2d 119 (Colo. App. 1997).

**The judiciary should adhere to its previous constructions of this act.** Where the general assembly has repeatedly reenacted this article which has received settled judicial construction, there can be no doubt that the legislative intent was that such reenactments continue to be construed in accordance with such former judicial construction. Herbertson v. Russell, 150 Colo. 110, 371 P.2d 422 (1962).

**This section with §§ 13-21-202, 13-21-203, and 13-21-204 must be construed as one act,** and each section construed as it is connected with and related to the whole act. Clint v. Stolworthy, 144 Colo. 597, 357 P.2d 649 (1960).

**It is penal in character.** Denver & R. G. R. v. Frederic, 57 Colo. 90, 140 P. 463 (1914); Denver & R. G. R. v. Clint, 235 F.2d 445 (10th Cir. 1956); Clint v. Stolworthy, 144 Colo. 597, 357 P.2d 649 (1960).

**It manifests a purpose to compensate dependent relatives.** The statute must be construed in the light of its purpose, and while it is penal in character, the fact that the forfeiture or penalty is recoverable by the kin of the deceased manifests a purpose to in a measure protect or compensate dependent relatives by blood or di-



rect marriage. *Myers v. Denver & R. G. R. R.*, 61 Colo. 302, 157 P. 196 (1916).

**Recovery may be had under the section without any proof whatever of damages.** *Clint v. Stolworthy*, 144 Colo. 597, 357 P.2d 649 (1960).

**A wrongful death claim is not assignable.** *Espinosa v. Perez*, 165 P.3d 770 (Colo. App. 2006).

**The section may be divided with reference to persons injured, into two parts;** The first giving the right of action to any person injured by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, etc.; the second furnishing a right of action where the death of the passenger resulted from a defect or insufficiency of a railroad locomotive, stage coach, or other public conveyance. *Atchison, T. & S. F. R. R. v. Headland*, 18 Colo. 477, 33 P. 185 (1893).

**Impact not required in negligence claim against common carrier.** There is no impact requirement for claims which allege negligence on the part of a common carrier. *Deming v. Kellogg*, 41 Colo. App. 264, 583 P.2d 944 (1978).

**A second civil action against treating physicians for wrongful death is prohibited where plaintiffs previously settled a wrongful death action against the driver that struck pedestrian.** The plain language of this section clearly and unambiguously reflects the intent of the general assembly to permit only one wrongful death action for the death of one decedent. *Estate of Kronmeyer v. Meinig*, 948 P.2d 119 (Colo. App. 1997).

**Passenger elevators in office buildings are included within the term "other public conveyance"** as used in this section. *Davis v. Colo. Sav. Bank*, 78 Colo. 509, 242 P. 985 (1926).

**Station agent may be an employee managing train.** The station agent of a railroad company charged with the duty to communicate to the conductor and engineer of the several trains the orders of the train dispatcher as to where they are to pass other trains, is managing the trains, within the meaning of this section. If by his negligent failure to deliver an order, a collision occurs, and the death of a passenger results, the railway company is liable. *Whittle v. Denver & R. G. R. R.*, 51 Colo. 382, 118 P. 971 (1911).

**"Any person" does not include servant injured by negligence of fellow-servant.** The rule of the common law, that the servant assumes all the ordinary risks of the service upon which he enters, including those risks which arise from the negligence of other servants of the same master in the same employment, is not abrogated by this section, and the words "any person" do not include servants of the same master injured by the negligence of a fellow-servant while acting in the common employ-

ment. *Atchison, T. & S. F. R. R. v. Farrow*, 6 Colo. 498 (1883).

**Subsection (2) refers to statute of descent and distribution in effect at time section is applied.** *In re Arrington v. Arrington*, 618 P.2d 744 (Colo. App. 1980).

**Statute as basis for jurisdiction.** See *First Nat'l Bank v. Rostek*, 182 Colo. 437, 514 P.2d 314 (1973); *Ellerman v. Amax, Inc.*, 194 Colo. 392, 572 P.2d 836 (1977).

**Applied in Berry Constr., Inc. v. Indus. Comm'n**, 39 Colo. App. 251, 567 P.2d 806 (1977); *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981); *in re Estate of Daigle*, 634 P.2d 71 (Colo. 1981).

## B. Damages.

**There is no absurdity in a legislative decision to authorize in effect an award of different amounts depending on whether an insured is injured or killed in an accident.** *Kline v. Am. States Ins. Co.*, 924 P.2d 1150 (Colo. App. 1996).

**The amount of recovery under this section depends on the degree of culpability of the defendant.** *Clint v. Stolworthy*, 144 Colo. 597, 357 P.2d 649 (1960).

**It is exclusively the province of the jury to estimate and assess the damages, and the amount to be allowed in such cases rests largely in their sound discretion.** *Dawkins v. Chavez*, 132 Colo. 61, 285 P.2d 821 (1955).

**Funeral expense is an item of recovery under the wrongful death statute, but in no event can recovery exceed the amount provided by statute.** *McEntyre v. Jones*, 128 Colo. 461, 263 P.2d 313 (1953); *Kling v. Phayer*, 130 Colo. 158, 274 P.2d 97 (1954); *Espinoza v. Gurule*, 144 Colo. 381, 356 P.2d 891 (1960).

**Funeral expenses may be recovered by the parents of a deceased child in an action independent of this article where an alleged financial loss results to parents from negligence on the part of another.** *Espinoza v. Gurule*, 144 Colo. 381, 356 P.2d 891 (1960).

**This section's remedy is not exclusive.** While funeral expenses are recoverable in an action under this article, the remedy provided therein is not exclusive. *Espinoza v. Gurule*, 144 Colo. 381, 356 P.2d 891 (1960).

**Federal civil rights claim for damages under 42 U.S.C. § 1983 cannot be limited by Colorado's survival statute, § 13-20-101, or this section.** *White v. Talboys*, 573 F. Supp. 49 (D. Colo. 1983).

**For damages resulting from a wrongful death accident, see Kling v. Phayer**, 130 Colo. 158, 274 P.2d 97 (1954).

## II. WHO MAY RECOVER.

**The paragraphs of subsection (1) are intended to take rank and have effect in the**

**order in which they occur**, and their true meaning may be stated in this way: If the deceased leave a husband or wife, the sole right of action will be in such survivor, save that, as against children, the right will be lost unless asserted by suit within one year; but if there be no surviving husband or wife, or the survivor fails to sue within one year, then the sole right of action will be in the children; and if there be no surviving husband or wife, nor any child, then, and then only, will the right of action be in the father and mother, or the survivor of them. The first subdivision does not make the right of the husband or wife dependent upon the majority of the deceased, nor does the second make the right of the children dependent upon his majority or upon his being married at the time of his death; and as the third is evidently designed to take rank and have effect in subordination to the other two, we think it should be interpreted as if it read: "If such deceased be a minor or unmarried, and leave no surviving husband or wife and no surviving child, then by the father and mother". In no other way can the three subdivisions be completely harmonized without violating the sense of the statute as a whole. Hopper v. Denver & R. G. R. R., 155 F. 273 (8th Cir. 1907); Clint v. Stolworthy, 144 Colo. 597, 357 P.2d 649 (1960).

**No one can invoke this section except the class of persons listed in the subdivisions.** The wrongful death statute cannot be invoked where deceased is not survived by a husband or children, nor a father or mother, to which the statute limits such an action. Kling v. Phayer, 130 Colo. 158, 274 P.2d 97 (1954).

**This act makes no distinction between citizens and aliens, residents, and nonresidents;** and public policy does not require the making of any such discrimination. Indeed, the policy of the state would seem to require that no such discrimination should be made. Patek v. Am. Smelting & Ref. Co., 154 F. 190 (8th Cir. 1907); Ferrara v. Auric Mining Co., 43 Colo. 496, 95 P. 952 (1908).

**The right to sue is vested, in the first instance, in the surviving husband or wife** to the exclusion of all others; and the existence of the right in the second class named is wholly dependent upon the fact that there be neither husband nor wife surviving, or that he or she shall have waived the right by failing to sue in the time prescribed; thus evincing an intention on the part of the law-making power to confer the right of action upon the second class, only in the event the decedent, at the time of death, was, or had been, a married person, and should leave surviving lineal descendants. Hindry v. Holt, 24 Colo. 464, 51 P. 1002 (1897); Hahn v. Union P. R. R., 162 F. Supp. 558 (D. Colo. 1958); Clint v. Stolworthy, 144 Colo. 597, 357 P.2d 649 (1960).

The surviving spouse has the exclusive right to bring the action within the first year from the

date of death. Peck v. Taylor, 38 Colo. App. 90, 554 P.2d 698 (1976); Campbell v. Shankle, 680 P.2d 1352 (Colo. App. 1984).

The sole right to bring an action for wrongful death within the first year after the death is with the surviving husband or wife. Niven v. Falkenburg, 553 F. Supp. 1021 (D. Colo. 1983).

**Surviving spouse is authorized to sue in his or her own name without joining decedent's children**, who are real parties in interest. Howlett v. Greenberg, 34 Colo. App. 356, 530 P.2d 1285 (1974).

**This section does not limit the widow's cause of action to one year.** Hayes v. Williams, 17 Colo. 465, 30 P. 352 (1892); Hahn v. Union P. R. R., 162 F. Supp. 558 (D. Colo. 1958).

**It simply declares that if she does not sue within that time the heirs may bring an action.** Hahn v. Union P. R. R., 162 F. Supp. 558 (D. Colo. 1958).

**When spouse may sue after first year.** If the spouse does not sue within the first year, the heir or heirs may bring an action during the second year, but, if the heirs have not instituted proceedings, the spouse can maintain an action at any time before the expiration of the two years. Peck v. Taylor, 38 Colo. App. 90, 554 P.2d 698 (1976), expressly disapproved in Pub. Serv. Co. v. District Court, 674 P.2d 383 (Colo. 1984); Murphy v. Colo. Aviation, Inc., 41 Colo. App. 237, 588 P.2d 877 (1978).

**In general the spouse's right to maintain an action continues throughout the two years.** Peck v. Taylor, 38 Colo. App. 90, 554 P.2d 698 (1976).

The real purpose of this section was simply to give the surviving wife or husband preference during the first year; but not to estop her or him from maintaining an action at any time before the expiration of the second year. Peck v. Taylor, 38 Colo. App. 90, 554 P.2d 698 (1976).

**Children may bring suit within the first year only if there is no surviving spouse.** Niven v. Falkenburg, 553 F. Supp. 1021 (D. Colo. 1983).

**Action by spouse and daughter as coplaintiffs.** A wrongful death action instituted the second year after the death by both the surviving spouse and the daughter as coplaintiffs can be maintained by both plaintiffs. Peck v. Taylor, 38 Colo. App. 90, 554 P.2d 698 (1976).

An action filed by both surviving spouse and daughter does not operate against the interests of either. Consequently, since the purpose of the statute is to compensate those who sustain pecuniary injury by the loss of the life of a spouse or parent, retention of both husband and daughter as parties plaintiff is proper. Peck v. Taylor, 38 Colo. App. 90, 554 P.2d 698 (1976).

**This section requires proportionate division among the heirs** when a widow obtains a judgment. Clint v. Stolworthy, 144 Colo. 597, 357 P.2d 649 (1960).



**When multiple plaintiffs bring a wrongful death action and the plaintiffs only seek damages for noneconomic losses,** each plaintiff does not need to establish that he or she personally suffered damages for noneconomic losses to remain a party to the action. *Reigel v. SavaSeniorCare L.L.C.*, \_\_ P.3d \_\_ (Colo. App. 2011).

**Presumption that spouse will make good faith effort to represent rights of decedent's children.** Implicit in this statute is a presumption that the surviving spouse will make a good faith effort to represent adequately the rights of all decedent's children, regardless of whether the surviving spouse is their natural parent. *Howlett v. Greenberg*, 34 Colo. App. 356, 530 P.2d 1285 (1974).

**Insurance companies have no common law duty to assure distribution of settlement proceeds.** Where insurers distributed settlement proceeds to the surviving spouse in a wrongful death action, the insurers satisfied their statutory duty and are not required to monitor the distribution of the proceeds to all potential beneficiaries. *Campbell v. Shankle*, 680 P.2d 1352 (Colo. App. 1984).

**Heirs preempted if spouse sues.** A spouse, having elected to sue pursuant to this section, preempts the heirs at law from ever bringing a subsequent action. *Howlett v. Greenberg*, 34 Colo. App. 356, 530 P.2d 1285 (1974).

**Heirs at law have proprietary interest in judgment** resulting from the lawsuit in accordance with the applicable rules of descent and distribution. *Howlett v. Greenberg*, 34 Colo. App. 356, 530 P.2d 1285 (1974).

**What their right to sue depends on.** The right to sue of the heirs (interpreted as lineal descendants for the purposes of this portion of the statute) depends on either there being no surviving spouse or on the spouse's not having sued during the first year. *Peck v. Taylor*, 38 Colo. App. 90, 554 P.2d 698 (1976).

**Intervention by heirs if spouse elects to abandon cause.** Where the surviving spouse sues under this section and subsequent thereto elects to abandon the litigation against the wishes of the other heirs at law, they are entitled to intervene pursuant to C.R.C.P. 24(a)(2), for the purpose of continuing the litigation. *Howlett v. Greenberg*, 34 Colo. App. 356, 530 P.2d 1285 (1974).

**General assembly did not intend to grant exclusive control of litigation to spouse** where there is a showing of inadequate representation of decedent's children's rights. *Howlett v. Greenberg*, 34 Colo. App. 356, 530 P.2d 1285 (1974).

**Automatic intervention by parties represented by spouse contrary to section's intent.** To allow all parties whose interests are represented by the surviving spouse an automatic right of intervention in pending litigation would

be contrary to the intent of the statute vesting the surviving spouse with the exclusive right to sue and would result in confusion and controversy in litigating a wrongful death action. *Howlett v. Greenberg*, 34 Colo. App. 356, 530 P.2d 1285 (1974).

**The words "heir or heirs", in the second paragraph of subsection (1), mean child or children,** that is, lineal descendants. *Hindry v. Holt*, 24 Colo. 464, 51 P. 1002 (1897); *Hopper v. Denver & R. G. R. R.*, 155 F. 273 (8th Cir. 1907); *Grogan v. Denver & R. G. R. R.*, 56 Colo. 450, 138 P. 764 (1914); *Rocky Mt. Fuel Co. v. Kovaics*, 26 Colo. App. 554, 144 P. 863 (1914); *Page v. Elwell*, 81 Colo. 73, 253 P. 1059 (1927); *Blom v. United Air Lines*, 152 Colo. 486, 382 P.2d 993 (1963); *McGill v. GMC*, 174 Colo. 388, 484 P.2d 790 (1971); *Howlett v. Greenberg*, 34 Colo. App. 356, 530 P.2d 1285 (1974); *McCord v. Affinity Ins. Group*, 13 P.3d 1224 (Colo. App. 2000).

**The term "heirs" as used in this section refers only to lineal descendants of the deceased and does not include the deceased's parents.** *Whitenhill v. Kaiser Permanente*, 940 P.2d 1129 (Colo. 1997).

**Heirs do not include brothers and sisters of deceased.** *Hindry v. Holt*, 24 Colo. 464, 51 P. 1002 (1897), distinguishing *Denver S. R. & P. R. R. v. Wilson*, 12 Colo. 20, 20 P. 340 (1888); *Grogan v. Denver & R. G. R. R.*, 56 Colo. 450, 138 P. 764 (1914); *Blom v. United Air Lines*, 152 Colo. 486, 382 P.2d 993 (1963); *Ablin v. Richard O'Brien Plastering Co.*, 885 P.2d 289 (Colo. App. 1994).

**Sister cannot recover.** This section does not provide for a cause of action by a deceased minor's sister. *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982).

**Under this section the parents of an unmarried adult are entitled to recover their pecuniary loss resulting from his death from the negligence of another.** *Denver, S. P. & P. R. R. v. Wilson*, 12 Colo. 20, 20 P. 340 (1888).

**Decedent's parents may not bring a wrongful death action if there is a surviving child of the deceased.** *Pub. Serv. Co. v. District Court*, 674 P.2d 383 (Colo. 1984).

**Plaintiff may bring a cause of action that would have belonged to the decedent had he survived.** A claim that could have been brought by a plaintiff on behalf of a minor decedent if he had survived is barred unless brought under the wrongful death act. *Hale v. Morris*, 725 P.2d 26 (Colo. App. 1986).

**"Father or mother" should be read "father and mother".** The true reading of the words "father or mother" in the third paragraph is "father and mother"; such is the language of the first official publication; and such is the language of the enrolled bill in the office of the secretary of state. *Pierce v. Connors*, 20 Colo.

178, 37 P. 721 (1894); *Hopper v. Denver & R. G. R. Co.*, 155 F. 273 (8th Cir. 1907).

**The legislature did not bar or reduce recovery for parents, who have abandoned, deserted or failed to support a child under this section.** Therefore, subsection (1)(c) allows both parents to share equally in any judgment and does not require a parent to have a close relationship with the deceased child. *Brill v. Hughes*, 958 P.2d 529 (Colo. App. 1998).

**Father and mother may be joined.** Under this section, if the deceased was a minor, the father and mother may join in the suit and each shall have an equal interest in the judgment; but the joining of the father and mother is permissive, not imperative; either may sue alone. *Pierce v. Conners*, 20 Colo. 178, 37 P. 721 (1894); *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 P. 460 (1912).

**Even after judgment or review.** A parent not joined, but entitled to join, in a suit under this section may be made a party on his or her application at any time, even after judgment or after review in an appellate court, for the purpose of protecting the interest which he or she may have in the judgment. *Pierce v. Conners*, 20 Colo. 178, 37 P. 721 (1894); *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 P. 460 (1912).

**The joinder or nonjoinder of a parent is material only to the parents themselves;** the defendant cannot be prejudiced by the nonjoinder of one of them; the measure of recovery is the same whether the action be brought in the name of one or both; the defendant can only be subjected to a single suit. *Pierce v. Conners*, 20 Colo. 178, 37 P. 721 (1894).

**"Unmarried" is not limited to those who have never been married.** The great weight of authority as to the meaning of the word "unmarried", as defined by lexicographers and law writers, and as construed by courts, includes within the term not only those who have not been married, but who are at the time unmarried. *Myers v. Denver & R. G. R. Co.*, 61 Colo. 302, 157 P. 196 (1916).

**Parents have right to support and maintenance from children.** As a matter of sentiment, life has no pecuniary value, but considered with reference to the relations of deceased with others, it is capable of such estimate. In this sense a parent is entitled to the services of children during their minority, and to support and maintenance from them in his declining years. *Dawkins v. Chavez*, 132 Colo. 61, 285 P.2d 821 (1955).

**Parent need not show deceased child's pecuniary value to them.** It is not necessary for a husband and wife, in order to recover for the death of an adult child, to prove loss of food, clothing, shelter, or care which may be measured in dollars and cents. The court may consider the loss of a legal obligation for future

financial support, bodily care, and intellectual care. *Stevens v. Strauss*, 147 Colo. 547, 364 P.2d 382 (1961).

**The mental, moral, and physical characteristics of the child must be considered as well as the expectation of life in determining the pecuniary aid which she would probably give to the parents and the probable future earning capacity of the child.** *Stevens v. Strauss*, 147 Colo. 547, 364 P.2d 382 (1961).

**Adoptive parent cannot recover when one over 21 is adopted.** Where one over the age of 21 years is adopted as an heir-at-law by another person, such adoptive parent is without legal status to maintain action under the wrongful death statute for the death of such adopted person. *Martin v. Cuellar*, 131 Colo. 117, 279 P.2d 843 (1955).

**An equitably adopted child is not an "heir" for purposes of this section.** *Herrera v. Glau*, 772 P.2d 682 (Colo. App. 1989).

**Parents of child who is married and of age have no cause.** Under the wrongful death statute the parents of a child who is both married and of age at the time of his death have no standing to maintain such an action. *McGill v. GMC*, 174 Colo. 388, 484 P.2d 790 (1971).

**Parents of child who was married and of age have no cause of action.** Further, parents cannot represent purported common-law widow because they have adverse interests to such widow. *Potter v. Thieman*, 770 P.2d 1348 (Colo. App. 1989).

**Court's decision that overrules prior case law by precluding any claim for relief by a surviving spouse commenced after the first anniversary of the spouse's death** need not be applied retroactively if it creates an injustice and hardship in the case at bar. *Williams v. Trailmobile, Inc.*, 745 P.2d 267 (Colo. App. 1987) (decided prior to 1988 amendment repealing and reenacting paragraphs (a) to (c) of subsection (1)).

**If surviving spouse fails to sue,** the spouse loses not only the right to sue, but the right to share in the proceeds of any award made to the children. *Landsberg v. Hutsell*, 837 P.2d 205 (Colo. App. 1992) (decided under law in effect prior to the 1988 amendment repealing and reenacting paragraphs (a) to (c) of subsection (1)); *Champlin v. Burlington N. Santa Fe Corp.*, 385 F. Supp. 2d 720 (N. Dist. Ill. 2005).

**Where divorced parents' son was killed in an automobile accident, and each parent had a separate policy applicable to the accident that provided up to \$100,000 for damages arising from an accident involving an underinsured motor vehicle,** and the driver's policy had a liability limit of \$100,000, the driver was obligated to pay \$50,000 to each parent. As a result, for purposes of each parent's policy, \$50,000 was paid to a person "other than an insured injured person in the accident", namely,



the other parent. Hence, the driver's vehicle was underinsured under the terms of each policy. Under the provisions of this section, each parent could recover up to \$75,000 in uninsured motorist (UIM) benefits, and insurer was potentially liable under each parent's UIM policy for such amount. *Kline v. Am. States Ins. Co.*, 924 P.2d 1150 (Colo. App. 1996).

### III. DEFENSES.

#### A. In General.

**Person riding freight train without paying fare is not a passenger.** A person who is riding upon a freight train without paying fare, and after having been refused permission to ride by the conductor, is not a passenger within the meaning of this section. *Atchison, T. & S. F. R. R. v. Headland*, 18 Colo. 477, 33 P. 185 (1893).

**The fact that deceased was riding on free pass is no defense.** In an action under this section, it is no defense to the action that the deceased was riding upon a free pass, stipulating that the passenger "assumes all risks of accident and the company shall not be liable, under any circumstances, whether of negligence by its agents or others". *Denver & R. G. R. R. v. Frederic*, 57 Colo. 90, 140 P. 463 (1914).

**Pass is properly excluded as evidence.** From the nature, purposes, and objects of this section, it is manifest that the cause of action is one in which the deceased had no interest at all, and from the liability for which he could not relieve the company by a contract with it. It, therefore, follows that a free pass, and the contract included in it, offered in evidence is incompetent and immaterial, and is properly excluded. *Denver & R. G. R. R. v. Frederic*, 57 Colo. 90, 140 P. 463 (1914).

**Section not applicable when decedent killed by police.** This and § 13-21-202 entitle certain classes of survivors of a person killed to damages in the manner and to the extent prescribed but do not apply in an action by a wife to recover against bondsmen of public peace officers who killed her husband. *People ex rel. Putnum v. United States Fid. & Guar. Co.*, 99 Colo. 64, 59 P.2d 796 (1936).

**Rights not waived by claim under workmen's compensation act.** The general proposition that a person who has a cause of action against a third party tortfeasor for damages for wrongful death or injury does not lose or waive it by exercising another right based on a claim for workman's compensation is settled beyond dispute in this jurisdiction. *Drake v. Hodges*, 114 Colo. 10, 161 P.2d 338 (1945).

**Guest statute (repealed § 42-9-101) limited recovery under the wrongful death act.** There being no recovery for death except under the provisions of the wrongful death statute, and the guest statute specifically precluding recovery for

death except under the conditions therein specified, the guest statute was held to apply to and limit recovery under the wrongful death statute. *Taylor v. Welle*, 143 Colo. 37, 352 P.2d 106 (1960).

#### B. Negligence Required.

**Negligence must be affirmatively established by a preponderance of the evidence.** It is well established that in a case of this kind the plaintiff is not entitled to recover unless the negligence of the defendant is affirmatively established by a preponderance of the evidence. *Denver & R. G. R. R. v. Ryan*, 17 Colo. 98, 28 P. 79 (1891).

**Accident caused by defect in road or machinery, or carelessness of defendant's agents, is prima facie evidence of negligence,** and the defendant must establish affirmatively that no negligence existed on its part. *Kansas Pac. Ry. v. Miller*, 2 Colo. 442 (1874).

**Construction of new bridge in different manner is not admission of negligence.** In action by administrator for injuries resulting in the death of his intestate, by the subversion of a bridge on defendant's railway, by which the train wherein intestate was traveling was wrecked, it was held that the subsequent construction of a new bridge over the same channel, in a different manner, amounted to an admission that the former one was improperly constructed, but not that these defects were attributable to negligence. *Kansas Pac. Ry. v. Miller*, 2 Colo. 442 (1874).

**Evidence as to health, age, earning capacity, and contributions of deceased is inadmissible.** Because of the penal character of this section, and the rights of the plaintiffs and the liability of the defendant as therein defined, evidence showing the character, habits, health, age, and earning capacity of the deceased, and the contributions by him to the support of his parents, was inadmissible. *Denver & R. G. R. R. v. Frederic*, 57 Colo. 90, 140 P. 463 (1914).

**Presumption of negligence may be rebutted.** If a railroad car is overturned, and a passenger in consequence is killed, a presumption arises that the casualty was the result of negligence, but this presumption may be rebutted by the company, by showing that the accident itself was such that human prudence and foresight could not have guarded against it. *Denver Ry. v. Woodward*, 4 Colo. 1 (1877).

#### C. Contributory Negligence.

**Contributory negligence of decedent bars wrongful death action.** Where a driver of an automobile with ample opportunity to observe an oncoming train at a highway crossing, either failed to look or having looked failed to see the approaching train, he was guilty of contributory

negligence, constituting a proximate cause of the accident, and recovery for wrongful death was barred. *Union P. R. R. v. Larson*, 153 Colo. 354, 386 P.2d 583 (1963).

**Contributory negligence on the part of the person entitled to recover is a defense to an action brought under this section or § 13-21-202.** *Willy v. Atchison, T. & S. F. Ry.*, 115 Colo. 306, 172 P.2d 958 (1946).

**Contributory negligence of infant's father is not imputable to mother.** Where husband and wife unite as joint plaintiffs in an action for the death of a child, the negligence of the husband contributing to the death is not to be imputed to the wife, unless in the acts producing the injury, he was acting as her agent, or they were jointly engaged in the prosecution of a common enterprise. If the father is convicted of contributory negligence, the jury may ascertain the amount to be awarded to the mother. *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 P. 460 (1912).

**Issues of negligence and proximate cause to be determined by trier of fact.** In an action for

wrongful death of a child, where the issues of primary negligence, contributory negligence, and proximate cause presented clearly disputed issues of fact, findings made by the trier of facts on such disputed evidence will not be disturbed on review if supported by credible evidence. *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962).

**Instruction as to duty to look and listen permissible.** The learned judge who presided at the trial very properly charged the jury that, "as a matter of law it is negligence and carelessness for a person to go, stand, or be upon the track of a railroad without keeping watch both ways for trains"; and further, that it was the duty of deceased in going upon the track of the defendant company "to look and listen for the approach of trains and observe the surroundings", and that if he failed so to do, it was negligence on his part. *Denver & R. G. R. R. v. Ryan*, 17 Colo. 98, 28 P. 79 (1891).

**13-21-202. Action notwithstanding death.** When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.

**Source:** G.L. § 878. G.S. § 1031. R.S. 08: § 2057. C.L. § 6303. CSA: C. 50, § 2. CRS 53: § 41-1-2. C.R.S. 1963: § 41-1-2.

## ANNOTATION

- I. General Consideration.
- II. Negligence.
- III. Pleading and Practice.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "The Effect of the Wrongdoer's Death Upon an Action for Wrongful Death", see 22 Rocky Mt. L. Rev. 99 (1949). For comment discussing the interplay between actions brought pursuant to 42 U.S.C. § 1983 and the state wrongful death statute, see 55 Den. L. J. 291 (1978). For article, "Measures of Economic Loss in the Wrongful Death of a Child", see 14 Colo. Law. 392 (1985).

**Primary purpose of the wrongful death statute** is to compensate those who suffer a direct loss from the death. *Barnhill v. Pub. Serv. Co.*, 649 P.2d 716 (Colo. App. 1982), aff'd, 690 P.2d 1248 (Colo. 1984).

**No right of action existed at common law.** No right of action for damages resulting from death through wrongful act or negligence was given by the common law, and such right exists

only by virtue of this section. *Hindry v. Holt*, 24 Colo. 464, 51 P. 1002 (1897); *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949); *Taylor v. Welle*, 143 Colo. 37, 352 P.2d 106 (1960).

**Cause of action for wrongful death is created by statute.** *Mangus v. Miller*, 35 Colo. App. 335, 535 P.2d 219, cert. dismissed, 189 Colo. 481, 569 P.2d 1390 (1975).

Since Colorado law does not recognize the existence of a wrongful death action other than that created and defined by statute, the special statute of limitations made part of this act applies to wrongful death actions arising from alleged medical malpractice, absent a specific, valid exception provided by the general assembly. *Weedin v. United States*, 509 F. Supp. 1052 (D. Colo. 1981).

**Such action is separate and distinct from the action deceased would have had if he or she had survived,** even though plaintiff's cause of action under the statute arises only if the deceased would have been entitled to bring an action had he or she survived. *Mangus v. Miller*, 35 Colo. App. 335, 535 P.2d 219, cert. dismissed, 189 Colo. 481, 569 P.2d 1390 (1975).



A plaintiff's right to pursue a wrongful death action is derived from and dependent upon the decedent's right to have maintained an action had death not ensued. *Crownover v. Gleichman*, 38 Colo. App. 96, 554 P.2d 313 (1976), *aff'd*, 194 Colo. 48, 574 P.2d 497 (1977), *cert. denied*, 435 U.S. 905, 98 S. Ct. 1450, 55 L. Ed.2d 495 (1978); *Rowan v. Vail Holdings, Inc.*, 31 F. Supp.2d 889 (D. Colo. 1998).

**The constitutionality of this act has never been questioned.** The general assembly had the undoubted authority to give certain representatives of deceased a right of action against the person causing his death by negligence or wrongful act. *Vindicator Consol. Gold Mining Co. v. Firstbrook*, 36 Colo. 498, 86 P. 313 (1906).

**The statutory sections were enacted to preserve a right of action.** This and the following section were enacted for the purpose of preserving to the surviving relatives designated in § 13-21-201, a right of action that would else have failed by the decease of the party injured. They are in aid of the common law, not in derogation thereof. *Hayes v. Williams*, 17 Colo. 465, 30 P. 352 (1892); *Denver & R. G. R. v. Frederic*, 57 Colo. 90, 140 P. 463 (1914).

The wrongful death statute creates a claim for relief and an entitlement to damages for parties who have not themselves been directly injured by the actions of the tortfeasor. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), *dismissed for want of jurisdiction*, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**Sections should receive a liberal construction.** The provisions of this and the following section should unquestionably receive a liberal construction. *Hayes v. Williams*, 17 Colo. 465, 30 P. 352 (1892).

**The death act is not in its essence a "survival" statute,** but operates to create a new cause of action. *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949).

**Plaintiff's right of action under this section was in existence and inchoate** at the time of the commission of the wrongful act by the tortfeasor resulting thereafter in the death of decedent. *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949).

**This section is remedial,** the recovery being limited by § 13-21-203 to the pecuniary loss resulting from the death to the party who may be entitled to sue. *Hayes v. Williams*, 17 Colo. 465, 30 P. 352 (1892); *Clint v. Stolworthy*, 144 Colo. 597, 357 P.2d 649 (1960).

**The damages collectible under this section are compensatory only;** pecuniary loss must be shown by those who bring the action. *Rigot v. Conda*, 134 Colo. 375, 304 P.2d 629 (1956); *Denver & R. G. W. R. R. v. Clint*, 235 F.2d 445 (10th Cir. 1956); *Mosley v. Prall*, 158 Colo. 504, 408 P.2d 434 (1965).

**A common carrier may properly be sued under either this or the preceding section.** If this were not so, certain forms of negligence on the part of a common carrier, which are clearly not within the narrower limits of § 13-21-101, could cause death without entailing any liability whatever, though any other kind of corporation would under the same conditions be held responsible by virtue of this section. *Friedrichs v. Denver Tramway Corp.*, 93 Colo. 539, 27 P.2d 497 (1933).

**The wrongful death statute did not create a right of action independent of the guest statute (repealed § 42-9-101)** but was subject to the limitations the latter imposed. *Taylor v. Welle*, 143 Colo. 37, 352 P.2d 106 (1960).

**Any recovery under this section is controlled and must be distributed** under the provisions of § 13-21-201, this without regard to whether or not an heir entitled to share suffered damages. *Clint v. Stolworthy*, 144 Colo. 597, 357 P.2d 649 (1960).

**The operative injury for purposes of a wrongful death action is the wrongful death itself;** thus the \$150,000 per injury damages cap in the Colorado Governmental Immunity Act does not apply separately to each party in a wrongful death action but rather to the wrongful death action as a whole. *Steedle v. Sereff*, 167 P.3d 135 (Colo. 2007).

Section 24-10-103 (2) defines an "injury" as including "death"; therefore, the operative injury for purposes of a wrongful death action is the wrongful death itself, and § 24-10-114 (1)(a) limits damages to \$150,000. *Steedle v. Sereff*, 167 P.3d 135 (Colo. 2007).

**Action for wrongful death is property tort action.** An action for wrongful death is an action which may be brought by certain named survivors of a decedent who sustain a direct pecuniary loss upon the death of the decedent. It is classified as a property tort action and cannot be classified as a tort action "for injuries done to the person". *Jones v. Hildebrand*, 432 U.S. 183, 97 S. Ct. 2283, 53 L. Ed.2d 209 (1977).

**A constitutional claim based on an alleged deprivation of a mother's own rights,** and not on deprivation of those of her son, is not for any "property loss". *Jones v. Hildebrand*, 432 U.S. 183, 97 S. Ct. 2283, 53 L. Ed.2d 209 (1977).

**Asserted breach of warranty is a wrongful act.** Since section refers to "wrongful acts" and not simply "tortious acts", there is no basis for distinguishing between breaches of contractual duties and breaches of tort duties. *Ayala v. Joy Mfg. Co.*, 580 F. Supp. 521 (D. Colo. 1984).

**A child who is born alive and subsequently dies is a person within the meaning of this section.** A wrongful death action may be maintained regardless of whether the child was viable at the time of the injury or whether the child was viable at the time of birth. *Gonzales v. Mascarenas*, 190 P.3d 826 (Colo. App. 2008).

**Applicability of provisions to viable fetus.** A wrongful death action may be maintained for the death of a viable fetus, particularly a full-term fetus. *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986).

**Heirs of fatally-injured intoxicated person may not maintain wrongful death action against vendor of alcoholic beverages** because § 12-47-128.5 abolishes such actions by the consumers of alcohol and this statute permits heirs to maintain such actions only if the deceased could have done so had the deceased's injuries not been fatal. *Sigman v. Seafood Ltd. P'ship I*, 817 P.2d 527 (Colo. 1991).

**Wrongful death action based on theory of negligent entrustment** is derivative and granting of summary judgment motion not proper because genuine issues of material fact remained to be determined. *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

**Applied in** *In re Estate of Daigle*, 634 P.2d 71 (Colo. 1981); *Dohaish v. Tooley*, 670 F.2d 934 (10th Cir.), cert. denied, 459 U.S. 826, 103 S. Ct. 60, 74 L. Ed.2d 63 (1982); *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982).

## II. NEGLIGENCE.

**The breach of duty to be established** under the statute is that owed by the tortfeasor to the deceased, not that owed to the heirs of the deceased. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**In a wrongful death action, negligence is not presumed** from the happening of an accident, although it may be inferred from the surrounding facts and circumstances. *Ranke v. Fowler Real Estate Co.*, 30 Colo. App. 543, 497 P.2d 268 (1972).

**Questions of fact are for the jury.** In a wrongful death action where two equally plausible conclusions are deducible from the circumstances, the question is for the jury. *Ranke v. Fowler Real Estate Co.*, 30 Colo. App. 543, 497 P.2d 268 (1972).

**It is a question for the jury.** As a matter of law it cannot be said that the negligence of deceased directly contributed to his death, and whether this was true as matter of fact is for the consideration of the jury to whom it is properly referred and by whom it is determined, in conformity with established principles of law. *Kansas Pac. Ry. v. Twombly*, 3 Colo. 125 (1876).

**It is a matter of law when the facts are undisputed.** In a wrongful death action, contributory negligence is a question of law for the court to determine when the facts are undisputed and reasonable men can draw but one inference from them. *Ranke v. Fowler Real Estate Co.*, 30 Colo. App. 543, 497 P.2d 268 (1972).

**For when contributory negligence should be decided as a matter of fact not law**, see *Dillon v. Sterling Rendering Works*, 106 Colo. 407, 106 P.2d 358 (1940).

**Contributory negligence is a defense.** Recovery may be denied because of a deceased employee's contributory negligence in failing to discover defects or weaknesses in machinery or appliances of which he had charge. *Wells v. Coe*, 9 Colo. 159, 11 P. 50 (1886); *Willy v. Atchison, T. & S. F. Ry.*, 115 Colo. 306, 172 P.2d 958 (1946).

**It must be established like other defenses.** The law does not presume contributory negligence; unless appearing in the proofs offered by plaintiff, it is a defense to be established as are other defenses. *Platte & Denver Canal & Milling Co. v. Dowell*, 17 Colo. 376, 30 P. 68 (1892).

**"Loss of a chance of survival" theory of proximate causation.** A plaintiff may recover damages when the defendant's conduct was not the cause of the medical condition which caused the injury but did cause a substantial reduction in the plaintiff's chance of survival. *Mays v. United States*, 608 F. Supp. 1476 (D. Colo. 1985).

**For proximate cause necessary for liability**, see *Ward v. United States*, 208 F. Supp. 118 (D. Colo. 1962).

**For case where proximate cause is lacking**, see *McMillan v. Hammond*, 158 Colo. 40, 404 P.2d 549 (1965).

## III. PLEADING AND PRACTICE.

**Complaint held sufficient.** *Pierce v. Connors*, 20 Colo. 178, 37 P. 721 (1894).

**Plaintiff has burden of establishing prima facie right to punitive damages.** When punitive damages are in issue and information is sought by the plaintiff relating to the defendant's financial condition, justice requires no less than the imposition on the plaintiff of the burden of establishing a prima facie right to punitive damages. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

**Statute of limitations relating to death cases commences with time of injury.** *Ferrari, S.p.A. SEFAC v. District Court*, 185 Colo. 136, 522 P.2d 105 (1974).

**Exclusion of evidence held harmless.** A wife sued road building contractors for the death of her husband alleged to have been caused by their failure to install sufficient warning signals at a road barrier as required by their contract. On the trial she offered the pertinent provisions of the contract in evidence, which were by the court excluded. The exclusion was harmless because plaintiff's right to sue and defendants' liability were to be determined by the law of negligence and not by provisions of the contract. *Lewis v. La Nier*, 84 Colo. 376, 270 P. 656 (1928).



**Admission of evidence not reversible error.**

Admission in evidence of statement of decedent that his family had "turned him down", apparently offered on the theory that it tended to show that plaintiffs suffered no loss, if erroneous, was trivial and not reversible. *Dwinelle v. Union Pac. R. R.*, 104 Colo. 545, 92 P.2d 741 (1939).

**Permissible scope of discovery of defendant's financial worth should include only material evidence of the defendant's financial worth where a prima facie case for punitive damages has been made, and should be framed in such a manner that the questions proposed are not unduly burdensome.** *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

**Extent of discovery of defendant's financial condition not unlimited.** The extent of discovery of defendant's financial condition, even after a prima facie case for punitive damages is made, is not unlimited. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

**Specific requests of detailed information may constitute harassment.** Specific questions requesting detailed information regarding the defendant's financial status may constitute unnecessary harassment. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

**Decedents' ability to accumulate wealth and loss of earning capacity in a certain business are relevant in a wrongful death action when a material part of the heir's net pecuniary loss is based on the loss of increase in her anticipated inheritance and the estimates and opinions presented were sufficiently grounded in fact to be admissible and probative on the issue of the decedents' earning capacity.** *Ford v. Bd.*

*of County Comm'rs*, 677 P.2d 358 (Colo. App. 1983), cert. dismissed, 679 P.2d 579 (Colo. 1984).

**Objections to giving and refusing instructions held without merit** in action under this section by parents for death of minor son. *Windsor Reservoir & Canal Co. v. Smith*, 92 Colo. 464, 21 P.2d 1116 (1933).

**This section relates only to wrongs done within the state**, imposes no duty upon anyone not subject to its jurisdiction, and gives a right of action to persons without its jurisdiction only when they are injured by a wrong done within its jurisdiction. *Patek v. Am. Smelting & Ref. Co.*, 154 F. 190 (8th Cir. 1907).

**The Colorado wrongful death statute does not attempt to give a right of action for wrongful death committed outside of Colorado.** *Stoltz v. Burlington Transp. Co.*, 178 F.2d 514 (10th Cir. 1949), cert. denied, 339 U.S. 929, 70 S. Ct. 628, 94 L. Ed. 1349 (1950); *Estate of Murphy v. Colo. Aviation, Inc.*, 353 F. Supp. 1095 (D. Colo. 1973).

**Lex loci governs where injury occurred outside state.** In an action for wrongful death where the injury occurred outside of the state in which the action is brought, the amount of recovery is governed by the lex loci and not by the lex fori. *Stoltz v. Burlington Transp. Co.*, 178 F.2d 514 (10th Cir. 1949), cert. denied, 339 U.S. 929, 70 S. Ct. 628, 94 L. Ed. 1349 (1950).

**Mere disagreement with the amount of damages awarded** is not a sufficient ground to overturn an award of damages which is supported by competent evidence in the record. *Morrison v. Bradley*, 655 P.2d 385 (Colo. 1982).

**13-21-203. Limitation on damages.** (1) (a) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, including damages for noneconomic loss or injury as defined in section 13-21-102.5 and subject to the limitations of this section and including within noneconomic loss or injury damages for grief, loss of companionship, pain and suffering, and emotional stress, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that, if the decedent left neither a widow, a widower, minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed the limitations for noneconomic loss or injury set forth in section 13-21-102.5, unless the wrongful act, neglect, or default causing death constitutes a felonious killing, as defined in section 15-11-803 (1) (b), C.R.S., and as determined in the manner described in section 15-11-803 (7), C.R.S., in which case there shall be no limitation on the damages for noneconomic loss or injury recoverable in such action. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202, and in all cases the plaintiff is required to elect under which section he or she will proceed. There shall be only one civil action under this part 2 for recovery of damages for the wrongful death of any one decedent. Notwithstanding anything in this section or in section 13-21-102.5 to the contrary, there shall be no recovery under this part 2 for noneconomic loss or injury in excess of two hundred fifty thousand dollars, unless the wrongful act, neglect, or default causing death constitutes a felonious killing, as defined in section 15-11-803 (1) (b), C.R.S., and as determined in the manner described in section 15-11-803 (7), C.R.S.

(b) The damages recoverable for noneconomic loss or injury in any medical malpractice action shall not exceed the limitations on noneconomic loss or injury set forth in section 13-64-302.

(2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default.

(3) (a) In all actions brought under section 13-21-201 or 13-21-202 in which damages are assessed by the trier of fact, and the death complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the trier of fact, in addition to the actual damages, may award reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount that is equal to the amount of the actual damages awarded to the injured party.

(b) For purposes of this subsection (3), "willful and wanton conduct" shall have the same meaning as set forth in section 13-21-102 (1) (b).

(c) (I) A claim for exemplary damages in an action governed by this section may not be included in any initial claim for relief. A claim for exemplary damages in an action governed by this section shall be allowed by amendment to the pleadings only after the passage of sixty days following the exchange of initial disclosures pursuant to rule 26 of the Colorado rules of civil procedure and the plaintiff establishes prima facie proof of a triable issue. After the plaintiff establishes the existence of a triable issue of exemplary damages, the court may, in its discretion, allow additional discovery on the issue of exemplary damages as the court deems appropriate.

(II) A claim for exemplary damages in an action governed by this section shall not be time barred by the applicable provisions of law for the commencement of actions, so long as:

(A) The claim for exemplary damages arises, pursuant to paragraph (a) of this subsection (3), from the claim in such action that is brought under section 13-21-201 or 13-21-202; and

(B) The claim in such action that is brought under section 13-21-201 or 13-21-202 is not time barred.

(III) The assertion of a claim for exemplary damages in an action governed by this section shall not be rendered ineffective solely because the assertion was made after the applicable deadline contained in the court's case management order, so long as the plaintiff establishes that he or she did not discover, and could not have reasonably discovered prior to such deadline, the grounds for asserting the exemplary damages claim.

(4) Notwithstanding the provisions of subsection (3) of this section, the court may reduce or disallow the award of exemplary damages to the extent that:

(a) The deterrent effect of the damages has been accomplished; or

(b) The conduct that resulted in the award has ceased; or

(c) The purpose of such damages has otherwise been served.

(5) Notwithstanding the provisions of subsection (3) of this section, the court may increase any award of exemplary damages to a sum not to exceed three times the amount of actual damages, if it is shown that:

(a) The defendant has continued the behavior or repeated the action that is the subject of the claim against the defendant in a willful and wanton manner against another person or persons during the pendency of the case; or

(b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner that has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

(6) The provisions of this section shall not apply to a peace officer, as described in section 16-2.5-101, C.R.S., or to any firefighter, as defined in section 18-3-201 (1), C.R.S., for claims arising out of injuries sustained from an act or omission of such peace officer or firefighter acting in the performance of his or her duties and within the scope of his or her employment.

(7) Nothing in this section shall be construed to alter or amend the provisions of section 13-64-302.5 or the provisions of part 1 of article 10 of title 24, C.R.S.



**Source:** G.L. § 879. G.S. § 1032. R.S. 08: § 2058. C.L. § 6304. CSA: C. 50, § 3. L. 51: p. 339, § 2. CRS 53: § 41-1-3. L. 57: p. 338, §§ 1, 2. C.R.S. 1963: § 41-1-3. L. 67: p. 481, § 1. L. 69: pp. 329, 330, §§ 1, 3. L. 89: (1) amended, p. 752, § 2, effective July 1. L. 96: (1) amended, p. 49, § 1, effective July 1. L. 2001: Entire section amended, p. 376, § 1, effective August 8. L. 2003: (1) amended, p. 1787, § 2, effective July 1; (6) amended, p. 1614, § 6, effective August 6.

## ANNOTATION

- I. General Consideration.
- II. Proof of Damages.
  - A. Jury Function.
  - B. Evidence.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Double Recovery for Wrongful Death by Public Carrier", see 28 Dicta 299 (1951). For comment on McEntyre v. Jones, appearing below, see 31 Dicta 198 (1954). For article, "Damages for Death — Limited or Unlimited", see 34 Dicta 32 (1957). For comment on Clint v. Stolworthy, appearing below, see 33 Rocky Mt. L. Rev. 443 (1961). For comment on Herbertson v. Russell, appearing below, see 35 U. Colo. L. Rev. 463 (1963). For note, "The Propriety of Punitive Damages Under Colorado's Wrongful Death Statute", see 49 Den. L.J. 81 (1972). For note, "Blind Imitation of the Past: An Analysis of Pecuniary Damages in Wrongful Death Actions", see 49 Den. L.J. 99 (1972).

**Rationale for limitation of recovery.** The state policy of limiting wrongful death recovery to the actual property loss which has been suffered by the heirs of the deceased serves to negate any possibility of a windfall of the decedent's heirs by denying them compensation for injuries which were not their own. Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**This section does not involve a suspect class** and it furthers a legitimate state interest because it seems well within the general assembly's discretion to weigh the competing social interests and determine that, where the parents are not actually dependent on a child, the recovery should be limited to \$45,000. Pollock v. City & County of Denver, 194 Colo. 380, 572 P.2d 828 (1977).

**It may not be given retroactive effect.** Hansen v. Mercy Hosp., 40 Colo. App. 17, 570 P.2d 1309 (1977), aff'd, 195 Colo. 529, 579 P.2d 1158 (1978).

**Legislative intent to treat negligent acts and omissions identically with regard to subsection (2).** The general assembly selected the phrase, "wrongful act, neglect or default", to govern application of amendments to the damages limitation of the death statute. This indicates a legislative intent to treat negligent acts

and negligent omissions identically. Hernandez v. United States, 383 F. Supp. 168 (D. Colo. 1974).

**Rule does not unconstitutionally restrict damages.** Damages under the wrongful death statute are not unconstitutionally restricted by the net pecuniary loss rule, which permits recovery of only compensatory damages for the loss of a decedent's services and support and does not permit recovery of damages for the survivor's grief or for punitive damages. Jones v. Hildebrant, 191 Colo. 1, 550 P.2d 339 (1976), cert. denied, 432 U.S. 183, 97 S. Ct. 2283, 53 L. Ed.2d 209 (1977), overruled on other grounds, Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**The noneconomic damages cap under this section applies on a per-claim basis** and not a per-defendant basis. The term "recovery" refers to the plaintiff's total recovery, and the plain language of the statute limits that recovery to \$250,000. Lanahan v. Chi Psi Fraternity, 175 P.3d 97 (Colo. 2008).

**There is no limitation on the amount of recovery for noneconomic damages when death caused by a wrongful act, neglect, or default constitutes a felonious killing as defined in § 15-11-803 (1) and as determined in the manner described in § 15-11-803 (7).** Estate of Wright ex rel. Wright v. United Serv. Auto. Ass'n, 53 P.3d 683 (Colo. App. 2001).

**The felonious killing exception in subsection (1)(a) does not apply to skiing-related wrongful death actions.** Stamp v. Vail Corp., 172 P.3d 437 (Colo. 2007).

**Wrongful death and outrageous conduct actions serve entirely different purposes,** and the validity of one does not rise and fall with the success or failure of the other. DeCicco v. Trinidad Area Health Ass'n, 40 Colo. App. 63, 573 P.2d 559 (1977).

**An arbitration proceeding is not a civil action as contemplated by the wrongful death statute.** Arbitration is an alternative dispute resolution mechanism designed to avoid the need for filing a civil action or to resolve an existing civil action. Morrison v. Colo. Permanente Medical Group, 983 F. Supp. 937 (D. Colo. 1997).

**Rule inapplicable in § 1983 action.** In an action in state court under 42 U.S.C. § 1983, the plaintiff is not subject to the net pecuniary loss

limitation on his right to recover damages otherwise imposed by this section. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**Subsection (1)(a) limits wrongful death actions to "only one civil action"**, and the severance of plaintiff's negligence claim and the concomitant transfer of this claim to a new venue has created two civil actions for wrongful death, thereby violating the terms of the section. To the extent that the rules of venue set forth in C.R.C.P. 98 support defendant's demand for a change of venue, those rules are subordinate to the statutory language applicable in unique situations where, as here, co-defendants are sued for the wrongful death of one decedent based on separate torts committed in different counties. *Hernandez v. Downing*, 154 P.3d 1068 (Colo. 2007).

**This section allows compensatory damages only.** *Moffat v. Tenney*, 17 Colo. 189, 30 P. 348 (1892); *Hayes v. Williams*, 17 Colo. 465, 30 P. 352 (1892); *Pierce v. Conners*, 20 Colo. 178, 37 P. 721; *Mollie Gibson Consol. Mining & Milling Co. v. Sharp*, 5 Colo. App. 321, 38 P. 850 (1894); *Denver & R. G. R. R. v. Spencer*, 25 Colo. 9, 52 P. 211 (1898); *Mitchell v. Colo. Milling & Elevator Co.*, 12 Colo. App. 277, 55 P. 736 (1898); *Denver & R. G. R. R. v. Spencer*, 27 Colo. 313, 61 P. 606 (1900).

This section limits damages in wrongful death to compensatory damages. *Mangus v. Miller*, 35 Colo. App. 335, 535 P.2d 219, cert. dismissed, 189 Colo. 481, 569 P.2d 1390 (1975).

**Not exemplary damages.** If the general assembly had intended to authorize exemplary damages they would, doubtless, have used different language. This they did not do; but lest the courts should be troubled with excessive verdicts which might be supposed to rest upon a vindictive basis, they placed an absolute limit upon the recovery in the class of actions thus authorized. *Moffat v. Tenney*, 17 Colo. 189, 30 P. 348 (1892); *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962).

This section excludes an award of exemplary damages. *Mangus v. Miller*, 35 Colo. App. 335, 535 P.2d 219, cert. dismissed, 189 Colo. 481, 569 P.2d 1390 (1975).

**Net pecuniary loss is the proper measure of damages** in a wrongful death action under this section. *Good v. A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977).

A plaintiff in a wrongful death action is limited in damages to his net pecuniary loss. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**The net pecuniary loss rule** limits a wrongful death plaintiff's damages to the financial benefit, if any, which that person might reason-

ably have expected to receive from the decedent had he lived. *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**Evidence regarding decedent's future income tax liability may not be considered** when determining amount of plaintiff's (decedent's wife's) net pecuniary loss. *Hoyal v. Pioneer Sand Co.*, 188 P.3d 716 (Colo. 2008).

**Plaintiffs may recover only for diminution of decedent's estate;** there is no recovery permitted for grief, loss of comfort and society and other general damages. *Niven v. Falkenburg*, 553 F. Supp. 1021 (D. Colo. 1983).

**For the true measure of damages being pecuniary loss resulting to plaintiff,** see *Pierce v. Conners*, 20 Colo. 178, 37 P. 721, 46 Am. St. R. 279 (1894); *Denver & R. G. R. R. v. Spencer*, 25 Colo. 9, 52 P. 211 (1898); *Mitchell v. Colo. Milling & Elevator Co.*, 12 Colo. App. 277, 55 P. 736 (1898); *Denver & R. G. R. R. v. Spencer*, 27 Colo. 313, 61 P. 606, 51 L.R.A. 121 (1900); *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962); *Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962); *Pollock v. City & County of Denver*, 194 Colo. 380, 572 P.2d 828 (1977).

**For sufficient statement of pecuniary injury,** see *Orman v. Mannix*, 17 Colo. 564, 30 P. 1037 (1892); *Mollie Gibson Consol. Mining & Milling Co. v. Sharp*, 5 Colo. App. 321, 38 P. 850 (1894).

**Life has pecuniary value with reference to the relations of the deceased.** As a matter of sentiment, life has no pecuniary value, but considered with reference to the relations of deceased with others, it is capable of such estimate. In this sense a parent is entitled to the services of children during their minority, and to support and maintenance from them in his declining years. *McEntyre v. Jones*, 128 Colo. 461, 263 P.2d 313 (1953).

**Amount is made largely dependent on plaintiff's interest in deceased's life.** Under this statute, the amount to be received by the plaintiff is made largely, if not wholly, dependent upon the interest which the plaintiff had in the life of the deceased. *Mitchell v. Colo. Milling & Elevator Co.*, 12 Colo. App. 277, 55 P. 736 (1898).

**Recovery is not to be measured or determined by the extent of the contributions or support furnished by the deceased to the plaintiff.** In other words, although the deceased as a son may never yet have contributed to the support of his father, yet when the son's age, habits, earning capacity, and the age of the father are once established, a recovery may be had for the probable injury which the father has sustained in the loss of his son. *Mollie Gibson Consol. Mining & Milling Co. v. Sharp*, 5 Colo. App. 321, 38 P. 850 (1894).



**The sum will depend on a variety of circumstances and future contingencies,** and will, therefore, be difficult of exact ascertainment; but the damages to be awarded in each case may be approximated by considering the age, health, condition in life, habits of industry or otherwise, ability to earn money, on the part of the deceased, including his or her disposition to aid or assist the plaintiff; not only the kinship or legal relation between the deceased and the plaintiff, but the actual relations between them as manifested by acts of pecuniary assistance rendered by the deceased to the plaintiff, and also contrary acts may be taken into consideration. *Pierce v. Conners*, 20 Colo. 178, 37 P. 721 (1894).

**The amount of recovery may be determined from the prospective accumulations** of the deceased had he not been killed, having reference to his or her age, occupation, habits, bodily health and ability to earn money. Compensation as damages under these sections is based on the reasonable expectation of benefit which a plaintiff may have a right to indulge from a continuance of the life of the deceased. *Kansas Pac. Ry. v. Lundin*, 3 Colo. 94 (1876); *Denver & R. R. v. Frederic*, 57 Colo. 90, 140 P. 463 (1914).

Damages in a wrongful death action under this section necessarily include estimations of the accumulations of a decedent during the probable remainder of his life. *Good v. A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977).

**For approximation of pecuniary value,** see *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962).

**The recovery allowable is in no sense a solatium for the grief of the living** occasioned by the death of the relative or friend, however dear. *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962).

**Damages for mental suffering, caused by grief, are not recoverable,** but this conclusion is based upon the ground that damages recoverable by this section are limited to the net pecuniary benefit which the plaintiff might reasonably have expected to receive from the deceased. *Bleecker v. Colo. & S. Ry.*, 50 Colo. 140, 114 P. 481 (1911).

**Parental grief is not an element of damages** in wrongful death actions, it being the peculiar province of the jury to estimate and assess such loss under proper instructions. *Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962); *Bradshaw v. Nicolay*, 765 P.2d 630 (Colo. App. 1988); *Aiken v. Peters*, 899 P.2d 382 (Colo. App. 1995).

The net pecuniary loss rule does not allow for the compensation of parental grief. *Jones v. Hildebrandt*, 191 Colo. 1, 550 P.2d 339 (1976), cert. denied, 432 U.S. 183, 97 S. Ct. 2283, 53 L. Ed.2d 209 (1977), overruled on other grounds,

*Espinoza v. O'Dell*, 633 P.2d 455 (1981), appeal dismissed for want of jurisdiction, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed.2d 237 (1982).

**Decedents' families' mental anguish claims covered by an insurance policy are limited by this section,** which prohibits recovery for non-economic loss or injury in wrongful death cases in excess of \$250,000. This limit is applied collectively for each decedent. *Old Republic Ins. Co. v. Durango Air Serv., Inc.*, 283 F.3d 1222 (10th Cir. 2002).

**Child is minor until age 21.** A child is a minor, as that term is used in subsection (1), until his or her twenty-first birthday. *Hesseltine v. United States*, 538 F. Supp. 1003 (D. Colo. 1982).

**A parent may or may not be a dependent.** *Hesseltine v. United States*, 538 F. Supp. 1003 (D. Colo. 1982).

**A change in this rule must be by the general assembly.** Any change in the law as to the measure of damages allowed for the wrongful death of a child in our view should only come by proper legislative action and not through judicial legislation. *Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962).

**Parents are entitled to anticipated support in their declining years.** "Net pecuniary loss" has been construed so as to include not only the loss to the parent of the services and earnings which they could have reasonably expected from their child during his or her minority, less their expenditures for his or her maintenance, but also includes the loss of services and support which they could have reasonably anticipated during their "declining years", but for the untimely death. *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962).

**Supreme court declines to recognize a Colorado common law right in parents to seek damages for loss of consortium with their injured child.** The decision to grant a right of recovery for loss of consortium because of a child's injury is a matter best left to the general assembly. *Bartlett v. Elgin*, 973 P.2d 694 (Colo. App. 1998), aff'd, 994 P.2d 411 (Colo. 1999) (following *Lee v. Colo. Dept. of Health*, 718 P.2d 221 (Colo. 1986) and *Hill v. United States*, 854 F. Supp. 727 (D. Colo. 1994) and declining to follow *Hancey v. United States*, 967 F. Supp. 443 (D. Colo. 1997)).

**Widow need not be necessitous in order to recover.** We fail to discover in our statute any warrant for saying that unless the widow in the lifetime of her husband was necessitous, or dependent she is not entitled to recover. Without regard to the needy condition of the widow, *caeteris paribus*, the measure of her damages is the same in each case. *Denver, etc., Ry. v. Woodward*, 4 Colo. 1 (1877).

**The phrase "mitigating or aggravating circumstances"** is confined to those circumstances which increase or diminish this compensation.

Hayes v. Williams, 17 Colo. 465, 30 P. 352 (1892).

Mitigating or aggravating circumstances contemplate circumstances not relating to the wrongful act itself, but such as affect the actual damages suffered by the surviving party entitled to sue, either by way of diminishing or enhancing the same. Mangus v. Miller, 35 Colo. App. 335, 535 P.2d 219, cert. dismissed, 189 Colo. 481, 569 P.2d 1390 (1975).

**Charge need not specifically enumerate every aggravating or mitigating circumstance.** In actions under this and the preceding section, it is not necessary for the court to specifically enumerate in its charge each and every aggravating or mitigating circumstance to be considered in computing compensatory damages. Hayes v. Williams, 17 Colo. 465, 30 P. 352 (1892).

**Funeral expenses are a proper element of damage.** McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953).

**Proceeds of judgment must be distributed according to § 13-21-201.** The proceeds of a judgment obtained by a widow and based only on her pecuniary loss under this section and § 13-21-202 do not belong solely to her, but are to be owned by and divided among the heirs as provided in § 13-21-201, even though heirs other than the widow personally suffered no pecuniary loss. Clint v. Stolworthy, 144 Colo. 597, 357 P.2d 649 (1960); Mosley v. Prall, 158 Colo. 504, 408 P.2d 434 (1965).

**Insurance companies have no common law duty to assure distribution of settlement proceeds.** Where insurers distributed settlement proceeds to the surviving spouse in a wrongful death action, the insurers satisfied their statutory duty and are not required to monitor the distribution of the proceeds to all potential beneficiaries. Campbell v. Shankle, 680 P.2d 1352 (Colo. App. 1984).

**Court may instruct jury that pecuniary loss may exist when there is no obligation of support.** It is urged that the court erred in instructing the jury that the appellees were entitled to recover for the pecuniary loss resulting to them in consequence of the said death, for the reason that there was no legal obligation upon the part of the deceased to support the appellees, and therefore there were no damages except simply nominal damages. This position is untenable. Denver & R. G. R. R. v. Wilson, 12 Colo. 20, 20 P. 340 (1888).

**Instruction failing to limit recovery to pecuniary loss is erroneous.** It is only for the pecuniary loss resulting to the living party entitled to sue resulting from the death of the deceased that this section affords compensation, and an instruction which omits this important limitation, and leaves the jury at liberty to find any amount that they might deem fair and just, not exceeding the maximum, regardless of the

fact whether the plaintiffs suffered any pecuniary loss by the death of the deceased, or not, is erroneous. Denver & R. G. R. R. v. Spencer, 25 Colo. 9, 52 P. 211 (1898).

**For instructions on damages held correct,** see Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951); St. Lukes Hosp. Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952); McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953).

**Instruction to jury on provocation as an element to be considered is error.** In a wrongful death action, it is error for the trial court to give an instruction on provocation as an element to be considered by the jury in mitigation of damages or as a factor to be considered in the determination of liability. Mangus v. Miller, 35 Colo. App. 335, 535 P.2d 219, cert. dismissed, 189 Colo. 481, 569 P.2d 1390 (1975).

**Tortious act or omission occurs when and where negligence occurs, without reference to time of discovery or accrual.** The language used by the general assembly suggests that the time of the wrongful act, neglect, or default's occurrence must be determined as an objective fact, without reference to the subjective elements of the "time of discovery" or accrual rules. Hernandez v. United States, 383 F. Supp. 168 (D. Colo. 1974).

**Wrongful default occurs when failure to disclose becomes tortious negligence,** or in other words, when the duty to disclose was first breached. Hernandez v. United States, 383 F. Supp. 168 (D. Colo. 1974).

**Evidence of defendant's actions following decedent's death is irrelevant** in determining the noneconomic damages recoverable under this section, since any additional mental suffering thereby inflicted on grieving relatives is not a "necessary injury resulting from [the] death" of the decedent. Aiken v. Peters, 899 P.2d 382 (Colo. App. 1995).

**Enhanced award not available.** Subsection (1) mandates that the provisions of § 13-21-102.5 authorizing the court to enter an award of damages for noneconomic losses up to \$500,000 are to be disregarded, and the \$250,000 limit set forth in this section applies. Aiken v. Peters, 899 P.2d 382 (Colo. App. 1995).

**Although the decedent's children were entitled to an award,** the defendant counsel satisfied his statutory duty by paying the settlement proceeds to his client, the surviving spouse. Klancke v. Smith, 829 P.2d 464 (Colo. App. 1991).

**Trial court abused its discretion** when it denied plaintiffs' motion to amend their complaint to add a claim for exemplary damages where amended complaint satisfied the burden of proof set forth in subsection (3)(c)(I). Stamp v. Vail Corp., 172 P.3d 437 (Colo. 2007).

**Applied** in Sager v. City of Woodland Park, 543 F. Supp. 282 (D. Colo. 1982); Pub. Serv. Co. v. District Court, 674 P.2d 383 (Colo. 1984).



## II. PROOF OF DAMAGES.

### A. Jury Function.

**While damages in a wrongful death action need not be proved with mathematical certainty**, there must be some evidence to *prima facie* establish with a reasonable degree of certainty the damages flowing from the wrongful death. *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962).

**There must be some evidence to *prima facie* establish** with at least a reasonable degree of certainty the damages flowing from the wrongful death. *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962).

**Court cannot set aside jury's verdict unless damages are grossly and manifestly inadequate.** It is an abuse of discretion on the part of the trial court to set aside the verdict of the jury and grant a new trial solely on the ground of inadequacy of the verdict unless, under the evidence, it can be definitely said that the verdict is grossly and manifestly inadequate, or unless the amount thereof is so small as to clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion, or other improper considerations. *Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962).

**Disagreement with amount awarded insufficient ground to overturn.** Mere disagreement with the amount of damages awarded is not a sufficient ground to overturn an award of damages which is supported by competent evidence in the record. *Morrison v. Bradley*, 655 P.2d 385 (Colo. 1982); *Foster ex rel. Foster v. Phillips*, 6 P.3d 791 (Colo. App. 1999).

**The jury has the benefit of extensive testimony and evidence**, and it is its peculiar province to estimate and assess the damages. *Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962).

**Jury verdict may be upset when it cannot be supported by any legitimate inference.** In view of the undisputed testimony on deceased's salary and life expectancy, it is apparent that no consideration at all was given to the net pecuniary loss the plaintiffs would sustain in the near foreseeable future by reason of being deprived of the support they could reasonably expect under the various life expectancy tables which the jury was told to consider, not only relating to the deceased, but also in connection with the plaintiffs. The verdict is contrary to the undisputed evidence and cannot be supported by any legitimate inferences. *Lewis v. Great W. Distrib. Co.*, 168 Colo. 424, 451 P.2d 754 (1969).

**A directed verdict in any dollar amount is not sanctioned** even in the clearest of liability cases where the recovery is unlimited. It would not be a valid ground to invade the province of the jury merely because the case involved an

amount which by statute put a ceiling on the jury determination. *Lewis v. Great W. Distrib. Co.*, 168 Colo. 424, 451 P.2d 754 (1969).

**The words "the jury" in this section should not be read as excluding the court in nonjury cases.** *Bartch v. United States*, 330 F.2d 466 (10th Cir. 1964).

**Statutory limit is applicable in suits under federal tort claim act.** The Colorado statutory limitation upon gross recovery for wrongful death is applicable in an action brought under the federal tort claims act, 28 U.S.C. §§ 1346(b), 2674. *Bartch v. United States*, 330 F.2d 466 (10th Cir. 1964).

**This section does not purport to apply to actions brought for wrongful death under a statute of another state.** Neither is there anything in the Colorado statute which indicates that Colorado regards full compensatory damages for wrongful death committed outside of Colorado to be contrary to good morals or natural justice, or violative of the public policy of Colorado. *Stoltz v. Burlington Transp. Co.*, 178 F.2d 514 (10th Cir. 1949), cert. denied, 339 U.S. 929, 70 S. Ct. 628, 94 L. Ed. 1349 (1950).

### B. Evidence.

**Testimony concerning the relations of the deceased to the plaintiff is admissible**, in order to form a just estimate of the probable damage. *Mollie Gibson Consol. Mining & Milling Co. v. Sharp*, 5 Colo. App. 321, 38 P. 850 (1894).

**Evidence of value of services of girl from seven to eighteen.** The trial court did not err in admitting evidence of the value of the services of a girl like the deceased from the age of seven years to the age of eighteen, though the law does not necessarily limit the recovery to the value of such services. *Pierce v. Connors*, 20 Colo. 178, 37 P. 721 (1894).

**Evidence of provocation is irrelevant to assessment of actual damages** in a wrongful death claim. *Mangus v. Miller*, 35 Colo. App. 335, 535 P.2d 219, cert. dismissed, 189 Colo. 481, 569 P.2d 1390 (1975).

**Statute does not permit the jury to consider the aggravating circumstances surrounding defendant's actions.** Technical evidence of the level of alcohol in the defendant's blood was irrelevant on the issue of whether noneconomic damages were aggravated by the knowledge of the defendant's intoxication. *Foster ex rel. Foster v. Phillips*, 6 P.3d 791 (Colo. App. 1999).

**Approved mortality tables may be used** for the purpose of showing the probable duration of life. *Kansas Pac. Ry. v. Lundin*, 3 Colo. 94 (1876).

**For when proof is sufficient to show probable loss**, see *Colo. Coal & Iron Co. v. Lamb*, 6 Colo. App. 255, 40 P. 251 (1895).

**13-21-203.5. Alternative means of establishing damages - solatium amount.** In any case arising under section 13-21-202, the persons entitled to sue under the provisions of section 13-21-201 (1) may elect in writing to sue for and recover a solatium in the amount of fifty thousand dollars. Such solatium amount shall be in addition to economic damages and to reasonable funeral, burial, interment, or cremation expenses, which expenses may also be recovered in an action under this section. Such solatium amount shall be in lieu of noneconomic damages recoverable under section 13-21-203 and shall be awarded upon a finding or admission of the defendant's liability for the wrongful death.

**Source: L. 89:** Entire section added, p. 753, § 3, effective July 1.

#### ANNOTATION

**Procedural due process is not denied by solatium statute** since it requires a full civil trial to determine liability thereby providing defendants a substantial opportunity to be heard. *Dewey v. Hardy*, 917 P.2d 305 (Colo. App. 1995).

**Amount of \$50,000 set by solatium statute for death of a human being is not so grossly excessive** and severe as to be disproportionate to the offense and obviously unreasonable in violation of the due process clause. *Dewey v. Hardy*, 917 P.2d 305 (Colo. App. 1995).

**The solatium award of \$50,000 is exempt from reduction** by operation of the comparative fault statute. *Dewey v. Hardy*, 917 P.2d 305 (Colo. App. 1995).

**And it is not subject to reduction** by operation of the pro-rata liability statute. To the extent that the comparative fault statute and the pro-rata liability statute conflict with this section by compelling a reduction of the solatium amount recoverable by a wrongful death plaintiff, this section prevails. *B.G.'s Inc. v. Gross*, 23 P.3d 691 (Colo. 2001).

**Nor is the \$50,000 solatium award subject to reduction by a co-defendant's settlement where the settlement did not designate the nature of the damages for which payment was made.** To permit such a settlement to reduce the solatium award would run contrary to the rationale that the solatium award is intended as an ultimate award not subject to further reduction regardless of the fault of other tortfeasors. *Smith v. Vincent*, 77 P.3d 927 (Colo. App. 2003).

**With limited exceptions, this section generally does not require co-defendants to share equitably in the responsibility to pay the solatium award.** *Smith v. Vincent*, 77 P.3d 927 (Colo. App. 2003).

**Trial court did not err in awarding costs to plaintiff** pursuing a wrongful death action under this section and denying defendant's costs. *Dewey v. Hardy*, 917 P.2d 305 (Colo. App. 1995).

**13-21-203.7. Adjustments of dollar limitations for effects of inflation.** (1) The limitations on noneconomic damages set forth in section 13-21-203 (1) (a) and the amount of the solatium set forth in section 13-21-203.5 shall be adjusted for inflation as of January 1, 1998, and January 1, 2008. The adjustments made on January 1, 1998, and January 1, 2008, shall be based on the cumulative annual adjustment for inflation for each year since the effective date of the damages limitations in sections 13-21-203 (1) (a) and 13-21-203.5. The adjustments made pursuant to this subsection (1) shall be rounded upward or downward to the nearest ten-dollar increment.

(2) As used in this section, "inflation" means the annual percentage change in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Boulder, all items, all urban consumers, or its successor index.

(3) The secretary of state shall certify the adjusted limitation on damages within fourteen days after the appropriate information is available, and:

(a) The adjusted limitation on damages shall be the limitation applicable to all claims for relief that accrue on or after January 1, 1998, and before January 1, 2008; and

(b) The adjusted limitation on damages as of January 1, 2008, shall be the limitation applicable to all claims for relief that accrue on and after January 1, 2008.

**Source: L. 97:** Entire section added, p. 923, § 5, effective August 6. **L. 2007:** (1) and (3) amended, p. 330, § 4, effective July 1.



**Cross references:** For the legislative declaration stating the purpose of and the provision directing legislative staff agencies to conduct a post-enactment review pursuant to § 2-2-1201 scheduled in 2009, see sections 1 and 5 of chapter 83, Session Laws of Colorado 2007. To obtain a copy of the review, once completed, view Colorado Legislative Council's web site.

**13-21-204. Limitation of actions.** All actions provided for by this part 2 shall be brought within the time period prescribed in section 13-80-102.

**Source:** G.L. § 880. G.S. § 1033. R.S. 08: § 2059. C.L. § 6305. CSA: C. 50, § 4. CRS 53: § 41-1-4. C.R.S. 1963: § 41-1-4. L. 79: Entire section amended, p. 615, § 1, effective June 7. L. 86: Entire section amended, p. 704, § 13, effective July 1.

## ANNOTATION

**The time limitation in this section is a matter of procedural law rather than substantive law** based on court's reading of *Barnhill v. Public Serv. Co.* (649 P.2d 716 (Colo. App. 1982), *aff'd*, 690 P.2d 1248 (Colo. 1984)). Therefore, in diversity action filed in Mississippi where Mississippi's choice of law principles apply, Mississippi must apply the substantive law of Colorado but may apply its own law in procedural matters including statute of limitations. *Davis v. Nat'l Gypsum Co.*, 743 F.2d 1132 (5th Cir. 1984).

**Language of section is plainly all-inclusive**, and must be construed to apply to all wrongful death actions in the absence of an express exception in former § 13-80-127. *McClanahan v. Am. Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo. 1980).

**Bringing action is indispensable condition for liability.** Commencement of an action within the time fixed by this section is an indispensable condition of the liability and of the action which wrongful death statutes permit. *Ritter v. Aspen Skiing Corp.*, 519 F. Supp. 907 (D. Colo. 1981).

**The statute of limitations begins to run immediately upon the happening of the wrongful act.** *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949).

The statute of limitations in a wrongful death action begins to run on the date the damage or injury arising from the commission of the alleged negligence from which death later results becomes known or by reasonable care could have been discovered. *Crownover v. Gleichman*, 38 Colo. App. 96, 554 P.2d 313 (1976), *aff'd*, 194 Colo. 48, 574 P.2d 497 (1977), *cert. denied*, 435 U.S. 905, 98 S. Ct. 1450, 55 L. Ed.2d 495 (1978).

**Limitation period starts running no later than date of death.** The statute of limitations specifically starts running no later than the date of death. *With v. General Elec. Co.*, 653 P.2d 764 (Colo. App. 1982); *Gonzales v. Denver & Rio Grande Western Railroad Co.*, 686 P.2d 1362 (Colo. App. 1984).

**Action not filed in two years is barred.** The action not having been filed within two years

after the commission of the alleged negligence, said to have resulted in the death of the injured husband, is barred. *Franzen v. Zimmerman*, 127 Colo. 381, 256 P.2d 897 (1953).

Action is barred when not filed within two years from the "discovery" of the alleged negligence. *Crownover v. Gleichman*, 194 Colo. 48, 574 P.2d 497 (1977), *cert. denied*, 435 U.S. 905, 98 S. Ct. 1450, 55 L. Ed.2d 495 (1978); *Rauschenberger v. Radetsky*, 745 P.2d 640 (Colo. 1987).

**Having an action for wrongful conduct not a condition precedent to bringing wrongful death action.** The wrongful death action is not complete until death. Therefore, statute of limitations begins at death. *Rowell v. Clifford*, 976 P.2d 363 (Colo. App. 1998).

**Limitation period not tolled by former § 13-80-126.** The Colorado wrongful death act is not a "statute of limitations but a statute of creation," thus former § 13-80-126 will not toll the two year period in which one has to commence a wrongful death action. *Nelson v. Hall*, 573 F. Supp. 1097 (D. Colo. 1983).

**Limitation period tolled by § 13-81-103.** This statute is not a "nonclaim statute" which prohibits filing of a lawsuit after a specific period of time, and, therefore, it is subject to tolling provision of general disability statute, § 13-81-103. *Pub. Serv. Co. v. Barnhill*, 690 P.2d 1248 (Colo. 1984).

**Action barred by this section is not revived by former § 13-80-128.** The remedial revival statute, former § 13-80-128, does not apply to wrongful death actions. *Gonzales v. Denver Rio Grande Western R.R.*, 686 P.2d 1362 (Colo. App. 1984); *Phillips v. Beeche*, 679 P.2d 126 (Colo. App. 1984).

**For situation where statute does not begin to run until injury occurred**, see *Decaie v. Pub. Serv. Co.*, 173 Colo. 402, 479 P.2d 964 (1971).

**Limitations period is subject to tolling for fraudulent concealment** of facts underlying the wrongful act. *First Interstate Bank v. Piper Aircraft*, 744 P.2d 1197 (Colo. 1987).

The mere fact that the plaintiff was aware of a death on the date of its occurrence is not

dispositive of whether the fraudulent concealment doctrine should be applied to a wrongful death action. Negligent conduct cannot be presumed from the happening of an accident, but may be established by the facts and circumstances surrounding the accident. *First Interstate Bank v. Piper Aircraft*, 744 P.2d 1197 (Colo. 1987).

**Question of whether plaintiff applied reasonable diligence in discovering that death was caused by negligent act** is not question of law, but must generally be deemed a question of fact for determination by fact finder. *First Interstate Bank v. Piper Aircraft*, 744 P.2d 1197 (Colo. 1987).

## PART 3

### SETTLEMENTS, RELEASES, AND STATEMENTS

**13-21-301. Settlements, releases, and statements of injured persons.** (1) If a person is injured as a result of an occurrence which might give rise to liability and said person is a patient under the care of a practitioner of the healing arts or is hospitalized, no person or agent of any person whose interest is adverse to the injured person shall:

(a) Within thirty days after the date of the occurrence causing the injury, negotiate or attempt to negotiate a settlement with the injured patient;

(b) Within thirty days after the date of the occurrence causing the injury, obtain or attempt to obtain a general release of liability from the injured patient; or

(c) Within fifteen days after the date of the occurrence causing the injury, obtain or attempt to obtain any statement, either written, oral, recorded, or otherwise, from the injured patient for use in negotiating a settlement or obtaining a release except as provided by the Colorado rules of civil procedure.

(2) Any settlement agreement entered into or any general release of liability given by the injured patient in violation of this section shall be void. Any statement, written, oral, recorded, or otherwise, which is given by the injured party in violation of this section may not be used in evidence against the interest of the injured party in any civil action relating to the injury.

(3) Nothing in this section shall preclude the taking of statements by peace officers, as defined in section 24-31-301 (5), C.R.S., acting in their official capacity in the ordinary course of their employment, and nothing shall preclude the use of such statements for any purpose permitted by statute or rule of court applying to the admission of evidence.

**Source:** **L. 75:** Entire part added, p. 571, § 1, effective July 1. **L. 83:** (3) amended, p. 962, § 5, effective July 1, 1984. **L. 92:** (3) amended, p. 1097, § 4, effective March 6. **L. 96:** (1) amended, p. 1137, § 2, effective July 1.

**Cross references:** For the legislative declaration contained in the 1992 act amending subsection (3), see section 12 of chapter 167, Session Laws of Colorado 1992.

## ANNOTATION

**Law reviews.** For comment, "The Enforceability of Personal Injury Releases", see 54 U. Colo. L. Rev. 277 (1983).

**Subsection (3) is constitutional in promoting the legitimate governmental interest in encouraging the prompt and accurate reporting of incidents to peace officers.** *Wills v. State*, 821 P.2d 866 (Colo. App. 1991).

**Subsection (3) reflects the General Assembly's intent to allow statements given to peace officers to be admissible as evidence** if such statements are otherwise properly admissible. *Wills v. State*, 821 P.2d 866 (Colo. App. 1991).

**Legislative intent is to prevent hasty settlements.** The intent of the general assembly in

enacting this section was to prevent hasty settlements and to prohibit the evidentiary use of statements made by injured persons before the passage of enough time following an injury to permit the injured party to evaluate his condition carefully. *Safeway Stores, Inc. v. Smith*, 658 P.2d 255 (Colo. 1983).

**Purpose of medical care requirement.** The purpose of the requirement that the injured party be under the care of a practitioner of the healing arts or be hospitalized is to exclude from the protective provisions of this section those situations where no injuries result or where they are so slight as to require only brief medical attention. *Safeway Stores, Inc. v. Smith*, 658 P.2d 255



(Colo. 1983).

**“Under the care of a practitioner of the healing arts”.** For a person to be considered “under the care of a practitioner of the healing arts”, such care need not be actual and continuous, but rather must be provided in good faith and must be reasonably required. *Smith v. Safeway Stores, Inc.*, 636 P.2d 1310 (Colo. App. 1981), *aff’d*, 658 P.2d 255 (Colo. 1983).

**State of mind of party taking statement is not determinative of its admissibility.** This section does not require that the party taking a statement do so with the specific purpose of using the statement to negotiate a settlement or obtain a release before the exclusionary provisions of this section apply. The state of mind of the party taking the statement is not determinative of whether the statement is admissible. So long as the other requirements of this section have been met, this section applies to any statement which may be of some use or value in negotiating a settlement or obtaining a release irrespective of the state of mind or purpose of the party taking the statement. *Marlow v. Atchi-*

*son, T. & S.F. Ry.*, 671 P.2d 438 (Colo. App. 1983).

**Statements obtained in violation of this section may not be used** for purposes of impeachment. *Smith v. Safeway Stores, Inc.*, 636 P.2d 1310 (Colo. App. 1981), *aff’d*, 658 P.2d 255 (Colo. 1983).

Where a statement was clearly taken in violation of subsection (1)(c), its use is prohibited at trial for impeachment purposes or as substantive evidence. *Rowland v. Ditlow*, 653 P.2d 61 (Colo. App. 1982).

This section makes no distinction between use of a statement for impeachment and for other purposes. *Safeway Stores, Inc. v. Smith*, 658 P.2d 255 (Colo. 1983).

**The right to have statements excluded from evidence under this section is personal to an injured party** and applies only to statements given by the injured party. It may not be applied to exclude the otherwise admissible statement of a third party. *White v. Hansen*, 813 P.2d 750 (Colo. App. 1990), *rev’d on other grounds*, 837 P.2d 1229 (Colo. 1992).

## PART 4

### PRODUCT LIABILITY ACTIONS - GENERAL PROVISIONS

**Cross references:** For limitation of actions against manufacturers, sellers, or lessors, see §§ 13-80-106 and 13-80-107.

**Law reviews:** For article, “The Apportionment of Tort Responsibility”, see 14 *Colo. Law.* 741 (1985); for article, “Torts”, which discusses Tenth Circuit decisions dealing with product liability actions, see 62 *Den. U. L. Rev.* 357 (1985); for article, “Product Liability”, see 16 *Colo. Law.* 474 (1987); for article, “Permanent Solution for Product Liability Crises: Uniform Federal Tort Law Standards”, see 64 *Den. U. L. Rev.* 685 (1988); for article, “Our Product Liability System: An Efficient Solution to a Complex Problem”, see 64 *Den. U. L. Rev.* 703 (1988); for article, “Recovering Asbestos Abatement Costs in Tort Actions”, see 19 *Colo. Law.* 659 (1990); for article, “Strict Product Liability and Comparative Fault in Colorado”, see 19 *Colo. Law.* 2081 (1990); for article, “Preemption of State Tort Claims Under The Medical Device Amendments”, see 24 *Colo. Law.* 2217 (1995).

**13-21-401. Definitions.** As used in this part 4, unless the context otherwise requires:

(1) “Manufacturer” means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller who has actual knowledge of a defect in a product or a seller of a product who creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into his possession and before it is sold to the ultimate user or consumer. The term also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer. A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he did not otherwise specify how the product shall be produced or control, in some significant manner, the manufacturing process of the product and the seller discloses who the actual manufacturer is.

(2) “Product liability action” means any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or

resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product.

(3) "Seller" means any individual or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling or leasing any product for resale, use, or consumption.

**Source:** L. 77: Entire part added, p. 820, § 2, effective July 1.

#### ANNOTATION

**For liability of successor corporations under the Colorado products liability act**, see *Ruiz v. ExCello Corp.*, 653 P.2d 415 (Colo. App. 1982); *Florum v. Elliott Mfg. Co.*, 629 F. Supp. 1145 (D. Colo. 1986), *aff'd* in part and *rev'd* in part, 867 F.2d 570 (10th Cir.), *reh'g* denied, 879 F.2d 801 (10th Cir. 1989).

**By negative implication, the statute allows a seller who places a private label on a product without disclosing the actual manufacturer to be held liable as a manufacturer.** *Yoder v. Honeywell, Inc.*, 104 F.3d 1215 (10th Cir.), *cert. denied*, 522 U.S. 812, 118 S. Ct. 55, 139 L. Ed. 2d 19 (1997); *Long v. United States Brass Corp.*, 333 F. Supp. 2d 999 (D. Colo. 2004).

**To hold a seller liable as a manufacturer**, the plaintiff must prove that the seller had both

actual knowledge of the design and use of the final product and actual knowledge that the final product was unreasonably dangerous without a warning. *Bond v. E.I. Du Pont De Nemours and Co.*, 868 P.2d 1114 (Colo. App. 1993).

**Liability for injuries caused by a product will not be imputed to a corporation that provides the trademark but has no role in the manufacturing process or the sale of the product.** *Yoder v. Honeywell, Inc.*, 900 F. Supp. 240 (D. Colo. 1995), *aff'd*, 104 F.3d 1215 (10th Cir.), *cert. denied*, 522 U.S. 812, 118 S. Ct. 55, 139 L. Ed. 2d 19 (1997).

**Applied** in *Roberts v. May*, 41 Colo. App. 82, 583 P.2d 305 (1978); *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168 (Colo. 1987); *Rice v. Armstrong World Indus., Inc.*, 653 F. Supp. 763 (D. Colo. 1987).

**13-21-402. Innocent seller.** (1) No product liability action shall be commenced or maintained against any seller of a product unless said seller is also the manufacturer of said product or the manufacturer of the part thereof giving rise to the product liability action. Nothing in this part 4 shall be construed to limit any other action from being brought against any seller of a product.

(2) If jurisdiction cannot be obtained over a particular manufacturer of a product or a part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed, for the purposes of this section, the manufacturer of the product.

**Source:** L. 77: Entire part added, p. 820, § 2, effective July 1. L. 2003: (1) amended, p. 1289, § 1, effective September 1.

#### ANNOTATION

**Law reviews.** For article, "New Statutes Change Civil Litigation in Colorado", see 33 Colo. Law. 65 (May 2004).

**Issues under strict liability theory.** Under a strict liability theory, the determination is whether the product is defective, or, if not defective, unreasonably unsafe, and whether, under an objective standard, after weighing the relevant costs and benefits, a warning was required. *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985).

**Claims based upon negligence and breach of implied warranty of merchantability are**

**not based on the doctrine of strict liability in tort**; hence, action could proceed against seller even though the seller was not also the manufacturer. *Wallman v. Kelley*, 976 P.2d 330 (Colo. App. 1998).

**Contract claims that seek only economic loss for a defective product without collateral damage or risk of harm to others do not constitute product liability actions.** With the innocent seller statute, the general assembly intended to insulate sellers who did not manufacture a product from liability for harm caused by the product and not from the commercial obli-



gation to stand behind the merchantability of a product the seller chooses to sell in the public market place. *Carter v. Brighton Ford, Inc.*, 251 P.3d 1179 (Colo. App. 2010).

**Strict liability is limited to claims against manufacture** of an allegedly defective product. *Potthoff v. Alms*, 41 Colo. App. 51, 583 P.2d 309 (1978)(cause of action arose before effective date of section).

**Strict liability on the part of manufacturer of component parts** for injuries resulting from design defects does not equate to absolute liability. *Shaw v. General Motors Corp.*, 727 P.2d 387 (Colo. App. 1986).

**Electricity is a product** for purposes of section 402 of the Restatement (Second) of Torts while the distribution system for electricity is a service. *Smith v. Home Light & Power Co.*, 695 P.2d 788 (Colo. App. 1984) (cause of action arose before effective date of section), *aff'd*, 734 P.2d 1051 (Colo. 1987).

**Defense of misuse available.** *Uptain v. Huntington Lab, Inc.*, 685 P.2d 218 (Colo. App. 1984).

**Generally, living things do not constitute "products"** within the meaning of this section. *Kaplan v. C Lazy U Ranch*, 615 F. Supp. 234 (D. Colo. 1985).

**Lack of a passive restraint system in automobiles held not actionable under unreasonable defect theory of restatement (second) of torts § 402A.** *Kern v. General Motors Corp.*, 724 P.2d 1365 (Colo. App. 1986).

**The absence of leg protection devices was not a defect** that rendered the motorcycle unreasonably dangerous. *Camacho v. Honda Motor Co., Ltd.*, 701 P.2d 628 (Colo. App. 1985), *rev'd* on other grounds, 741 P.2d 1240 (Colo. 1987), *cert. dismissed*, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988).

Nor was the motorcycle in a defective condition unreasonably dangerous because defendants failed to warn the plaintiffs of the risk of harm of driving a motorcycle without crash bars or leg protection devices. *Camacho v. Honda Motor Co., Ltd.*, 701 P.2d 628 (Colo. App. 1985), *rev'd* on other grounds, 741 P.2d 1240 (Colo. 1987), *cert. dismissed*, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988).

**A manufacturer of component parts** may be held strictly liable for injuries as a result of design defects in the component when it is expected to and does reach the consumer without substantial change in condition. *Union Supply Co. v. Pust*, 583 P.2d 276 (1978); *Shaw v. General Motors Corp.*, 727 P.2d 387 (Colo. App. 1986).

Dealership which sold truck that injured plaintiff was not a manufacturer and could not be held strictly liable for alleged defective and unreasonably dangerous condition in truck. *Shaw v. General Motors Corp.*, 727 P.2d 387 (Colo. App. 1986).

The analysis for determining the liability of a manufacturer of component parts rests on whether the component parts or raw materials were unreasonably dangerous as a result of a failure to warn or other design defect existing at the time of delivery. *Bond v. E.I. Du Pont De Nemours and Co.*, 868 P.2d 1114 (Colo. App. 1993).

**For liability of successor corporations under the Colorado products liability act**, see *Ruiz v. ExCello Corp.*, 653 P.2d 415 (Colo. App. 1982); *Florum v. Elliott Mfg. Co.*, 629 F. Supp. 1145 (D. Colo. 1986), *aff'd* in part and *rev'd* in part, 867 F.2d 570 (10th Cir.), *reh'g denied*, 879 F.2d 801 (10th Cir. 1989).

The Colorado Products Liability Act does not address the liability of successor manufacturers or corporations in relation to the product line theory. *Johnston v. Amsted Industries, Inc.*, 830 P.2d 1141 (Colo. App. 1992).

**Product-line theory and continuity of enterprise theory exceptions to general rule of nonliability of successor corporation not adopted by court decision.** Since such concepts existed prior to enactment of this act, their omission creates a negative inference that the general assembly considered these concepts and chose not to enact them. *Florum v. Elliott Mfg. Co.*, 629 F. Supp. 1145 (D. Colo. 1986), *aff'd* in part and *rev'd* in part, 867 F.2d 570 (10th Cir.), *reh'g denied*, 879 F.2d 801 (10th Cir. 1989); *Johnson v. Amsted Indus., Inc.*, 830 P.2d 1141 (Colo. App. 1992).

**Sale of product to defendant not found.** *Borroel v. Lakeshore, Inc.*, 618 F. Supp. 354 (D. Colo. 1985).

**The crashworthiness doctrine is adopted for this jurisdiction** so that a motor vehicle manufacturer may be liable in negligence or strict liability when the design or manufacturing defect caused or enhanced the injuries sustained. *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240 (Colo. 1987), *cert. dismissed*, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988).

This doctrine requires motorcycle manufacturers to provide reasonable, cost-acceptable safety features to reduce the severity of injuries incurred in foreseeable motorcycle accidents. *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240 (Colo. 1987), *cert. dismissed*, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988).

**Installation of a windshield which includes preparation of component parts** is a "product" prepared for sale to the consumer. *Miller v. Solaglas California, Inc.*, 870 P.2d 559 (Colo. App. 1993).

**Colorado will not hold a successor corporation liable under the product line theory of liability.** The court will not follow the reasoning which holds a corporation liable merely because it is able to pay the plaintiff's damages. *Johnston v. Amsted Industries, Inc.*, 830 P.2d 1141 (Colo. App. 1992).

**The qualified immunity granted to sellers and distributors is an affirmative defense** that must be raised in the defendant's responsive pleading or answer. *Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991).

**Once seller who is not manufacturer invokes the protections of this section**, the burden of proof shifts to the plaintiff to show that jurisdiction could not be obtained over the manufacturer. *Deacon v. Am. Plant Food Corp.*, 782 P.2d 861 (Colo. App. 1989), rev'd on other grounds sub nom. *Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991).

**When claim against manufacturer is barred by expiration of limitation period, not by lack of jurisdiction, claim may not be**

**asserted against seller under subsection (2).** *Halter v. Waco Scaffolding & Equip. Co.*, 797 P.2d 790 (Colo. App. 1990).

**Although the plaintiff's product liability suit against the manufacturer was automatically stayed by the manufacturer's filing of a petition in bankruptcy**, the court retained jurisdiction over the product liability suit. *Bond v. E.I. Du Pont De Nemours & Co.*, 868 P.2d 1114 (Colo. App. 1993).

**Applied in** *Frazier v. Kysor Indus. Corp.*, 43 Colo. App. 287, 607 P.2d 1296 (1979); *Am. Safety Equip. Corp. v. Winkler*, 640 P.2d 216 (Colo. 1982); *Shaw v. General Motors Corp.*, 727 P.2d 387 (Colo. App. 1986).

**13-21-402.5. Product misuse.** A product liability action may not be commenced or maintained against a manufacturer or seller of a product that caused injury, death, or property damage if, at the time the injury, death, or property damage occurred, the product was used in a manner or for a purpose other than that which was intended and which could not reasonably have been expected, and such misuse of the product was a cause of the injury, death, or property damage.

**Source: L. 2003:** Entire section added, p. 1289, § 2, effective September 1.

#### ANNOTATION

**Law reviews.** For article, "New Statutes Change Civil Litigation in Colorado", see 33 *Colo. Law.* 65 (May 2004).

**13-21-403. Presumptions.** (1) In any product liability action, it shall be rebuttably presumed that the product which caused the injury, death, or property damage was not defective and that the manufacturer or seller thereof was not negligent if the product:

(a) Prior to sale by the manufacturer, conformed to the state of the art, as distinguished from industry standards, applicable to such product in existence at the time of sale; or

(b) Complied with, at the time of sale by the manufacturer, any applicable code, standard, or regulation adopted or promulgated by the United States or by this state, or by any agency of the United States or of this state.

(2) In like manner, noncompliance with a government code, standard, or regulation existing and in effect at the time of sale of the product by the manufacturer which contributed to the claim or injury shall create a rebuttable presumption that the product was defective or negligently manufactured.

(3) Ten years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective and that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate.

(4) In a product liability action in which the court determines by a preponderance of the evidence that the necessary facts giving rise to a presumption have been established, the court shall instruct the jury concerning the presumption.

**Source: L. 77:** Entire part added, p. 820, § 2, effective July 1. **L. 2003:** (4) added, p. 1289, § 3, effective September 1.

#### ANNOTATION

**Law reviews.** For comment, "Liability Without Fault and the AIDS Plague Compel a New

Approach to Cases of Transfusion-Transmitted Disease", see 61 *U. Colo. L. Rev.* 81 (1990). For



article, "New Statutes Change Civil Litigation in Colorado", see 33 Colo. Law. 65 (May 2004).

**Presumption as to "unavoidably unsafe" product.** The presumption in subsection (1)(a) does not apply in the case of a product which is claimed to be unavoidably unsafe. *Belle Bonfils Mem. Blood Bank v. Hansen*, 665 P.2d 118 (Colo. 1983).

**Evidence showing compliance with applicable statutes and regulations** may be controverted by evidence sufficient to warrant a reasonable inference of noncompliance (evidence of lack of odorization of propane gas). *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579 (Colo. 1984) (cause of action arose before effective date of section).

**Subsection (3) presumption inapplicable within 10 years of first sale.** An injury complained of must have occurred within 10 years of the date the product was first sold for use or consumption, otherwise the rebuttable presumption in subsection (3) will be applicable. *Fraleay v. Am. Cyanamid Co.*, 570 F. Supp. 497 (D. Colo. 1983).

The ten-year period runs from the sale of the individual product or item which causes the personal injury, death, or property damage, not from the first sale of the particular model to the public. *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985).

For the purposes of subsection (3), the date that "a product is first sold for use or consumption" refers to the time when a product line of a particular design is first sold to the public and not the date on which the particular product was sold. *Patterson v. Magna Am. Corporation*, 754 P.2d 1385 (Colo. App. 1988) (holding contrary to *Downing v. Overhead Door Corp.*, annotated above).

**Implicit in subsection (3) is assumption that no other strict liability claims have been established against product** during the ten-year period. *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986).

**Error to instruct jury concerning the presumption.** Where the evidence demonstrated only that the manufacturer began manufacturing the model of garage opener involved in the incident in October, 1967, and that by its serial number, the product in this case was allegedly manufactured in September, 1968, the jury was without sufficient evidence reasonably to conclude by a preponderance of the evidence, that the basic facts giving rise to the presumption existed. *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985).

**This statute inapplicable to suit of subrogee** since subrogor's cause of action accrued

before the effective date of the statute. *Union Insurance Co. v. RCA Corp.*, 724 P.2d 80 (Colo. App. 1986).

**Presumption may be rebutted by a preponderance of the evidence to the contrary.** Based upon language in *Hawkinson v. A.H. Robins Co., Inc.* (595 F. Supp. 1290 (D. Colo. 1984)) and *Union Ins. Co. v. RCA*, (724 P.2d 80 (Colo. App. 1986)), the trial court's application of the preponderance of the evidence standard was the proper standard to use when rebutting a presumption under this section. *Tafoya v. Sears Roebuck and Co.*, 884 F.2d 1330 (10th Cir. 1989).

**Expert testimony showing compliance with federal standards is admissible** to show that the product is not defective. *States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990).

**Instruction not warranted.** Where plaintiff has presented sufficient evidence to defeat a motion for a directed verdict, he has necessarily rebutted the presumption of subsection (3), and there is no reason for judge to issue instruction. *Matz v. Mile Hi Concrete, Inc.*, 819 P.2d 530 (Colo. App. 1991), aff'd in part and rev'd in part on other grounds, 842 P.2d 198 (Colo. 1992) (decided prior to 2003 amendment); *Perlmutter v. U.S. Gypsum Co.*, 4 F.3d 864 (10th Cir. 1993) (decided prior to 2003 amendment).

**It was error to instruct the jury regarding the statutory presumption** where warnings regarding concrete had been given within the last ten years, there was testimony that concrete had caused injuries within the last ten years, and there had been lawsuits during the last ten years alleging that concrete was unreasonably dangerous without warnings. *Matz v. Mile Hi Concrete, Inc.*, 819 P.2d 530 (Colo. App. 1991), aff'd in part and rev'd in part on other grounds, 842 P.2d 198 (Colo. 1992) (decided prior to 2003 amendment).

**Once a showing by a preponderance has been made concerning the facts giving rise to subsection (3)'s presumption, an instruction regarding the presumption must be given.** *Kokins v. Teleflex, Inc.*, 621 F.3d 1290 (10th Cir. 2010).

The presumption in subsection (3) is to be considered by the jury along with traditional forms of evidence, so long as the trial court determines by a preponderance of the evidence that the necessary facts giving rise to the presumption have been established. *Kokins v. Teleflex, Inc.*, 621 F.3d 1290 (10th Cir. 2010).

**Applied in** *Welch v. F.R. Stokes, Inc.*, 555 F. Supp. 1054 (D. Colo. 1983); *Uptain v. Huntington Lab, Inc.*, 685 P.2d 218 (Colo. App. 1984); *Hawkinson v. A.H. Robins Co., Inc.*, 595 F. Supp. 1290 (D. Colo. 1984).

**13-21-404. Inadmissible evidence.** In any product liability action, evidence of any scientific advancements in technical or other knowledge or techniques, or in design theory or philosophy, or in manufacturing or testing knowledge, techniques, or processes, or in

labeling, warnings of risks or hazards, or instructions for the use of such product, where such advancements were discovered subsequent to the time the product in issue was sold by the manufacturer, shall not be admissible for any purpose other than to show a duty to warn.

**Source:** L. 77: Entire part added, p. 821, § 2, effective July 1.

#### ANNOTATION

**Duty to warn.** After a product involving human safety has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy such defects, or if a complete remedy is not feasible, to give users adequate warnings and instructions concerning methods for minimizing danger. *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985).

**Evidence of preaccident warning.** Evidence that the defendant prepared and distributed warnings regarding the product prior to the accident is admissible to show that the defendant had breached its duty to warn, as such evidence is probative of defendant's preaccident knowledge of the danger inherent in the product, and the feasibility of giving a warning to make the product less dangerous. *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985).

**Evidence of postaccident design change admissible.** Since a postaccident design change may bear directly on the issue of feasible alternatives to the defective design, evidence of such a change may be admitted. *Roberts v. May*, 41

Colo. App. 82, 583 P.2d 305 (1978) (cause of action arose before effective date of section).

**Limitation on evidence of subsequent remedial measures applicable** in diversity-based action and controls the application of Fed. Rule of Evid. 407 but not in this case since cause of action arose before effective date of section. *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917 (1984), cert. denied, 469 U.S. 853, 105 S. Ct. 176, 83 L. Ed.2d 110 (1984).

**Evidence of alternative concepts implemented later that were known as possible at time of manufacture is admissible under this section.** *Meller v. Heil Co.*, 745 F.2d 1297 (10th Cir. 1984), cert. denied, 467 U.S. 1206, 104 S. Ct. 2390, 81 L. Ed.2d 347 (1984).

**Scientific advancements construed as new discoveries after original construction.** *Meller v. Heil Co.*, 745 F.2d 1297 (10th Cir. 1984), cert. denied, 467 U.S. 1206, 104 S. Ct. 2390, 81 L. Ed.2d 347 (1984).

**For court's refusal to apply this section to new warning label**, see *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986).

#### 13-21-405. Report to general assembly. (Repealed)

**Source:** L. 77: Entire part added, p. 821, § 2, effective July 1. L. 92: Entire section repealed, p. 1613, § 168, effective May 20.

**13-21-406. Comparative fault as measure of damages.** (1) In any product liability action, the fault of the person suffering the harm, as well as the fault of all others who are parties to the action for causing the harm, shall be compared by the trier of fact in accordance with this section. The fault of the person suffering the harm shall not bar such person, or a party bringing an action on behalf of such a person, or his estate, or his heirs from recovering damages, but the award of damages to such person or the party bringing the action shall be diminished in proportion to the amount of causal fault attributed to the person suffering the harm. If any party is claiming damages for a decedent's wrongful death, the fault of the decedent, if any, shall be imputed to such party.

(2) Where comparative fault in any such action is an issue, the jury shall return special verdicts, or, in the absence of a jury, the court shall make special findings determining the percentage of fault attributable to each of the persons to whom some fault is attributed and determining the total amount of damages sustained by each of the claimants. The entry of judgment shall be made by the court, and no general verdict shall be returned by the jury.

(3) Repealed.

(4) The provisions of section 13-21-111 do not apply to any product liability action.

**Source:** L. 81: Entire section added, p. 885, § 1, effective July 1; (3) amended, p. 2030, § 42, effective July 14. L. 86: (3) repealed, p. 682, § 6, effective July 1.



## ANNOTATION

**Law reviews.** For comment, "Multiple Defendants in Negligence Actions: Mountain Mobile Mix, Inc. v. Gifford", see 56 U. Colo. L. Rev. 303 (1985). For article, "Application of the Pro Rata Liability, Comparative Negligence and Contribution Statutes", see 23 Colo. Law. 1717 (1994). For article, "Overview of Comparative Fault", see 29 Colo. Law. 95 (July 2000).

**This section does not apply to the issue of liability;** it merely permits the jury to consider fault in arriving at the damage figure. *Welch v. F.R. Stokes, Inc.*, 555 F. Supp. 1054 (D. Colo. 1983); *Perlmutter v. U.S. Gypsum Co.*, 4 F.3d 864 (10th Cir. 1993).

**If product is defective, and both the product and the injured party's conduct contributed to the injury,** then the injured party's recovery must be reduced by a percentage representing the amount of fault attributable to his own conduct. *States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990); *Armentrout v. FMC Corp.*, 819 P.2d 522 (Colo. App. 1991).

If the injured party's misuse of the product is the sole cause of damages, and the alleged defect was not a cause thereof, then the injured party cannot recover under strict liability theory. *States v. R.D. Werner Co.*, 799 P.2d 427 (Colo.

App. 1990); *Armentrout v. FMC Corp.*, 819 P.2d 522 (Colo. App. 1991).

**The word "fault",** although not defined, is not restricted to assumption of risk and/or product misuse but is to be construed as a general term encompassing a broad range of culpable behavior including, but not limited, to negligence. *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470 (10th Cir. 1990); *Carter v. Unit Rig & Equipment Co.*, 908 F.2d 1483 (10th Cir. 1990); *Miller v. Solaglas California, Inc.*, 870 P.2d 559 (Colo. App. 1993); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996).

**Manufacturer was not entitled to a jury instruction on comparative fault.** Where instructions regarding use of paint product were contained only in marketing materials intended for architects and designers, and were not printed on the product itself, there was no evidence that the consumer of the product knew of its limitations and no jury instruction was warranted. *Perlmutter v. U.S. Gypsum Co.*, 4 F.3d 864 (10th Cir. 1993).

**Applied** in *Mountain Mobile Mix, Inc. v. Gifford*, 660 P.2d 883 (Colo. 1983); *Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056 (Colo. 1983).

## PART 5

## PRODUCT LIABILITY ACTIONS - FIREARMS AND AMMUNITION

**13-21-501. Legislative declaration.** (1) The general assembly hereby declares that it shall be the policy in this state that product liability for injury, damage, or death caused by the discharge of a firearm or ammunition shall be based only upon an actual defect in the design or manufacture of such firearm or ammunition and not upon the inherent potential of a firearm or ammunition to cause injury, damage, or death when discharged.

(2) The general assembly further finds that it shall be the policy of this state that a civil action in tort for any remedy arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm or ammunition shall be based only upon an actual defect in the design or manufacture of such firearm or ammunition or upon the commission of a violation of a state or federal statute or regulation and not upon any other theory of liability. The general assembly also finds that under no theory shall a firearms or an ammunition manufacturer, importer, or dealer be held liable for the actions of another person.

**Source:** L. 86: Entire part added, p. 689, § 1, effective May 12. L. 2000: Entire section amended, p. 1059, § 2, effective May 26.

**13-21-502. "Product liability action" - definition.** As used in this part 5, unless the context otherwise requires, "product liability action" means a claim for damages brought against the manufacturer, distributor, importer, or seller of firearms or ammunition alleging a defect in the design or manufacture of a firearm or ammunition.

**Source:** L. 86: Entire part added, p. 689, § 1, effective May 12.

**13-21-503. Determination of defect - burden of proof.** (1) In a product liability action, whether a firearm or ammunition shall be deemed defective in design shall not be

based upon its potential to cause injury, damage, or death when discharged.

(2) The burden shall be on the plaintiff to prove, in addition to any other elements required to be proven:

(a) In a product liability action alleging a design defect, that the actual design was defective and that such defective design was the proximate cause of the injury, damage, or death;

(b) In a product liability action alleging a defect in manufacture, that the firearm or ammunition was manufactured at variance from its design and that such defective manufacture was the proximate cause of the injury, damage, or death.

(3) The inherent potential of a firearm or ammunition to cause injury, damage, or death when discharged shall not be a basis for a finding that the product is defective in design or manufacture.

**Source:** L. 86: Entire part added, p. 689, § 1, effective May 12.

**13-21-504. Proximate cause.** (1) In a product liability action, the actual discharge of a firearm or ammunition shall be the proximate cause of injury, damage, or death resulting from the use of such product and not the inherent capability of the product to cause injury, damage, or death.

(2) The manufacturer's, importer's, or distributor's placement of a firearm or ammunition in the stream of commerce, even if such placement is found to be foreseeable, shall not be conduct deemed sufficient to constitute the proximate cause of injury, damage, or death resulting from a third party's use of the product.

(3) In a product liability action concerning the accidental discharge of a firearm, the manufacturer's, importer's, or distributor's placement of the product in the stream of commerce shall not be conduct deemed sufficient to constitute proximate cause, even if accidental discharge is found to be foreseeable.

(4) In addition to any limitation of an action set forth in section 13-80-119, in a product liability action brought by the criminal, it shall be an absolute defense that the injury, damage, or death immediately resulted from the use of the firearm or ammunition during the commission of the criminal act which is a felony or a class 1 or class 2 misdemeanor.

**Source:** L. 86: Entire part added, p. 689, § 1, effective May 12. L. 93: (4) amended, p. 465, § 2, effective July 1.

**13-21-504.5. Limitations on actions - award of fees.** (1) A person or other public or private entity may not bring an action in tort, other than a product liability action, against a firearms or ammunition manufacturer, importer, or dealer for any remedy arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm or ammunition.

(2) In no type of action shall a firearms or ammunition manufacturer, importer, or dealer be held liable as a third party for the actions of another person.

(3) The court, upon the filing of a motion to dismiss pursuant to rule 12 (b) of the Colorado rules of civil procedure, shall dismiss any action brought against a firearms or ammunition manufacturer, importer, or dealer that the court determines is prohibited under subsection (1) or (2) of this section. Upon dismissal pursuant to this subsection (3), the court shall award reasonable attorney fees, in addition to costs, to each defendant named in the action.

(4) Notwithstanding the provisions of subsection (1) of this section, a firearms or ammunition manufacturer, importer, or dealer may be sued in tort for any damages proximately caused by an act of the manufacturer, importer, or dealer in violation of a state or federal statute or regulation. In any action brought pursuant to the provisions of this subsection (4), the plaintiff shall have the burden of proving by clear and convincing evidence that the defendant violated the state or federal statute or regulation.

**Source:** L. 2000: Entire section added, p. 1058, § 1, effective May 26.



**13-21-505. Applicability of this part 5.** Nothing contained in this part 5 shall be construed to bar recovery where the plaintiff proves that the proximate cause of the injury, damage, or death was a firearm or ammunition which contained a defect in manufacture causing it to be at variance from its design or which was designed so that it did not function in the manner reasonably expected by the ordinary consumer of such product.

**Source: L. 86:** Entire part added, p. 690, § 1, effective May 12.

#### PART 6

### LIABILITY FOR ELECTRONIC COMPUTING DEVICE FAILURES ASSOCIATED WITH THE YEAR 2000 DATE CHANGE

#### **13-21-601 to 13-21-604. (Repealed)**

**Source: L. 2011:** Entire part repealed, (HB 11-1303), ch. 264, p. 1152, § 18, effective August 10.

**Editor's note:** This part 6 was added in 1999 and was not amended prior to its repeal in 2011. For the text of this part 6 prior to 2011, consult the 2010 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

#### PART 7

### YEAR 2000 CITIZENS' PROTECTION ACT

#### **13-21-701 to 13-21-705. (Repealed)**

**Editor's note:** (1) This part 7 was added in 1999 and was not amended prior to its repeal in 2006. For the text of this part 7 prior to 2006, consult the 2005 Colorado Revised Statutes.

(2) Section 13-21-705 provided for the repeal of this part 7, effective December 31, 2006. (See L. 99, p. 632.)

#### PART 8

### DRUG DEALER LIABILITY ACT

**13-21-801. Short title.** This part 8 shall be known and may be cited as the "Drug Dealer Liability Act".

**Source: L. 99:** Entire part added, p. 1261, § 1, effective June 2.

**13-21-802. Legislative declaration.** (1) The general assembly hereby declares that the purpose of this part 8 is:

(a) To provide a civil remedy for damages to persons in this state injured as a result of the use of an illegal drug;

(b) To shift, to the extent possible, the cost of damage caused by the market for illegal drugs in the state to those who illegally profit from that market; and

(c) To deter those who have not yet entered into the distribution market for illegal drugs by establishing the prospect of substantial monetary loss.

**Source: L. 99:** Entire part added, p. 1261, § 1, effective June 2.

**13-21-803. Definitions.** As used in this part 8, unless the context otherwise requires:

(1) "Illegal drug" means a controlled substance as defined in section 18-18-102 (5), C.R.S.

(2) "Individual illegal drug user" means the individual whose use of a specified illegal drug is the basis of an action brought under this part 8.

(3) "Participate in the marketing of illegal drugs" means to transport, import into this state, sell, possess with the intent to sell, furnish, administer, or give away, import into this state, sell, furnish, administer, or give away an illegal drug. "Participate in the marketing of illegal drugs" does not include the purchase or receipt of an illegal drug for personal use.

(4) "Period of illegal drug use" means, in relation to the individual illegal drug user, the period of time from the individual's first use of a specified illegal drug to the accrual of the cause of action. The period of illegal drug use is presumed to commence two years before the cause of action accrues unless the defendant proves otherwise by clear and convincing evidence.

(5) "Person" means an individual, governmental entity, corporation, firm, trust, partnership, or incorporated or unincorporated association existing under or authorized by the laws of this state, another state, or a foreign country.

(6) "Specified illegal drug" means the type of illegal drug used by an individual illegal drug user whose use is the basis of an action brought under section 13-21-804 (2) (b).

**Source: L. 99:** Entire part added, p. 1261, § 1, effective June 2.

**13-21-804. Damages - persons injured by an individual illegal drug user.** (1) Any one or more of the following persons may bring an action for damages caused by an individual's use of an illegal drug within this state:

- (a) A parent, legal guardian, child, spouse, or sibling of the individual illegal drug user;
- (b) An employer of an individual illegal drug user;
- (c) A medical facility, insurer, governmental entity, employer, or other entity that funded a drug treatment program or employee assistance program for the individual illegal drug user or that otherwise expended money on behalf of the individual illegal drug user or a dependent of the individual illegal drug user; and
- (d) A person injured as a result of the willful, reckless, or negligent actions of an individual illegal drug user.

(2) (a) A person entitled to seek damages under this section may seek damages from one or more of the following:

(I) A person who sold, administered, or furnished, or is in the chain of distribution of, an illegal drug used by the individual illegal drug user;

(II) A person who knowingly participated in the marketing or distribution in the state of Colorado of the specified illegal drug used by an individual illegal drug user during the individual drug user's period of illegal drug use.

(b) Nothing in this section shall be deemed to authorize a suit against an employer of a person described in paragraph (a) of this subsection (2) if the employer had no knowledge of the actions of the person giving rise to the claim under this section.

(3) The standard of proof for establishing liability under this section shall be by clear and convincing evidence.

(4) A person entitled to bring an action under this section may recover all of the following damages:

(a) Economic damages, including but not limited to the cost of treatment and rehabilitation, medical expenses, or any other pecuniary loss proximately caused by an individual's use of an illegal drug;

(b) Noneconomic damages, including but not limited to pain and suffering, disfigurement, loss of enjoyment, loss of companionship and consortium, and other nonpecuniary loss proximately caused by an individual's use of an illegal drug;

(c) Exemplary damages;

(d) Reasonable attorney fees incurred as a result of bringing an action under this section; and

(e) Costs of suit, including but not limited to expenses for expert witnesses and expenses for investigative services to determine the identity of the defendants and the location of any assets of the defendants.

**Source: L. 99:** Entire part added, p. 1262, § 1, effective June 2.



**13-21-805. Nonexclusiveness - exceptions to liability - joinder.** (1) Any cause of action established by this part 8 shall be in addition to and not in lieu of any other cause of action available to a plaintiff.

(2) A person whose possession, use, or distribution of illegal drugs is authorized by law is not liable for damages under this part 8.

(3) A law enforcement officer or agency, the state, or a person acting at the direction of a law enforcement officer or agency or the state is not liable for participating in the marketing of illegal drugs if the participation is in furtherance of an official investigation.

(4) Two or more persons may join together in one action under section 13-21-804 if any portion of the period of illegal drug use of the individual illegal drug user whose actions resulted in the damages to one plaintiff overlaps with the period of illegal drug use of the individual illegal drug users whose actions resulted in the damages to every other plaintiff.

(5) A third party shall not pay damages awarded under this part 8 or provide a defense or money for a defense on behalf of an insured under a contract of insurance or indemnification.

**Source: L. 99:** Entire part added, p. 1263, § 1, effective June 2.

**13-21-806. Comparative negligence.** (1) An action under this part 8 is governed by the principles of comparative negligence.

(2) The burden of proving the comparative negligence of the plaintiff shall be on the defendant by clear and convincing evidence.

**Source: L. 99:** Entire part added, p. 1264, § 1, effective June 2.

**13-21-807. Contribution among and recovery from multiple defendants.** Notwithstanding the provisions of section 13-50.5-102 (3), a person subject to liability under this part 8 has a right of contribution against any other person subject to liability under this part 8. Contribution may be enforced either in the original action or by a separate action brought for that purpose. A plaintiff may seek recovery against a person whom a defendant has asserted a right of contribution in accordance with this part 8 and other laws.

**Source: L. 99:** Entire part added, p. 1264, § 1, effective June 2.

**13-21-808. Effect of criminal drug conviction.** (1) (a) A person against whom recovery is sought is estopped from denying participation in the marketing of illegal drugs if the person has a criminal conviction based on the same circumstances that are the basis for the claim for damages. Said conviction must be for other than mere possession of the specified illegal drug:

(I) That is a felony under the "Comprehensive Drug Abuse Prevention and Control Act of 1970", 21 U.S.C. sec. 801, et seq.;

(II) Under section 18-18-405 or 18-18-406, C.R.S.; or

(III) That is a felony related to participation in the marketing of illegal drugs under the laws of another state.

(b) Such a conviction is also prima facie evidence of the person's participation in the marketing of illegal drugs during the two years preceding the date of an act giving rise to a conviction.

(2) The absence of a conviction of a person against whom recovery is sought does not bar an action against that person.

**Source: L. 99:** Entire part added, p. 1264, § 1, effective June 2.

**13-21-809. Prejudgment attachment and execution on judgments.** (1) (a) Except as provided in subsection (3) of this section, a plaintiff under this part 8 may request an ex parte, prejudgment order of attachment under rule 102 of the Colorado rules of civil procedure against all of the assets of a defendant sufficient to satisfy a potential award. If

attachment is issued, a defendant is entitled to an immediate hearing. The attachment may be removed if the defendant demonstrates that the assets will be available for a potential award or if the defendant posts a bond sufficient to cover a potential award.

(b) Prior to the payment of any judgment awarded pursuant to this part 8, payment shall first be made to satisfy any order or judgment entered against the defendant in a criminal proceeding for restitution, including any contributions to a crime victim compensation fund pursuant to article 4.1 of title 24, C.R.S., or to a victims and witnesses assistance and law enforcement fund pursuant to article 4.2 of title 24, C.R.S.

(2) A person against whom a judgment has been rendered under this part 8 is not eligible to exempt any property, of whatever kind, from process to levy or process to execute on the judgment.

(3) Any assets sought to satisfy a judgment under this part 8 that have been named in a forfeiture action pending on the date that the attachment under subsection (1) of this section is sought or have been seized for forfeiture by any state or federal agency may not be attached or used to satisfy a judgment under this part 8 unless and until the assets have been released following conclusion of the forfeiture action or released by the agency that seized the assets.

**Source: L. 99:** Entire part added, p. 1265, § 1, effective June 2.

**13-21-810. Statute of limitations.** (1) Except as otherwise provided by this section, a claim under this part 8 shall not be brought more than four years after the cause of action accrues. A cause of action accrues under this part 8 when a person who may recover has reason to know of the harm from illegal drug use that is the basis of the cause of action and has reason to know that the illegal drug use is the cause of the harm.

(2) For a defendant, the statute of limitations under this section does not expire until six months after the individual potential defendant is convicted of a criminal offense or as otherwise provided by law.

**Source: L. 99:** Entire part added, p. 1265, § 1, effective June 2.

**13-21-811. Stay of action.** On motion by a governmental agency involved in a drug investigation or prosecution, an action brought under this part 8 shall be stayed until the completion of the criminal investigation or prosecution that gave rise to the motion for a stay of the action.

**Source: L. 99:** Entire part added, p. 1265, § 1, effective June 2.

**13-21-812. Nonretroactive.** No cause of action shall accrue based upon any act by a defendant that occurred prior to June 2, 1999.

**Source: L. 99:** Entire part added, p. 1265, § 1, effective June 2.

**13-21-813. Severability.** If any provision of this part 8 or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this part 8 that can be given effect without the invalid provision or application, and to this end the provisions of this part 8 are declared to be severable.

**Source: L. 99:** Entire part added, p. 1266, § 1, effective June 2.



## PART 9

LIABILITY OF HOSPITAL ENTERPRISES FOR ELECTRONIC COMPUTING  
DEVICE FAILURES ASSOCIATED WITH THE YEAR 2000 DATE CHANGE**13-21-901 and 13-21-902. (Repealed)**

**Source: L. 2011:** Entire part repealed, (HB 11-1303), ch. 264, p. 1152, § 19, effective August 10.

**Editor's note:** This part 9 was added in 1999. For amendments to this part 9 prior to its repeal in 2011, consult the 2010 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

## PART 10

LIABILITY FOR COMPUTER DISSEMINATION  
OF INDECENT MATERIAL TO CHILDREN

**13-21-1001. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Child" means a person under eighteen years of age.
- (2) "Sexual contact", "sexual intrusion", and "sexual penetration" shall have the same meanings as set forth in section 18-3-401 (4), (5), and (6), C.R.S., respectively.

**Source: L. 2003:** Entire part added, p. 1879, § 1, effective July 1.

**13-21-1002. Computer dissemination of indecent material to a child - prohibition.**

- (1) A person commits computer dissemination of indecent material to a child when:
  - (a) Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, or sexual conduct, as defined in section 19-1-103 (97), C.R.S., the person willfully uses a computer, computer network, telephone network, data network, or computer system allowing the input, output, examination, or transfer of computer data or computer programs from one computer to another or a text-messaging or instant-messaging system to initiate or engage in such communication with a person he or she believes to be a child; and
  - (b) By means of such communication the person importunes, invites, entices, or induces a person he or she believes to be a child to engage in sexual contact, sexual intrusion, or sexual penetration with the person, or to engage in a sexual performance or sexual conduct, as defined in section 19-1-103 (97), C.R.S., for the person's benefit.
- (2) Computer dissemination of indecent material to a child is prohibited. A person who violates the provisions of subsection (1) of this section shall be subject to a civil penalty as provided in section 13-21-1003.
- (3) It shall not be an affirmative defense in a civil action brought under this part 10 that the person the defendant believed to be a child in fact was not a child.

**Source: L. 2003:** Entire part added, p. 1879, § 1, effective July 1. **L. 2009:** (1)(a) amended, (HB 09-1132), ch. 341, p. 1792, § 1, effective July 1.

**13-21-1003. Civil penalty - action for recovery - distribution of proceeds - attorney fees.** (1) A person who is found in a civil action brought under this part 10 to have committed computer dissemination of indecent material to a child in violation of section 13-21-1002 shall forfeit and pay a civil penalty established pursuant to verdict or judgment.

(2) (a) An action to recover a civil penalty under this part 10 may be brought by any private individual. Venue for the action shall be proper in the district court for the county in which the defendant resides or maintains a principal place of business in this state, or in

the county in which the defendant sent the communication, or in the county in which the recipient received the communication.

(b) The action shall be brought in the name of the person seeking recovery of the civil penalty.

(3) In determining the liability for or the amount of a civil penalty pursuant to this section, the court or jury shall consider the nature, circumstances, and gravity of the alleged violation and the alleged violator's degree of culpability, history of prior violations, criminal convictions, and level of cooperation with any investigation of the alleged violation.

(4) No action may be brought or maintained pursuant to this section without the written consent of the child's parent or guardian, which consent may be withdrawn at any time.

(5) A child alleged to be a victim of computer dissemination of indecent material to a child, or his or her parent or guardian, shall have the right to intervene and assume control of any case brought pursuant to this section.

(6) In a case in which the court awards a civil penalty pursuant to this section, the court shall order the distribution as follows:

(a) In a case brought by a child or other recipient of indecent material as described in subsection 13-21-1002 (1), one hundred percent to the plaintiff;

(b) In a case brought by a plaintiff other than a child or recipient of indecent material, forty percent to the plaintiff and sixty percent to the child or recipient;

(c) In a case initiated by a plaintiff and in which the child's parent or guardian has intervened, eighty percent to the child and twenty percent to the plaintiff.

(7) If a plaintiff is awarded a distribution of the civil penalty pursuant to subsection (6) of this section, the court shall award judgment to the plaintiff for the plaintiff's reasonable attorney fees and costs.

(8) Nothing in this part 10 shall be construed to limit or abrogate:

(a) A criminal action brought to prosecute an act described in the criminal laws of this state;

(b) Any right or cause of action that a person, on the person's own behalf or on behalf of another, may have;

(c) The ability to include in a civil action brought under this part 10 additional claims that are otherwise permitted by law to be brought in a civil action.

**Source: L. 2003:** Entire part added, p. 1880, § 1, effective July 1.

## PART 11

### COMMONSENSE CONSUMPTION ACT

**13-21-1101. Short title.** This part 11 shall be known and may be cited as the "Commonsense Consumption Act".

**Source: L. 2004:** Entire part added, p. 759, § 1, effective May 17.

**13-21-1102. Legislative declaration.** (1) The general assembly hereby finds and declares that:

(a) Obesity and many other conditions that are detrimental to the health and well-being of individuals are frequently long-term manifestations of poor choices that are habitually made by those individuals;

(b) Despite commercial influences, individuals remain ultimately responsible for the choices they make regarding their body; and

(c) Excessive litigation restricts the wide range of choices otherwise available to individuals who consume products responsibly.

**Source: L. 2004:** Entire part added, p. 759, § 1, effective May 17.



**13-21-1103. Definitions.** For the purposes of this part 11, unless the context otherwise requires:

(1) "Claim" means any claim by or on behalf of a natural person and any derivative or other claim arising therefrom that is asserted by or on behalf of any other person.

(2) "Food" means any food or beverage, including chewing gum, intended for human consumption and articles used for components of any such food or beverage.

(3) "Injury caused by or likely to result from long-term consumption" means an injury or condition resulting or likely to result from the cumulative effect of consumption and not from a single instance of consumption.

(4) "Other person" means any individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or private attorney general.

**Source: L. 2004:** Entire part added, p. 760, § 1, effective May 17.

**13-21-1104. Actions against food providers that comply with applicable state and federal laws - exemptions.** (1) Except as otherwise provided in subsection (2) of this section, a manufacturer, packer, distributor, carrier, holder, or seller of a food, or an association of one or more such entities, shall not be subject to civil liability for any claim arising from weight gain, obesity, a health condition associated with weight gain or obesity, or other injury caused by or likely to result from the long-term consumption of the food.

(2) The provisions of subsection (1) of this section shall not preclude civil liability of a manufacturer, packer, distributor, carrier, holder, or seller of a food in cases in which a claim of injury not related to weight gain, obesity, or a health condition associated with weight gain or obesity is based on a material violation of a composition, branding, or labeling standard prescribed by state or federal law and the claimed injury was actual and proximately caused by such violation.

**Source: L. 2004:** Entire part added, p. 760, § 1, effective May 17.

**13-21-1105. Pleading requirements.** (1) In any action permitted under section 13-21-1104 (2), the plaintiff shall state the following with particularity in the complaint:

(a) The statute, regulation, or other provision of state or federal law that was allegedly violated;

(b) The facts that are alleged to constitute a material violation of such law; and

(c) The facts that are alleged to demonstrate that the material violation proximately caused actual injury to the plaintiff.

(2) In addition to the requirements set forth in subsection (1) of this section, the complaint shall state with particularity facts sufficient to support a reasonable inference that the violation was knowing and willful.

(3) For purposes of applying this part 11:

(a) The pleading requirements contained in this section shall be regarded as jurisdictional prerequisites to the bringing of an action and not merely procedural provisions; and

(b) The requirements of actual injury, knowledge and willfulness, and proximate cause as described in this section shall apply to all actions commenced under this part 11 notwithstanding any provision of law of another state that may be inconsistent with or contrary to such requirements.

**Source: L. 2004:** Entire part added, p. 760, § 1, effective May 17.

**13-21-1106. Stay of proceedings pending motion to dismiss.** (1) In any action brought against a manufacturer, packer, distributor, carrier, holder, or seller of a food for claims related to the long-term consumption of food, all proceedings including but not limited to discovery shall be stayed during the pendency of a motion to dismiss unless the court finds for good cause shown on the motion of any party that limited discovery is necessary to preserve evidence or to prevent undue prejudice to the movant.

(2) During a stay of discovery, unless otherwise ordered by the court, any party in the case, including any plaintiff and any defendant that has been properly served with the complaint, shall preserve all documents, data compilations including but not limited to electronically recorded data and electronically stored data, and tangible objects that are in the custody or control of such party and that are relevant to the allegations in the complaint as though a request for production of those documents and things had been served pursuant to court rule.

**Source:** L. 2004: Entire part added, p. 761, § 1, effective May 17.

**CONTRACTS AND AGREEMENTS**

**ARTICLE 22**

**Age of Competence - Arbitration  
- Mediation**

**Cross references:** For capacity of a minor, fifteen years of age or older, to consent to receive mental health services from a physician or hospital, see § 27-65-103; for rights of minors with respect to the purchase of insurance, see § 10-4-104.

**Law reviews:** For survey, “Quality of Dispute Resolution Symposium Issue”, see 66 Den. U.L. Rev. 335 (1989); for article, “New Rules on ADR: Professional Ethics, Shotguns and Fish”, see 21 Colo. Law. 1877 (1992); for article, “Compendium of Colorado ADR Provisions - Part I”, see 24 Colo. Law. 1515 (1994); for article, “Compendium of Colorado ADR Provisions - Part II”, see 23 Colo. Law. 2101 (1994); for article, “Mediation/Arbitration: An ADR Tool”, see 24 Colo. Law. 553 (1995).

PART 1		13-22-203.	Applicability.
AGE OF COMPETENCE - TRANSPLANT AND TRANSFUSION LIMITATION		13-22-204.	Effect of agreement to arbitrate - nonwaivable provisions.
		13-22-205.	Application for judicial relief.
13-22-101.	Competence of persons eight- teen years of age or older.	13-22-206.	Validity of agreement to arbitrate.
13-22-102.	Minors - consent for medical care and treatment for addiction to or use of drugs.	13-22-207.	Motion to compel or stay arbitration.
13-22-103.	Minors - consent for medical, dental, and related care.	13-22-208.	Provisional remedies.
13-22-103.5.	Minors - consent for medical care - pregnancy.	13-22-209.	Initiation of arbitration.
13-22-104.	Transplants and transfusions generally - declaration of policy - limit on liability of minors.	13-22-210.	Consolidation of separate arbitration proceedings.
13-22-105.	Minors - birth control services rendered by physicians.	13-22-211.	Appointment of arbitrator - service as a neutral arbitrator.
13-22-106.	Minors - consent - sexual offense.	13-22-212.	Disclosure by arbitrator.
13-22-107.	Legislative declaration - definitions - children - waiver by parent of prospective negligence claims.	13-22-213.	Action by majority.
PART 2		13-22-214.	Immunity of arbitrator - competency to testify - attorney fees and costs.
		13-22-215.	Arbitration process.
UNIFORM ARBITRATION ACT		13-22-216.	Representation by attorney.
		13-22-217.	Witnesses - subpoenas - depositions - discovery.
13-22-201.	Definitions.	13-22-218.	Judicial enforcement of pre-award ruling by arbitrator.
13-22-202.	Notice.	13-22-219.	Award.
		13-22-220.	Change of award by arbitrator.
		13-22-221.	Remedies - fees and expenses of arbitration proceeding.
		13-22-222.	Confirmation of award.
		13-22-223.	Vacating award.
		13-22-224.	Modification or correction of award.



13-22-225.	Judgment on award - attorney fees and litigation expenses.	13-22-311.	Court referral to mediation - duties of mediator.
13-22-226.	Jurisdiction.	13-22-312.	Applicability.
13-22-227.	Venue.	13-22-313.	Judicial referral to ancillary forms of alternative dispute resolution.
13-22-228.	Appeals.		
13-22-229.	Uniformity of application and construction.		
13-22-230.	Savings clause.		

## PART 4

## PART 3

## MANDATORY ARBITRATION - CIVIL ACTIONS

## DISPUTE RESOLUTION ACT

13-22-401 to

13-22-411. (Repealed)

## PART 5

13-22-301.	Short title.
13-22-302.	Definitions.
13-22-303.	Office of dispute resolution - establishment.
13-22-304.	Director - assistants.
13-22-305.	Mediation services.
13-22-306.	Office of dispute resolution programs - mediators.
13-22-307.	Confidentiality.
13-22-308.	Settlement of disputes.
13-22-309.	Reports. (Repealed)
13-22-310.	Dispute resolution fund - creation - source of funds.

## COLORADO INTERNATIONAL DISPUTE RESOLUTION ACT

13-22-501.	Short title.
13-22-502.	Legislative declaration.
13-22-503.	Definitions.
13-22-504.	Agreement for alternative dispute resolution.
13-22-505.	Applicability.
13-22-506.	Choice of language.
13-22-507.	Immunity.

## PART 1

## AGE OF COMPETENCE - TRANSPLANT AND TRANSFUSION LIMITATION

**Law reviews:** For article "Consent to Treatment and Access to Minors' Medical Records", see 17 Colo. Law. 1323 (1988).

**13-22-101. Competence of persons eighteen years of age or older.** (1) Notwithstanding any other provision of law enacted or any judicial decision made prior to July 1, 1973, every person, otherwise competent, shall be deemed to be of full age at the age of eighteen years or older for the following specific purposes:

(a) To enter into any legal contractual obligation and to be legally bound thereby to the full extent as any other adult person; but such obligation shall not be considered a family expense of the parents of the person who entered into the contract, under section 14-6-110, C.R.S.;

(b) To manage his estate in the same manner as any other adult person. This section shall not apply to custodial property given or held under the terms of the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S., or property held for a protected person under the "Colorado Probate Code", article 14 of title 15, C.R.S., unless otherwise permitted in said articles;

(c) To sue and be sued in any action to the full extent as any other adult person in any of the courts of this state, without the necessity for a guardian ad litem or someone acting in his behalf;

(d) To make decisions in regard to his own body and the body of his issue, whether natural or adopted by such person, to the full extent allowed to any other adult person.

**Source:** L. 73: p. 543, §§ 1, 2. C.R.S. 1963: § 41-4-1. L. 84: (1)(b) amended, p. 394, § 5, effective July 1. L. 91: (1)(b) amended, p. 1442, § 2, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Age Requirements in Colorado: A Guide for Estate Planners", see 34 Colo. Law. 87 (August 2005).

**Legislative intent.** The title of this section and the relevant language of subsection (1)(c) do not suggest that the general assembly intended to change the age of majority for bringing actions on contract but not for personal actions. *McKinney v. Armco Recreational Prods., Inc.*, 419 F. Supp. 464 (D. Colo. 1976).

**The context of § 19-3-602 (3) requires that "minor" be defined as a person 18 years of age or older.** Defining "minor" in § 19-3-602 (3) as a person under the age of 21 would be inconsistent with this section and the definitions of "child" and "adult" in the Colorado Children's Code. *People ex rel. L.A.C.*, 97 P.3d 363 (Colo. App. 2004).

The definition of a "minor" in § 2-4-401 (6) is not applicable in § 19-3-602 (3) because "the context otherwise requires". *People ex rel. L.A.C.*, 97 P.3d 363 (Colo. App. 2004).

**Contract entered into by minor is not void but only voidable** by the minor, and on reaching the age of 18 one is required either to disaffirm a contract made during minority within a reasonable time, or be bound thereby. *Jones v. Dressel*, 40 Colo. App. 459, 582 P.2d 1057 (1978), *aff'd*, 623 P.2d 370 (Colo. 1981).

**As matter of public policy, courts have protected minors from improvident and imprudent contractual commitments** by declaring that the contract of a minor is voidable at the election of the minor after he attains his majority. *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981).

**Parent's duty to support not abrogated.** There is no general mandate in this section or

§§ 19-1-103 (3) or 19-7-101 (2) (now § 19-6-101 (2)) which abrogates the duty of support a parent has toward his minor child until the age of 21 or emancipation. *In re Weaver*, 39 Colo. App. 523, 571 P.2d 307 (1977).

**The "disability" of minority of a plaintiff in an employment discrimination action was prospectively removed** on July 1, 1973, the effective date of this section, at which time he was 20 years old, and not May 5, 1974, when he turned 21. *McKinney v. Armco Recreational Prods., Inc.*, 419 F. Supp. 464 (D. Colo. 1976).

**Industrial commission not a court.** A claimant before the industrial commission does not have to be regarded as an adult in determining benefits because the commission is a tribunal of the executive branch of government. *Casa Bonita Restaurant v. Indus. Comm'n*, 677 P.2d 344 (Colo. App. 1983) (decided prior to the abolition of the industrial commission in 1986).

**Because child was not represented by guardian ad litem in initial paternity proceeding**, she was not a party to the action for purposes of determining whether doctrine of res judicata and collateral estoppel barred a present paternity hearing. *People in Interest of M.C.*, 895 P.2d 1098 (Colo. App. 1994), *aff'd*, 914 P.2d 355 (Colo. 1996).

**There is no conflict between the provisions of this section and § 13-81-103.** This section addresses how a suit may be brought while the other section addresses how the statute of limitations applies to a suit. *Elgin v. Bartlett*, 994 P.2d 411 (Colo. 1999).

**Applied in** *In re A.W.*, 637 P.2d 366 (Colo. 1981); *Hesseltine v. United States*, 538 F. Supp. 1003 (D. Colo. 1982).

**13-22-102. Minors - consent for medical care and treatment for addiction to or use of drugs.** Notwithstanding any other provision of law, any physician licensed to practice in this state, upon consultation by a minor as a patient, with the consent of such minor patient, may examine, prescribe for, and treat such minor patient for addiction to or use of drugs without the consent of or notification to the parent, parents, or legal guardian of such minor patient, or to any other person having custody or decision-making responsibility with respect to the medical care of such minor patient. In any such case the physician or any person acting pursuant to the minor's direction shall incur no civil or criminal liability by reason of having made such examination or prescription or having rendered such treatment, but this immunity shall not apply to any negligent acts or omissions by the physician or any person acting pursuant to the physician's direction.

**Source:** L. 71: p. 493, § 1. C.R.S. 1963: § 41-2-12. L. 98: Entire section amended, p. 1393, § 28, effective February 1, 1999.

**13-22-103. Minors - consent for medical, dental, and related care.** (1) Except as otherwise provided in sections 18-1.3-407 (4.5), 18-6-101, 25-4-402, and 12-34-104, C.R.S., a minor eighteen years of age or older, or a minor fifteen years of age or older who is living separate and apart from his or her parent, parents, or legal guardian, with or without the consent of his or her parent, parents, or legal guardian, and is managing his or her own



financial affairs, regardless of the source of his or her income, or any minor who has contracted a lawful marriage may give consent to organ or tissue donation or the furnishing of hospital, medical, dental, emergency health, and surgical care to himself or herself. Such consent shall not be subject to disaffirmance because of minority, and, when such consent is given, said minor shall have the same rights, powers, and obligations as if he or she had obtained majority. Consent to organ or tissue donation may be revoked pursuant to section 12-34-106, C.R.S.

(2) The consent of the parent, parents, or legal guardian of a minor described in subsection (1) of this section shall not be necessary in order to authorize organ or tissue donation or hospital, medical, dental, emergency health, or surgical care, and no hospital, physician, surgeon, dentist, trained emergency health care provider, or agent or employee thereof who, in good faith, relies on such a minor's consent shall be liable for civil damages for failure to secure the consent of such a minor's parent, parents, or legal guardian prior to rendering such care. The parent, parents, or legal guardian of a minor described in subsection (1) of this section shall not be liable to pay the charges for the care provided the minor on said minor's consent, unless said parent, parents, or legal guardian agrees to be so liable.

(3) In addition to the authority granted in section 25-4-1704 (2.5), C.R.S., any parent, including a parent who is a minor, may request and consent to organ or tissue donation of his or her child or the furnishing of hospital, medical, dental, emergency health, and surgical care to his or her child or ward. The consent of a minor parent shall not be subject to disaffirmance because of minority, and, when such consent is given, said minor parent has the same rights, powers, and obligations as if he or she were of legal age.

**Source:** L. 71: p. 494, § 1. C.R.S. 1963: § 41-2-13. L. 72: p. 594, § 71. L. 79: Entire section amended, p. 616, § 1, effective May 18. L. 95: (1) amended, p. 871, § 2, effective May 24. L. 96: (3) amended, p. 585, § 5, effective July 1. L. 2000: Entire section amended, p. 729, § 6, effective July 1. L. 2002: (1) amended, p. 1487, § 122, effective October 1. L. 2007: (1) amended, p. 796, § 2, effective July 1.

**Cross references:** (1) For provisions relating to testing of minors for human immunodeficiency virus ("HIV") infection, see § 25-4-1405 (6).

(2) For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

#### ANNOTATION

**Law reviews.** For article, "Involuntary Sterilization of Retarded Minors in Colorado", see 11 Colo. Law. 421 (1982).

**Sterilization is special case.** While this section empowers parents to consent to normal

medical procedures on their minor offspring, sterilization is a special case which requires more than parental consent. A court, using uniform criteria, must be the ultimate arbiter. In re A.W., 637 P.2d 366 (Colo. 1981).

**13-22-103.5. Minors - consent for medical care - pregnancy.** Notwithstanding any other provision of law, a pregnant minor may authorize prenatal, delivery, and post-delivery medical care for herself related to the intended live birth of a child.

**Source:** L. 2006: Entire section added, p. 535, § 1, effective April 22.

**13-22-104. Transplants and transfusions generally - declaration of policy - limit on liability of minors.** (1) The availability of scientific knowledge, skills, and materials for the transplantation, injection, transfusion, or transfer of human tissue, organs, blood, or components thereof is important to the health and welfare of the people of this state. Equally important is the duty of those performing such service or providing such materials to exercise due care under the attending circumstances to the end that those receiving health care will benefit and adverse results therefrom will be minimized by the use of available and proven scientific safeguards. The imposition of legal liability without fault upon the persons

and organizations engaged in such scientific procedures may inhibit the exercise of sound medical judgment and restrict the availability of important scientific knowledge, skills, and materials. It is, therefore, the public policy of this state to promote the health and welfare of the people by emphasizing the importance of exercising due care, and by limiting the legal liability arising out of such scientific procedures to instances of negligence or willful misconduct.

(2) The donation, whether for or without valuable consideration, the acquisition, preparation, transplantation, injection, or transfusion of any human tissue, organ, blood, or component thereof for or to a human being is the performance of a medical service and does not, in any way, constitute a sale. No physician, surgeon, hospital, blood bank, tissue bank, or other person or entity who donates, obtains, prepares, transplants, injects, transfuses, or otherwise transfers, or who assists or participates in donating, obtaining, preparing, transplanting, injecting, transfusing, or transferring any tissue, organ, blood, or component thereof from one or more human beings, living or dead, to another living human being for the purpose of therapy or transplantation needed by him for his health or welfare shall be liable for any damages of any kind or description directly or indirectly caused by or resulting from any such activity; except that each such person or entity remains liable for his or its own negligence or willful misconduct.

(3) Any provision of the law to the contrary notwithstanding, any minor who has reached the age of eighteen years may give consent to the donation of his or her blood, organs, or tissue and to the penetration of tissue which is necessary to accomplish such donation. Such consent shall not be subject to disaffirmance because of minority. The consent of the parent, parents, or legal guardian of such a minor shall not be necessary in order to authorize such donation of blood, organs, or tissue and penetration of tissue.

(4) Any provision of the law to the contrary notwithstanding, a minor who is at least sixteen years of age but is less than eighteen years of age may give consent to the donation of his or her blood and to the penetration of tissue that is necessary to accomplish the donation, so long as the minor's parent or legal guardian consents to authorize the donation of the minor's blood and the penetration of tissue. A minor's consent shall not be subject to disaffirmance because of minority.

**Source:** L. 71: p. 491, § 1. C.R.S. 1963: § 41-2-11. L. 2000: (3) amended, p. 730, § 7, effective July 1. L. 2009: (4) added, (HB 09-1023), ch. 27, p. 117, § 1, effective August 5.

**Cross references:** For additional authority, see the "Uniform Anatomical Gift Act", part 1 of article 34 of title 12; for the donation of human tissue, organ, or blood or component thereof under the uniform commercial code, see § 4-2-102.

## ANNOTATION

**Law reviews.** For note, "Medical Products and Services Liability: Public Policy Requires Legislative Innovation and Judicial Restraint", see 53 Den. L. J. 387 (1976). For comment, "Liability Without Fault and the Aids Plague Compel a New Approach to Cases of Transfusion-Transmitted Disease", see 61 U. Colo. L. Rev. 81 (1990).

**This section does not have retroactive application.** Belle Bonfils Mem. Blood Bank v. Hansen, 665 P.2d 118 (Colo. 1983).

**This section affirms that general negligence standards, not product liability standards, shall apply in determining the liability of a blood bank supplying blood tainted with the AIDS virus.** Quintana v. United Blood Servs., 811 P.2d 424 (Colo. App. 1991), aff'd, 827 P.2d 509 (Colo. 1992).

**This section expresses a twofold purpose.** One purpose is to foster the development of medical services and to make those services more available to health care recipients by relieving blood banks from unduly rigid standards of legal liability. The other purpose is to minimize the risk of harm to health care recipients by requiring a blood bank to exercise due care by utilizing "available and proven scientific safeguards" in its operations. United Blood Servs. v. Quintana, 827 P.2d 509 (Colo. 1992).

**The implantation of an embryo is not a sale of a good or product;** rather it constitutes the provision of a medical service pursuant to this section. Am. Econ. Ins. Co. v. Schoolcraft, 551 F. Supp. 2d 1235 (D. Colo. 2007).

**The statutory scheme of this section clearly contemplates that a blood bank's conduct in**



**procuring and processing blood is to be measured by a professional standard of care** because subsection (2) expressly categorizes the acquisition, preparation, and transfer of human blood or its components for medical transfusion as the performance of a medical service. *United Blood Servs. v. Quintana*, 827 P.2d 509 (Colo. 1992).

**The trial court erred in excluding expert testimony** on the unreasonably deficient character of the blood banking community's screening and testing procedures. The trial court, after

correctly ruling that a professional standard of conduct applied, erroneously applied that standard in a manner that effectively precluded the plaintiffs from establishing that the national blood banking community's standard of care was itself unreasonably deficient in not incorporating available safeguards designed to provide substantially more protection against the risk of infecting a transfusion recipient with AIDS. *United Blood Servs. v. Quintana*, 827 P.2d 509 (Colo. 1992).

**13-22-105. Minors - birth control services rendered by physicians.** Except as otherwise provided in part 1 of article 6 of title 18, C.R.S., birth control procedures, supplies, and information may be furnished by physicians licensed under article 36 of title 12, C.R.S., to any minor who is pregnant, or a parent, or married, or who has the consent of his parent or legal guardian, or who has been referred for such services by another physician, a clergyman, a family planning clinic, a school or institution of higher education, or any agency or instrumentality of this state or any subdivision thereof, or who requests and is in need of birth control procedures, supplies, or information.

**Source:** L. 71: p. 639, § 3. C.R.S. 1963: § 91-1-38.

**13-22-106. Minors - consent - sexual offense.** (1) Any physician licensed to practice in this state, upon consultation by a minor as a patient who indicates that he or she was the victim of a sexual offense pursuant to part 4 of article 3 of title 18, C.R.S., with the consent of such minor patient, may perform customary and necessary examinations to obtain evidence of the sexual offense and may prescribe for and treat the patient for any immediate condition caused by the sexual offense.

(2) (a) Prior to examining or treating a minor pursuant to subsection (1) of this section, a physician shall make a reasonable effort to notify the parent, parents, legal guardian, or any other person having custody or decision-making responsibility with respect to the medical care of such minor of the sexual offense.

(b) So long as the minor has consented, the physician may examine and treat the minor as provided for in subsection (1) of this section whether or not the physician has been able to make the notification provided for in paragraph (a) of this subsection (2) and whether or not those notified have given consent, but, if the person having custody or decision-making responsibility with respect to the minor's medical care objects to treatment, then the physician shall proceed under the provisions of part 3 of article 3 of title 19, C.R.S.

(c) Nothing in this section shall be deemed to relieve any person from the requirements of the provisions of part 3 of article 3 of title 19, C.R.S., concerning child abuse.

(3) If a minor is unable to give the consent required by this section by reason of age or mental or physical condition and it appears that the minor has been the victim of a sexual assault, the physician shall not examine or treat the minor as provided in subsection (1) of this section but shall proceed under the provisions of part 3 of article 3 of title 19, C.R.S.

(4) A physician shall incur no civil or criminal liability by reason of having examined or treated a minor pursuant to subsection (1) of this section, but this immunity shall not apply to any negligent acts or omissions by the physician.

**Source:** L. 79: Entire section added, p. 618, § 1, effective May 4. L. 87: (2)(b), (2)(c), and (3) amended, p. 814, § 12, effective October 10. L. 98: (2)(a) and (2)(b) amended, p. 1394, § 29, effective February 1, 1999. L. 2003: (1) and (2)(a) amended, p. 1432, § 23, effective April 29.

**Cross references:** For the exemption from civil liability of physicians and surgeons rendering emergency assistance, see § 13-21-108; for the exemption from civil liability for persons administering tests to persons suspected of driving under the influence of alcohol or drugs, see § 42-4-1301.1 (6)(b).

**13-22-107. Legislative declaration - definitions - children - waiver by parent of prospective negligence claims.** (1) (a) The general assembly hereby finds, determines, and declares it is the public policy of this state that:

(I) Children of this state should have the maximum opportunity to participate in sporting, recreational, educational, and other activities where certain risks may exist;

(II) Public, private, and non-profit entities providing these essential activities to children in Colorado need a measure of protection against lawsuits, and without the measure of protection these entities may be unwilling or unable to provide the activities;

(III) Parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their children. The law has long presumed that parents act in the best interest of their children.

(IV) Parents make conscious choices every day on behalf of their children concerning the risks and benefits of participation in activities that may involve risk;

(V) These are proper parental choices on behalf of children that should not be ignored. So long as the decision is voluntary and informed, the decision should be given the same dignity as decisions regarding schooling, medical treatment, and religious education; and

(VI) It is the intent of the general assembly to encourage the affordability and availability of youth activities in this state by permitting a parent of a child to release a prospective negligence claim of the child against certain persons and entities involved in providing the opportunity to participate in the activities.

(b) The general assembly further declares that the Colorado supreme court's holding in case number 00SC885, 48 P.3d 1229 (Colo. 2002), has not been adopted by the general assembly and does not reflect the intent of the general assembly or the public policy of this state.

(2) As used in this section, unless the context otherwise requires:

(a) "Child" means a person under eighteen years of age.

(b) For purposes of this section only, "parent" means a parent, as defined in section 19-1-103 (82), C.R.S., a person who has guardianship of the person, as defined in section 19-1-103 (60), C.R.S., a person who has legal custody, as defined in section 19-1-103 (73), C.R.S., a legal representative, as defined in section 19-1-103 (73.5), C.R.S., a physical custodian, as defined in section 19-1-103 (84), C.R.S., or a responsible person, as defined in section 19-1-103 (94), C.R.S.

(3) A parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence.

(4) Nothing in this section shall be construed to permit a parent acting on behalf of his or her child to waive the child's prospective claim against a person or entity for a willful and wanton act or omission, a reckless act or omission, or a grossly negligent act or omission.

**Source: L. 2003:** Entire section added, p. 1721, § 1, effective May 14.

#### ANNOTATION

**Law reviews.** For article, "Recreational Waivers in Colorado: Playing at Your Own Risk", see 32 Colo. Law. 77 (August 2003).

**Section may not be applied retrospectively** to cause of action accruing prior to its effective date. Absent express legislative intent to the contrary, a statute is presumed to apply only prospectively. *Pollock v. Highlands Ranch Cmty. Ass'n*, 140 P.3d 351 (Colo. App. 2006).

**Where registration form made no reference to the relevant activity or to waiving personal injury claims, the form is legally insufficient to release plaintiff's personal injury claims.** *Wycoff v. Grace Cmty. Church*, 251 P.3d 1260 (Colo. App. 2010).

**Applied** in *Hamill v. Cheley Colo. Camps, Inc.*, 262 P.3d 945 (Colo. App. 2011).



## PART 2

## UNIFORM ARBITRATION ACT

**Editor's note:** This part 2 was added in 1975. This part 2 was repealed and reenacted in 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 2 prior to 2004, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated.

**Cross references:** For the employment of the procedures in this part 2 to disputes arising under written agreements between employers and employees, see § 8-1-123.

**Law reviews:** For article, "Enforcement of Arbitration Awards in Colorado", see 14 Colo. Law. 535 (1985); for article, "New Avenues for the Domestic Relations Practitioner", see 14 Colo. Law. 998 (1985); for article, "Avoiding Arbitration in Complex Construction Litigation", see 15 Colo. Law. 1808 (1986); for a discussion of Tenth Circuit decisions dealing with arbitration, see 66 Den. U.L. Rev. 675 (1989); for numerous articles dealing with alternative dispute resolution (ADR), see 18 Colo. Law. 828-928 (1989); for articles "The Power of Arbitrators and Courts to Order Discovery in Arbitration" parts I and II, see 25 Colo. Law. 55 (February 1996) and 25 Colo. Law. 35 (March 1996); for article, "Alternative Dispute Resolution in Colorado", see 28 Colo. Law. 67 (September 1999); for article, "Colorado's Revised Uniform Arbitration Act", see 33 Colo. Law. 11 (September 2004); for article, "A Three-Year Survey of Colorado Appellate Decisions on Arbitration Part I", see 34 Colo. Law. 41 (February 2005); for article, "A Three-Year Survey of Colorado Appellate Decisions on Arbitration Part II", see 34 Colo. Law. 47 (March 2005); for article, "Arbitrator and Mediator Disclosure Obligations in Colorado", see 34 Colo. Law. 53 (September 2005); for article, "The State of the Intertwining Doctrine in Colorado", see 36 Colo. Law. 15 (January 2007); for article, "Demise of the Intertwining Doctrine in Colorado", see 37 Colo. Law. 21 (January 2008).

**13-22-201. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) "Court" means a court of competent jurisdiction in this state.

(4) "Knowledge" means actual knowledge.

(5) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**Source: L. 2004:** Entire part R&RE, p. 1718, § 1, effective August 4.

**13-22-202. Notice.** (1) Except as otherwise provided in this part 2, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(2) A person has notice if the person has knowledge of the notice or has received notice.

(3) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

**Source: L. 2004:** Entire part R&RE, p. 1719, § 1, effective August 4.

**13-22-203. Applicability.** (1) Except as otherwise provided in subsection (2) of this section, this part 2 shall govern an agreement to arbitrate made on or after August 4, 2004.

(2) This part 2 shall govern an agreement to arbitrate made before August 4, 2004, if all parties to the agreement or to the arbitration proceeding so agree in a record.

**Source: L. 2004:** Entire part R&RE, p. 1719, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-222 as it existed prior to 2004.

**13-22-204. Effect of agreement to arbitrate - nonwaivable provisions.** (1) Except as otherwise provided in subsections (2) and (3) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or, the parties may vary the effect of, the requirements of this part 2 to the extent permitted by law.

(2) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(a) Waive or agree to vary the effect of the requirements of section 13-22-205 (1), 13-22-206 (1), 13-22-208, 13-22-217 (1) or (2), 13-22-226, or 13-22-228;

(b) Agree to unreasonably restrict the right under section 13-22-209 to notice of the initiation of an arbitration proceeding;

(c) Agree to unreasonably restrict the right under section 13-22-212 to disclosure of any facts by a neutral arbitrator; or

(d) Waive the right under section 13-22-216 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this part 2, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(3) (a) Except as otherwise provided in paragraph (b) of this subsection (3), a party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of this section or section 13-22-203 (1), 13-22-207, 13-22-214, 13-22-218, 13-22-220 (4) or (5), 13-22-222, 13-22-223, 13-22-224, 13-22-225 (1) or (2), or 13-22-229.

(b) If the parties to an agreement to arbitrate or to an arbitration proceeding are a government, governmental subdivision, governmental agency, governmental instrumental-ity, public corporation, or any commercial entity, the parties may waive the requirements of section 13-22-223 except if the award was procured by corruption or fraud.

**Source: L. 2004:** Entire part R&RE, p. 1719, § 1, effective August 4.

**13-22-205. Application for judicial relief.** (1) Except as otherwise provided in section 13-22-228, an application for judicial relief under this part 2 must be made by motion to the court and heard in the manner provided by law or court rule for making and hearing motions.

(2) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this part 2 must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion must be given in the manner provided by law or court rule for serving motions in pending cases.

**Source: L. 2004:** Entire part R&RE, p. 1720, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-218 as it existed prior to 2004.

**13-22-206. Validity of agreement to arbitrate.** (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.



(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

**Source:** L. 2004: Entire part R&RE, p. 1720, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-203 as it existed prior to 2004.

#### ANNOTATION

**Annotator's note.** Since § 13-22-206 is similar to § 13-22-203 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**Colorado's arbitration act encompasses all forms of contract** and contract conditions that expressly or impliedly include a duty to arbitrate. *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006).

**An agreement to arbitrate can take the form of previously executed consents to arbitrate.** Where licensed real estate brokers signed membership agreements consenting to arbitration with other members of the professional organization should disputes arise among themselves, and where those brokers were members of the organization at the time they entered into the alleged referral fee agreement that led to the dispute, their previously executed consents to arbitrate constituted an implied condition of the alleged referral fee agreement enforceable under Colorado's arbitration act. *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006).

**Binding grievance arbitration of public employment agreement disputes.** Binding grievance arbitration of disputes arising under the terms of a public employment collective bargaining agreement is not per se unconstitutional as a delegation of legislative authority. *City & County of Denver v. Denver Firefighters Local 858*, 663 P.2d 1032 (Colo. 1983).

**Parties may expand an original contract for arbitration** by agreeing to submit other matters of dispute to arbitration. *Cabus v. Dairyland Ins. Co.*, 656 P.2d 54 (Colo. App. 1982).

**Once a controversy is submitted, it remains before the arbitrator** until an award is rendered unless the parties mutually agree to withdraw it. *Cabus v. Dairyland Ins. Co.*, 656 P.2d 54 (Colo. App. 1982).

That an issue was voluntarily submitted or submitted by an agreement expanding the original scope of the arbitrator's jurisdiction does not alter the fact that, once agreed upon, it becomes part of a binding contract to arbitrate. *Cabus v. Dairyland Ins. Co.*, 656 P.2d 54 (Colo. App. 1982).

**Parties' agreement for binding Rabbinical arbitration in a legal separation proceeding**

**that was later dismissed** remained valid and applicable to the subsequent dissolution of marriage proceeding between the same parties where the agreement stated that the parties would submit any future issues that might arise relating to the marriage to the "Beth Din" and where the agreement contained no qualifying or limiting language indicating that the parties intended to link the agreement to any particular proceeding. *In re Popack*, 998 P.2d 464 (Colo. App. 2000).

**Arbitration of claim that underlying contract induced by fraud.** Where a party does not contest the validity of the arbitration clause itself, the statutory exception contained in this section does not preclude arbitration of the claim that underlying contract was induced by fraud. *Nat'l Camera, Inc. v. Love*, 644 P.2d 94 (Colo. App. 1982).

**Former § 13-22-204(1) contemplates that the trial court will have the authority to consider one issue: The existence of the agreement to arbitrate.** All other issues, including challenges to the enforceability of the agreement under former § 13-22-203, implicitly are the province of the arbitrator. Furthermore, the trial court's authority is limited to specific challenges to the agreement to arbitrate, not the broader contract containing the arbitration provision. A fraudulent inducement claim, if it is to be considered by the trial court, must be directed specifically to fraud inducing the plaintiff to agree to arbitrate. Broader allegations of fraudulent inducement must be resolved in arbitration. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007) (decided under law in effect prior to the 2004 repeal and reenactment).

**Allegations of fraudulent inducement directed specifically to an arbitration provision in a contract must be decided by a trial court;** allegations of fraudulent inducement directed more broadly to the contract as a whole must be decided by the arbitrator. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007) (decided under law in effect prior to the 2004 repeal and reenactment); *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126 (Colo. 2007).

**Allegation of fraudulent inducement not directed specifically to lease's arbitration provision** is an issue to be decided by the arbitrator and not the trial court. *Ingold v. AIMCO/*

Bluffs, L.L.C. Apartments, 159 P.3d 116 (Colo. 2007) (decided under law in effect prior to the 2004 repeal and reenactment).

Despite the expiration of the contract, an arbitration clause survives as to disputes that arise under the contract. *Shams v. Howard*, 165 P.3d 876 (Colo. App. 2007).

The Uniform Arbitration Act cannot breathe life into an arbitration agreement that the Wage Claim Act deems void. The compensation provisions of an employment contract of a Colorado employee that mandated arbitration of disputes concerning payment of his commission was void as it waived his substantive and procedural rights under the Wage Claim Act. *Lambdin v. District Ct. of Arapahoe County*, 903 P.2d 1126 (Colo. 1995).

For a discussion of whether certain claims were within the scope of an arbitration clause in an employment agreement, see *Austin v. U S West, Inc.*, 926 P.2d 181 (Colo. App. 1996).

Prior to ordering arbitration, the court was required to determine whether the arbitration clause was enforceable and whether the plaintiff had sufficient mental capacity to enter into the contract. The doctrine of separability applies, and the court must resolve any challenge to an arbitration provision before an arbitrator can decide any challenge to the entire contract. However, there is a difference between questions about the contract's validity and whether any agreement was ever concluded, and a mental capacity defense requires the court to make a determination whether an agreement exists. Therefore, the mental capacity defense is exempt from the separability inquiry under the Colorado Uniform Arbitration Act. *Estate of Grimm v. Evans*, 251 P.3d 574 (Colo. App. 2010).

Applied in *Cabs, Inc. v. Delivery Drivers Local 435*, 39 Colo. App. 241, 566 P.2d 1078 (1977).

**13-22-207. Motion to compel or stay arbitration.** (1) On the motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(a) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and

(b) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(2) On the motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is not an agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(3) If the court finds that there is no enforceable agreement, it may not invoke the provisions of subsection (1) or (2) of this section to order the parties to arbitrate.

(4) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or because one or more grounds for the claim have not been established.

(5) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion made under this section shall be filed with that court. Otherwise, a motion made under this section may be filed in any court pursuant to section 13-22-227.

(6) If a party files a motion with the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the ordering court renders a final decision under this section.

(7) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

**Source:** L. 2004: Entire part R&RE, p. 1720, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-204 as it existed prior to 2004.



## ANNOTATION

**Annotator's note.** Since § 13-22-207 is similar to § 13-22-204 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**When arbitration proceedings stayed.** A court is empowered to stay arbitration proceedings upon a showing that there is no agreement to arbitrate; and where it is apparent from the language of the contract that the issue sought to be arbitrated lies clearly beyond the scope of the arbitration clause, a court cannot order arbitration. *Cabs, Inc. v. Delivery Drivers Local 435*, 39 Colo. App. 241, 566 P.2d 1078 (1977).

This section gives the court authority to stay an arbitration only if there is no arbitration agreement or it appears from the arbitration agreement that the claim sought to be arbitrated is beyond the scope of the arbitration clause. *Sopko v. Clear Channel Satellite Servs., Inc.*, 151 P.3d 663 (Colo. App. 2006).

Where, however, there is an agreement to arbitrate and there is a reasonable basis for construing the agreement in support of arbitrability of the claim, the scope of the arbitration agreement must be determined by the arbitrator, not by the court. *Sopko v. Clear Channel Satellite Servs., Inc.*, 151 P.3d 663 (Colo. App. 2006).

**Scope of arbitration to be determined by arbitrator.** Where there is a reasonable basis for construing the agreement in support of arbitrability, the legislative policy underlying the article requires that the scope of the arbitration be determined by the arbitrator. *Cabs, Inc. v. Delivery Drivers Local 435*, 39 Colo. App. 241, 566 P.2d 1078 (1977).

**Order compelling arbitration not appealable.** An order compelling parties to arbitrate is not a final appealable order. *Frontier Materials, Inc. v. City of Boulder*, 663 P.2d 1065 (Colo. App. 1983).

**Uniform Arbitration Act authorizes party to arbitration agreement to apply to district court for order compelling arbitration.** *Thomas v. Farmers Ins. Exch.*, 857 P.2d 532 (Colo. App. 1993).

**Proper procedure to stay action pending arbitration.** A stay of the proceeding preserves plaintiff's right to foreclose on its mechanic's lien if it prevails in arbitration. *Mountain Plains Constructors v. Torrez*, 785 P.2d 928 (Colo. 1990).

**Party's unsuccessful attempt to stay the arbitration of a contract dispute** does not mean that the party is estopped from obtaining clarification of issues which may be arbitrated. *Associated Natural Gas v. Nordic Petro.*, 807 P.2d 1195 (Colo. App. 1990).

**A trial court has limited power to preserve the status quo** even though there is a statutory requirement that a pending civil action be stayed

pending an arbitrator's decision. *Hughley v. Rocky Mountain HMO, Inc.*, 927 P.2d 1325 (Colo. 1996).

**Appealable order.** A denial of a motion to compel arbitration is an appealable order. However, an immediate appeal is permissive and not mandatory. Therefore, an order denying a motion to compel arbitration may also be appealed after final judgment. *Mountain Plains Constructors v. Torrez*, 785 P.2d 928 (Colo. 1990).

**The phrase "proceed to summarily decide the issue" in subsection (1)(b) requires that a trial court considering a fraudulent inducement challenge to an arbitration agreement should begin by considering the undisputed affidavits, pleadings, discovery, and stipulations.** If the material facts are undisputed, trial court can resolve the challenge on the record before it. *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126 (Colo. 2007).

**If, however, the material facts are in dispute, the trial court should proceed expeditiously in holding an evidentiary hearing to consider the disputed facts and resolve the party's challenge to the arbitration agreement.** *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126 (Colo. 2007).

**Parties may enter into an enforceable agreement to arbitrate notwithstanding the absence of their signatures.** Trial court should hold an evidentiary hearing to consider disputed facts and resolve the challenge regarding the existence of the alleged arbitration agreement. *E-21 Eng'g v. Steve Stock & Assocs.*, 252 P.3d 36 (Colo. App. 2010).

**Once the court determines that a valid, enforceable arbitration agreement exists, the court is divested of jurisdiction** over matters submitted to arbitration and the proper procedure is to stay the proceedings until arbitration is completed. An order granting a motion to stay the proceedings is an interlocutory order that is not immediately appealable. *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006).

**Arbitration is a favored means of dispute resolution** and any doubts about the scope of an arbitration clause should be resolved in favor of arbitration. *Gergel v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999); *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006).

**A court may refuse to compel arbitration** upon application by a party showing an agreement to arbitrate, only if there is no agreement to arbitrate or if the issue sought to be arbitrated is clearly beyond the scope of the arbitration provision. *Shorey v. Jefferson County Sch. District No. R-1*, 807 P.2d 1181 (Colo. App. 1990); *Eychner v. Van Vleet*, 870 P.2d 486 (Colo. App. 1993); *Gergel v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999); *Eagle Ridge*

Condo. Ass'n v. Metro. Builders, Inc., 98 P.3d 915 (Colo. App. 2004).

**In resolving a motion to compel arbitration** the court must inquire whether there is a valid agreement to arbitrate between the parties to the action, and whether the issues being disputed are within the scope of that agreement. Eychner v. Van Vleet, 870 P.2d 486 (Colo. App. 1993).

In considering a motion to compel arbitration, the court must first determine whether a valid agreement to arbitrate exists. Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc., 98 P.3d 915 (Colo. App. 2004).

**Intertwining doctrine no longer good law in Colorado.** Claims that are subject to an arbitration agreement must be arbitrated regardless of their joinder with non-arbitrable claims. Claims that are not subject to arbitration should be stayed or proceed separately in litigation based on the discretion of the trial court. Ingold v. AIMCO/Bluffs, L.L.C. Apartments, 159 P.3d 116 (Colo. 2007) (overruling Sandefer v. District Court, 635 P.2d 547 (Colo. 1981)).

**Intertwining doctrine does not prevent a court from ordering arbitration** where all claims to be decided fall within the scope of an arbitration clause. Gergel v. High View Homes, LLC, 996 P.2d 233 (Colo. App. 1999); Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc., 98 P.3d 915 (Colo. App. 2004).

**When facts and issues are intertwined,** if some issues require arbitration and others do not, consideration of the interests of judicial economy, time, and expense leads to the conclusion that all the issues should be resolved by litigation. Atmel Corp. v. Vitesse Semiconductor Corp., 30 P.3d 789 (Colo. App. 2001), overruled in Ingold v. AIMCO/Bluffs, L.L.C. Apartments, 159 P.3d 116 (Colo. 2007); Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc., 98 P.3d 915 (Colo. App. 2004), overruled in Ingold v. AIMCO/Bluffs, L.L.C. Apartments, 159 P.3d 116 (Colo. 2007).

**Determining whether the intertwining doctrine applies** requires determinations as to whether any claims fall under the arbitration provision at issue and whether any nonarbitrable claims are so inextricably intertwined with the arbitrable claims as to prevent severance. Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc., 98 P.3d 915 (Colo. App. 2004), overruled in Ingold v. AIMCO/Bluffs, L.L.C. Apartments, 159 P.3d 116 (Colo. 2007).

**Intertwining doctrine does not prevent a court from ordering arbitration** where all claims to be decided fall within the scope of an arbitration clause. Gergel v. High View Homes, LLC, 996 P.2d 233 (Colo. App. 1999); Eagle

Ridge Condo. Ass'n v. Metro. Builders, Inc., 98 P.3d 915 (Colo. App. 2004).

**The right to compel arbitration is derived from contract.** Unless the intent of the parties to the contract is to bring a nonparty within the scope of an arbitration agreement, one who is not a party to the contract lacks standing to compel, or to be subject to, arbitration. Eychner v. Van Vleet, 870 P.2d 486 (Colo. App. 1993); Parker v. Center for Creative Leadership, 15 P.3d 297 (Colo. App. 2000); Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc., 98 P.3d 915 (Colo. App. 2004).

In determining whether the parties agreed or intended to submit an issue to arbitration, the ordinary principles of contract interpretation apply. Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc., 98 P.3d 915 (Colo. App. 2004).

**In determining the scope of an arbitration clause,** the court must strive to ascertain and give effect to the mutual intent of the parties and must consider the subject matter and purposes to be accomplished by the agreement. Eychner v. Van Vleet, 870 P.2d 486 (Colo. App. 1993); Hughley v. Rocky Mountain HMO, Inc., 910 P.2d 30 (Colo. App. 1995), rev'd on other grounds, 927 P.2d 1325 (Colo. 1996); Parker v. Center for Creative Leadership, 15 P.3d 297 (Colo. App. 2000).

**When arbitration agreement covers interpretation of contract terms,** arbitrator, not court, empowered to decide whether dispute falls within scope of arbitration provision. BRM Constr., Inc. v. Marais Gaylord, L.L.C., 181 P.3d 283 (Colo. App. 2007).

**If a party asserts that the entire contract is illegal,** the court must determine this threshold issue first. R.P.T. v. Innovative Commc'ns, 917 P.2d 340 (Colo. App. 1996).

**Allegations of fraudulent inducement directed specifically to an arbitration provision in a contract must be decided by a trial court;** allegations of fraudulent inducement directed more broadly to the contract as a whole must be decided by the arbitrator. Ingold v. AIMCO/Bluffs, L.L.C. Apartments, 159 P.3d 116 (Colo. 2007) (decided under law in effect prior to the 2004 repeal and reenactment).

**Applied** in Paul Mullins Constr. Co. v. Alspaugh, 628 P.2d 113 (Colo. App. 1980); Weedon v. United States, 509 F. Supp. 1052 (D. Colo. 1981); Sandefer v. District Court, 635 P.2d 547 (Colo. 1981); City & County of Denver v. Denver Firefighters Local 858, 663 P.2d 1032 (Colo. 1983); Lawrence St. Part. v. Lawrence St. Vent., 786 P.2d 508 (Colo. App. 1989); Shorey v. Jefferson County Sch. Dist. R-1, 807 P.2d 1181 (Colo. App. 1990); Lane v. Urgitus, 145 P.3d 672 (Colo. 2006).

**13-22-208. Provisional remedies.** (1) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness



of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(2) After an arbitrator is appointed and is authorized and able to act:

(a) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(b) A party to an arbitration proceeding may request the court to issue an order for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.

(3) A party does not waive a right of arbitration by making a motion under subsection (1) or (2) of this section.

**Source: L. 2004:** Entire part R&RE, p. 1721, § 1, effective August 4.

**13-22-209. Initiation of arbitration.** (1) A person may initiate an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of an agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized by law for the commencement of a civil action. The notice shall describe the nature of the controversy and the remedy sought.

(2) Unless a person objects to the lack of notice or the insufficiency of notice under section 13-22-215 (3) not later than the beginning of the arbitration hearing, a person who appears at the arbitration hearing waives any objection to the lack of notice or insufficiency of notice.

**Source: L. 2004:** Entire part R&RE, p. 1722, § 1, effective August 4.

**13-22-210. Consolidation of separate arbitration proceedings.** (1) Except as otherwise provided in subsection (3) of this section, upon the motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if all parties in the arbitration proceedings consent and:

(a) There are separate agreements to arbitrate or separate arbitration proceedings between or among the same persons or one of the persons is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(b) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(c) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(d) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(2) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(3) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

**Source: L. 2004:** Entire part R&RE, p. 1722, § 1, effective August 4.

**13-22-211. Appointment of arbitrator - service as a neutral arbitrator.** (1) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, the method shall be followed unless the method fails. If the parties have not agreed on a method, or the agreed method fails, or an appointed arbitrator fails to act or is unable to act and a successor has not been appointed, the court, on the motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator appointed pursuant to this subsection

(1) shall have all the powers of an arbitrator designated in an agreement to arbitrate or appointed pursuant to an agreed method.

(2) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator if the agreement requires the arbitrator to be neutral.

**Source: L. 2004:** Entire part R&RE, p. 1722, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-205 as it existed prior to 2004.

**13-22-212. Disclosure by arbitrator.** (1) Before accepting an appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(a) A financial or personal interest in the outcome of the arbitration proceeding; and

(b) A current or previous relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(2) An arbitrator shall have a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator.

(3) If an arbitrator discloses a fact required to be disclosed by subsection (1) or (2) of this section and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under section 13-22-223 (1) (b) for vacating an award made by an arbitrator.

(4) If the arbitrator does not disclose a fact as required by subsection (1) or (2) of this section, upon timely objection by a party, the court may vacate an award under section 13-22-223 (1) (b).

(5) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party shall be presumed to act with evident partiality under section 13-22-223 (1) (b).

(6) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under section 13-22-223 (1) (b).

**Source: L. 2004:** Entire part R&RE, p. 1723, § 1, effective August 4.

**13-22-213. Action by majority.** If there is more than one arbitrator, the powers of an arbitrator shall be exercised by a majority of the arbitrators, except that all of the arbitrators shall conduct the hearing under the provisions of section 13-22-215 (3).

**Source: L. 2004:** Entire part R&RE, p. 1724, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-205 as it existed prior to 2004.

**13-22-214. Immunity of arbitrator - competency to testify - attorney fees and costs.**

(1) An arbitrator or an arbitration organization acting in the capacity of an arbitrator is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity.

(2) The immunity afforded by this section is in addition to, and not in lieu of, or in derogation of, immunity conferred under any other provision of law.



(3) The failure of an arbitrator to make a disclosure required by section 13-22-212 shall not cause any loss of immunity that is granted under this section.

(4) (a) In a judicial proceeding, administrative proceeding, or other similar proceeding, an arbitrator or representative of an arbitration organization shall not be competent to testify and may not be required to produce records as to any statement, conduct, decision, or ruling that occurred during the arbitration proceeding, to the same extent as a judge of a court of this state acting in a judicial capacity.

(b) This subsection (4) shall not apply:

(I) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(II) To a hearing on a motion to vacate an award under section 13-22-223 (1) (a) or (1) (b) if the movant makes a prima facie showing that a ground for vacating the award exists.

(5) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (4) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney fees and reasonable expenses of litigation.

**Source:** L. 2004: Entire part R&RE, p. 1724, § 1, effective August 4.

**13-22-215. Arbitration process.** (1) An arbitrator may conduct an arbitration in a manner that the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator by this part 2 shall include, but not be limited to, the power to hold conferences with the parties to the arbitration proceeding before the hearing and the power to determine the admissibility, relevance, materiality, and weight of any evidence.

(2) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(a) If all interested parties agree; or

(b) Upon request of one or more parties to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(3) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing shall waive the objection. Upon the request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced even if a party who was duly notified of the arbitration proceeding does not appear. The court, on motion, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(4) At a hearing under subsection (3) of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(5) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator shall be appointed in accordance with section 13-22-211 to continue the proceeding and to resolve the controversy.

**Source: L. 2004:** Entire part R&RE, p. 1724, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-207 as it existed prior to 2004.

#### ANNOTATION

**Annotator's note.** Since § 13-22-215 is similar to § 13-22-207 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**Generally, arbitrators are not bound by either substantive or procedural rules of law,** except as required under the terms of the arbitration agreement. *Cabus v. Dairyland Ins. Co.*, 656 P.2d 54 (Colo. App. 1982).

**No absolute right to a hearing under this section if the arbitration agreement does not**

**require a hearing.** Section 10203 (a) of the National Association of Securities Dealers, Inc., code of arbitration procedure does not require an arbitrator to hold a hearing. Therefore, it was within the discretion of the arbitrator whether to hold a hearing. *Carson v. PaineWebber, Inc.*, 62 P.3d 996 (Colo. App. 2002).

**Taking of oath not required.** The taking of an oath prior to commencing deliberations is not required by the hearing procedures set forth in this section. *In re Salter v. Farner*, 653 P.2d 413 (Colo. App. 1982).

**13-22-216. Representation by attorney.** A party to an arbitration proceeding may be represented by an attorney.

**Source: L. 2004:** Entire part R&RE, p. 1725, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-208 as it existed prior to 2004.

**13-22-217. Witnesses - subpoenas - depositions - discovery.** (1) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena issued under this section shall be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or by the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(2) In order to make the proceedings fair, expeditious, and cost effective, upon the request of a party or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for a hearing or who is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(3) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

(4) If an arbitrator permits discovery under subsection (3) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a non-complying party to the extent a court could take such action if the controversy were the subject of a civil action; except that the arbitrator shall not have the power of contempt.

(5) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action.

(6) All provisions of law that compel a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness shall apply to an arbitration proceeding in the same manner as if the controversy were the subject of a civil action.

(7) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this state and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions



determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another state shall be served in the manner provided by law for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action.

**Source: L. 2004:** Entire part R&RE, p. 1725, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-209 as it existed prior to 2004.

**Cross references:** For the Colorado rule of civil procedure concerning subpoenas, see rule 45; for the fees of witnesses, see § 13-33-102.

#### ANNOTATION

**Annotator's note.** Since § 13-22-217 is similar to § 13-22-209 as it existed prior to the 2004 repeal and reenactment of this part 2, a relevant case construing that provision has been included in the annotations to this section.

**This section allows arbitrators to issue subpoenas for the production of documents and**

**other evidence;** therefore there is no merit in the argument that the arbitration clause of a health care contract is unenforceable because it does not provide for discovery. *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249 (Colo. App. 2001).

**13-22-218. Judicial enforcement of pre-award ruling by arbitrator.** If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under section 13-22-219. A prevailing party may make a motion to the court for an expedited order to confirm the award under section 13-22-222, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under section 13-22-223 or 13-22-224.

**Source: L. 2004:** Entire part R&RE, p. 1726, § 1, effective August 4.

**13-22-219. Award.** (1) An arbitrator shall make a record of an award. The record shall be signed or otherwise authenticated by an arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(2) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend the time or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party shall be deemed to have waived any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

**Source: L. 2004:** Entire part R&RE, p. 1727, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-210 as it existed prior to 2004.

#### ANNOTATION

**Annotator's note.** Since § 13-22-219 is similar to § 13-22-210 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**Arbitrator is the final judge of both fact and law.** *Judd Constr. Co. v. Evans Joint Venture*, 642 P.2d 922 (Colo. 1982).

**Arbitration award is tantamount to a judgment.** *Judd Constr. Co. v. Evans Joint Venture*, 642 P.2d 922 (Colo. 1982); *Container Tech. v. J. Gadsden Pty.*, 781 P.2d 119 (Colo. App. 1989); *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo. App. 1996).

**Specific findings of fact not required.** An arbitration award does not need to contain spe-

cific findings of fact if there is no statute or contractual provision in the arbitration agreement which requires such findings. *Ash Apts. v. Martinez*, 656 P.2d 708 (Colo. App. 1982).

**Contractual provisions that give arbitrators authority to resolve disputes concerning the time period in which an award must be made are enforceable.** *Sopko v. Clear Channel Satellite Servs., Inc.*, 151 P.3d 663 (Colo. App. 2006).

**Time requirements for issuance of an arbitration award are directory, not mandatory**

**or jurisdictional.** In the absence of language in an arbitration agreement indicating that “time is of the essence” or that an award issued outside the pertinent time period in an arbitration agreement is void, the party seeking to preclude an award issued outside the time period must make a timely objection and demonstrate prejudice. *Sopko v. Clear Channel Satellite Servs., Inc.*, 151 P.3d 663 (Colo. App. 2006).

**13-22-220. Change of award by arbitrator.** (1) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

- (a) Upon a ground stated in section 13-22-224 (1) (a) or (1) (c);
  - (b) If the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or
  - (c) To clarify the award.
- (2) A motion made under subsection (1) of this section shall be made and notice shall be given to all parties within twenty days after the movant receives notice of the award.
- (3) A party to the arbitration proceeding shall give notice of any objection to the motion within ten days after receipt of the notice.
- (4) If a motion to the court is pending under section 13-22-222, 13-22-223, or 13-22-224, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:
- (a) Upon a ground stated in section 13-22-224 (1) (a) or (1) (c);
  - (b) If the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or
  - (c) To clarify the award.
- (5) An award modified or corrected pursuant to this section is subject to the provisions of sections 13-22-219 (1), 13-22-222, 13-22-223, and 13-22-224.

**Source:** L. 2004: Entire part R&RE, p. 1727, § 1, effective August 4.

**Editor’s note:** This section is similar to former § 13-22-211 as it existed prior to 2004.

## ANNOTATION

**Annotator’s note.** Since § 13-22-220 is similar to § 13-22-211 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**An application for modification of award pursuant to this section tolls the time limits in §§ 13-22-214 and 13-22-215 for seeking review by the court.** *Swan v. Am. Family Mut. Ins. Co.*, 8 P.3d 546 (Colo. App. 2000).

**Amendment or modification of the award by the arbitrator is permitted only under the narrow circumstances listed in this section.** *Applehans v. Farmers Ins. Exch.*, 68 P.3d 594 (Colo. App. 2003); *Rocha v. Fin. Indem. Corp.*, 155 P.3d 602 (Colo. App. 2006).

**“Clarify”, in subsection (1)(a), does not connote a reassessment or redetermination, but rather involves making something clear or understandable.** This does not mean that an arbitrator may reexamine the merits under the

auspices of clarification — merely that an arbitrator’s mistake, ambiguity, or general lack of clarity may require elucidation for the parties and reviewing courts to make sense of an arbitration award. *Sooper Credit Union v. Sholar Group Architects, P.C.*, 113 P.3d 768 (Colo. 2005).

According to former § 13-22-211, an arbitrator may “modify or correct the award . . . for the purpose of clarifying the award”. This unambiguous phrase means that a confusing award may be clarified as required for better understanding. Nowhere does the statute impose an additional requirement that the confusion be evident or apparent strictly on the face of the award. Had the general assembly intended to limit clarification to patently ambiguous awards, it would have said so. *Sooper Credit Union v. Sholar Group Architects, P.C.*, 113 P.3d 768 (Colo. 2005) (decided under law in effect prior to the 2004 repeal and reenactment).



Where an award is confusing because of an error, ambiguity, or general lack of clarity, an arbitrator may modify it to make it clearer and thereby effectuate the arbitrator's intent. The statute does not require that the confusion be evident on the face of the award or patently ambiguous, but an arbitrator may not redetermine the merits when clarifying an award. *Sooper Credit Union v. Sholar Group Architects, P.C.*, 113 P.3d 768 (Colo. 2005).

**Failure to object to an arbitrator's authority to issue a clarification or explanation** of an award precludes raising an objection to the same on appeal. *Osborn v. Packard*, 117 P.3d 77 (Colo. App. 2004) (decided under law in effect prior to 2004 repeal and reenactment).

**If an arbitrator's rulings are ambiguous**, the court should attempt to resolve the ambiguity

from the record whenever possible. If that is not possible, however, the matter must be remanded to the arbitrator for issuance of a modified arbitration award that clarifies the ambiguity. The arbitrator may conduct such further proceedings as he or she deems necessary. *Osborn v. Packard*, 117 P.3d 77 (Colo. App. 2004) (decided under law in effect prior to 2004 repeal and reenactment).

**Arbitrator acted within his or her statutory authority by correcting an award that was initially miscalculated, thus clarifying the initial award's ruling on the merits of the case.** *Sooper Credit Union v. Sholar Group Architects, P.C.*, 113 P.3d 768 (Colo. 2005).

**Applied** in *Red Carpet Armory Realty Co. v. Golden W. Realty*, 644 P.2d 93 (Colo. App. 1982).

**13-22-221. Remedies - fees and expenses of arbitration proceeding.** (1) An arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(2) An arbitrator's expenses and fees, together with other expenses, shall be paid as provided in the award.

(3) Nothing in this section shall be construed to alter or amend the provisions of section 13-21-102 (5).

**Source: L. 2004:** Entire part R&RE, p. 1728, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-212 as it existed prior to 2004.

## ANNOTATION

**Annotator's note.** Since § 13-22-221 is similar to § 13-22-212 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**Where appellants have not shown section arbitrarily singles out a group of persons similarly situated for disparate treatment**, provisions of section, which allow an interlocutory appeal of an order denying a motion to compel arbitration but do not authorize an interlocutory appeal of an order compelling arbitration, are rationally based and do not violate equal protection. *Ferla v. Infinity Dev. Assocs., LLC*, 107 P.3d 1006 (Colo. App. 2004).

**Trial court is not required to conduct an evidentiary hearing on an arbitrator's request for payment of fees.** Although the necessity or reasonableness of an arbitrator's fees may be subject to dispute, the parties' due process rights to litigate the scope of the services

and the amounts requested are well protected by written motion practice. In re *Eggert*, 53 P.3d 794 (Colo. App. 2002).

**Although section excludes "counsel fees," it appears to cover other costs incurred in the arbitration.** Because there was no agreement to the contrary, the statute compels the parties to pay these costs as provided under the arbitrator's award. Thus, to the extent the arbitrator's award represented costs other than counsel fees, the trial court should have confirmed the award. *Compton v. Lemon Ranches, Ltd.*, 972 P.2d 1078 (Colo. App. 1999).

**This section prohibits an arbitrator from awarding attorney fees** unless the parties have specifically agreed that the arbitrator shall address that issue. Therefore, the trial court did not err in awarding the defendant its attorney fees incurred in the trial court, and the trial court's order was not void for lack of jurisdiction. *Camelot Invs., LLC v. LANDesign, LLC*, 973 P.2d 1279 (Colo. App. 1999).

**13-22-222. Confirmation of award.** (1) After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award

is modified or corrected pursuant to section 13-22-220 or 13-22-224 or is vacated pursuant to section 13-22-223.

(2) Repealed.

**Source:** L. 2004: Entire part R&RE, p. 1728, § 1, effective August 4. L. 2005: (2) repealed, p. 764, § 20, effective June 1.

**Editor's note:** This section is similar to former § 13-22-213 as it existed prior to 2004.

## ANNOTATION

**Annotator's note.** Since § 13-22-222 is similar to § 13-22-213 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**Purpose of article is** to provide ground rules and procedures for enforcement of awards through the courts, but not to supersede any agreement entered into by the parties. *Water Works Employees Local 1045 v. Bd. of Water Works*, 44 Colo. App. 178, 615 P.2d 52 (1980).

**Court's role is limited.** The role of the court is considering an arbitrator's award is strictly limited. *Judd Constr. Co. v. Evans Joint Venture*, 642 P.2d 922 (Colo. 1982).

The issues before the court in a confirmation proceeding are limited by this article. *Judd Constr. Co. v. Evans Joint Venture*, 642 P.2d 922 (Colo. 1982); *State Farm Mut. Auto. Ins. v. Cabs, Inc.*, 751 P.2d 61 (Colo. 1988); *Container Tech. v. J. Gadsden Pty.*, 781 P.2d 119 (Colo. App. 1989); *S. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992); *Kutch v. State Farm Mut. Auto. Ins. Co.*, 960 P.2d 93 (Colo. 1998).

The trial court erred in considering defendant's substantive defense concerning the constitutionality of the statute because the only defenses permitted to a request for confirmation of an arbitration award are whether grounds exist to vacate, modify, or correct such award and such defenses must be made within specified time limits. *State Farm Mut. Auto. Ins. v. Cabs, Inc.*, 751 P.2d 61 (Colo. 1988).

In the absence of appropriate grounds to modify, vacate, or correct an award, a trial court is required to affirm the award without review of the merits. *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo. App. 1996); *Osborn v. Packard*, 117 P.3d 77 (Colo. App. 2004).

**A court is limited on review to modify or correct an arbitration award only upon statutory grounds** and may not review the merits of the arbitrator's decision. *Duncan v. Nat'l Home Ins. Co.*, 36 P.3d 191 (Colo. App. 2001); *Levy v. Am. Family Mut. Ins. Co.*, \_\_\_ P.3d \_\_\_ (Colo. App. 2011).

When arbitration award is for all damages incurred by plaintiff, which under state law includes prejudgment interest, district court's subsequent order granting prejudgment interest was an impermissible modification of arbitration award. *Levy v. Am. Family Mut. Ins. Co.*, \_\_\_ P.3d \_\_\_ (Colo. App. 2011).

**Trial court correctly denied plaintiff's motion to confirm the award** where defendant had filed an application to modify or correct the award with the arbitrator. *Applehans v. Farmers Ins. Exch.*, 68 P.3d 594 (Colo. App. 2003).

**Failure to take oath does not invalidate proceedings.** Failure of the arbitrators to take an oath does not invalidate proceedings which comply with the requirement of both the uniform act and the arbitration agreement. In re *Salter v. Farner*, 653 P.2d 413 (Colo. App. 1982).

**Arbitrator held deprived of binding power by contract.** Where under the contract at issue, binding arbitration had been expressly excluded by the specific provision for advisory arbitration, arbitrator was deprived of any power to bind either party. *Water Works Employees Local 1045 v. Bd. of Water Works*, 44 Colo. App. 178, 615 P.2d 52 (1980).

**Uniform Arbitration Act authorizes party to arbitration agreement to apply to district court for order confirming arbitration award after award has been entered.** *Thomas v. Farmers Ins. Exch.*, 857 P.2d 532 (Colo. App. 1993).

**When a party attacks the validity of an arbitration award, he bears the burden of sustaining the attack.** *Container Tech. v. J. Gadsden Pty.*, 781 P.2d 119 (Colo. App. 1989).

The party challenging the validity of an arbitration award bears a heavy burden of establishing sufficient evidence of partiality. *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo. App. 1996).

**Arbitrators may not be deposed** for the purpose of inquiring into their thought processes. *Container Tech. v. J. Gadsden Pty.*, 781 P.2d 119 (Colo. App. 1989).

**13-22-223. Vacating award.** (1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if the court finds that:



- (a) The award was procured by corruption, fraud, or other undue means;
  - (b) There was:
    - (I) Evident partiality by an arbitrator appointed as a neutral arbitrator;
    - (II) Corruption by an arbitrator; or
    - (III) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
  - (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 13-22-215, so as to prejudice substantially the rights of a party to the arbitration proceeding;
  - (d) An arbitrator exceeded the arbitrator's powers;
  - (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 13-22-215 (3) not later than the beginning of the arbitration hearing; or
  - (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 13-22-209 so as to substantially prejudice the rights of a party to the arbitration proceeding.
- (1.5) Notwithstanding the provisions of subsection (1) of this section, the fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.
- (2) A motion made under this section shall be filed within ninety-one days after the movant receives notice of the award pursuant to section 13-22-219 or within ninety-one days after the movant receives notice of a modified or corrected award pursuant to section 13-22-220, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within ninety-one days after either the ground is known or by the exercise of reasonable care should have been known by the movant.
- (3) If the court vacates an award on a ground other than that set forth in paragraph (e) of subsection (1) of this section, it may order a rehearing. If the award is vacated on a ground stated in paragraph (a) or (b) of subsection (1) of this section, the rehearing shall be held before a new arbitrator. If the award is vacated on a ground stated in paragraph (c), (d), or (f) of subsection (1) of this section, the rehearing may be held before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in section 13-22-219 (2) for an award.
- (4) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

**Source:** **L. 2004:** Entire part R&RE, p. 1728, § 1, effective August 4. **L. 2005:** (1.5) added, p. 764, § 21, effective June 1. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 824, § 7, effective July 1.

**Editor's note:** (1) This section is similar to former § 13-22-214 as it existed prior to 2004.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Annotator's note.** Since § 13-22-223 is similar to § 13-22-214 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**Generally, arbitrators are not bound by either substantive or procedural rules of law,** except as required under the terms of the arbitration agreement. *Cabus v. Dairyland Ins. Co.*, 656 P.2d 54 (Colo. App. 1982); *Byerly v.*

*Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771 (Colo. App. 2000).

The arbitrators do not exceed their authority by rendering a decision that is contrary to the rules of law that would have been applied by a court. *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771 (Colo. App. 2000).

**An arbitrator's manifest disregard of the law** is not a ground for vacating an arbitration award as exceeding the arbitrator's power under

former § 13-22-214 (1)(a)(III) or as a nonstatutory common law ground. An arbitrator does not necessarily exceed his power when he does not properly apply the law. *Coors Brewing Co. v. Cabo*, 114 P.3d 60 (Colo. App. 2004) (decided under former law).

**Failure to take oath does not invalidate proceedings.** Failure of the arbitrators to take an oath does not invalidate proceedings which comply with the requirement of both the uniform act and the arbitration agreement. In re *Salter v. Farnier*, 653 P.2d 413 (Colo. App. 1982).

**Rule's inconsistency with section overridden.** To the extent C.R.C.P. 109 is inconsistent with this section, it would appear to be overridden. *Copper Mt., Inc. v. Project Oneco, Inc.*, 3 Bankr. 284 (Bankr. D. Colo. 1980).

**If an arbitrator exceeds his authority** by going beyond the contract terms and, in effect, enacting new binding terms and conditions of employment, the dissatisfied party may apply to the court to vacate the award. *City & County of Denver v. Denver Firefighters Local 858*, 663 P.2d 1032 (Colo. 1983).

**Applicable statute of limitations for breach of contract/duty of fair representation claim under the federal Railway Labor Act** was the six-month period provided by the federal National Labor Relations Act and not the 90-day period in subsection (2). *Barnett v. United Airlines, Inc.*, 738 F.2d 358 (10th Cir.), cert. denied, 469 U.S. 1087, 105 S. Ct. 594, 83 L. Ed.2d 703 (1984).

**Uniform Arbitration Act authorizes party to arbitration agreement to apply to district court for order vacating arbitration award after entry of award.** *Thomas v. Farmers Ins. Exch.*, 857 P.2d 532 (Colo. App. 1993).

**Failure of a party to move to vacate an arbitration award** within the prescribed time period precludes such party from using the grounds as an affirmative defense in a subsequent action by the other party to enforce the award. *Elec. Workers Local 969 v. Babcock & Wilcox*, 826 F.2d 962 (10th Cir. 1987).

**Failure to bring a motion to vacate, modify, or correct the arbitration award within the prescribed time limit prevents the defendant from raising the contractual policy limits as a defense** in a confirmation proceeding held after expiration of the statutory time limit. *Kutch v. State Farm Mut. Auto. Ins. Co.*, 960 P.2d 93 (Colo. 1998).

**However, an application to arbitrator pursuant to § 13-22-211 to modify award tolls the 30-day time limit under this section for seeking judicial review.** *Swan v. Am. Family Mut. Ins. Co.*, 8 P.3d 546 (Colo. App. 2000).

**When a party moves to vacate an award** under subsection (1)(f), the court must independently determine the adequacy of the notice and any resulting prejudice. *Braata, Inc. v. Oneida*

*Cold Storage Co.*, 251 P.3d 584 (Colo. App. 2010).

**Vacating, modifying, or correcting awards** by court permissible only on the basis of the statutory grounds set forth in this section or § 13-22-215. *Foust v. Aetna Cas. & Ins. Co.*, 786 P.2d 450 (Colo. App. 1989); *Sportsman's Quikstop I, Ltd. v. Didonato*, 32 P.3d 633 (Colo. App. 2001).

**An arbitrator's award is not a "final judgment" reviewable by an appellate court.** Upon confirmation of the award by a district court in accordance with § 13-22-213, and absent a timely motion to vacate, modify, or correct the award, there is no appealable issue. *S. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

**General assembly's authority to determine the jurisdiction of the court of appeals is exclusive.** *S. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

**Parties to an arbitration agreement cannot define and prescribe the powers of a court of law.** Where a contract term purported to allow an appellate court to conduct a substantive review of the arbitration panel's award, contrary to the controlling statutes, clause was void and unenforceable. *S. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

**Trial court erred in finding arbitrators had the authority to decide whether insureds were entitled to stack uninsured motorist benefits.** Arbitration clause in policy was a limited clause and provided only for the arbitration of two stated issues. *State Farm Mut. Auto. Ins. Co. v. Stein*, 886 P.2d 323 (Colo. App. 1994).

**An unfavorable interpretation of a contract is not a basis for setting aside an arbitration award.** *Container Tech. v. J. Gadsden Pty.*, 781 P.2d 119 (Colo. App. 1989).

**The five enumerated grounds for relief set forth in subsection (1)(a) are exclusive.** *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771 (Colo. App. 2000).

**In order to establish that the award was "procured by" undue means**, there must be a causal connection between the improper conduct and the arbitration award. *Nasca v. State Farm Mut. Auto. Ins. Co.*, 12 P.3d 346 (Colo. App. 2000); *BFN-Greeley, LLC*, 141 P.3d 937 (Colo. App. 2006).

Affidavits of the arbitration panel members may be properly considered on the causation issue as long as the purpose is not to establish the thought process of the panel members. *Nasca v. State Farm Mut. Auto. Ins. Co.*, 12 P.3d 346 (Colo. App. 2000).

**The ordinary meaning of "undue means" suggests some type of impropriety in the arbitration process.** The terms are broad enough to include a party-appointed arbitrator's non-disclosure of a substantial business relationship. Thus, if an arbitrator in a law firm with attorneys



who have a substantial business relationship with an insurance carrier in the arbitration proceeding, including service as expert witnesses, has a duty to disclose the relationship to the parties in the proceeding. *Nasca v. State Farm Mut. Auto. Ins. Co.*, 12 P.3d 346 (Colo. App. 2000).

**Party must demonstrate that he or she was substantially prejudiced** by an arbitrator's refusal to consider evidence material to the controversy before a court can vacate an award. *Carson v. PaineWebber, Inc.*, 62 P.3d 996 (Colo. App. 2002).

**One of the statutory grounds for vacation of an award** is that the arbitrator exceeded the powers granted in the arbitration agreement. It is not sufficient to argue merely that the arbitrator committed an error of law on the merits, but rather, plaintiff must establish that the arbitrator refused to apply or ignored the legal standard agreed upon by the parties for resolution of the dispute. *Giraldi by and through Giraldi v. Morrell*, 892 P.2d 422 (Colo. App. 1994).

**When provision states that arbitrator shall award "fees and expenses (including reasonable attorneys' fees)" to the prevailing party**, whether attorney fees should be awarded to the prevailing party was not an arbitrable issue, and the arbitrator exceeded his powers in refusing to award any attorney fees. *Magenis v. Bruner*, 187 P.3d 1222 (Colo. App. 2008).

**Evident partiality is a fact-sensitive standard.** It depends on the nature of the conflict between the arbitrator and the party, the issue being arbitrated, and the structure of the arbitration agreement. *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo. App. 1996).

**Arbitrators have a duty to disclose any potential conflict that could constitute evident partiality**, which is a relationship that would persuade a reasonable person that the arbitrator is likely to be partial to one side in the dispute. *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo. App. 1996).

Some facts indicating bias include pecuniary interest, familial relationship, and the existence

of an adversarial or sympathetic relationship. *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo. App. 1996).

**Evident partiality was not established in medical malpractice case** by mere fact that some of arbitrator's relatives were health care professionals. *Giraldi by and through Giraldi v. Morrell*, 892 P.2d 422 (Colo. App. 1994).

**If a party asserts that the entire contract is illegal**, the court must determine this threshold issue first. *R.P.T. v. Innovative Commc'ns*, 917 P.2d 340 (Colo. App. 1996).

**Colorado law affords an arbitrator great flexibility** in fashioning appropriate remedies, including specific performance and conditional assessment of damages. *R.P.T. v. Innovative Commc'ns*, 917 P.2d 340 (Colo. App. 1996).

**To determine if the arbitrator exceeded his or her authority** within the meaning of this section, the court must determine the scope of the arbitration clause contained in the contract. *Farmers Ins. Exch. v. Taylor*, 45 P.3d 759 (Colo. App. 2001).

**Award does not exceed arbitrator's power because its explanation was lacking or mistaken**, as long as there was a reason that could have justified the award. *Treadwell v. Vill. Homes of Colo., Inc.*, 222 P.3d 398 (Colo. App. 2009).

**When an arbitration award is secured by fraud, the court must vacate the whole award unless there is a discrete and severable part of the award that was procured by fraud.** *Superior Constr. Co. v. Bentley*, 104 P.3d 331 (Colo. App. 2004) (decided under former § 13-22-214 prior to 2004 repeal and reenactment).

**Fraudulent testimony** that was brought to the attention of the arbitrators well before they issued the award could not have "procured" the award. *BFN-Greely, LLC v. Adair Group, Inc.*, 141 P.3d 937 (Colo. App. 2006).

**Applied in Judd Constr. Co. v. Evans Joint Venture**, 642 P.2d 922 (Colo. 1982); *Red Carpet Armory Realty Co. v. Golden W. Realty*, 644 P.2d 93 (Colo. App. 1982); *S. Conejos Sch. District RE-10 v. Martinez*, 709 P.2d 594 (Colo. App. 1985).

**13-22-224. Modification or correction of award.** (1) Upon motion made within ninety-one days after the movant receives notice of the award pursuant to section 13-22-219 or within ninety-one days after the movant receives notice of a modified or corrected award pursuant to section 13-22-220, the court shall modify or correct the award if:

(a) There is an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(c) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(2) If a motion made under subsection (1) of this section is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(3) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

**Source:** L. 2004: Entire part R&RE, p. 1729, § 1, effective August 4. L. 2012: IP(1) amended, (SB 12-175), ch. 208, p. 824, § 8, effective July 1.

**Editor's note:** (1) This section is similar to former § 13-22-215 as it existed prior to 2004.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Annotator's note.** Since § 13-22-224 is similar to § 13-22-215 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**"Evident miscalculation of figures"** refers only to mathematical errors committed by arbitrators which would be patently clear to a reviewing court. Court cannot use these grounds to review the merits of the award on appeal. In re Gavend, 781 P.2d 161 (Colo. App. 1989).

Such a mistake which permits a modification under subsection (1)(a) must be so gross as to evidence that the award did not actually represent the arbitrator's intent. Such a modification is only authorized if it seeks to effectuate the clearly expressed intent of the arbitrator by correcting a mathematical error without altering the arbitrator's conclusion on the merits. Foust v. Aetna Cas. & Ins. Co., 786 P.2d 450 (Colo. App. 1989).

**Vacating, modifying, or correcting awards** by court permissible only on the basis of the statutory grounds set forth in this section or § 13-22-214. Foust v. Aetna Cas. & Ins. Co., 786 P.2d 450 (Colo. App. 1989); Sportsman's Quikstop I, Ltd. v. Didonato, 32 P.3d 633 (Colo. App. 2001).

**An arbitrator's award is not a "final judgment" reviewable by an appellate court.** Upon confirmation of the award by a district court in accordance with § 13-22-213, and absent a timely motion to vacate, modify, or correct the award, there is no appealable issue. S. Washington Assoc. v. Flanagan, 859 P.2d 217 (Colo. 1992).

**General assembly's authority to determine the jurisdiction of the court of appeals is exclusive.** S. Washington Assoc. v. Flanagan, 859 P.2d 217 (Colo. 1992).

**Parties to an arbitration agreement cannot define and prescribe the powers of a court of**

**law.** Where a contract term purported to allow an appellate court to conduct a substantive review of the arbitration panel's award, contrary to the controlling statutes, clause was void and unenforceable. S. Washington Assoc. v. Flanagan, 859 P.2d 217 (Colo. 1992).

**Failure to bring a motion to vacate, modify, or correct the arbitration award within the prescribed time limit** prevents the defendant from raising the contractual policy limits as a defense in a confirmation proceeding held after expiration of the statutory time limit. Kutch v. State Farm Mut. Auto. Ins. Co., 960 P.2d 93 (Colo. 1998).

Since defendant failed to follow prescribed time limit in motion to vacate, modify, or correct the arbitration award, he is barred from presenting the substantive defenses to plaintiff's motion. Sportsman's Quikstop I, Ltd. v. Didonato, 32 P.3d 633 (Colo. App. 2001).

**Where there is no evidence that the parties disagreed over policy limits, the issue of policy limits was not arbitrable.** Court could modify arbitration award to reduce the award to the policy limits. Rocha v. Fin. Indem. Corp., 155 P.3d 602 (Colo. App. 2006).

**However, an application to arbitrator pursuant to § 13-22-211 to modify award tolls the 30-day time limit under this section for seeking judicial review.** Swan v. Am. Family Mut. Ins. Co., 8 P.3d 546 (Colo. App. 2000).

**Trial court's award of prejudgment interest upon confirmation of the arbitration award is an impermissible modification of the arbitration award where such interest was not requested during the arbitration.** Duncan v. Nat'l Home Ins. Co., 36 P.3d 191 (Colo. App. 2001).

**Applied** in Atencio v. Mid-Century Ins. Co., 619 P.2d 784 (Colo. App. 1980); Judd Constr. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982).

**13-22-225. Judgment on award - attorney fees and litigation expenses.** (1) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.



(2) A court may award the reasonable costs of the motion and subsequent judicial proceedings.

(3) On the application of a prevailing party to a contested judicial proceeding under section 13-22-222, 13-22-223, or 13-22-224, the court may add reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

**Source:** L. 2004: Entire part R&RE, p. 1730, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-216 as it existed prior to 2004.

#### ANNOTATION

**Annotator's note.** Since § 13-22-225 is similar to § 13-22-216 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**Arbitration award is tantamount to a judgment.** Judd Constr. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982); Container Tech. v. J. Gadsden Pty., 781 P.2d 119 (Colo. App. 1989).

**A judgment confirming an arbitration award is enforceable in the same manner as any other judgment.** Therefore, the district court did not err in ordering post-judgment interest on the unpaid portion of the judgment. Barrett v. Inv. Mgmt. Consultants, 190 P.3d 800 (Colo. App. 2008).

**District court erred in granting costs in favor of plaintiff.** Where plaintiff did not petition court to confirm the arbitration award pursuant to subsection (2) and is not the prevailing party to a contested judicial proceeding under subsection (3), plaintiff is not entitled to costs of the court proceedings. Levy v. Am. Family Mut. Ins. Co., \_\_ P.3d \_\_ (Colo. App. 2011).

**Collateral estoppel and res judicata apply to arbitration proceedings.** To determine whether an arbitration proceeding should be given preclusive effect, the court looks to the

factors of the collateral estoppel test. Collateral estoppel, or issue preclusion, bars relitigation of an issue determined in a prior proceeding if: (1) The issue precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding. Dale v. Guar. Nat'l Ins. Co., 948 P.2d 545 (Colo. 1997); Barnett v. Elite Props. of Am., 252 P.3d 14 (Colo. App. 2010).

**Collateral estoppel precludes relitigation of issues decided in an arbitration proceeding if the traditional collateral estoppel test has been met.** Guar. Nat'l Ins. Co. v. Williams, 982 P.2d 306 (Colo. 1999); Barnett v. Elite Props. of Am., 252 P.3d 14 (Colo. App. 2010).

**While certiorari is unresolved, arbitration proceeding is not final for issue preclusion purposes.** Certiorari can be resolved in any of three ways: (1) The parties fail to file a timely petition for certiorari; (2) the court denies the petition for certiorari; or (3) the court issues an opinion after granting certiorari. Barnett v. Elite Props. of Am., 252 P.3d 14 (Colo. App. 2010).

**13-22-226. Jurisdiction.** (1) A court having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(2) An agreement to arbitrate providing for arbitration in this state confers jurisdiction on the court to enter judgment on an award under this part 2.

**Source:** L. 2004: Entire part R&RE, p. 1730, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-219 as it existed prior to 2004.

#### ANNOTATION

**Annotator's note.** Since § 13-22-226 is similar to § 13-22-219 as it existed prior to the 2004 repeal and reenactment of this part 2, a relevant case construing that provision has been

included in the annotations to this section.

**A motion to compel arbitration is a motion to dismiss for lack of subject matter jurisdiction** which cannot be resolved by the presumpt-

tive truthfulness of the complaint but which must be determined in a factual hearing.

Eychner v. Van Vleet, 870 P.2d 486 (Colo. App. 1993).

**13-22-227. Venue.** A motion pursuant to section 13-22-205 shall be made in a court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in a court of the county in which it was held. Otherwise, a motion pursuant to section 13-22-205 may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this state, in a court of any county in this state. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

**Source: L. 2004:** Entire part R&RE, p. 1730, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-220 as it existed prior to 2004.

**13-22-228. Appeals.** (1) An appeal may be taken from:

- (a) An order denying a motion to compel arbitration;
- (b) An order granting a motion to stay arbitration;
- (c) An order confirming or denying confirmation of an award;
- (d) An order modifying or correcting an award;
- (e) An order vacating an award without directing a rehearing; or
- (f) A final judgment entered pursuant to this part 2.

(2) An appeal under this section shall be taken in the same manner as an appeal of an order or judgment in a civil action.

**Source: L. 2004:** Entire part R&RE, p. 1730, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-221 as it existed prior to 2004.

## ANNOTATION

**Annotator's note.** Since § 13-22-228 is similar to § 13-22-221 as it existed prior to the 2004 repeal and reenactment of this part 2, relevant cases construing that provision have been included in the annotations to this section.

**When denial of application to compel arbitration not appealable.** An appeal may not be taken from an order denying an application to compel arbitration on an employment contract entered into before July 14, 1975. *Monatt v. Pioneer Astro Indus., Inc.*, 42 Colo. App. 265, 592 P.2d 1352 (1979).

**Order compelling arbitration not appealable.** An order compelling parties to arbitrate, pursuant to § 13-22-204, is not a final appealable order. *Frontier Materials, Inc. v. City of Boulder*, 663 P.2d 1065 (Colo. App. 1983); *Thomas v. Farmers Ins. Exch.*, 857 P.2d 532 (Colo. App. 1993).

Order compelling arbitration is interlocutory order which is not appealable even if court's order determines the substantive issue of arbitrability. *Thomas v. Farmers Ins. Exch.*, 857 P.2d 532 (Colo. App. 1993).

**Order denying a stay of arbitration not appealable.** Section expressly authorizes an ap-

peal from an order granting a stay of arbitration, not an order denying such a stay. Therefore, court of appeals lacked jurisdiction to review an order denying a stay of arbitration. *Gergel v. High View Homes, L.L.C.*, 58 P.3d 1132 (Colo. App. 2002).

**Where the district court's denial of Denver's motion** to dismiss contractor's claims and Denver's request to stay proceedings pending alternative dispute resolution raised issues of substantial public importance, permissive immediate appeal under this section was appropriate. *City & County of Denver v. District Court*, 939 P.2d 1353 (Colo. 1997).

**Securities brokers acted inconsistently with right to arbitrate by pursuing discovery** and confirming intent to go to trial in open court, after they knew that they had legally enforceable arbitration clause. Therefore, brokers waived right to arbitration, where brokers had completed discovery, but customer had not done so. *Norden v. E.F. Hutton & Co., Inc.*, 739 P.2d 914 (Colo. App. 1987).

**Defendants' failure to assert right to arbitration contemporaneously with their motions to dismiss** was an act deemed to be a



waiver of the right to have the dispute resolved by arbitration. *Bashor v. Bache Halsey Stuart Shields*, 773 P.2d 578 (Colo. App. 1989).

**No waiver of right to arbitrate** by failing to appeal denial of motion to dismiss where issue reserved in answer, trial data certificate, and motion for a new trial. *Mountain Plains Constructors v. Torrez*, 785 P.2d 928 (Colo. 1990).

**No waiver of right to arbitrate** by litigating claims that arose under a separate agreement that did not contain an arbitration clause. *Breaker v. Corrosion Control Corp.*, 23 P.3d 1278 (Colo. App. 2001).

**Appealable order.** A denial of a motion to compel arbitration is an appealable order. However, an immediate appeal is permissive and not mandatory. Therefore, an order denying a motion to compel arbitration may also be appealed after final judgment. *Mountain Plains Constructors v. Torrez*, 785 P.2d 928 (Colo. 1990).

Appeals court had jurisdiction under this section although the trial court dismissed the action for lack of jurisdiction, finding that the dispute was subject to arbitration, and entered an order awarding attorney fees. *Camelot Invs., LLC v. LANDesign, LLC*, 973 P.2d 1279 (Colo. App. 1999).

**Uniform Arbitration Act authorizes party to arbitration agreement to appeal certain district court orders** in the same manner and to the same extent as appeals may be taken from court orders and judgments in other civil actions. *Thomas v. Farmers Ins. Exch.*, 857 P.2d 532 (Colo. App. 1993).

**Court of appeals lacks jurisdiction to review an arbitration award;** jurisdiction extends only to orders and judgments entered by statutorily specified courts. *Thomas v. Farmers Ins. Exch.*, 857 P.2d 532 (Colo. App. 1993).

**Assertion that trial court erred in directing arbitration cannot be raised before an appellate court** until there has been an award by the arbitrator on the merits of the controversy and a

court order entered confirming the award. *Thomas v. Farmers Ins. Exch.*, 857 P.2d 532 (Colo. App. 1993).

**An arbitrator's award is not a "final judgment" reviewable by an appellate court.** Upon confirmation of the award by a district court in accordance with § 13-22-213, and absent a timely motion to vacate, modify, or correct the award, there is no appealable issue. *So. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

**While certiorari is unresolved, arbitration proceeding is not final for issue preclusion purposes.** Certiorari can be resolved in any of three ways: (1) The parties fail to file a timely petition for certiorari; (2) the court denies the petition for certiorari; or (3) the court issues an opinion after granting certiorari. *Barnett v. Elite Props. of Am.*, 252 P.3d 14 (Colo. App. 2010).

**The determination of the existence of a valid agreement to arbitrate does not trigger a right to appeal under the Act.** *Gergel v. High View Homes, L.L.C.*, 58 P.3d 1132 (Colo. App. 2002).

**An interlocutory appeal under subsection (1)(a) of this section may only be taken from the denial of a motion that seeks to compel arbitration based on "an agreement to arbitrate" as described in § 13-22-207 (1).** *Vulcan Power Co. v. Munson*, 252 P.3d 511 (Colo. App. 2011).

**General assembly's authority to determine the jurisdiction of the court of appeals is exclusive.** *So. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

**Parties to an arbitration agreement cannot define and prescribe the powers of a court of law.** Where a contract term purported to allow an appellate court to conduct a substantive review of the arbitration panel's award, contrary to the controlling statutes, clause was void and unenforceable. *So. Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

**13-22-229. Uniformity of application and construction.** In applying and construing this part 2, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source: L. 2004:** Entire part R&RE, p. 1731, § 1, effective August 4.

**Editor's note:** This section is similar to former § 13-22-223 as it existed prior to 2004.

**13-22-230. Savings clause.** This part 2 shall not affect an action or proceeding commenced or a right accrued before this part 2 takes effect. Except as otherwise provided in section 13-22-203, an arbitration agreement made before August 4, 2004, is governed by the "Uniform Arbitration Act of 1975".

**Source: L. 2004:** Entire part R&RE, p. 1731, § 1, effective August 4.

## PART 3

## DISPUTE RESOLUTION ACT

**Law reviews:** For article, “The Mediation Alternative is Gaining Support in Colorado”, see 13 Colo. Law. 589 (1984); for article, “Divorce Mediation: A Financial Perspective”, see 13 Colo. Law. 1650 (1984); for article, “Enforcement of Arbitration Awards in Colorado”, see 14 Colo. Law. 535 (1985); for article, “Litigation v. Alternative Dispute Resolution — Let’s Talk About It”, see 17 Colo. Law. 655 (1988); for article, “Mediation Revisited: Amendments to the Colorado Dispute Resolution Act”, see 17 Colo. Law. 1297 (1988); for article, “The ‘Alternatives’ in Alternative Dispute Resolution”, see 18 Colo. Law. 1751 (1989); for several articles regarding the issue of the “Quality of dispute resolution”, see 66 Den. U.L. Rev. 335-549 (1989); for numerous articles dealing with alternative dispute resolution (ADR), see 18 Colo. Law. 828-928 (1989); for article, “Court-ordered Mediation of Civil Cases”, see 19 Colo. Law. 1057 (1990); for article, “The Growing Duty to Effectuate Settlement”, see 20 Colo. Law. 453 (1991); for article, “New Rules on ADR: Professional Ethics, Shotguns and Fish”, see 21 Colo. Law. 1877 (1992); for article, “Alternative Dispute Resolution in Colorado”, see 22 Colo. Law. 1445 (1993); for article, “ADR: Important Options for Municipal Government”, see 24 Colo. Law. 1279 (1995); for article, “Alternative Dispute Resolution Meets the Administrative Process”, see 24 Colo. Law. 1549 (1995); for article, “Civil Mediation: Where, When and Why It Is Effective”, see 24 Colo. Law. 1261 (1995); for article, “Alternative Dispute Resolution in Colorado”, see 28 Colo. Law. 67 (September 1999); for article, “The Mediation Privilege”, see 29 Colo. Law. 65 (November 2000); for article, “Mediating with Handkerchiefs: The New Model Standards for Divorce Mediation”, see 31 Colo. Law. 69 (January 2002); for article, “The Uniform Mediation Act: Its Potential Impact on Colorado Mediation Practice—Part I”, see 31 Colo. Law. 61 (May 2002); for article, “The Uniform Mediation Act: Its Potential Impact on Colorado Mediation Practice—Part II”, see 31 Colo. Law. 67 (June 2002); for article, “The Uniform Mediation Act: Its Potential Impact on Colorado Mediation Practice—Part III”, see 31 Colo. Law. 101 (July 2002); for article, “Colorado Law on Mediation: A Primer”, see 35 Colo. Law. 21 (March 2006).

**13-22-301. Short title.** This part 3 shall be known and may be cited as the “Dispute Resolution Act”.

**Source: L. 83:** Entire part added, p. 624, § 1, effective July 1.

**13-22-302. Definitions.** As used in this part 3, unless the context otherwise requires:

(1) “Arbitration” means the referral of a dispute to one or more neutral third parties for a decision based on evidence and testimony provided by the disputants.

(1.3) “Chief justice” means the chief justice of the Colorado supreme court.

(1.7) “Director” means the director of the office of dispute resolution.

(2) “Early neutral evaluation” means an early intervention in a lawsuit by a court-appointed evaluator to narrow, eliminate, and simplify issues and assist in case planning and management. Settlement of the case may occur under early neutral evaluation.

(2.1) “Fact finding” means an investigation of a dispute by a public or private body that examines the issues and facts in a case and may or may not recommend settlement procedures.

(2.3) “Med-arb” means a process in which parties begin by mediation, and failing settlement, the same neutral third party acts as arbitrator of the remaining issues.

(2.4) “Mediation” means an intervention in dispute negotiations by a trained neutral third party with the purpose of assisting the parties to reach their own solution.

(2.5) “Mediation communication” means any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding or dispute resolution program proceeding, including, but not limited to, any memoranda, notes, records, or work product of a mediator, mediation organization, or party; except that a written agreement to enter into a mediation service proceeding or dispute resolution proceeding, or a final written agreement reached as a result of a mediation service proceeding or dispute resolution proceeding, which has been fully executed, is not a mediation communication unless otherwise agreed upon by the parties.



(2.7) “Mediation organization” means any public or private corporation, partnership, or association which provides mediation services or dispute resolution programs through a mediator or mediators.

(3) “Mediation services” or “dispute resolution programs” means a process by which parties involved in a dispute, whether or not an action has been filed in court, agree to enter into one or more settlement discussions with a mediator in order to resolve their dispute.

(4) “Mediator” means a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives.

(4.3) “Mini-trial” means a structured settlement process in which the principals involved meet at a hearing before a neutral advisor to present the merits of each side of the dispute and attempt to formulate a voluntary settlement.

(4.5) “Multi-door courthouse concepts” means that form of alternative dispute resolution in which the parties select any combination of problem solving methods designed to achieve effective resolution, including, but not limited to, arbitration, early neutral evaluation, med-arb, mini-trials, settlement conference, special masters, and summary jury trials.

(5) “Office” means the office of dispute resolution.

(6) “Party” means a mediation participant other than the mediator and may be a person, public officer, corporation, partnership, association, or other organization or entity, either public or private.

(7) “Settlement conference” means an informal assessment and negotiation session conducted by a legal professional who hears both sides of the case and may advise the parties on the law and precedent relating to the dispute and suggest a settlement.

(8) “Special master” means a court-appointed magistrate, auditor, or examiner who, subject to specifications and limitations stated in the court order, shall exercise the power to regulate all proceedings in every hearing before such special master, and to do all acts and take all measures necessary or proper for compliance with the court’s order.

(9) “Summary jury trial” means summary presentations in complex cases before a jury empaneled to make findings which may or may not be binding.

**Source:** L. 83: Entire part added, p. 624, § 1, effective July 1. L. 88: (3) amended and (6) added, p. 605, § 1, effective July 1. L. 91: (2.5) and (2.7) added and (3) amended, p. 369, § 1, effective July 1. L. 92: (1) and (2) amended and (1.3), (1.7), (2.1), (2.3), (2.4), (4.3), (4.5), (7), (8), and (9) added, p. 298, § 2, effective June 2.

**Cross references:** For the legislative declaration contained in the 1992 act amending subsections (1) and (2) and enacting subsections (1.3), (1.7), (2.1), (2.3), (2.4), (4.3), (4.5), (7), (8), and (9), see section 1 of chapter 66, Session Laws of Colorado 1992.

#### ANNOTATION

“Mediation communications” does not extend to all communications that may be related to the mediation. Mediation communications are limited to those made in the presence or at the behest of the mediator. After a preliminary settlement agreement had been signed fol-

lowing a mediation, negotiations between counsel and statements to the court were not mediation communications required to be kept confidential pursuant to § 13-22-307. *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008).

**13-22-303. Office of dispute resolution - establishment.** There is hereby established in the judicial department the office of dispute resolution, the head of which shall be the director of the office of dispute resolution, who shall be appointed by the chief justice of the supreme court and who shall receive such compensation as determined by the chief justice.

**Source:** L. 83: Entire part added, p. 624, § 1, effective July 1.

**13-22-304. Director - assistants.** The director shall be an employee of the judicial department and shall be responsible to the chief justice for the administration of the office. The director may be but need not be an attorney and shall be hired on the basis of training

and experience in management and mediation. The director, subject to the approval of the chief justice, may appoint such additional employees as deemed necessary for the administration of the office of dispute resolution.

**Source:** L. 83: Entire part added, p. 625, § 1, effective July 1. L. 88: Entire section amended, p. 605, § 2, effective July 1.

**13-22-305. Mediation services.** (1) In order to resolve disputes between persons or organizations, dispute resolution programs shall be established or made available in such judicial districts or combinations of such districts as shall be designated by the chief justice of the supreme court, subject to moneys available for such purpose. For all office of dispute resolution programs, the director shall establish rules, regulations, and procedures for the prompt resolution of disputes. Such rules, regulations, and procedures shall be designed to establish a simple nonadversary format for the resolution of disputes by neutral mediators in an informal setting for the purpose of allowing each participant, on a voluntary basis, to define and articulate the participant's particular problem for the possible resolution of such dispute.

(2) Persons involved in a dispute shall be eligible for the mediation services set forth in this section before or after the filing of an action in either the county or the district court.

(3) Each party who uses the mediation services or ancillary forms of alternative dispute resolution in section 13-22-313 of the office of dispute resolution shall pay a fee as prescribed by order of the supreme court. Fees shall be set at a level necessary to cover the reasonable and necessary expenses of operating the program. Any fee may be waived at the discretion of the director. The fees established in this part 3 shall be transmitted to the state treasurer, who shall credit the same to the dispute resolution fund created in section 13-22-310.

(4) All rules, regulations, and procedures established pursuant to this section shall be subject to the approval of the chief justice.

(5) No adjudication, sanction, or penalty may be made or imposed by any mediator or the director.

(6) The liability of mediators shall be limited to willful or wanton misconduct.

**Source:** L. 83: Entire part added, p. 625, § 1, effective July 1. L. 88: (1), (2), and (3) amended and (6) added, p. 606, § 3, effective July 1. L. 91: (1), (3), and (6) amended, p. 370, § 2, effective July 1. L. 92: (3) amended, p. 300, § 4, effective June 2.

**Cross references:** For the legislative declaration contained in the 1992 act amending subsection (3), see section 1 of chapter 66, Session Laws of Colorado 1992.

**13-22-306. Office of dispute resolution programs - mediators.** In order to implement the dispute resolution programs described in section 13-22-305, the director may contract with mediators or mediation organizations on a case-by-case or service or program basis. Such mediators or mediation organizations shall be subject to the rules, regulations, procedures, and fees set by the director. The tasks of the mediators or mediation organizations shall be defined by the director. The director may also use qualified volunteers to assist in mediation service or dispute resolution program efforts.

**Source:** L. 83: Entire part added, p. 625, § 1, effective July 1. L. 88: Entire section R&RE, p. 606, § 4, effective July 1. L. 91: Entire section amended, p. 370, § 3, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Selecting Cases for Mediation", see 17 Colo. Law. 2007 (1988).



**13-22-307. Confidentiality.** (1) Dispute resolution meetings may be closed at the discretion of the mediator.

(2) Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization, unless and to the extent that:

(a) All parties to the dispute resolution proceeding and the mediator consent in writing; or

(b) The mediation communication reveals the intent to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of eighteen years; or

(c) The mediation communication is required by statute to be made public; or

(d) Disclosure of the mediation communication is necessary and relevant to an action alleging willful or wanton misconduct of the mediator or mediation organization.

(3) Any mediation communication that is disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding.

(4) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a mediation service proceeding or dispute resolution proceeding.

(5) Nothing in this section shall prevent the gathering of information for research or educational purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, mediation service, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

**Source:** L. 83: Entire part added, p. 625, § 1, effective July 1. L. 91: Entire section amended, p. 370, § 4, effective July 1.

#### ANNOTATION

**“Mediation communications” does not extend to all communications that may be related to the mediation.** Mediation communications are limited to those made in the presence or at the behest of the mediator. After a preliminary settlement agreement had been signed following a mediation, negotiations between counsel and statements to the court were not

mediation communications required to be kept confidential pursuant to this section. *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008).

**Testimony of mediator and attorneys inadmissible to prove existence of a final, unsigned settlement agreement.** *GLN Compliance v. Aviation Manual Solutions*, 203 P.3d 595 (Colo. App. 2008).

**13-22-308. Settlement of disputes.** (1) If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

(2) (Deleted by amendment, L. 91, p. 371, § 5, effective July 1, 1991.)

**Source:** L. 83: Entire part added, p. 626, § 1, effective July 1. L. 88: Entire section amended, p. 606, § 5, effective July 1. L. 91: Entire section amended, p. 371, § 5, effective July 1.

#### ANNOTATION

**Oral agreement not enforceable as an order of the court.** Alleged oral settlement agreement entered into during private mediation was not enforceable by a court under this section.

*Nat'l Union Fire Ins. Co. v. Price*, 78 P.3d 1138 (Colo. App. 2003).

**In the absence of a signed settlement agreement,** agreement entered into during private

mediation could not be enforced by court. Agreement unenforceable even if terms of the settlement were read into the record and parties acknowledged that the oral statements constituted the full agreement. GLN Compliance v. Aviation Manual Solutions, 203 P.3d 595 (Colo. App. 2008).

**This section does not control in the context of an agreement to modify parenting time.** Because § 14-10-129 allows the trial court to modify parenting time whenever doing so would be in the child's best interests, the court did not

abuse its discretion in adopting the agreement and modifying the parenting time accordingly despite the fact that the agreement was not reduced to writing or signed. In re Barker, 251 P.3d 591 (Colo. App. 2010).

**This section specifies the requirements for an agreement to become an order of court.** This section does not limit the ways by which the parties may form a binding agreement; but § 13-22-307 limits the admissibility of some evidence of such an agreement. Yackle v. Andrews, 195 P.3d 1101 (Colo. 2008).

### 13-22-309. Reports. (Repealed)

**Source:** L. 83: Entire part added, p. 626, § 1, effective July 1. L. 88: Entire section amended, p. 606, § 6, effective July 1. L. 92: Entire section amended, p. 301, § 6, effective June 2. L. 98: Entire section repealed, p. 724, § 1, effective May 18.

**13-22-310. Dispute resolution fund - creation - source of funds.** (1) There is hereby created in the state treasury a fund to be known as the dispute resolution fund, which fund shall consist of:

- (a) All moneys collected pursuant to section 13-22-305 (3);
- (b) Any moneys appropriated by the general assembly for credit to the fund; and
- (c) Any moneys collected by the office from federal grants and other contributions, grants, gifts, bequests, and donations.

(2) (a) All moneys in the fund shall be subject to annual appropriation by the general assembly. Any moneys not appropriated shall remain in the fund at the end of any fiscal year and shall not revert to the general fund.

(b) Notwithstanding any provision of paragraph (a) of this subsection (2) to the contrary, on April 20, 2009, the state treasurer shall transfer the balance of moneys in the dispute resolution fund to the general fund.

**Source:** L. 83: Entire part added, p. 626, § 1, effective July 1. L. 88: Entire section R&RE, p. 607, § 7, effective July 1. L. 91: Entire section R&RE, p. 372, § 6, effective July 1. L. 2009: (2) amended, (SB 09-208), ch. 149, p. 620, § 10, effective April 20.

**13-22-311. Court referral to mediation - duties of mediator.** (1) Any court of record may, in its discretion, refer any case for mediation services or dispute resolution programs, subject to the availability of mediation services or dispute resolution programs; except that the court shall not refer the case to mediation services or dispute resolution programs where one of the parties claims that it has been the victim of physical or psychological abuse by the other party and states that it is thereby unwilling to enter into mediation services or dispute resolution programs. In addition, the court may exempt from referral any case in which a party files with the court, within five days of a referral order, a motion objecting to mediation and demonstrating compelling reasons why mediation should not be ordered. Compelling reasons may include, but are not limited to, that the costs of mediation would be higher than the requested relief and previous attempts to resolve the issues were not successful. Parties referred to mediation services or dispute resolution programs may select said services or programs from mediators or mediation organizations or from the office of dispute resolution. This section shall not apply in any civil action where injunctive or similar equitable relief is the only remedy sought.

(2) Upon completion of mediation services or dispute resolution programs, the mediator shall supply to the court, unless counsel for a party is required to do so by local rule or order of the court, a written statement certifying that parties have met with the mediator.

(3) In the event the mediator and the parties agree and inform the court that the parties are engaging in good faith mediation, any pending hearing in the action filed by the parties shall be continued to a date certain.



(4) In no event shall a party be denied the right to proceed in court in the action filed because of failure to pay the mediator.

**Source:** L. 88: Entire section added, p. 607, § 8, effective July 1. L. 91: (1) and (2) amended, p. 372, § 7, effective July 1. L. 92: Entire section amended, p. 299, § 3, effective June 2.

**Cross references:** For the legislative declaration contained in the 1992 act amending this section, see section 1 of chapter 66, Session Laws of Colorado 1992.

### ANNOTATION

**Law reviews.** For article, "Selecting Cases for Mediation", see 17 Colo. Law. 2007 (1988).

**Where petitioner files a verified, uncontroverted claim of physical and psychological abuse by husband,** the trial court "shall not refer" such a case to mediation; the plain and obvious language of subsection (1) forbids a court from ordering mediation where a party claims physical and psychological abuse. *Pearson v. District Court*, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

**This section does not require a party to file a declaration of abuse and an unwillingness to participate in mediation prior to the entry of a court order to mediate.** *Pearson v. District*

*Court*, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

**Subsection (1) covers two distinct circumstances:** First, it contains a mandatory command that a court "shall not refer" a case to mediation services where a party claims physical or psychological abuse, which requirement has no time limitations. Second, it contains a discretionary "compelling reasons" excusal that is subject to the five-day rule and exists independently of the mandatory excusal for physical or psychological abuse. *Pearson v. District Court*, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

**13-22-312. Applicability.** This part 3 shall apply to all mediation services or dispute resolution programs conducted in this state, whether conducted through the office of dispute resolution or through a mediator or mediation organization.

**Source:** L. 91: Entire section added, p. 373, § 8, effective July 1.

**13-22-313. Judicial referral to ancillary forms of alternative dispute resolution.**

(1) Any court of record, in its discretion, may refer a case to any ancillary form of alternative dispute resolution; except that the court shall not refer the case to any ancillary form of alternative dispute resolution where one of the parties claims that it has been the victim of physical or psychological abuse by the other party and states that it is thereby unwilling to enter into ancillary forms of alternative dispute resolution. In addition, the court may exempt from referral any case in which a party files with the court, within five days of a referral order, a motion objecting to ancillary forms of alternative dispute resolution and demonstrating compelling reasons why ancillary forms of alternative dispute resolution should not be ordered. Compelling reasons may include, but are not limited to, that the costs of ancillary forms of alternative dispute resolution would be higher than the requested relief and previous attempts to resolve the issues were not successful. Such forms of alternative dispute resolution may include, but are not limited to: arbitration, early neutral evaluation, med-arb, mini-trial, multi-door courthouse concepts, settlement conference, special master, summary jury trial, or any other form of alternative dispute resolution which the court deems to be an effective method for resolving the dispute in question. Parties and counsel are encouraged to seek the most appropriate forum for the resolution of their dispute. Judges may provide guidance or suggest an appropriate forum. However, nothing in this section shall impinge upon the right of parties to have their dispute tried in a court of law, including trial by jury.

(2) Ancillary programs may be established, made available, and promoted in any judicial district or combination of districts as designated by the chief judge of the affected district. Rules and regulations for ancillary forms of alternative dispute resolution shall be promulgated by the director of the office of dispute resolution.

(3) All rules, regulations, and procedures established pursuant to this section shall be subject to the approval of the chief justice.

(4) Nothing in this section shall preclude any court from making a referral to mediation services provided for in this article.

(5) All referrals under this section shall be made subject to the availability of alternative dispute resolution programs. Parties referred to ancillary forms of alternative dispute resolution may select services offered by the office of dispute resolution or by other individuals or organizations.

(6) This section shall not apply in any civil action where injunctive or similar equitable relief is the only remedy sought.

**Source:** L. 92: Entire section added, p. 300, § 5, effective June 2.

**Cross references:** For the legislative declaration contained in the 1992 act enacting this section, see section 1 of chapter 66, Session Laws of Colorado 1992.

#### ANNOTATION

**This section and § 14-10-128.1 are in conflict and cannot be harmonized with respect to the standards for the appointment of a parenting coordinator if abuse by one parent is alleged by the other.** Although this section bars the court from referring a case to any ancillary form of alternative dispute resolution if one of the parties claims abuse by the other party, under § 14-10-128.1, a mere claim of

abuse by one parent is insufficient to bar the appointment of a parenting coordinator. Even documented evidence of domestic violence does not automatically bar such an appointment. Rather, the court is required only to consider the effect of the evidence on the parties' ability to engage in parenting coordination. In re Rozzi, 190 P.3d 815 (Colo. App. 2008).

#### PART 4

##### MANDATORY ARBITRATION - CIVIL ACTIONS

##### 13-22-401 to 13-22-411. (Repealed)

**Editor's note:** (1) This part 4 was added in 1987. For amendments to this part 4 prior to its repeal in 1991, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 13-22-411 provided for the repeal of this part 4, effective July 1, 1991. (See L. 90, p. 875.)

#### PART 5

##### COLORADO INTERNATIONAL DISPUTE RESOLUTION ACT

**13-22-501. Short title.** This part 5 shall be known and may be cited as the "Colorado International Dispute Resolution Act".

**Source:** L. 93: Entire part added, p. 360, § 5, effective April 12.

**13-22-502. Legislative declaration.** The general assembly finds and declares that it is the policy of the state of Colorado to encourage parties to international commercial or noncommercial agreements or transactions to resolve disputes arising from such agreements or transactions, when appropriate, through arbitration, mediation, or conciliation. Therefore, it is the intent of the general assembly that arbitration and ancillary forms of alternative dispute resolution be made available to resolve international disputes.

**Source:** L. 93: Entire part added, p. 360, § 5, effective April 12.



**13-22-503. Definitions.** As used in this part 5, unless the context otherwise requires:

(1) "Arbitration" means the referral of a dispute to one or more neutral third parties for a decision based on evidence and testimony provided by the disputants.

(2) "Conciliation" means all forms of dispute resolution including, but not limited to, arbitration and mediation.

(3) "International dispute" means any dispute which involves the following:

(a) A dispute between persons who are residents of more than one country or entities which have facilities or operations relevant to the dispute located in more than one country;

(b) A dispute in which the parties have expressly agreed that the subject matter relates to interests in more than one country; or

(c) A dispute which is otherwise related to interests in more than one country.

(4) "Mediation" means an intervention in dispute negotiations by a trained, neutral third party with the purpose of assisting the parties to reach their own solution.

**Source: L. 93:** Entire part added, p. 361, § 5, effective April 12.

**13-22-504. Agreement for alternative dispute resolution.** The parties to an international dispute may agree to submit such dispute to arbitration, mediation, or conciliation for resolution of such dispute by means other than by litigation. Such dispute resolution pursuant to this part 5 shall be subject to any treaties or agreements which are in force and effect between the United States and any other country.

**Source: L. 93:** Entire part added, p. 361, § 5, effective April 12.

**13-22-505. Applicability.** The provisions of part 2 of this article and sections 13-22-307 and 13-22-308 shall apply to any international dispute submitted to alternative dispute resolution pursuant to this part 5.

**Source: L. 93:** Entire part added, p. 361, § 5, effective April 12.

**13-22-506. Choice of language.** The parties to any international dispute submitted for alternative dispute resolution pursuant to this part 5 may agree upon the language or languages to be used in the dispute resolution proceedings.

**Source: L. 93:** Entire part added, p. 361, § 5, effective April 12.

**13-22-507. Immunity.** None of the arbitrators, mediators, conciliators, witnesses, parties, or representatives of the parties involved in the arbitration, mediation, or conciliation of an international dispute pursuant to this part 5 shall be subject to service of process on any civil matter while such persons are present in this state for the purpose of participating in the arbitration, mediation, or conciliation of that international dispute.

**Source: L. 93:** Entire part added, p. 362, § 5, effective April 12.

## ARTICLE 23

### Structured Settlement Protection Act

13-23-101.  
13-23-102.

Short title.  
Definitions.

13-23-103.

Required disclosures to  
payee.

13-23-104.	Approval of transfers of structured settlement payment rights.	13-23-108.	Exceptions - judgment for periodic payment against a health care professional or institution - assignment of workers' compensation benefits.
13-23-105.	Effect of transfer of structured settlement payment right.		
13-23-106.	Procedure for approval of transfer.		
13-23-107.	General provisions - construction.		

**13-23-101. Short title.** This article shall be known and may be cited as the "Structured Settlement Protection Act".

**Source: L. 2004:** Entire article added, p. 494, § 1, effective July 1.

**13-23-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Annuity issuer" means an insurer that has issued a contract to fund periodic payments under a structured settlement.

(2) "Dependent" means a payee's spouse, minor child, or any person for whom the payee is legally obligated to provide support, including maintenance.

(3) "Discounted present value" means the present value of future payments determined by discounting such payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States internal revenue service.

(4) "Gross advance amount" means the sum payable to the payee or for the payee's account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions are made from such consideration.

(5) "Independent professional advice" means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser.

(6) "Interested parties" means the payee, any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the structured settlement obligor, and any other party who has continuing rights or obligations under such structured settlement. If a delegate child support enforcement unit is enforcing a payee's legal obligation to support his or her dependent children, pursuant to section 26-13-105, C.R.S., "interested parties" shall also include the delegate child support enforcement unit.

(7) "Net advance amount" means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under section 13-23-103.

(8) "Payee" means an individual who is receiving tax-free payments under a structured settlement and who proposes to make a transfer of payment rights thereunder.

(9) "Periodic payment" means a recurring payment or a scheduled future lump-sum payment.

(10) "Qualified assignment agreement" means an agreement providing for a qualified assignment within the meaning of section 130 of the federal "Internal Revenue Code of 1986", as amended.

(11) "Responsible administrative authority" means any government authority vested by law with exclusive jurisdiction over the settled claim resolved by such structured settlement.

(12) "Settled claim" means the original tort claim resolved by a structured settlement.

(13) "Structured settlement" means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of a tort claim.

(14) "Structured settlement agreement" means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement.

(15) "Structured settlement obligor" means the party who has the continuing obligation to make periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement.



(16) “Structured settlement payment right” means the right to receive periodic payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, where:

(a) The payee is domiciled in Colorado or the domicile or principal place of business of the structured settlement obligor or the annuity issuer is Colorado; or

(b) The structured settlement agreement was approved by a court or responsible administrative authority in Colorado; or

(c) The structured settlement agreement is expressly governed by the laws of Colorado.

(17) “Terms of the structured settlement” means the terms of the structured settlement agreement, the annuity contract, a qualified assignment agreement, and any order or other approval of a court or responsible administrative authority or other government authority that authorized or approved such structured settlement.

(18) “Transfer” means a sale, assignment, pledge, hypothecation, or other alienation or encumbrance of a structured settlement payment right made by a payee for consideration; except that the term “transfer” does not include the creation or perfection of a security interest in a structured settlement payment right under a blanket security agreement entered into with an insured depository institution in the absence of any action to redirect the structured settlement payments to such insured depository institution, or an agent or successor in interest thereof, or otherwise to enforce such blanket security interest against the structured settlement payment rights.

(19) “Transfer agreement” means the agreement providing for a transfer of a structured settlement payment right.

(20) “Transferee” means a party acquiring or proposing to acquire a structured settlement payment right through a transfer.

(21) “Transfer expenses” means all expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including, without limitation, court filing fees, attorney fees, escrow fees, lien recordation fees, judgment and lien search fees, finders’ fees, commissions, and other payments to a broker or other intermediary. “Transfer expenses” does not include preexisting obligations of the payee payable for the payee’s account from the proceeds of a transfer.

**Source: L. 2004:** Entire article added, p. 494, § 1, effective July 1.

**13-23-103. Required disclosures to payee.** (1) Not fewer than three days prior to the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a separate disclosure statement, in bold type no smaller than fourteen points, setting forth:

(a) The amounts and due dates of the structured settlement payments to be transferred;

(b) The aggregate amount of such payments;

(c) The discounted present value of the payments to be transferred, which shall be identified as the “calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities”, and the amount of the applicable federal rate used in calculating such discounted present value;

(d) The gross advance amount;

(e) An itemized listing of all applicable transfer expenses, other than attorney fees and related disbursements, payable in connection with the transferee’s application for approval of the transfer and the transferee’s best estimate of the amount of any attorney fees and related disbursements;

(f) The net advance amount;

(g) The amount of any penalties or liquidated damages payable by the payee in the event of a breach of the transfer agreement by the payee; and

(h) A statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed by the payee.

**Source: L. 2004:** Entire article added, p. 496, § 1, effective July 1.

**13-23-104. Approval of transfers of structured settlement payment rights.** (1) A direct or indirect transfer of a structured settlement payment right shall not be effective and a structured settlement obligor or annuity issuer shall not be required to make a payment directly or indirectly to a transferee of a structured settlement payment right unless the transfer has been approved in advance in a final court order or order of a responsible administrative authority based on express findings by such court or responsible administrative authority that:

(a) The transfer is in the best interests of the payee, taking into account the welfare and support of the payee's dependents;

(b) The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly and willingly waived such advice in writing; and

(c) The transfer does not contravene any applicable statute or the order of any court or other government authority.

**Source: L. 2004:** Entire article added, p. 497, § 1, effective July 1.

**13-23-105. Effect of transfer of structured settlement payment right.** (1) Following a transfer of a structured settlement payment right pursuant to this article:

(a) The structured settlement obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from all liability for the transferred payments;

(b) The transferee shall be liable to the structured settlement obligor and the annuity issuer:

(I) If the transfer contravenes the terms of the structured settlement, for any taxes incurred by such parties as a consequence of the transfer; and

(II) For any other liabilities or costs, including reasonable costs and attorney fees, arising from compliance by such parties with the order of the court or responsible administrative authority or arising as a consequence of the transferee's failure to comply with the provisions of this article;

(c) Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and a transferee or assignee or between two or more transferees or assignees; and

(d) Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this article.

**Source: L. 2004:** Entire article added, p. 497, § 1, effective July 1.

**13-23-106. Procedure for approval of transfer.** (1) An application under this article for approval of a transfer of a structured settlement payment right shall be made by the transferee and may be brought:

(a) In the district court for the county in which the payee resides;

(b) In the district court for the county in which the structured settlement obligor or the annuity issuer maintains its principal place of business; or

(c) In any court or before any responsible administrative authority that approved the structured settlement agreement.

(2) Not fewer than twenty days prior to the scheduled hearing on an application for approval of a transfer of structured settlement payment rights under section 13-23-104, the transferee shall file with the court or responsible administrative authority and serve on all interested parties a notice of the proposed transfer and the application for its authorization. The transferee shall file and serve:

(a) A copy of the transferee's application;

(b) A copy of the transfer agreement;

(c) A copy of the disclosure statement required pursuant to section 13-23-103;

(d) A listing of each of the payee's dependents, together with each dependent's age;

(e) A notification that any interested party is entitled to support, oppose, or otherwise respond to the transferee's application, either in person or by counsel, by submitting written



comments to the court or responsible administrative authority or by participating in the hearing; and

(f) A notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed, which shall be not fewer than fifteen days after service of the transferee's notice, in order to be considered by the court or responsible administrative authority.

**Source: L. 2004:** Entire article added, p. 498, § 1, effective July 1.

**13-23-107. General provisions - construction.** (1) The provisions of this article may not be waived by any payee.

(2) Any transfer agreement entered into on or after July 1, 2004, by a payee who resides in Colorado shall provide that disputes under such transfer agreement, including any claim that the payee has breached the agreement, shall be determined in and under the laws of Colorado. No such transfer agreement shall authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.

(3) A transfer of structured settlement payment rights shall not extend to any payments that are life-contingent unless, prior to the date on which the payee signs the transfer agreement, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the annuity issuer and the structured settlement obligor for periodically confirming the payee's survival and giving the annuity issuer and the structured settlement obligor prompt written notice in the event of the payee's death.

(4) A payee who proposes to make a transfer of a structured settlement payment right shall not incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee or any assignee based on a failure of such transfer to satisfy the conditions of this article.

(5) Nothing contained in this article shall be construed to authorize a transfer of a structured settlement payment right in contravention of any law or to imply that a transfer under a transfer agreement entered into prior to July 1, 2004, is valid or invalid.

(6) Compliance with the requirements set forth in section 13-23-103 and fulfillment of the conditions set forth in section 13-23-104 shall be solely the responsibility of the transferee in a transfer of structured settlement payment rights, and neither the structured settlement obligor nor the annuity issuer shall bear responsibility for, or any liability arising from, noncompliance with such requirements or failure to fulfill such conditions.

**Source: L. 2004:** Entire article added, p. 499, § 1, effective July 1.

**13-23-108. Exceptions - judgment for periodic payment against a health care professional or institution - assignment of workers' compensation benefits.** Nothing in this article shall apply to a judgment entered pursuant to the provisions of part 2 of article 64 of this title or to compensation or benefits due under articles 40 to 47 of title 8, C.R.S.

**Source: L. 2004:** Entire article added, p. 500, § 1, effective July 1.

## EVIDENCE

### ARTICLE 25

#### Evidence - General Provisions

**Cross references:** For admissibility of witnesses' testimony, see part 1 of article 90 of this title and C.R.C.P. 43; for admissibility of evidence of failure to wear a safety belt system to mitigate damages resulting from a motor vehicle accident, see § 42-4-237 (7).

**Law reviews:** For a discussion of Tenth Circuit decisions dealing with evidence, see 66 Den. U.L. Rev. 767 (1989).

13-25-101.	Printed statutes - reports of decisions.	13-25-126.5.	Documents arising from environmental self-evaluation - admissibility in evidence.
13-25-102.	Mortality table as evidence.	13-25-127.	Civil actions - degree of proof required.
13-25-103.	Mortality table.	13-25-128.	Rules of evidence - grant of authority subject to reservation.
13-25-104.	Proof of handwriting.	13-25-129.	Statements of child victim of unlawful sexual offense against a child or of child abuse - hearsay exception.
13-25-105.	Certificate of register - patent.	13-25-129.5.	Statements of persons with developmental disabilities - hearsay exception.
13-25-106.	Judicial notice of laws of other jurisdictions.	13-25-130.	Criminal actions - use of photographs, video tapes, or films of property.
13-25-107.	Proceedings of cities and towns.	13-25-131.	Civil actions - sexual assault - certain evidence presumed irrelevant.
13-25-108.	Evidence of assessment.	13-25-132.	Criminal actions - video tape depositions - use at trial.
13-25-109.	Recording of patents to land.	13-25-133.	Telecommunications devices for the deaf and teletype - inadmissibility in evidence - exception.
13-25-110.	Patent - copy of record.	13-25-134.	Electronic records and signatures - admissibility in evidence - originals.
13-25-111.	Patents already recorded.	13-25-135.	Evidence of admissions - civil proceedings - unanticipated outcomes - medical care.
13-25-112.	Fees of recorder.	13-25-136.	Criminal actions - prenatal drug and alcohol screening - admissibility of evidence.
13-25-113.	Lost deed - bond - note - affidavit.	13-25-137.	Admissibility of commercial packaging.
13-25-114.	Certificate of publisher.		
13-25-115.	Certificate of head officer.		
13-25-116.	Water officials' records.		
13-25-117.	Parties plaintiff.		
13-25-118.	Joint defendants.		
13-25-119.	Dying declarations.		
13-25-120.	Corporate resolutions and minutes.		
13-25-121.	Reports of death.		
13-25-122.	Person missing, interned, or captured.		
13-25-123.	Report deemed pursuant to law.		
13-25-124.	Libel and slander - how pleaded.		
13-25-125.	Justification - pleaded and proved.		
13-25-125.5.	Libel and slander - self-publication.		
13-25-126.	Genetic tests to determine parentage.		

**13-25-101. Printed statutes - reports of decisions.** The printed statute books of the United States and of the several states and territories, printed under the authority of such states and territories, and the books of reports of decisions of the supreme courts of the United States and of the several states and territories, published by authority of such courts, may be read as evidence in all courts of this state of such acts and decisions.

**Source:** R.S. p. 309, § 1. G.L. § 1078. G.S. § 1308. R.S. 08: § 2489. C.L. § 6535. CSA: C. 63, § 1. CRS 53: § 52-1-1. C.R.S. 1963: § 52-1-1.

**Cross references:** For use of statutes and books as evidence, see C.R.C.P. 44(e) and 264.

#### ANNOTATION

**Applied** in *Sego v. Mains*, 41 Colo. App. 1, 578 P.2d 1069 (1978).

**13-25-102. Mortality table as evidence.** In all civil actions, special proceedings, or other modes of litigation in courts of justice or before magistrates or other persons having power and authority to receive evidence, when it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he is living



at the time or not, the table set out in section 13-25-103 shall be received as evidence, together with other evidence as to health, constitution, habits, and occupation of such person of such expectancy.

**Source:** L. 1893: p. 261, § 1. R.S. 08: § 2490. C.L. § 6536. CSA: C. 63, § 2. CRS 53: § 52-1-2. C.R.S. 1963: § 52-1-2. L. 91: Entire section amended, p. 358, § 16, effective April 9.

### ANNOTATION

**Tables are admissible where personal injuries are alleged to be permanent.** Where in an action for personal injuries there is evidence that the disability complained of is permanent, the mortuary tables are admissible to establish the plaintiff's expectancy of life. *Rio Grande S. R. R. v. Nichols*, 52 Colo. 300, 123 P. 318 (1912).

**Under this section, a mortality table which has legislative recognition at any given time is evidence** to be considered with other pertinent matter as bearing upon the life expectancy of person whose rights are being adjudicated; such table does not fix the liability of an employer, and under certain circumstances might be wholly disregarded by the industrial commission. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 148 Colo. 557, 367 P.2d 597 (1961).

**However, the tables are not conclusive**, but are to be considered in connection with other evidence as to the health, habits, and condition of the injured party. *Rio Grande S. R. R. v. Nichols*, 52 Colo. 300, 123 P. 318 (1912); *Riss*

& *Co. v. Anderson*, 108 Colo. 78, 114 P.2d 278 (1941); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 148 Colo. 557, 367 P.2d 597 (1961).

**Evidence as to the age, habits, and health of the absentee is admissible**, because bearing upon the probable duration of his life. The mortuary table prescribed by this section is admissible for the reason that it bears upon the probable duration of his life. *New York Life Ins. Co. v. Holck*, 59 Colo. 416, 151 P. 916 (1915).

In such cases the litigant may avail himself of the admissibility of the mortality tables or not, at his pleasure. *Gilligan v. Blakesley*, 93 Colo. 370, 26 P.2d 808 (1933).

In determining the life expectancy of a claimant, the industrial commission may use any recognized expectancy tables without their formal introduction by either party at the hearing. *Indus. Comm'n v. Big Six Coal Co.*, 72 Colo. 377, 211 P. 361 (1922) (decided prior to the abolition of the industrial commission in 1986).

**13-25-103. Mortality table.** The table referred to in section 13-25-102 is as follows:

Completed Age	Expectancy of Life, U.S. Life Table: 1998
0	76.7
1	76.3
2	75.3
3	74.3
4	73.4
5	72.4
6	71.4
7	70.4
8	69.4
9	68.4
10	67.4
11	66.4
12	65.5
13	64.5
14	63.5
15	62.5
16	61.5
17	60.6
18	59.6
19	58.7
20	57.7
21	56.8

**Completed  
Age****Expectancy of Life,  
U.S. Life Table: 1998**

22	55.8
23	54.9
24	53.9
25	53.0
26	52.0
27	51.1
28	50.1
29	49.2
30	48.2
31	47.3
32	46.3
33	45.4
34	44.4
35	43.5
36	42.6
37	41.6
38	40.7
39	39.8
40	38.8
41	37.9
42	37.0
43	36.1
44	35.2
45	34.3
46	33.4
47	32.5
48	31.6
49	30.7
50	29.8
51	29.0
52	28.1
53	27.2
54	26.4
55	25.5
56	24.7
57	23.9
58	23.1
59	22.3
60	21.5
61	20.7
62	20.0
63	19.2
64	18.5
65	17.8
66	17.1
67	16.4
68	15.7
69	15.0
70	14.3
71	13.7
72	13.1
73	12.5
74	11.9
75	11.3



Completed Age	Expectancy of Life, U.S. Life Table: 1998
76	10.7
77	10.2
78	9.6
79	9.1
80	8.6
81	8.1
82	7.6
83	7.1
84	6.7
85	6.3
86	6.0
87	5.6
88	5.3
89	5.0
90	4.7
91	4.4
92	4.1
93	3.9
94	3.7
95	3.5
96	3.3
97	3.1
98	2.9
99	2.7
100	2.6

**Source:** L. 1893: p. 261, § 2. R.S. 08: § 2491. C.L. § 6537. CSA: C. 63, § 3. CRS 53: § 52-1-3. L. 55: p. 371, § 1. L. 60: p. 138, § 1. C.R.S. 1963: § 52-1-3. L. 77: Entire section R&RE, p. 804, § 1, effective July 1. L. 86: Entire section R&RE, p. 691, § 1, effective July 1. L. 93: Entire section amended, p. 250, § 1, effective July 1. L. 2002: Entire section amended, p. 1354, § 1, effective July 1.

**13-25-104. Proof of handwriting.** Comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

**Source:** L. 1893: p. 264, § 1. R.S. 08: § 2492. C.L. § 6538. CSA: C. 63, § 4. CRS 53: § 52-1-4. C.R.S. 1963: § 52-1-4.

#### ANNOTATION

An expert in handwriting may depose as to the authenticity of the handwriting in question, though he acquires his knowledge of the writing of the person to whom it is ascribed merely by examination of specimens proven or admitted to be his genuine handwriting, such specimens being produced in court and the witness comparing them and stating his conclusions as to their similarity or dissimilarity. *Salazar v. Taylor*, 18 Colo. 538 (1893); *Ausmus v. People*, 47 Colo. 167, 107 P. 204 (1910).

It is not necessary that an expert testify as to the authenticity of the writing. If there is a genuine writing which may be used to compare the handwriting of the disputed handwritings, then such disputed writings are admissible into evidence. *Lewis v. People*, 174 Colo. 334, 483 P.2d 949 (1971).

**Anyone can identify handwriting by comparison.** The rule is that when a writing in issue is claimed on the one hand and denied upon the other to be the writing of a particular person, any

other writing of that person's may be admitted in evidence for the mere purpose of comparison with the writing in dispute, whether the latter is susceptible of or supported by direct proof or not; but before any such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding judge, upon clear and undoubted evidence. *Wilson v. Scroggs*, 85 Colo. 537, 277 P. 784 (1929).

**Preliminary determination of genuineness of writing.** This section requires that before a disputed writing is admissible for comparison purposes, the court shall make a preliminary determination that the writing is genuine. In order for the court to make such a determination, the party offering the evidence must make a prima facie showing of genuineness based on clear and competent evidence. *People v. Taylor*, 197 Colo. 161, 591 P.2d 1017 (1979).

**For proof of extraneous writing as genuine,** see *Bradford v. People*, 22 Colo. 157, 43 P. 1013 (1896); *Brindisi v. People*, 76 Colo. 244, 230 P. 797 (1924).

**Something must connect the authors of the two writings.** Before such standards of comparison are admissible, there must be something to connect the author of them with the writing, the authenticity of which is in dispute. *Wilson v. Scroggs*, 85 Colo. 537, 277 P. 784 (1929).

**If shown to be authentic it is admissible as standard of comparison.** Where the genuineness of a signature is an issue, the court should allow all evidence which tends to establish the genuineness of a signature offered in evidence as a basis of comparison, and should then determine as a matter of law whether the authenticity of such signature has been established, and if this has been done to his satisfaction, then the proven signature should be admitted as a standard of comparison to be used by witnesses and jurors in determining the issue. *Wilson v. Scroggs*, 85 Colo. 537, 277 P. 784 (1929).

**Disputed signature need not be admitted to be genuine if comparison shows it is.** In an action involving a disputed signature, it is not the law that before an alleged genuine signature may be admitted in evidence as a standard of comparison, it must be admitted to be genuine. If the evidence establishes the signature to be genuine to the satisfaction of the court, it is admissible. *Wilson v. Scroggs*, 85 Colo. 537, 277 P. 784 (1929).

**The words "the same" appearing in this section refer to "writing proved"** as well as to "disputed writing" and the words "and such writings" may well have been stricken from the original bill as superfluous. *Brindisi v. People*, 76 Colo. 244, 230 P. 797 (1924).

**This section is not applicable to a prosecution for forgery in a federal court.** *Withaup v. United States*, 127 F. 530 (8th Cir. 1903).

**Applied in** *People v. Todd*, 189 Colo. 117, 538 P.2d 433 (1975).

**13-25-105. Certificate of register - patent.** The official certificate of any register or receiver of any land office of the United States to any fact or matter on record in his office shall be received and held competent to prove the fact as certified. The certificate of any such register of the entry or purchase of any tract of land within his district shall be taken to be evidence of title in the party who made such entry or purchase, or his heirs and assigns; but a patent for land shall be considered a better legal and paramount title in the patentee, his heirs, or his assigns than such register's certificate of the entry and purchase of the same land.

**Source:** R.S. p. 309, § 3. G.L. § 1080. G.S. § 1310. R.S. 08: § 2494. C.L. § 6540. CSA: C. 63, § 6. CRS 53: § 52-1-6. C.R.S. 1963: § 52-1-6.

#### ANNOTATION

The statute was clearly intended to cover only facts and matters affirmatively appearing on record in the land office; and it is too simple a proposition to admit of argument that it does not authorize receiving in evidence a certificate stating that a certain fact or matter does not appear on record. *Knoth v. Barclay*, 8 Colo. 300, 6 P. 924 (1885).

Land entered as herein prescribed has always been held to be the subject of contract and sale, and the receipt of the money and the issuance of the certificate have universally been held to be such a segregation of the land from the public domain as to entitle the party to his patent, and to warrant legal proceedings for the

purposes of procuring it. *Godding v. Decker*, 3 Colo. App. 198, 32 P. 832 (1893).

**A purchase money receipt from land office is prima facie evidence.** A receipt for the purchase money of lands issued by the receiver of a land office of the United States is prima facie evidence of title to the lands therein described. *Carson v. Cudworth*, 26 Colo. App. 131, 140 P. 935 (1914).

**A record of a receiver's receipt constitutes recorded title** within the meaning of this section. *Dallemand v. Mannon*, 4 Colo. App. 262, 35 P. 679 (1894).

**A receiver's duplicate receipt** is by this section made evidence of title in the person making



the entry or purchase of the land, and is entitled to be recorded. *Dallemand v. Mannon*, 4 Colo. App. 262, 35 P. 679 (1894).

**It has been held good as against a subsequent patent.** A receiver's receipt, regular in all respects, both as to its form and the antecedent acts of entryman leading up to it, has been held to be good as against a subsequent patent issued by the government. *Carson v. Cudworth*, 26 Colo. App. 131, 140 P. 935 (1914).

**A patent is conclusive evidence of compliance with federal statutes.** A patent for lands

purchased of the United States relates to the entry, and is conclusive evidence of compliance by the entryman with all the requirements of the federal statutes. *Carson v. Cudworth*, 26 Colo. App. 131, 140 P. 935 (1914).

**A purchaser cannot complain that vendor has only a final receipt.** That the vendor holds only a final receipt, and not a patent for the land, is not a defect of which the purchaser can complain. *Godding v. Decker*, 3 Colo. App. 198, 32 P. 832 (1893).

**13-25-106. Judicial notice of laws of other jurisdictions.** (1) Every court of this state shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States.

(2) The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

(3) The determination of such laws shall be made by the court and not by the jury and is reviewable.

(4) Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

(5) The law of a jurisdiction other than those referred to in subsection (1) of this section is an issue for the court but shall not be subject to the foregoing provisions concerning judicial notice.

(6) This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it and may be cited as the "Uniform Judicial Notice of Foreign Law Act".

**Source:** R.S. p. 310, § 4. G.L. § 1081. G.S. § 1311. R.S. 08: § 2495. C.L. § 6541. CSA: C. 63, § 7. CRS 53: § 52-1-7. L. 67: p. 989, § 1. C.R.S. 1963: § 52-1-7.

#### ANNOTATION

**Applied** in *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979).

**13-25-107. Proceedings of cities and towns.** Copies of all papers, books, or proceedings or parts thereof appertaining to transactions in their corporate capacity of any town or city incorporated under any general or special law of this state, certified to be true copies by the clerk or keeper of the same, under the seal of such town or city, or under the private seal of said clerk or keeper if there is no public seal, the clerk or keeper also certifying that he is entrusted with the safekeeping of the original, shall be received as prima facie evidence of the facts so certified in any court in this state.

**Source:** R.S. p. 311, § 7. G.L. § 1084. G.S. § 1314. R.S. 08: § 2496. C.L. § 6542. CSA: C. 63, § 8. CRS 53: § 52-1-8. C.R.S. 1963: § 52-1-8.

#### ANNOTATION

**Applied** in *People v. Stribel*, 199 Colo. 377, 609 P.2d 113 (1980).

**13-25-108. Evidence of assessment.** In all actions in all courts of record, the original assessment, or a certified copy thereof purporting to be made by the corporate authorities of any municipality in this state, under a statute authorizing the same, which determines the

cost and expense due from any piece of real estate, or from the owner thereof, because of the construction of any kind of local improvement in the taxing district wherein such property is located, or in front of, abutting upon, or adjacent to said realty within any such municipality shall be accepted and treated by such tribunals as prima facie evidence of the lawful existence, and due and proper performance of all preliminary steps essential to make such assessment a legal and valid assessment against the realty or owner thereof, or both, against whom it appears to be made.

**Source:** L. 1891: p. 192, § 1. R.S. 08: § 2497. C.L. § 6543. CSA: C. 63, § 9. CRS 53: § 52-1-9. C.R.S. 1963: § 52-1-9. L. 64: p. 266, § 158.

#### ANNOTATION

**Law reviews.** For note, "Notes and Comments: What is a Life Worth?", see 34 Dicta 41 (1957).

**13-25-109. Recording of patents to land.** Any person to whom any patent to any land, whether agricultural or mineral, situate in this state, has been issued from the government of the United States may have same recorded in the office of the recorder of deeds of the county wherein such lands are situate upon presentation of the same at the proper office.

**Source:** L. 1872: p. 162, § 1. G.L. § 2145. G.S. § 1317. R.S. 08: § 2498. C.L. § 6544. CSA: C. 63, § 10. CRS 53: § 52-1-10. C.R.S. 1963: § 52-1-10.

**13-25-110. Patent - copy of record.** Any patent may be read in evidence in the first instance without further proof of its execution. Copy of the record of such patent is entitled to be read in evidence under such regulations as are provided for the admission of a copy of the record of deeds.

**Source:** L. 1872: p. 162, § 2. G.L. § 2146. G.S. § 1318. R.S. 08: § 2499. C.L. § 6545. CSA: C. 63, § 11. CRS 53: § 52-1-11. C.R.S. 1963: § 52-1-11.

**13-25-111. Patents already recorded.** The provisions of sections 13-25-109 and 13-25-110 apply to patents already recorded.

**Source:** L. 1872: p. 162, § 3. G.L. § 2147. G.S. § 1319. R.S. 08: § 2500. C.L. § 6546. CSA: C. 63, § 12. CRS 53: § 52-1-12. C.R.S. 1963: § 52-1-12.

**13-25-112. Fees of recorder.** The fees of the recorder of deeds for the record of such patents are the same as fixed for the record of deeds.

**Source:** L. 1872: p. 163, § 4. G.L. § 2148. G.S. § 1320. R.S. 08: § 2501. C.L. § 6547. CSA: C. 63, § 13. CRS 53: § 52-1-13. C.R.S. 1963: § 52-1-13. L. 73: p. 631, § 1.

**Cross references:** For fees of county clerks, see § 30-1-103.

**13-25-113. Lost deed - bond - note - affidavit.** When, in the progress of any suit in any court in this state, either party thereto relies for its maintenance or defense, in whole or in part, on any deed, bond, note, draft, bill of exchange, letter, or any other writing alleged to have been executed, signed, or written by the adverse party, and to have been lost or destroyed, the party so relying on the same as evidence in his behalf in the trial of the cause shall not be permitted to give evidence of the contents thereof by a competent witness until said party or his agent or attorney first makes an oath to the loss or destruction thereof, and to the substance of the same.



**Source:** L. 1870: p. 73, § 1. G.L. § 1085. G.S. § 1321. R.S. 08: § 2502. C.L. § 6548. CSA: C. 63, § 14. CRS 53: § 52-1-14. C.R.S. 1963: § 52-1-14.

### ANNOTATION

**Under this section the filing of a proper affidavit lays the foundation for the introduction of secondary evidence** as to the contents of a lost instrument; but where such secondary evidence is admitted, it must be clear and satisfactory as to the contents of the document involved, and if the proceeding is one for specific performance, the evidence must be strong and unequivocal. *Walker v. Drogmund*, 101 Colo. 521, 74 P.2d 1235 (1937).

**Affidavit must show original is unavailable.** The reception of secondary evidence of the contents of a writing in the absence of a showing that the original is unavailable is error. *Epple v. First Nat'l Bank*, 143 Colo. 319, 352 P.2d 796 (1960).

**Affidavit was not sufficient to comply with this section** where it was not based upon the affiant's personal knowledge of the existence of

the document and his personal knowledge that it was lost. *People v. Heckers*, 37 Colo. App. 166, 543 P.2d 1311 (1975).

**It need not be lost as long as affiant does not have power to produce.** This section does not require proof that the original deed has been lost. It is sufficient if affidavit be made that the original is not in the affiant's possession or power to produce. *Coleman v. Davis*, 13 Colo. 98, 21 P. 1018 (1889).

**The greater the value of the instrument, the more conclusive should be the proof of its existence** and contents. *People v. Heckers*, 37 Colo. App. 166, 543 P.2d 1311 (1975).

**Secondary evidence adduced to prove contents of lost instrument must be clear and convincing especially in criminal case.** *People v. Heckers*, 37 Colo. App. 166, 543 P.2d 1311 (1975).

**13-25-114. Certificate of publisher.** When any notice or advertisement is required by law or order of court to be published in any newspaper, the certificate of the printer or publisher with a printed copy of such notice or advertisement annexed, stating the number of times which the same has been published and the dates of the first and last paper containing the same, shall be sufficient evidence of the publication therein set forth. Such notices and certificates of the publication thereof, when so certified, shall be a part of the records of the court.

**Source:** R.S. p. 45, §§ 1, 2. G.L. §§ 6, 7. G.S. §§ 1315, 1316. R.S. 08: §§ 2503, 2504. C.L. §§ 6549, 6550. CSA: C. 63, §§ 15, 16. CRS 53: § 52-1-15. C.R.S. 1963: § 52-1-15.

**Cross references:** For legal notices and advertisements, see article 70 of title 24 and C.R.C.P. 4(g) and (h).

**13-25-115. Certificate of head officer.** Where a subpoena is issued to a state agency of an executive department seeking an appearance in any court of record, and the evidence sought is proof of the absence of a public record or entry, or the foundation for or the authenticity of the documents which are otherwise admissible pursuant to the Colorado rules of evidence, such subpoena may be complied with by the submission of the documents under the official certificate of the head officer, or acting head officer, or official custodian acting under the authority of the head officer of any executive department of the government of the state of Colorado, as provided for in this section, without an appearance by the personnel of such agency. Nothing in this section shall be construed to restrict the right of any party to any legal proceeding to subpoena a state employee to testify to matters going beyond the foundation or authenticity of the records of the executive department.

**Source:** L. 11: p. 231, § 1. C.L. § 6551. CSA: C. 63, § 17. CRS 53: § 52-1-16. C.R.S. 1963: § 52-1-16. L. 91: Entire section amended, p. 374, § 1, effective April 19.

## ANNOTATION

**This section concerns the authentication of official state documents and not the competency or relevance** of the documents themselves. *Liber v. Flor*, 160 Colo. 7, 415 P.2d 332 (1966); *Orth v. Bauer*, 163 Colo. 136, 429 P.2d 279 (1967).

**The word "fact" refers to facts within the knowledge of the reporting officer** or agent and cannot refer to hearsay statements or conclusions of others, such as those sought to be admitted here. *Orth v. Bauer*, 163 Colo. 136, 429 P.2d 279 (1967).

**It is a codification of the hearsay exception for official records.** The section is not specific in requiring the admission of findings, adjudications, and conclusions, and, thus, it is nothing more than a codification of the common-law exception to the hearsay rule in favor of official records. *Orth v. Bauer*, 163 Colo. 136, 429 P.2d 279 (1967).

**The records themselves cannot contain hearsay.** The section does not authorize the

reception in evidence of every report of an investigation regardless of its hearsay character and of whether it contains conclusions and adjudications. *Orth v. Bauer*, 163 Colo. 136, 429 P.2d 279 (1967).

**Where the officer was not present, and the defendant was not given the opportunity to cross-examine him,** the entire report was properly excluded. "Official documents" to be admissible in evidence must first be tested by common-law principles of testimonial competency. The mere writing down of hearsay does not remove the bar to its admission. *Orth v. Bauer*, 163 Colo. 136, 429 P.2d 279 (1967).

**The court has invariably noticed the documents evidencing action of the general assembly,** subscribed by the proper officials, and found in the office of the secretary of state. They are accepted as prima facie evidence of the law, and whoever asserts the contrary has the burden of proof. *Harrison v. People ex rel. Whatley*, 57 Colo. 137, 140 P. 203 (1914).

**13-25-116. Water officials' records.** In all civil actions, special proceedings, or other modes of litigation before a water judge or referee having power to receive evidence, all records, reports, tables, and other documents of division engineers and water commissioners of the state of Colorado and all records, streamflow tables, rating curves, automatic water register sheets, and special reports of the state engineer and his deputies, hydrographers, and employees, and of the division engineers of the several divisions, and all records of canal headgate keepers, reservoir outlet keepers, gauge readers, and other systematically compiled records or reports of diversions, storage, and discharge of waters or of the flows of streams on file in or constituting a part of the records and files of the state engineer of the state of Colorado, and all copies duly certified as correct by the state engineer or his deputy shall be admitted as evidence of the facts contained therein.

**Source:** L. 21: p. 309, § 1. C.L. § 6552. CSA: C. 63, § 18. CRS 53: § 52-1-17. C.R.S. 1963: § 52-1-17.

## ANNOTATION

**Water commissioners' reports will be assumed by an appellate court to be properly verified.** Where portions of water commissioners' reports are admitted in evidence, it will be assumed on review, in the absence of evidence to the contrary, that they were properly verified where such verification is required by statute. *Commonwealth Irrigation Co. v. Rio Grande Canal Water Users Ass'n*, 96 Colo. 478, 45 P.2d 622 (1935).

**An objection to their admissibility cannot first be made on appeal.** A party may not successfully urge an objection to the admission in evidence of water commissioners' reports on

the ground that they were not sworn to, where the question is raised for the first time in the reviewing court. *Commonwealth Irrigation Co. v. Rio Grande Canal Water Users Ass'n*, 96 Colo. 478, 45 P. 2d 622 (1935).

**The water court did not abuse its discretion when it admitted the state's water records into evidence** despite fact the state failed to furnish copies to the owner of the water rights within time specified in the pretrial order, when reason for the delay was explained, the exhibit was matter of public record, and additional time to respond was given. *Masters Inv. Co. v. Irrigationists Ass'n*, 702 P.2d 268 (Colo. 1985).

**13-25-117. Parties plaintiff.** In trials of actions upon contracts, expressed or implied, where the action is brought by partners or by joint payees or obligees, it shall not be necessary for the plaintiff, in order to maintain any such action, to prove the partnership of



the individuals named in such action or to prove the first names or surnames of such partners or of joint payees or obligees, but the names of the partners or joint payees or obligees shall be presumed to be truly set forth in the declaration, petition, or bill. Nothing in this section shall prevent the defendant from pleading in abatement or proving on the trial that more persons should have been made plaintiffs, or that more persons have been made plaintiffs than have the legal right to sue, in which event the defendant's right shall be as at common law.

**Source:** R.S. p. 310, § 5. G.L. § 1082. G.S. § 1312. R.S. 08: § 2505. C.L. § 6553. CSA: C. 63, § 19. CRS 53: § 52-1-18. C.R.S. 1963: § 52-1-18. L. 73: p. 612, § 1.

**13-25-118. Joint defendants.** In actions upon express contracts against two or more defendants alleged to have been made or executed by such defendants as partners or joint obligors or payors, proof of the joint liability or partnership of the defendants, or their first names or surnames, shall not in the first instance be required to entitle the plaintiff to judgment, unless such proof is rendered necessary by the filing of pleas denying the execution of such writing, verified by affidavit as required by law.

**Source:** R.S. p. 310, § 6. G.L. § 1083. G.S. § 1313. R.S. 08: § 2506. C.L. § 6554. CSA: C. 63, § 20. CRS 53: § 52-1-19. C.R.S. 1963: § 52-1-19. L. 73: p. 612, § 2.

**Cross references:** For joint and several obligations, see article 50 of this title; for pleading special matters, see C.R.C.P. 9.

#### ANNOTATION

**Joint liability as partners need not be proved unless denied.** Under this section a plaintiff is not required to prove the joint liability of defendants sued as partners, unless the execution of the instrument sued on is denied by plea verified by affidavit. *Litchfield v. Daniels*, 1 Colo. 268 (1871).

**Denial of partnership may be made by general issue, without oath.** In *assumpsit*

against two persons as partners to recover damages for failure to deliver stock pursuant to a contract which was not in writing, the general issue by one of the defendants, without oath, operates to deny the partnership. *Rogers v. Nuckolls*, 2 Colo. 281 (1874).

**13-25-119. Dying declarations.** (1) The dying declarations of a deceased person are admissible in evidence in all civil and criminal trials and other proceedings before courts, commissions, and other tribunals to the same extent and for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings, under the following restrictions. To render the declarations of the deceased competent evidence, it must be satisfactorily proved:

(a) That at the time of the making of such declaration he was conscious of approaching death and believed there was no hope of recovery;

(b) That such declaration was voluntarily made, and not through the persuasion of any person;

(c) That such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement;

(d) That he was of sound mind at the time of making the declaration.

**Source:** L. 37: p. 557, § 1. CSA: C. 63, § 21. CRS 53: § 52-1-20. C.R.S. 1963: § 52-1-20.

#### ANNOTATION

**Law reviews.** For article, "A Voice from the Grave: Dying Declarations in Colorado", see 15

*Dicta* 127 (1938). For article, "Dying Declarations", see 16 *Dicta* 379 (1939). For note, "Dy-

ing Declarations in Colorado”, see 21 Rocky Mt. L. Rev. 106 (1948). For article, “Hearsay in Criminal Cases Under The Colorado Rules of Evidence: An Overview”, see 50 U. Colo. L. Rev. 277 (1979).

**It is admission of declarations resulting from persuasion or leading questions that this section seeks to prohibit.** *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

**Fact that declaration was in response to question does not violate either subsection (1)(b) or (1)(c) of this section.** *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

**Declarant need not declare that he has sense of impending death.** To make a dying declaration admissible in evidence it is not necessary that the declarant should have stated that at the time it was made under a sense of impending death. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger. *Dolan v. People*, 168 Colo. 19, 449 P.2d 828 (1969).

**Deceased motorist’s statement, in regard to collision, admitted** under this section where all the essential elements of a dying declaration under this section were positively established. *Barsch v. Hammond*, 110 Colo. 441, 135 P.2d 519 (1943).

**Statements made two months prior to death admissible.** Where a victim of homicide caused by an abortion made statements two months before her death as to who performed the unlawful operation, knowing at the time that death was inevitable, such statements would be admissible under this section. *Ferguson v. People*, 118 Colo. 54, 192 P.2d 523 (1948).

**In an abortion case where deceased was not conscious of approaching death,** and where it was not a voluntary statement, but was made through persuasion by her physician in order to obtain a history of her case, her statement did not satisfy the requirements of this section so as to make it admissible. *Polly v. People*, 107 Colo. 6, 108 P.2d 220 (1940).

**Judge passes on admissibility.** The rule as to determination of the sufficiency of the foundation proof which will allow dying declarations to be admitted into evidence is that the judge is to pass on the preliminary conditions necessary to the admissibility. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

**After dying declaration has been admitted, the weight to be given to it is matter exclusively for jury.** *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

**Applied** in *People v. Howard*, 198 Colo. 317, 599 P.2d 899 (1979); *People v. Lagunas*, 710 P.2d 1145 (Colo. App. 1985).

**13-25-120. Corporate resolutions and minutes.** (1) A certified copy of a resolution purportedly adopted by a meeting of the board of directors, or by a meeting of the stockholders of a corporation, or of the minutes or of a portion of the minutes of a meeting of the board of directors or stockholders of a corporation, when the same purports to be certified by an officer of such corporation and purports to have the seal of such corporation affixed to such certification, shall be admissible in evidence as prima facie evidence of the adoption of such resolution or as prima facie evidence of the truth of the statements or recitals contained in such minutes or portion of such minutes insofar as the same may affect the title to real estate, and it shall not be necessary to prove any facts as the foundation for the admission of the same in evidence. If any such certified copy has been filed for record in the office of the county clerk and recorder of the county where the real estate affected thereby is situate, the record thereof in the office of said clerk and recorder, or a certified copy of such record certified by the county clerk and recorder, shall be admissible in evidence in the same manner as the certified copy itself.

(2) The word “corporation” as used in this section shall include both foreign and domestic corporations. The words “board of directors” as used in this section shall include both a board of directors and any other board or body of a corporation which has powers and duties similar to those exercised by a board of directors. The word “stockholders” as used in this section shall include both stockholders and members of corporations.

(3) The provisions of this section apply to certified copies of resolutions adopted prior to April 16, 1941, as well as those adopted after such date, and to certified copies of minutes of meetings or portions of minutes of meetings held prior to April 16, 1941, as well as those held after such date, and to certified copies which were certified prior to April 16, 1941, as well as those which were certified after such date.

**Source:** L. 41: p. 354, § 1. CSA: C. 63, § 22. CRS 53: § 52-1-21. C.R.S. 1963: § 52-1-21.



## ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949).

**13-25-121. Reports of death.** A written finding of actual death, made by the secretary of the Army, the secretary of the Navy, or other officer or employee of the United States authorized to make such finding pursuant to the federal missing persons act (50 U.S.C. app. supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding may be received in any court, office, or other place in this state as evidence of the death of the person therein found to be dead in place of and with like effect as a state certificate of death. A written finding by such federal officer or employee of presumed death because missing in action or a duly certified copy of such finding after one year from the cessation of war in that theatre of war where missing may be received in any court, office, or other place in this state as evidence of the death of the person therein found presumed dead and the date, circumstances, and place of disappearance.

**Source:** L. 45: p. 326, § 1. CSA: C. 63, § 23. CRS 53: § 52-1-22. C.R.S. 1963: § 52-1-22.

**13-25-122. Person missing, interned, or captured.** An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy, or is dead, or is alive made by any officer or employee of the United States authorized by the act referred to in section 13-25-121, or by any other law of the United States to make the same, may be received in any court, office, or other place in this state as evidence that such person was, on the date of the certificate, missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy, or was dead, or was alive, as the case may be.

**Source:** L. 45: p. 326, § 2. CSA: C. 63, § 23. CRS 53: § 52-1-23. C.R.S. 1963: § 52-1-23.

**13-25-123. Report deemed pursuant to law.** For purposes of sections 13-25-121 and 13-25-122, any finding, report, or record, or duly certified copy thereof, purporting to have been signed by an officer or employee of the United States as described in sections 13-25-121 and 13-25-122 shall prima facie be deemed to have been signed and issued by such officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, that certified copy shall be prima facie evidence of his authority to so certify.

**Source:** L. 45: p. 327, § 3. CSA: C. 63, § 23. CRS 53: § 52-1-24. C.R.S. 1963: § 52-1-24.

**13-25-124. Libel and slander - how pleaded.** In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose. It shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and, if such allegation is controverted, the plaintiff shall establish on the trial that it was so published or spoken.

**Source:** L. 1887: p. 114, § 68. Code 08: § 74. Code 21: § 74. Code 35: § 74. CRS 53: § 52-1-25. C.R.S. 1963: § 52-1-25.

## ANNOTATION

**Law reviews.** For article, "The Law of Libel in Colorado", see 28 Dicta 121 (1951). For article, "Emotional Distress, The First Amendment, and 'This kind of speech': A Heretical Perspective on Hustler Magazine v. Falwell", see 50 U. Colo. L. Rev. 315 (1989).

**Annotator's note:** For statements by officers within scope of duties as an absolute privilege, see Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed.2d 1434 (1959) and Howard v. Lyons, 360 U.S. 593, 79 S. Ct. 1331, 3 L. Ed.2d 1454 (1959).

**Identity of party who committed libel may be generally pleaded.** It has been held under a similar statute that even where the person against whom the libelous charge is made is so ambiguously described that, without the aid of extrinsic facts, his identity cannot be ascertained, it is sufficient to state generally that it was published concerning the plaintiff and that the averments and colloquium which were formerly necessary to connect the libel with the plaintiff may be dispensed with. Craig v. Pueblo Press Publ'g Co., 5 Colo. App. 208, 37 P. 945 (1894).

**It is proper for the injured party to plead that the defamatory words were spoken by the master, although in fact they were uttered by his employee.** In such a situation the acts of

the servant are the acts of the master, where the defamatory words were spoken or published by the authority or with the consent of the latter. Kendall v. Lively, 94 Colo. 483, 31 P.2d 343 (1934).

**Evidence of pecuniary loss is unnecessary** to a right of action for a libelous charge of attempt to commit murder. Republican Publ'g Co. v. Miner, 12 Colo. 77, 20 P. 345 (1888).

**Effect of retraction demand.** Whether a demand to the publisher for retraction of an allegedly false statement should be a condition precedent to the commencement of an action for libel is more properly within the legislative ambit than the subject of initial judicial purview. Walker v. Colo. Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed.2d 399 (1975), overruled on other grounds, Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103 (Colo. 1982).

**Certain foreseeable "self-publication" can impose responsibility for publication on an originator,** when the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third party. Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988) (decided prior to enactment of § 13-25-125.5).

**13-25-125. Justification - pleaded and proved.** In an action for libel or slander, the defendant, in his answer, may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

**Source:** L. 1887: p. 114, § 69. **Code 08:** § 75. **Code 21:** § 75. **Code 35:** § 75. **CRS 53:** § 52-1-26. **C.R.S. 1963:** § 52-1-26.

## ANNOTATION

- I. General Consideration.
- II. Defenses.
  - A. Truth.
  - B. Qualified Privilege.
- III. Mitigation of Damages.

## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Law of Libel in Colorado", see 28 Dicta 121 (1951). For article, "Emotional Distress, The First Amendment, and 'This kind of speech': A Heretical Perspective on Hustler Magazine v. Falwell", see 50 U. Colo. L. Rev. 315 (1989).

## II. DEFENSES.

## A. Truth.

**Truth of published matter, established by evidence, is a complete justification and de-**

**fense.** Republican Publ'g Co. v. Mosman, 15 Colo. 399, 24 P. 1051 (1890); Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972).

**The truth of the charge must be shown.** Where the publication is not privileged, the rule is that where the libelous article is published as being alleged in the complaint, it is not sufficient as a defense to show that it was thus alleged, but the truth of the charge must be shown. Republican Publ'g Co. v. Miner, 3 Colo. App. 568, 34 P. 485 (1893).

**He only must justify that the gist of the matter is true.** A defendant asserting truth as a defense in a libel action is not required to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting, of the matter is true. Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972).



**Question to be decided is whether there is substantial difference between truth and libelous statement.** Where the defendant asserts truth as a defense in a libel suit, the question, a factual one, is whether there is a substantial difference between the allegedly libelous statement and the truth; or stated differently whether the statement produces a different effect upon the reader than that which would be produced by the literal truth of the matter. *Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337 (1972).

**The defendant may plead the truth of the alleged libel without admitting the publication.** *Daniels v. Stock*, 21 Colo. App. 651, 126 P. 281 (1912).

**Even where libel is per se.** Evidence of the truth of any allegedly libelous statement is admissible, even where the libel is per se, or where the publication is admittedly false. *Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337 (1972).

**Defamatory statement of public concern libelous only if knowingly false.** When a defamatory statement has been published concerning one who is not a public official or a public figure, but the matter involved is of public or general concern, the publisher of the statement will be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not. *Walker v. Colo. Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed.2d 399 (1975), overruled on other grounds, *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982).

**For definition of "reckless disregard",** see *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982).

**Publisher can assume the truth of facts contained in his reporters' stories** but this rule cannot apply to the publication of letters to the editor selected for publication in the paper by the publisher. *Walker v. Colo. Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed.2d 399 (1975), overruled on other grounds, *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982).

**There can be no libel by innuendo of a public figure** if the allegedly libelous statements are true. *Pietrafesa v. D.P.I., Inc.*, 757 P.2d 1113 (Colo. App. 1988).

**Question of truth is jury question.** One who is alleged to have defamed another has a constitutional and statutory right to assert the truth of the defamatory statement and to have a jury decide such a defense. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988).

#### B. Qualified Privilege.

**Qualified privilege is an affirmative defense to be pleaded by defendant.** *Radovich v.*

*Douglas*, 84 Colo. 149, 268 P. 575 (1928); *Morley v. Post Printing & Publ'g Co.*, 84 Colo. 41, 268 P. 540 (1928).

**The defense of qualified privilege is precluded where it is not pleaded,** and facts alleged in the complaint, upon which it might be based, are denied. *Radovich v. Douglas*, 84 Colo. 149, 268 P. 575 (1928).

**This defense may be pleaded without admitting the publication.** *Daniels v. Stock*, 21 Colo. App. 651, 126 P. 281 (1912).

**Defense of privilege is destroyed if plaintiff proves actual malice.** It is the law that the condition that makes a published communication privileged is that it be not made maliciously. In such a case the law does not imply malice from the publication itself, but casts upon the plaintiff the burden of alleging and proving actual malice; but if he does this, the defense of privilege is destroyed. *Morley v. Post Printing & Publ'g Co.*, 84 Colo. 41, 268 P. 540 (1928).

**If the complaint sufficiently pleads facts showing that the publication is privileged,** then it is not necessary that defendant affirmatively plead that defense. *Radovich v. Douglas*, 84 Colo. 149, 268 P. 575 (1928).

**This point is raised by demurrer.** Where it appears from the allegations of the complaint that the publication sued upon is privileged, a demurrer is the proper method of raising the point. *Morley v. Post Printing & Publ'g Co.*, 84 Colo. 41, 268 P. 540 (1928).

**Balancing test is used to determine when a qualified privilege should protect a communication.** It is a question of law requiring the court to balance the interests protected by a privilege and the interests served by allowing a defamation action. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988).

**National labor policy does not require unqualified privilege** be given employer in a defamation action based upon statements made in a grievance proceeding. *Thompson v. Pub. Serv. Co. of Colo.*, 800 P.2d 1299 (Colo. 1990), cert. denied, 520 U.S. 973, 112 S. Ct. 452, 116 L. Ed.2d 469 (1991).

A state law defamation action based upon statements made in a grievance or disciplinary proceeding may go forward when a qualified privilege for such statements is recognized. *Thompson v. Pub. Serv. Co. of Colo.*, 800 P.2d 1299 (Colo. 1990), cert. denied, 520 U.S. 973, 112 S. Ct. 452, 116 L. Ed.2d 469 (1991).

### III. MITIGATION OF DAMAGES.

**Defendant may rely upon mitigating circumstances to reduce the damages,** though pleaded in bar of the action. *Rocky Mt. News Printing Co. v. Fridborn*, 46 Colo. 440, 104 P. 956 (1909).

**Even if publication was in fact false.** *Republican Publ'g Co. v. Mosman*, 15 Colo. 399, 24 P. 1051 (1890).

**The mitigating circumstances are limited to those tending to show a mitigation of the injury inflicted** — a mitigation of the damages naturally flowing therefrom. *Republican Publ'g Co. v. Miner*, 12 Colo. 77, 20 P. 345 (1888).

**Such as retraction by defendant.** Thus, the circumstances showing the acts and conduct of the party inflicting injury by libel or slander in retracting or explaining the matter published, or anything else tending to lessen or to remove the injury or in any way to restore the injured party to the esteem previously enjoyed, are admissible in mitigation. *Republican Publ'g Co. v. Miner*, 12 Colo. 77; 20 P. 345 (1888).

**Rumors and reports prior to publication are admissible.** Giving our statute a liberal construction, and especially considering how the pleadings in this action are framed, we are of the opinion that common reports and rumors, to the same effect as the defamatory publication complained of, if circulated before such publication and without the agency of the defendant, were proper to be admitted in evidence, and should have been submitted to the jury by an appropriate and well-guarded instruction, not in any sense as a justification of the publication, but as matter tending in some degree, perhaps, to show that the plaintiff had suffered less damages than he might otherwise have sustained by reason of the publication. *Republican Publ'g Co. v. Mosman*, 15 Colo. 399, 24 P. 1051 (1890).

**13-25-125.5. Libel and slander - self-publication.** No action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing, the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement.

**Source:** L. 89: Entire section added, p. 759, § 1, effective April 8.

#### ANNOTATION

Certain foreseeable "self-publication" can impose responsibility for publication on an originator, when the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third party. *Churchey v. Adolph*

**While good faith is not a defense, it may be pleaded in mitigation of damages.** *Rocky Mt. News Printing Co. v. Fridborn*, 46 Colo. 440, 104 P. 956 (1909).

**It has been held that a defendant newspaper may plead that it merely copied the libelous article from another paper.** *Rocky Mt. News Printing Co. v. Fridborn*, 46 Colo. 440, 104 P. 956 (1909).

**The denial of malice does not constitute a good plea in mitigation of damages;** it sets forth no allegation of facts as required by our code and held by all the authorities necessary in order to make up such an issue. *Meeker v. Post Printing & Publ'g Co.*, 55 Colo. 355, 135 P. 457 (1913).

**The mitigating circumstances are new matter to be pleaded in the answer.** Under code provisions like ours, it is held that justification and mitigating circumstances are new matter to be pleaded in the answer. *Meeker v. Post Printing & Publ'g Co.*, 55 Colo. 355, 135 P. 457 (1913).

**Pleading should state the facts relied upon.** The general rule is in specially pleading mitigating circumstances that the answer should state the facts on which the mitigation is predicated. *Meeker v. Post Printing & Publ'g Co.*, 55 Colo. 355, 135 P. 457 (1913).

*Coors Co.*, 759 P.2d 1336 (Colo. 1988) (decided prior to enactment of this section).

**Summary judgment proper where evidence of defendant's involvement in publication not sufficient.** *Card v. Blakeslee*, 937 P.2d 846 (Colo. App. 1996).

**13-25-126. Genetic tests to determine parentage.** (1) (a) (I) In any action, suit, or proceeding in which the parentage of a child is at issue, including but not limited to actions or proceedings pursuant to section 14-10-122 (6) or 19-4-107.3, C.R.S., upon motion of the court or any of the interested parties, the court shall order the alleged mother, the child or children, and the alleged father to submit to genetic testing and other appropriate testing of inherited characteristics, including but not limited to blood and tissue type, for the purpose of determining probability of parentage. If a party refuses to submit to these tests, the court may resolve the question of parentage against the party to enforce its order if the rights of others and the interests of justice so require.



(II) A court, pursuant to this section, or delegate child support enforcement unit pursuant to section 26-13.5-105, C.R.S., shall not order genetic testing of a child whose parentage has previously been determined by or pursuant to the law of another state, but a court may stay a support proceeding for such reasonable time as determined by the court to allow the party asserting the defense to pursue the nonparentage claim in the other state.

(b) The tests shall be conducted by a laboratory approved by an accreditation body designated by the secretary of the federal department of health and human services, utilizing any genetic test of a type generally acknowledged as reliable by such accreditation body. Costs of any such expert witness for the first test administered shall be fixed at a reasonable amount and shall be paid as the court orders. If the results of the tests or the expert analysis of inherited characteristics are disputed by any party, the court shall order that an additional test be made by the same or another laboratory at the expense of the party disputing the test results or analysis.

(c) Documentation from the testing laboratory of the following information is sufficient to establish a reliable chain of custody that makes the results of genetic testing admissible without testimony:

(I) The names and photographs of the individuals from whom specimens have been taken;

(II) The names of the individuals who collected the specimens;

(III) The places at which and dates on which the specimens were collected;

(IV) The names of the individuals who received the specimens in the testing laboratory; and

(V) The dates the specimens were received.

(d) A specimen used in genetic testing may consist of one or more samples or a combination of samples, of blood, buccal cells, bone, hair, or other body tissue or fluid. The specimen used in the testing need not be of the same kind for each individual undergoing genetic testing.

(e) Specimens and reports are confidential. An individual who intentionally releases an identifiable specimen of another individual for any purpose other than that relevant to the proceeding regarding parentage without a court order or the written permission of the individual who furnished the specimen commits a class 1 misdemeanor and, upon conviction, shall be punished as provided in section 18-1.3-501 (1), C.R.S.

(f) A report of genetic testing shall be in a record, defined in section 19-1-103 (91.5), C.R.S., and signed under penalty of perjury by a designee of the testing laboratory. A report made pursuant to the requirements of this article is self-authenticating.

(g) Under this section, a man is presumed to be the father of a child if the genetic testing complies with the requirements of this section and the results disclose that the man is not excluded and that the man has at least a ninety-seven percent probability of paternity.

(h) A man presumed to be the father of the child pursuant to paragraph (g) of this subsection (1) may rebut the genetic testing results only by other genetic testing that satisfies the requirements of this section and that:

(I) Excludes the man as the genetic father of the child; or

(II) Identifies another man as the father of the child.

(i) The presumption of legitimacy of a child born during wedlock may be overcome, as provided in section 19-4-105 (2) (a), C.R.S., if the court finds that the conclusion of the experts conducting the tests, as disclosed by the evidence based upon the tests, shows that the husband or wife is not the parent of the child.

(2) Any objection to genetic testing results shall be made in writing not less than fifteen days before the first scheduled hearing at which the results may be introduced into evidence or fifteen days after motion for summary judgment is served on such person; except that a person shall object to the genetic testing results not less than twenty-four hours prior to the first scheduled hearing if such person did not receive the results fifteen or more days before such hearing. The test results shall be admissible as evidence of paternity in an action filed pursuant to article 10 of title 14, C.R.S., article 4 of title 19, C.R.S., or article 13.5 of title 26, C.R.S., without the need for foundation testimony or other proof of authenticity or accuracy.

(3) For good cause shown, the court may order genetic testing of a deceased individual.

(4) The court may order genetic testing of a brother of a man presumed to be the father of a child if the man is commonly believed to have an identical brother and evidence suggests that the brother may be the genetic father of the child. If genetic testing excludes none of the brothers as the genetic father, and each brother satisfies the requirements as the presumed father of the child under section 19-4-105, C.R.S., without consideration of another identical brother being presumed to be the father of the child, the court may rely on nongenetic evidence to adjudicate which brother is the father of the child.

**Source:** L. 57: p. 366, § 1. CRS 53: § 52-1-27. C.R.S. 1963: § 52-1-27. L. 67: p. 262, § 46. L. 77: (1)(a) amended, p. 1018, § 2, effective July 1. L. 78: (1)(a), (1)(c)(I), (1)(c)(III), and (1)(c)(IV) amended, p. 262, § 46, effective May 23. L. 83: Entire section R&RE, p. 627, § 1, effective May 26. L. 91: Entire section amended, p. 247, § 1, effective July 1. L. 94: (2) added, p. 1535, § 1, effective July 1. L. 97: (1)(b) and (2) amended, p. 1263, § 4, effective July 1. L. 2003: Entire section amended, p. 1238, § 1, effective July 1. L. 2008: (1)(a) amended, p. 1657, § 4, effective August 15. L. 2011: (1)(a) amended, (SB 11-123), ch. 46, p. 118, § 1, effective August 10.

**Cross references:** (1) For parentage proceedings, see article 4 of title 19.

(2) For the legislative declaration contained in the 1997 act amending subsections (1)(b) and (2), see section 1 of chapter 236, Session Laws of Colorado 1997.

## ANNOTATION

**Law reviews.** For article, "One Year Review of Evidence", see 35 Dicta 44 (1958). For article, "One Year Review of Domestic Relations", see 41 Den. L. Ctr. J. 97 (1964). For article, "Legislative Update", see 12 Colo. Law. 1257 (1983). For article, "Paternity Testing in the Age of DNA", see 19 Colo. Law. 2061 (1990).

**The presumption of legitimacy is one of the strongest known to law, and, prior to the adoption of this section, could be overcome only by proof of nonaccess or impotency of the husband; the rule has now been broadened by this section with respect to blood tests in cases where definite exclusion is established.** Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963).

**Under this section, a reputed father is entitled as a matter of right to have blood tests made and to have such tests received in evidence when definite exclusion is established and proper foundation therefor is laid.** Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963).

**The right to have blood tests performed cannot be denied an indigent defendant without violating the equal protection clause of the fourteenth amendment of the United States Constitution.** Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977).

**Right to genetic testing does not apply where a legal paternity judgment was already entered and a challenge based on mistake of material fact is barred by the six-month time limit set forth in C.R.C.P. 60(b).** People ex rel. J.A.U. v R.L.C., 47 P.3d 327 (Colo. 2002).

**This section and former § 19-6-117 (now § 19-4-117) are inconsistent on the question of who bears the cost of additional blood tests in paternity actions but this section controls.** L.D.G. v. E.R., 723 P.2d 746 (Colo. App. 1986).

**Conclusive evidence overcomes presumption of legitimacy.** Where accuracy of blood test relating to paternity of child was not challenged by the mother and shows conclusively that husband could not have been the father of the child, the evidence of such tests was competent and sufficient to overcome the presumption of legitimacy. Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963).

**It is abundantly clear that the general assembly intended the section for paternity proceedings to be the only vehicle for establishing paternity because under the statute the putative father has the right to trial by jury in paternity proceedings and blood grouping tests may be ordered by the court and received as evidence, whereas the statute on support proceedings allows neither of the above.** In re People in Interest of L.B., 179 Colo. 11, 498 P.2d 1157 (1972), dismissed, 410 U.S. 976, 93 S. Ct. 1497, 36 L. Ed.2d 173 (1973).

**No basis for diagnostic testing of minor.** There is no statutory basis for a guardian ad litem obtaining, in a paternity proceeding, genetic testing, at the expense of the department of social services or a county, to provide a basis for diagnosing problems that a minor child may encounter in later years. Figueroa v. Juvenile Court, 197 Colo. 510, 595 P.2d 223 (1979).

**Evidence that alleged father has been definitely excluded as probable father based on blood test was properly admitted.** K.H.R. By and Through D.S.J. v. R.L.S., 807 P.2d 1201 (Colo. App. 1990).

**Subsection (1) (c) intended to ease burden of establishing the chain of custody of specimens.** The use of word "may" was intended to



show a permissive alternative is shown by legislative history. *K.H.R. By and Through D.S.J. v. R.L.S.*, 807 P.2d 1201 (Colo. App. 1990).

**Applied** in *People in Interest of R.M.*, 37 Colo. App. 209, 548 P.2d 1282 (1975); *Smith v. Casey*, 198 Colo. 433, 601 P.2d 632 (1979).

**13-25-126.5. Documents arising from environmental self-evaluation - admissibility in evidence.** (1) The general assembly hereby finds and declares that protection of the environment is enhanced by the public's voluntary compliance with environmental laws and that the public will benefit from incentives to identify and remedy environmental compliance issues. It is further declared that limited expansion of the protection against disclosure will encourage such voluntary compliance and improve environmental quality and that the voluntary provisions of this act will not inhibit the exercise of the regulatory authority by those entrusted with protecting our environment.

(2) For the purposes of this section, unless the context otherwise requires:

(a) "Administrative law judge" means any person appointed to be an administrative law judge pursuant to part 10 of article 30 of title 24, C.R.S.

(b) "Environmental audit report" means any document, including any report, finding, communication, or opinion or any draft of a report, finding, communication, or opinion, related to and prepared as a result of a voluntary self-evaluation that is done in good faith.

(c) "Environmental law" means any requirement contained in article 20.5 of title 8, C.R.S., articles 7, 8, 11, and 15 of title 25, C.R.S., or article 20 of title 30, C.R.S., in regulations promulgated under such provisions, or in any orders, permits, licenses, or closure plans under such provisions.

(d) "In camera review" means a hearing or review in a courtroom, hearing room, or chambers to which the general public is not admitted. After such hearing or review, the content of the oral and other evidence and statements of the judge and counsel shall be held in confidence by those participating in or present at the hearing or review, and any transcript of the hearing or review shall be sealed and not considered a public record, until and unless its contents are disclosed by a court or administrative law judge having jurisdiction over the matter.

(e) "Voluntary self-evaluation" means a self-initiated assessment, audit, or review, not otherwise expressly required by environmental law, that is performed by any person or entity, for itself, either by an employee or employees employed by such person or entity who are assigned the responsibility of performing such assessment, audit, or review or by a consultant engaged by such person or entity expressly and specifically for the purpose of performing such assessment, audit, or review to determine whether such person or entity is in compliance with environmental laws. Once initiated, such voluntary self-evaluation shall be completed within a reasonable period of time. Nothing in this section shall be construed to authorize uninterrupted voluntary self-evaluations.

(3) An environmental audit report is privileged and is not admissible in any legal action or administrative proceeding and is not subject to any discovery pursuant to the rules of civil procedure, criminal procedure, or administrative procedure, unless:

(a) The entity or person for whom the environmental audit report was prepared, whether the environmental audit report was prepared by the entity or by a consultant hired by the entity, waives the privilege under this section;

(b) (I) A court of record, or, pursuant to section 24-4-105, C.R.S., an administrative law judge, after an in camera review, determines that:

(A) The environmental audit report shows evidence that the person or entity for which the environmental audit report was prepared is not or was not in compliance with an environmental law; and

(B) The person or entity did not initiate appropriate efforts to achieve compliance with the environmental law or complete any necessary permit application promptly after the noncompliance with the environmental law was discovered and, as a result, the person or entity did not or will not achieve compliance with the environmental law or complete the necessary permit application within a reasonable amount of time.

(II) For the purposes of this paragraph (b) only, if the evidence shows noncompliance by a person or entity with more than one environmental law, the person or entity may demonstrate that appropriate efforts to achieve compliance were or are being taken by

instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the person or entity into compliance with all of such environmental laws.

(c) A court of record, or, pursuant to section 24-4-105, C.R.S., an administrative law judge, after an in camera review, determines that compelling circumstances exist that make it necessary to admit the environmental audit report into evidence or that make it necessary to subject the environmental audit report to discovery procedures;

(d) A court of record, or, pursuant to section 24-4-105, C.R.S., an administrative law judge, after an in camera review, determines that the privilege is being asserted for a fraudulent purpose or that the environmental audit report was prepared to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, that was imminent, or for which the entity or person had been provided written notification that an investigation into a specific violation had been initiated; or

(e) A court of record, or, pursuant to section 24-4-105, C.R.S., an administrative law judge, after an in camera review, determines that the information contained in the environmental audit report demonstrates a clear, present, and impending danger to the public health or the environment in areas outside of the facility property.

(4) The self-evaluation privilege created by this section does not apply to:

(a) Documents or information required to be developed, maintained, or reported pursuant to any environmental law or any other law or regulation;

(b) Documents or other information required to be available or furnished to a regulatory agency pursuant to any environmental law or any other law or regulation;

(c) Information obtained by a regulatory agency through observation, sampling, or monitoring;

(d) Information obtained through any source independent of the environmental audit report or any person covered under section 13-90-107 (1) (j) (I) (A);

(e) Documents existing prior to the commencement of and independent of the voluntary self-evaluation;

(f) Documents prepared subsequent to the completion of and independent of the voluntary self-evaluation; or

(g) Any information, not otherwise privileged, including the privilege created by this section, that is developed or maintained in the course of regularly conducted business activity or regular practice.

(5) (a) Upon a showing by any party, based upon independent knowledge, that probable cause exists to believe that an exception to the self-evaluation privilege under subsection (3) of this section is applicable to an environmental audit report or that the privilege does not apply to the environmental audit report pursuant to the provisions of subsection (4) of this section, then a court of record or, pursuant to section 24-4-105, C.R.S., any administrative law judge, may allow such party limited access to the environmental audit report for the purposes of an in camera review only. The court of record or the administrative law judge may grant such limited access to all or part of the environmental audit report under the provisions of this subsection (5) upon such conditions as may be necessary to protect the confidentiality of the environmental audit report. A moving party who obtains access to an environmental audit report pursuant to the provisions of this subsection (5) may not divulge any information from the report except as specifically allowed by the court or administrative law judge.

(b) (I) If any party divulges all or any part of the information contained in an environmental audit report in violation of the provisions of paragraph (a) of this subsection (5) or if any other person or entity knowingly divulges or disseminates all or any part of the information contained in an environmental audit report that was provided to such person or entity in violation of the provisions of paragraph (a) of this subsection (5), such party or other person or entity is liable for any damages caused by the divulgence or dissemination of the information that are incurred by the person or entity for which the environmental audit report was prepared.

(II) If any public entity, public employee, or public official divulges all or any part of the information contained in an environmental audit report in violation of the provisions of paragraph (a) of this subsection (5) or knowingly divulges or disseminates all or any part of the information contained in an environmental audit report that was provided to such



public entity, public employee, or public official in violation of the provisions of paragraph (a) of this subsection (5), such public entity, public employee, or public official shall be guilty of a class 1 misdemeanor, may be found in contempt of court by a court of record, and may be assessed a penalty not to exceed ten thousand dollars by a court of record or an administrative law judge.

(6) Nothing in this section limits, waives, or abrogates the scope or nature of any statutory or common-law privilege.

(7) A person or entity asserting a voluntary self-evaluation privilege has the burden of proving a prima facie case as to the privilege. A party seeking disclosure of an environmental audit report has the burden of proving that such privilege does not exist under this section.

(8) Notwithstanding the provisions of subsection (3) of this section, the existence of an environmental audit report shall be subject to discovery proceedings pursuant to the rules of civil procedure, criminal procedure, or administrative procedure; except that the contents of such a report or any other privileged information contained therein shall remain confidential.

(9) This section applies to voluntary self-evaluations that are performed on or after June 1, 1994.

**Source:** L. 94: Entire section added, p. 1865, § 1, effective June 1. L. 96: (2)(c) amended, p. 1469, § 11, effective June 1. L. 99: (9) amended, p. 301, § 1, effective April 14.

#### ANNOTATION

**Law reviews.** For comment, "Colorado's Environmental Audit Privilege Statute: Striking the Appropriate Balance?", see 67 U. Colo. L. Rev. 443 (1996).

**13-25-127. Civil actions - degree of proof required.** (1) Any provision of the law to the contrary notwithstanding and except as provided in subsection (2) of this section, the burden of proof in any civil action shall be by a preponderance of the evidence. The provisions of this subsection (1) shall not apply to the burden of proof required in determining the validity of any legislative enactment.

(2) Exemplary damages against the party against whom the claim is asserted shall only be awarded in a civil action when the party asserting the claim proves beyond a reasonable doubt the commission of a wrong under the circumstances set forth in section 13-21-102. Nothing in this subsection (2) shall be construed as preventing a party asserting the claim from being awarded money damages or other appropriate relief, other than exemplary damages, if he sustains the burden of proof by a preponderance of the evidence.

(3) (Deleted by amendment, L. 95, p. 15, § 5, effective March 9, 1995.)

(4) This section became effective July 1, 1972, and applies only to civil actions which accrue on or after such date.

**Source:** L. 71: p. 579, § 1. C.R.S. 1963: § 52-1-28. L. 72: pp. 317, 318, §§ 1, 2. L. 95: (1) and (3) amended, p. 15, § 5, effective March 9.

#### ANNOTATION

**Law reviews.** For article, "Inverse Condemnation — A Viable Alternative", see 51 Den. L. J. 529 (1974). For article, "Burdens of Proof in Colorado Civil Actions", see 23 Colo. Law. 83 (1994).

**This section prevails over conflicting appellate case law.** McCallum Family L.L.C. v. Winger, 221 P.3d 69 (Colo. App. 2009).

**Burden of proof in quiet title action** to obtain title by adverse possession is preponderance of evidence, as required by this section, since such action does not constitute a taking, nor does it raise fundamental constitutional concerns. Gerner v. Sullivan, 768 P.2d 701 (Colo. 1989) (overruling Raftopoulos v. Monger, 656 P.2d 1308 (Colo. 1983)).

**Burden of party asserting equitable grounds.** The party attempting to set aside a transaction on equitable grounds should only be required to prove the truth of his contentions by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

**Burden in proceedings to terminate parental rights.** In the absence of a specific directive from the general assembly to use the "clear and convincing evidence" standard as the burden of proof in proceedings to terminate parental rights, courts are compelled to use the "preponderance of evidence" standard of civil actions. *People in Interest of B.J.D.*, 626 P.2d 727 (Colo. App. 1981).

**Burden of proof does not shift.** The burden of proof resting upon the plaintiff to prove the elements of his case, as determined by the pleadings, by a preponderance of the evidence, does not shift during the course of trial, although it may be aided by a presumption or a shift of the burden of going forward with the evidence once the plaintiff has established a prima facie case. *Exch. Nat'l Bank v. Sparkman*, 191 Colo. 534, 554 P.2d 1090 (1976); *W. Distributing Co. v. Diodosio*, 841 P.2d 1053 (Colo. 1992).

**Plaintiff failed to prove trust invalid as attempted testamentary disposition.** *Exch. Nat'l Bank v. Sparkman*, 191 Colo. 534, 554 P.2d 1090 (1976).

**Fraud must be shown by a preponderance of the evidence.** *Caldwell v. Armstrong*, 642 P.2d 47 (Colo. App. 1981).

**Fraud may be inferred from circumstantial evidence.** Direct evidence of reliance, one of the elements of fraud, is not required. *Kopeikin v. Merchant Mortg. & Trust Corp.*, 679 P.2d 599 (Colo. 1984).

**Where preponderance acceptable burden in federal law controversy.** Although the right to mine claims located on federal land is derived from federal law, there is no provision made as to the quantum of proof necessary to prevail in a dispute over title to those claims. Thus, the application of state law imposing a preponderance of the evidence regarding burden of proof is not in conflict with the national policy for mining claims. *Silver Core Mining Co. v. DeBell*, 42 Colo. App. 169, 595 P.2d 269 (1979).

**Section does not apply to public official/public figure defamation cases.** *Manuel v. Fort Collins Newspapers, Inc.*, 42 Colo. App. 324, 599 P.2d 931 (1979), rev'd on other grounds, 631 P.2d 1114 (Colo. 1981).

**Clear and convincing standard of proof applies to cases involving prescriptive easements.** *Auslaender v. MacMillan*, 696 P.2d 836 (Colo. App. 1984).

**Preponderance standard applies in actions to pierce the corporate veil.** *McCallum Family L.L.C. v. Winger*, 221 P.3d 69 (Colo. App. 2009).

**Section does not apply to Title VII and Civil Rights Act of 1991 cases.** The reasonable doubt standard set forth in this section is inconsistent with the remedial policies underlying Title VII and the Civil Rights Act of 1991. *Karnes v. SCI Colo. Funeral Servs., Inc.*, 162 F.3d 1077 (10th Cir. 1998).

**Evidence sufficient to show malice beyond a reasonable doubt.** *Vogel v. Carolina Intern., Inc.*, 711 P.2d 708 (Colo. App. 1985).

**For section's application to heirship,** see *In re Estate of Etchart v. Nelson*, 179 Colo. 142, 500 P.2d 363 (1972).

**Burden of proof in forfeiture action** under Colorado public nuisance statute rests on the state and must be proven by a preponderance of the evidence. *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

**Claim of promissory estoppel** must be established by a preponderance of the evidence. *Nicol v. Nelson*, 776 P.2d 1144 (Colo. App. 1989), cert. denied, 785 P.2d 917 (Colo. 1989).

**Preponderance of the evidence standard provided for in subsection (1) applies to actions for adverse possession.** *Nicol v. Nelson*, 776 P.2d 1144 (Colo. App. 1989).

**Burden of proof in case raising inverse condemnation claim is by a preponderance of the evidence.** Because it could not be determined from trial court's order which standard trial court applied, case remanded for new findings using a preponderance of the evidence standard. *Animas Valley Sand and Gravel, Inc. v. Bd. of County Comm'rs*, 8 P.3d 522 (Colo. App. 2000), rev'd on other grounds, 38 P.3d 59 (Colo. 2001).

**Trial court is in best position to weigh credibility** where evidence on issue of fraud consisted of testimony of plaintiff and defendant and appellate court need not engage in factual determination. *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987).

**Trial court abused its discretion when similarly situated physicians were awarded punitive damages on arbitrary and inconsistent basis.** *Ballow v. PHICO Ins. Co.*, 878 P.2d 672 (Colo. 1994).

**Proof by clear and convincing evidence is required in guardianship proceedings** because of the possibility of being deprived of basic liberties. *Sabrosky v. Denver DDS*, 781 P.2d 106 (Colo. App. 1989).

**This section is inapplicable to a motion to set aside a default judgment.** A motion to set aside a default judgment is not a "civil action" but is instead a simple procedural motion taking place within the context of a substantive "civil action". *Borer v. Lewis*, 91 P.3d 375 (Colo. 2004).

**In enacting this section, the general assembly did not legislatively override the "clear and convincing" burden of proof that has been applied to proceedings to set aside de-**



**fault judgments.** To decide otherwise would require the court to find the statute unconstitutional as an impermissible infringement on the judiciary's authority to promulgate procedural rules. *Borer v. Lewis*, 91 P.3d 375 (Colo. 2004).

**Higher standard of clear and convincing evidence is required for setting aside of default judgment.** *Salle v. Howe*, 757 P.2d 154 (Colo. App. 1988). (Holding modified in *White Front Auto Sales, Inc. v. Mygatt*, 810 P.2d 234 (Colo. App. 1990)).

**Taxpayer's burden is to prove by a preponderance of the evidence,** not by clear and convincing evidence, that the assessment is incorrect. *C.A. Staack v. Bd. of County Com'rs.*, 802 P.2d 1191 (Colo. App. 1990).

**Preponderance of evidence test should have been applied** in determination of motion to set aside default judgment since it is a civil action under subsection (1). *White Front Auto Sales, Inc. v. Mygatt*, 810 P.2d 234 (Colo. App. 1990).

**A party who claims a prescriptive easement** must prove by a preponderance of the evidence continuous, open, and adverse use of the easement for the statutory period of 18 years. *Proper v. Greager*, 827 P.2d 591 (Colo. App. 1992).

**Applied** in *Cline v. City of Boulder*, 35 Colo. App. 349, 532 P.2d 770 (1975); *Page v. Clark*, 40 Colo. App. 24, 572 P.2d 1214 (1977); *Sherman Agency v. Carey*, 195 Colo. 277, 577 P.2d 759 (1978); *Roberts v. Bucher*, 41 Colo. App. 138, 584 P.2d 97 (1978); *Frick v. Abell*, 198 Colo. 508, 602 P.2d 852 (1979); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152 (10th Cir. 1981), cert. denied, 464 U.S. 824, 104 S. Ct. 92, 78 L. Ed.2d 99 (1983); *Diversified Mgt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982); *Littlehorn v. Stratford*, 653 P.2d 1139 (Colo. 1982); *Honeywell Info. Sys. v. Bd. of Assmt. Appeals*, 654 P.2d 337 (Colo. App. 1982); *King v. Horizon Corp.*, 701 F.2d 1313 (10th Cir. 1983); *Fort Logan Mental Health Center v. Indus. Comm'n*, 665 P.2d 139 (Colo. App. 1983); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984); *Hawkinson v. A.H. Robins Co., Inc.*, 595 F. Supp. 1290 (D. Colo. 1984); *Basnett v. Vista Vill. Mobile Home Park*, 699 P.2d 1343 (Colo. App. 1984); *Florey v. District Court*, 713 P.2d 840 (Colo. 1985); *Tri-Aspen Construction Co. v. Johnson*, 714 P.2d 484 (Colo. 1986); *Juarez v. United Farm Tools, Inc.*, 798 F.2d 1341 (10th Cir. 1986); *Cty. Bd. of Equal. v. Bd. of Assess. App.*, 743 P.2d 444 (Colo. App. 1987); *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053 (Colo. 1992).

**13-25-128. Rules of evidence - grant of authority subject to reservation.** The supreme court of the state of Colorado shall have the power to prescribe general rules of evidence for the courts of record in the state of Colorado. Such rules of evidence shall be construed to be rules of practice and procedure and shall not be construed in such manner that such rules would fix, abridge, enlarge, modify, or diminish any substantive rights. The general assembly specifically reserves to itself the power to enact laws relating to substantive rights including, but not limited to, laws modifying or eliminating said rules of evidence.

**Source:** L. 79: Entire section added, p. 620, § 1, effective July 3.

**13-25-129. Statements of child victim of unlawful sexual offense against a child or of child abuse - hearsay exception.** (1) An out-of-court statement made by a child, as child is defined under the statutes which are the subject of the action, describing any act of sexual contact, intrusion, or penetration, as defined in section 18-3-401, C.R.S., performed with, by, on, or in the presence of the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of an unlawful sexual offense, as defined in section 18-3-411 (1), C.R.S., or is a victim of incest, as defined in section 18-6-301, C.R.S., when the victim was less than fifteen years of age at the time of the commission of the offense, or in which a child is the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104 (1) (b), C.R.S., and an out-of-court statement by a child, as child is defined under the statutes which are the subject of the action, describing any act of child abuse, as defined in section 18-6-401, C.R.S., to which the child declarant was subjected or which the child declarant witnessed, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of child abuse or the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104 (1) (b), C.R.S., and an out-of-court statement made by a person under thirteen years of age describing all or part

of an offense contained in part 1 of article 3 of title 18, C.R.S., or describing an act of domestic violence as defined in section 18-6-800.3 (1), C.R.S., not otherwise admissible by statute or court rule which provides an exception to the objection of hearsay is admissible in evidence in any criminal, delinquency, or civil proceeding, if:

(a) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(b) The child either:

(I) Testifies at the proceedings; or

(II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(2) If a statement is admitted pursuant to this section, the court shall instruct the jury in the final written instructions that during the proceeding the jury heard evidence repeating a child's out-of-court statement and that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, the jury shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(3) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

**Source:** L. 83: Entire section added, p. 629, § 1, effective May 25. L. 85: IP(1) amended, p. 676, § 5, effective June 7; IP(1) amended, p. 714, § 1, effective June 7. L. 87: IP(1) amended, p. 558, § 1, effective April 16; IP(1) amended, p. 815, § 13, effective October 1. L. 93: (2) amended, p. 515, § 1, effective July 1. L. 2003: IP(1) amended, p. 973, § 5, effective April 17. L. 2006: IP(1) amended, p. 420, § 1, effective April 13.

**Editor's note:** Senate Bill 85-042 superseded by House Bill 85-1327. Amendments to the introductory portion to subsection (1) by House Bill 87-1256 and Senate Bill 87-144 were harmonized.

## ANNOTATION

**Law reviews.** For article, "Children as Witnesses: Competency and Rules Favoring Their Testimony", see 12 Colo. Law 1982 (1983). For article, "The Child Sex Abuse Case in the Courtroom", see 15 Colo. Law 807 (1986). For comment, "Confrontation of Child Victim-Witnesses: Trauma, Unavailability, and Colorado's Hearsay Exceptions for Statements Describing Sexual Abuse", see 60 Colo. L. Rev. 659 (1989). For article "The Child Witness", see 22 Colo. Law 1201 (1993). For article, "Children as Witnesses", see 31 Colo. Law 15 (October 2002). For comment, "Crawford v. Washington: Child Victims of Sex Crimes in Colorado and the United States Supreme Court's Revised Approach to the Confrontation Clause", see 82 Den. U.L. Rev. 427 (2004). For article, "The Child's Wishes in APR Proceedings: An Evidentiary Conundrum", see 36 Colo. Law 33 (January 2007).

**Statutory child hearsay exception for statements by sexual assault victims violates the confrontation clause of the sixth amendment of the U.S. constitution** where the statements admitted are testimonial in nature and where defendant has not been afforded the opportunity to cross-examine the witness. *People v. Moreno*, 160 P.3d 242 (Colo. 2007).

**Further, to use the forfeiture doctrine to deprive a defendant of the protection of the confrontation clause**, the prosecution must show that defendant's wrongful conduct was designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends. The people must prove that defendant intended to prevent or dissuade the child from testifying against him or her. *People v. Moreno*, 160 P.3d 242 (Colo. 2007).

**This section may only be applied constitutionally to admit out-of-court testimonial statements when the defendant has forfeited the right to confrontation.** *Pena v. People*, 173 P.3d 1107 (Colo. 2007).

**Trial court must find that the time, content, and circumstances of contested statements provide sufficient safeguards of reliability and that there is sufficient corroborative evidence of the charged acts for statements of unavailable witness to be admitted under this section.** *Pena v. People*, 173 P.3d 1107 (Colo. 2007).

**Testimonial hearsay statements are admissible only if:** (1) The declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the declarant. The



juvenile victim's statement to an investigating officer in a question and answer format is a testimonial statement. Since, the defendant did not have an opportunity to cross-examine the juvenile victim, the statement is inadmissible. *People ex rel. R.A.S.*, 111 P.3d 487 (Colo. App. 2004).

**Admission of testimony under subsection (1) committed to sound discretion of trial court and not violative of defendant's constitutional rights.** *People v. Galloway*, 726 P.2d 249 (Colo. App. 1986).

**The admission into evidence at trial of prior out-of-court statements does not violate the confrontation clause, if** the declarant is not absent but is present to testify and to submit to cross-examination. *People v. Argomaniz-Ramirez*, 102 P.3d 1015 (Colo. 2004); *People v. Whitman*, 205 P.3d 371 (Colo. App. 2007).

**Section not unconstitutional on its face or as applied.** Because the victims were available, testified, and were subject to cross-examination, the sixth amendment confrontation issue does not apply. *People v. Whitman*, 205 P.3d 371 (Colo. App. 2007).

**Application of section held not to be barred on the basis of constituting an ex post facto law.** *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986).

**Trial court is required to instruct contemporaneously with admission of hearsay evidence pursuant to subsection (2), and, where no such instruction is given, the judgment of conviction had to be reversed.** *People v. Mathes*, 703 P.2d 608 (Colo. App. 1985).

**If a hearsay statement is admitted pursuant to this section,** a court must instruct the jury as required in subsection (2). However, failure to object to proffered evidence at trial constitutes a waiver of the objection, and such objection may not thereafter be raised on appeal. *People v. Lucero*, 724 P.2d 1374 (Colo. App. 1986).

**This section constitutes the exclusive basis for admitting a child victim's hearsay statement of a sexual act committed against the child when such hearsay statement is not otherwise admissible under any other specific hearsay exception created by statute or court rule.** *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989); *People v. Bowers*, 801 P.2d 511 (Colo. 1990); *People v. Wilson*, 838 P.2d 284 (Colo. 1992); *People v. Jones*, 851 P.2d 247 (Colo. App. 1993); *People v. Williams*, 899 P.2d 306 (Colo. App. 1995); *People v. Juvenile Court*, 937 P.2d 758 (Colo. 1997).

**This section is not controlling in every instance in which child hearsay is admitted.** *People v. Bolton*, 859 P.2d 303 (Colo. App. 1993); *People v. Bolton*, 859 P.2d 311 (Colo. App. 1993).

**The general assembly enacted this section to balance the interests of a person accused of**

the sexual abuse of a child and the interests of the truth-seeking process. *McPeck v. Colo. Dept. of Soc. Servs.*, 919 P.2d 942 (Colo. App. 1996).

**In administrative adjudication in which the sexual abuse of a child is an issue, this section provides the appropriate standard for determining the admissibility of hearsay statements of the child-declarant which describe the alleged sexual abuse.** *McPeck v. Colo. Dept. of Soc. Servs.*, 919 P.2d 942 (Colo. App. 1996).

**This section provides sufficient guidelines for consistent and fair application in the trial courts.** *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989); *McPeck v. Colo. Dept. of Soc. Servs.*, 919 P.2d 942 (Colo. App. 1996).

**Two-step analysis used when challenging hearsay evidence based on the constitutional ground of lack of confrontation:** Initially, the prosecution must either produce the hearsay declarant for cross-examination, or in most instances, demonstrate his unavailability and secondly, in those instances when the unavailability of the witness is demonstrated, only hearsay bearing sufficient indicia of reliability is admissible. *People v. Hise*, 738 P.2d 13 (Colo. App. 1986); *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**Where there is a confrontation clause challenge to hearsay evidence,** the two-step analysis is still applicable when considering exceptions to the hearsay rule which are nontraditional, i.e., exceptions which are not "firmly rooted" in the law of hearsay. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**This section is in many ways more protective than the required two-step analysis,** since first, unlike that analysis, it requires a showing of "sufficient safeguards of reliability" whether or not the declarant is unavailable and, second, if the declarant is unavailable, it requires corroborative evidence of the act which is the subject of the statement. Therefore, statements meeting the standard of this section also fulfill the requirements of the two-step analysis. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989); *People v. Dill*, 904 P.2d 1367 (Colo. App. 1995), *aff'd*, 927 P.2d 1315 (Colo. 1996).

**Statements admissible when victim testifies,** in accord with subsection (1)(b)(I). *People v. Williams*, 899 P.2d 306 (Colo. App. 1995).

**Victim need not be a "child" at the time of trial** for victim's out-of-court statement to be admissible. *People v. Gookins*, 111 P.3d 525 (Colo. App. 2004).

**Phrase "at the proceedings" in subsection (1)(b)(I) does not mean at every stage of the proceedings.** Where prosecution expressed that victim would testify at trial, the requirements of this section were conditionally met. *People v. Juvenile Court*, 937 P.2d 758 (Colo. 1997).

The phrase “when the victim was less than 15 years of age at the time of the commission of the offense” in subsection (1) applies only to a victim of incest, as defined in § 18-6-301. Therefore, the court did not err in applying this section to defendant’s case when the victim was 16 and defendant was charged with unlawful sexual offenses other than incest. *People v. Trujillo*, 251 P.3d 477 (Colo. App. 2010).

**Purpose of hearing under this section is not to determine the victim’s competency.** Rather, the determinations to be made are (1) whether sufficient safeguards of reliability exist to permit the admission of the victim’s hearsay statements into evidence, and (2) whether the victim is available to testify. *People v. Juvenile Court*, 937 P.2d 758 (Colo. 1997).

**Child’s hearsay statements are admissible under this section only if court finds:** (1) The time, context, and circumstances of statement provides sufficient safeguards of reliability; and (2) if child is unavailable as a witness, there must be corroborative evidence of sexual abuse that is the subject of the statement. *Stevens v. People*, 796 P.2d 946 (Colo. 1990).

**Although the trial court should make specific findings on which factors establish sufficient safeguards of reliability of its decision to admit the child hearsay statements, the trial court’s ruling will be affirmed absent such findings if the record shows adequate factual basis to support the trial court’s findings.** *People v. Rojas*, 181 P.3d 1216 (Colo. App. 2008).

**The fact that not all the relevant factors support admissibility does not require exclusion of the statements.** *People v. Rojas*, 181 P.3d 1216 (Colo. App. 2008).

**Applicability of this section is not limited to those circumstances in which the child is unavailable to testify or when the child has difficulty expressing herself.** *People v. Salas*, 902 P.2d 398 (Colo. App. 1994).

**Statutory requirement of “corroborative evidence” means any evidence, direct or by proof of surrounding circumstances, that tends to establish the act described in child’s hearsay statement occurred.** *Stevens v. People*, 796 P.2d 946 (Colo. 1990); *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

**Corroboration requirement of this section is objective method of establishing commission of sexual act rather than a guarantee of reliability of child’s hearsay statement.** *Stevens v. People*, 796 P.2d 946 (Colo. 1990).

This requirement ensures sexual abuse occurred and indirectly safeguards against wrongful conviction by requiring corroborative evidence sufficient to induce person of ordinary prudence and caution to entertain reasonable belief that sexual abuse that is subject of hearsay statement occurred. *Stevens v. People*, 796 P.2d 946 (Colo. 1990).

**Attendant circumstances necessary to provide adequate description of the sexual conduct** are admissible and within scope of statute. *People v. Serna*, 738 P.2d 802 (Colo. App. 1987).

**Preponderance of evidence standard of proof** is applicable to trial court’s determination of whether requirements for the admissibility of child’s hearsay statement, as set forth in this section, have been satisfied. *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

**Finding child incompetent to testify due to child’s reluctance to answer questions in courtroom setting** does not automatically impair the guarantees of reliability of child’s hearsay statement and render such statement inadmissible. *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

**Child’s use of anatomically correct dolls and gestures were part and parcel of hearsay statements** and, without independent corroborative evidence, fail to meet statutory requirements. *People v. Bowers*, 773 P.2d 1093 (Colo. App. 1988), *aff’d*, 801 P.2d 511 (Colo. 1990).

**Corroborative evidence required for admissibility of child’s hearsay statement pursuant to this section** is evidence, direct or circumstantial, that is independent of and supplementary to statement and that tends to confirm act described in statement occurred and child’s verbal or nonverbal assertions made during statement does not constitute corroborative evidence. *People v. Bowers*, 801 P.2d 511 (Colo. 1990); *People v. Nara*, 964 P.2d 578 (Colo. App. 1998).

**However, even where pretrial ruling approved admission of hearsay statement by child-victim to pediatrician** it was error to permit pediatrician to give impermissible opinion testimony. *People v. Gaffney*, 769 P.2d 1081 (Colo. 1989).

**Trial court’s findings concerning reliability of child victim’s hearsay statements** will not be disturbed on appeal if supported by the evidence. *People v. Serna*, 738 P.2d 802 (Colo. App. 1987).

**Trial court properly considered the age of the child** in light of the extensive case authority holding that such statements of very young children relating incidents of sexual abuse tend to be reliable. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**Trial court examines evidence as a whole** to determine whether sufficient corroboration exists to admit child’s hearsay statement under this section and such determination will not be overturned unless trial court abused its discretion. *Stevens v. People*, 796 P.2d 946 (Colo. 1990).

**Trial judge’s statements that he did not know much about the victim’s character**, that he had some concerns that the victim’s mother was present during an interview between the child and a social worker and about the cumu-



lative effect and rehearsal factor of the child's statements, and, as a result, that he would leave the issues of credibility and reliability to the jury did not constitute an improper delegation of duty from the court to the jury where the court found on balance that the child's statements met the reliability standard of the hearsay exception. *People v. Cordova*, 854 P.2d 1337 (Colo. App. 1992).

**Children's age-appropriate sexual terminology** cannot supply corroborative evidence of sexual abuse. *Stevens v. People*, 796 P.2d 946 (Colo. 1990).

**Children's demonstrations with anatomically correct dolls** contained sufficient indicia of reliability for purposes of this section. *Stevens v. People*, 796 P.2d 946 (Colo. 1990).

**Children's behavioral changes constituted corroborative evidence of existence of sexual abuse** even though such changes are not conclusive of sexual abuse. *Stevens v. People*, 796 P.2d 946 (Colo. 1990).

**Where a child's hearsay statements falls within a recognized exception to the hearsay rule**, the statement will be held to bear sufficient indicia of reliability. If it does not come within any recognized hearsay exception, it may still be admitted if it falls within the residual exception to the hearsay rule. *People v. District Court*, 776 P.2d 1083 (Colo. 1989).

**Although trial court did not adequately identify specific factors which provided sufficient guarantees of reliability of child's hearsay statements**, offer of proof by prosecuting attorney cured deficiency in trial court's ruling. *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

**Where hearsay evidence is admitted pursuant to the provisions of this section**, the trial court must give the cautionary instruction contemporaneously with the admission of this particular type of evidence and again in the court's general charge to the jury at the conclusion of the case, and failure to do so is reversible error. *People v. McClure*, 779 P.2d 864 (Colo. 1989); *People v. Cowan*, 813 P.2d 810 (Colo. App. 1991).

**Trial court could not admit evidence of alleged sexual assault under § 16-10-301, then in effect before prosecution presented prima facie case to jury.** Yet child's out-of-court statements could not establish a prima facie case warranting submission to the jury because, under subsection (1)(b), the statements were not admissible without the corroborative evidence. *People v. Nara*, 964 P.2d 578 (Colo. App. 1998).

As a result of the interplay of this section and § 16-10-301 then in effect, alleged victim's out-of-court statements could not be corroborated by similar acts, and those statements could not provide the prima facie case necessary for admission of evidence of the similar act. The trial court therefore could not properly admit evi-

dence of either. *People v. Nara*, 964 P.2d 578 (Colo. App. 1998).

**Sole purpose of contemporaneous instruction** is to alert jury to the suspect nature of hearsay testimony and thereby promote jury's critical examination of the hearsay evidence as it is being received. *People v. Jones*, 843 P.2d 67 (Colo. App. 1992).

**Failure to give a jury instruction on the credibility of a child's testimony at the time child's hearsay statement is admitted is not plain error** in a prosecution for aggravated incest and sexual assault on a child, so long as such instruction was given as a jury instruction at the conclusion of the evidence. *People v. Flysaway*, 807 P.2d 1179 (Colo. App. 1990).

**To find plain error**, the court must conclude, after reviewing the record as a whole, that trial court's failure to give contemporaneous cautionary instruction so undermined the fundamental fairness of the trial that it cast serious doubt on the reliability of the conviction. *People v. Jones*, 843 P.2d 67 (Colo. App. 1992).

**Plain error resulted** where court failed to give cautionary instruction contemporaneously with the testimony of two expert witnesses and four other witnesses who testified as to hearsay statements made by a four year old victim and her six year old brother identifying the defendant as the perpetrator. *People v. Jones*, 843 P.2d 67 (Colo. App. 1992).

**Cautionary instruction required by subsection (2) incorporates defendant's rights to due process and confrontation.** Court should not accompany instruction with comments tending to denigrate its importance. *People v. Talley*, 824 P.2d 65 (Colo. App. 1991).

**Where several witnesses gave testimony concerning child's hearsay statements and cautionary statement was given before the most extensive of those statements there was no plain error** although the cautionary statement should be given before any testimony regarding such hearsay statements by a child. *People v. Wilson*, 838 P.2d 284 (Colo. 1992).

**Omission of contemporaneous cautionary instruction regarding the victim's hearsay statement was not error.** The 1993 amendment to subsection (2) eliminated the requirement for such a contemporaneous cautionary instruction. The amended section requires a cautionary instruction only with the final written instructions. *People v. Burgess*, 946 P.2d 565 (Colo. App. 1997); *People v. Strean*, 74 P.3d 387 (Colo. App. 2002).

**Nor did it cause unfair prejudice to give a contemporaneous cautionary instruction** despite the 1993 change in the law. *People v. Burgess*, 946 P.2d 565 (Colo. App. 1997).

**Although this section requires the court to instruct the jury regarding the weight of the witness's testimony**, and no such specific instruction was given, the omission did not under-

mine the fundamental fairness of the trial because the testimony of the witness was merely corroborative of that of the victim. *People v. Wood*, 743 P.2d 422 (Colo. 1987); *People v. Miller*, 821 P.2d 881 (Colo. App. 1991).

The court's error in failing to instruct the jury as to the witnesses' credibility did not so undermine the fairness of the trial as to require reversal of defendant's conviction where one witness' testimony was corroborative of the victim's testimony and the other witness' testimony consisted mainly of the witness' observations of the victim and the witness' experience in interpreting body language of victims of sexual abuse. *People v. Miller*, 821 P.2d 881 (Colo. App. 1991).

**Although the state failed to fully comply** with this section by not informing the defendant of the particulars of the witness's testimony, there is no reversible error because the defendant was already aware of the substance of the testimony. *People v. Wood*, 743 P.2d 422 (Colo. 1987); *People v. Brown*, 761 P.2d 261 (Colo. App. 1988).

**A child who is not competent to testify is unavailable both within the meaning of subsection (1)(b)(II) and under the two-step analysis.** *People v. District Court*, 776 P.2d 1083 (Colo. 1989); *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**"Unavailability", both within the meaning of this section and the constitutionally required two-step analysis,** can be met when the court makes a particularized finding that the child's emotional or psychological health would be substantially impaired if she were forced to testify and that such impairment will be long standing rather than transitory in nature. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**Mere inconvenience or discomfort at the prospect of testifying does not meet the statutory standard of unavailability.** *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**Where the trial court found that requiring child victim to testify would be traumatic,** where the evidence showed that the trauma would be long lasting rather than transitory, and where the potential benefit to the defendant of requiring the child victim's testimony was not substantial, there was no error in the court's determination that the child victim was unavailable. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**The final requirement in order to admit statements under this section when the witness is unavailable to testify at trial** is that there be corroborative evidence of the act which is the subject of the statement. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**Admitting a child's hearsay statements** held not in error when there was expert testimony to the effect that substantial long-term emotional impairment would result from testi-

fying in court as well as corroborative evidence in the form of physical evidence and expert opinion to satisfy the finding of unavailability. *People v. Haynie*, 826 P.2d 371 (Colo. App. 1991).

**Both C.R.E. 803(24) and this section are residuary rules and apply only if hearsay is not otherwise admissible under the other hearsay exceptions.** This section applies only to hearsay statements not otherwise admissible by statute or court rule. C.R.E. 803(24) applies to hearsay statements which are not covered by the more specific hearsay exceptions in C.R.E. 803(1) - (23). Because this section and C.R.E. 803(24) have different requirements for the admission of hearsay statements, confusion and inconsistent results may occur if either residuary provision may be applied to the same hearsay statement of a child sexual assault victim which is otherwise not admissible into evidence. Since the more specific provision should prevail, this section is the sole basis upon which hearsay evidence, which otherwise comes within the terms of that statute, may be admitted. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989); *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

**Statements made by child victim to investigator and social services caseworker were properly admissible under this section** where the statements in question: (1) Are reliable; (2) the child victim was unavailable; and (3) there existed corroborating evidence consisting of incriminating statements made by defendant to the investigator and the child victim's physiological reaction to a child psychiatrist's questioning regarding the abuse incident. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**This section does not infringe on a court's procedural rulemaking powers** since, as with the "rape shield" statute, it effects the substantive policy of protecting certain witnesses from the sometimes traumatizing effect of facing their abusers openly in court. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**Hearing mandated by this section is not required** where prior statements were otherwise admissible by court rule. *People v. Doss*, 782 P.2d 1198 (Colo. App. 1989).

**Section does not apply to preliminary hearings.** This section applies to trial proceedings but not to such probable cause proceedings as a preliminary hearing. *People v. Jensen*, 765 P.2d 1028 (Colo. 1988).

**This section provides a hearsay exception only for testimony regarding statements from the child victim of, or a child witness to, the charged offense** and does not authorize the admission of otherwise inadmissible hearsay statements of similar transactions. *People in Interest of G.W.R.*, 943 P.2d 466 (Colo. App. 1996).

**But the better public policy to follow** is that when a child is a victim of an unlawful sexual



offense, this section permits the admission into evidence of hearsay statements that are not otherwise admissible under the statutes or court rule, provided the court gives a cautionary instruction to the jury both at the time the evidence is received and again in the general charge. In the event such evidence is admissible under other statutes or court rules, then the procedural requirements of this section are not implicated. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

**Trial court's ruling as to admissibility of child's hearsay statement pursuant to this section is based solely upon matters presented at in-limine hearing** and therefore, for purposes of an effective appellate review, the court's decision shall state on the record its findings regarding: (1) The time, content, and circumstances of statements that provide sufficient safeguards of reliability; (2) if the child is determined to be an unavailable witness, the factors rendering the child unavailable; and (3) if the child's statement is ruled admissible, the nature of the corroborative evidence of the act which is the subject of the statement. *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

**Juvenile court did not abuse its discretion by granting guardian ad litem's motion to admit child's out of court statements** during the proceedings to adjudicate whether the child was dependent and neglected even though the jury ultimately found the child had not been subjected to mistreatment or abuse. *People in Interest of C.L.S.*, 934 P.2d 851 (Colo. App. 1996).

**Appellate review of trial court's determination pursuant to this section regarding admissibility of child's hearsay statement** should be based upon record made at in-limine hearing and may go beyond record only if issue of harmless error or plain error is raised. *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

**This section is not applicable to videotaped statements of child abuse victim.** A child victim videotape may be admitted only if it is a videotaped deposition made in compliance with § 18-3-413 which governs all videotaped statements obtained from child sexual abuse victims. *People v. Newbrough*, 803 P.2d 155 (Colo. 1990); *People v. Carter*, 919 P.2d 862 (Colo. App. 1996).

**If the evidence is admissible under other statutes or court rules**, then the procedural requirements of this section need not be followed. *People v. Aldrich*, 849 P.2d 821 (Colo. App. 1992).

**Subsection (1) does not require that a child declarant be determined as competent in order for that declarant's statement to be admissible** so long as the reliability requirement of the statute is met. *People v. Moore*, 860 P.2d 549 (Colo. App. 1993).

Where both the children's statements were made shortly after the sexual assault, the statements made by them during the course of their videotaped interviews used age-appropriate language, they were made in response to nonleading questions, and while each displayed some reluctance to discuss sexual matters, their demeanor during the course of the interviews reinforced their reliability, the trial court's admission of these statements was proper. *People v. Moore*, 860 P.2d 549 (Colo. App. 1993).

**In determining the reliability of a child's statements under this section, the following factors may be helpful for the court to consider:** (1) Whether the statement was made spontaneously; (2) whether the statement was made while the child was still upset or in pain from the alleged abuse; (3) whether the language of the statement was likely to have been used by a child the age of the declarant; (4) whether the allegation was made in response to a leading question; (5) whether the child or the hearsay witness has any bias against the defendant or any motive for lying; (6) whether any other event occurred between the time of the abuse and the time of the statement which could account for the contents of the statement; (7) whether more than one person heard the statement; and (8) the general character of the child. *People v. District Court*, 776 P.2d 1083 (Colo. 1989); *People v. Dill*, 904 P.2d 1367 (Colo. App. 1995), *aff'd*, 927 P.2d 1315 (Colo. 1996); *McPeck v. Colo. Dept. of Soc. Servs.*, 919 P.2d 942 (Colo. App. 1996); *People v. Trujillo*, 923 P.2d 277 (Colo. App. 1996); *People v. Frost*, 5 P.3d 317 (Colo. App. 1999); *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002); *People v. Streaun*, 74 P.3d 387 (Colo. App. 2002).

**Trial court's decision to admit child hearsay is overturned only upon a finding of an abuse of discretion.** Court found victim's statement to her mother was reliable and "an outcry" made while explaining her mood swings and depression. *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002).

**Court did not err in admitting statements** where statements were spontaneous, made in response to an open-ended question and not in response to any leading question, and the victim used age-appropriate language. *People v. Trujillo*, 923 P.2d 277 (Colo. App. 1996).

**Trial court properly admitted videotaped interview.** Although defendant argued on appeal that the court should have made a "particularized assessment" of the videotape's reliability, he never asked the trial court for such an assessment, and the court's findings demonstrate that it was addressing the reliability of the taped statement as well as the other out-of-court statements. *People v. Melendez*, 80 P.3d 883 (Colo. App. 2003), *aff'd* on other grounds, 102 P.3d 315 (Colo. 2004).

The videotaped interview was not unfairly prejudicial as both the child and the interviewer testified at trial and were subject to cross-examination. The substance of the videotaped interview did not differ significantly from testimony by these and other prosecution witnesses at trial. *People v. Melendez*, 80 P.3d 883 (Colo. App. 2003), *aff'd* on other grounds, 102 P.3d 315 (Colo. 2004).

**Trial court's failure to exercise its discretion with regard to controlling jury access to testimonial evidence during deliberations was not harmless.** Trial court could have admonished the jury not to give the exhibit undue weight or emphasis, instructed the jury that it watch the video no more than a specific number of times, or even required that the video be viewed in open court or under the supervision of a bailiff. In selecting those controls appropriate for each case, the trial court would have made a record of assessment. *DeBella v. People*, 233 P.3d 664 (Colo. 2010).

**Admission of testimony of witness who did not participate in a pre-trial hearing**, where such testimony was cumulative of other similar

evidence properly admitted, did not undermine the fairness of the trial or cast serious doubt on the reliability of the verdict. *People v. Burgess*, 946 P.2d 565 (Colo. App. 1997).

**This section permits hearsay testimony related to acts of mental and emotional abuse in a child abuse case.** The term "health" in § 18-6-401 (1) includes both physical and mental well-being. *People v. Sherrod*, 204 P.3d 472 (Colo. App. 2007), *rev'd* on other grounds, 204 P.3d 466 (Colo. 2009).

**It was not plain error for court to admit child's statements where defendant did not touch the child** but where there was testimony that defendant intimidated the child into undressing herself and touching herself for the defendant's sexual gratification while threatening the child if she did not comply. The "constructive touching" of the child was sufficient to permit the testimony under the statute. *People v. Cook*, 197 P.3d 269 (Colo. App. 2008).

**Applied in** *People v. Woertman*, 786 P.2d 443 (Colo. App. 1989); *People v. Hansen*, 920 P.2d 831 (Colo. App. 1995).

**13-25-129.5. Statements of persons with developmental disabilities - hearsay exception.** (1) An out-of-court statement made by a person with a developmental disability, as defined in section 27-10.5-102 (11) (a), C.R.S., not otherwise admissible by a statute or court rule that provides an exception to the objection of hearsay is admissible in any criminal or delinquency proceeding in which the person is alleged to have been a victim if the conditions of subsection (5) of this section are satisfied.

(2) (a) An out-of-court statement made by a person with a developmental disability, as defined in section 27-10.5-102 (11) (a), C.R.S., that describes all or part of an offense described in paragraph (b) of this subsection (2) performed with, by, on, or in the presence of the declarant, and that is not otherwise admissible by a statute or court rule that provides an exception to the objection of hearsay, is admissible in any criminal, delinquency, or civil proceeding if the conditions of subsection (5) of this section are satisfied.

(b) The exception described in paragraph (a) of this subsection (2) applies to an out-of-court statement made by a person with a developmental disability, which statement describes all or part of any of the following offenses:

- (I) Sexual assault, as described in section 18-3-402, C.R.S.;
- (II) Unlawful sexual contact, as described in section 18-3-404, C.R.S.;
- (III) Sexual assault on a child, as described in section 18-3-405, C.R.S.;
- (IV) Sexual assault on a child by one in a position of trust, as described in section 18-3-405.3, C.R.S.;
- (V) Internet sexual exploitation of a child, as described in section 18-3-405.4, C.R.S.;
- (VI) Sexual assault on a client by a psychotherapist, as described in section 18-3-405.5, C.R.S.;
- (VII) Incest, as described in section 18-6-301, C.R.S.;
- (VIII) Aggravated incest, as described in section 18-6-302, C.R.S.;
- (IX) Trafficking in children, as described in section 18-3-502, C.R.S.;
- (X) Sexual exploitation of a child, as described in section 18-6-403, C.R.S.;
- (XI) Indecent exposure, as described in section 18-7-302, C.R.S.; or
- (XII) Criminal attempt to commit any of the acts specified in this paragraph (b).

(3) An out-of-court statement by a person with a developmental disability, as defined in section 27-10.5-102 (11) (a), C.R.S., that describes any act of child abuse, as defined in section 18-6-401, C.R.S., to which the declarant was subjected or which the declarant witnessed, and that is not otherwise admissible by a statute or court rule that provides an



exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceeding in which a child is alleged to be a victim of child abuse or the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104 (1) (b), C.R.S., if the conditions of subsection (5) of this section are satisfied.

(4) An out-of-court statement made by a person with a developmental disability, as defined in section 27-10.5-102 (11) (a), C.R.S., that describes all or part of an offense contained in part 1 of article 3 of title 18, C.R.S., or that describes an act of domestic violence as defined in section 18-6-800.3 (1), C.R.S., not otherwise admissible by statute or court rule that provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceeding if the conditions of subsection (5) of this section are satisfied.

(5) The exceptions to the objection of hearsay described in subsections (1), (2), (3), and (4) of this section shall apply only if the court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and either:

(a) The statement is a nontestimonial statement; or

(b) (I) The declarant testifies at the proceedings; or

(II) If the declarant is unavailable to testify, the defendant has had an opportunity to cross-examine the declarant in a previous proceeding and there is corroborative evidence of the act which is the subject of the statement.

(6) If a statement is admitted pursuant to this section, the court shall instruct the jury in the final written instructions that during the proceeding the jury heard evidence repeating a person's out-of-court statement, that it is for the jury to determine the weight and credit to be given the statement, and that, in making the determination, the jury shall consider the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(7) The proponent of the statement shall give the adverse party reasonable notice of his or her intention to offer the statement and the particulars of the statement.

**Source: L. 2012:** Entire section added, (HB 12-1085), ch. 75, p. 253, § 1, effective August 8.

### **13-25-130. Criminal actions - use of photographs, video tapes, or films of property.**

(1) Photographs, video tapes, or films of property over which a person is alleged to have exerted unauthorized control or otherwise to have obtained unlawfully are competent evidence if the photographs, video tapes, or films are admissible into evidence under the rules of law governing the admissibility of photographs, video tapes, or films into evidence. Any photographic, video tape, or film record, when satisfactorily identified and authenticated, is as admissible in evidence as the property itself.

(2) (a) Any photograph may bear a written description of the property alleged to have been wrongfully taken, the name of the owner of the property taken, the name of the accused, the name of the arresting law enforcement officer, the date of the photograph, and the signature of the photographer.

(b) Any video tape or film may include, as a segment of the tape or film, a written description of the property alleged to have been wrongfully taken, the name of the owner of the property taken, the name of the accused, the name of the arresting law enforcement officer, the date the tape or film was produced, and a segment showing the signature of the photographer.

(3) A law enforcement agency which is holding property over which a person is alleged to have exerted unauthorized control or otherwise to have obtained unlawfully may return that property to its owner if:

(a) The appropriately identified photographs, video tapes, or films are filed and retained by the law enforcement agency;

(b) Satisfactory proof of ownership of the property is shown by the owner;

(c) A declaration of ownership is signed under penalty of perjury;

(d) The defendant, if a defendant has been filed upon, has been notified that such photographs, video tapes, or films have been taken, recorded, or produced; and

(e) A receipt for the property is obtained from the owner upon delivery by the law enforcement agency.

**Source: L. 85:** Entire section added, p. 576, § 1, effective July 1.

**Cross references:** For provisions in the criminal code concerning the use of photographs, video tapes, or films of property, see §§ 18-4-305, 18-4-415, and 18-4-514.

**13-25-131. Civil actions - sexual assault - certain evidence presumed irrelevant.**

(1) In any civil action for damages by an alleged victim which alleges damages resulting from a sexual assault on a client by any person who enters into a professional-client relationship that permits professional physical access to the client's person or the opportunity to affect or influence the thought processes or emotions of such client, including, but not limited to, actions for professional malpractice or assault and battery, evidence of specific instances of the victim's prior or subsequent sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall be presumed to be irrelevant, except as provided in subsections (2) and (4) of this section. The persons to whom this subsection (1) applies in a civil action against such persons shall include any psychotherapist as defined in section 18-3-405.5, C.R.S., any medical professional, any member of the clergy, or any person acting under the color of a religious organization. This subsection (1) shall also apply in a civil action against a parent or other person in a position of trust, power, or authority over any child or other person, in a civil action by or on behalf of such child or such other person.

(2) Subsection (1) of this section notwithstanding, in any of the civil actions described in such subsection (1), evidence of the following shall be presumed to be relevant:

(a) Evidence of the victim's prior or subsequent sexual conduct with the defendant in such civil action;

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse, including, but not limited to, genetic testing pursuant to section 13-25-126, offered for the purpose of showing that the act or acts alleged were or were not committed by the defendant in such civil action.

(3) In any civil action described in subsection (1) of this section, evidence of specific instances of the alleged victim's prior or subsequent sexual conduct is not subject to discovery.

(4) Notwithstanding subsections (1) and (3) of this section, evidence of specific instances of the alleged victim's prior or subsequent sexual conduct may be determined to be subject to discovery or offered as evidence, if the defendant or plaintiff requests a hearing prior to conducting discovery or attempting to admit such evidence and makes an offer of proof of the relevancy of such evidence and the court finds that the evidence is relevant and the probative value of such evidence outweighs its prejudicial effect. Such hearing shall be held no later than thirty days prior to trial. In making an order that such evidence is relevant, the court shall detail the information or conduct that is subject to discovery or which may be admitted into evidence.

**Source: L. 91:** Entire section added, p. 352, § 1, effective July 1. **L. 97:** (2)(b) amended, p. 560, § 3, effective July 1.

**13-25-132. Criminal actions - video tape depositions - use at trial.** (1) (a) In any criminal action, if the court finds, upon application of the prosecution, that there is substantial risk of physical harm or intimidation of a witness, the court may enter an order that a deposition be taken of that witness' testimony and that the deposition be recorded and preserved on video tape.

(b) For the purposes of this section, "intimidation" means to, directly or indirectly, by oneself or through any other person in one's behalf, make use of any force, violence, restraint, abduction, duress, or forcible or fraudulent device or contrivance, or to inflict or threaten the infliction of any injury, damage, harm, or loss, or in any manner to practice



intimidation upon or against any person in order to impede, prevent, or otherwise interfere with the testimony of the witness, or to compel, induce, or prevail upon any witness to give or refrain from giving testimony in any criminal action.

(2) The prosecution shall apply for the order specified in subsection (1) of this section in writing at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition. The defendant shall have a right to be present and represented by counsel at the deposition.

(3) Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, there is likely to be a substantial risk of physical harm or intimidation of a witness. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on video tape. The prosecution shall transmit the video tape to the clerk of the court in which the action is pending.

**Source: L. 92:** Entire section added, p. 281, § 2, effective July 1.

**13-25-133. Telecommunications devices for the deaf and teletype - inadmissibility in evidence - exception.** (1) Except as provided in subsection (3) of this section, the contents of any communication made directly or indirectly through a telecommunications device for the deaf (commonly known as TDD) or teletype (commonly known as TTY) and any writing or recording resulting from the communication are inadmissible as evidence of the existence or contents of the communication in any court of law, legal proceeding, or administrative hearing.

(2) For the purposes of this section, “telecommunications device for the deaf or teletype” means any auxiliary aid or service consisting of listening or transcription systems that allow the reception or transmission of aurally delivered communication and materials for the benefit of individuals with hearing, speech, or physical impairments.

(3) The provisions of this section do not apply to any communication intercepted pursuant to a lawful court order.

**Source: L. 94:** Entire section added, p. 458, § 1, effective March 29.

**13-25-134. Electronic records and signatures - admissibility in evidence - originals.** Pursuant to the provisions of article 71.3 of title 24, C.R.S., in any legal proceeding, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of an electronic record or electronic signature into evidence on the sole ground that it is an electronic record or electronic signature or on the grounds that it is not in its original form or is not an original.

**Source: L. 99:** Entire section added, p. 1347, § 4, effective July 1. **L. 2002:** Entire section amended, p. 858, § 5, effective May 30.

**13-25-135. Evidence of admissions - civil proceedings - unanticipated outcomes - medical care.** (1) In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim and which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

(2) For purposes of this section, unless the context otherwise requires:

(a) “Health care provider” means any person licensed or certified by the state of Colorado to deliver health care and any clinic, health dispensary, or health facility licensed

by the state of Colorado. The term includes any professional corporation or other professional entity comprised of such health care providers as permitted by the laws of this state.

(b) “Relative” means a victim’s spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half brother, half sister, or spouse’s parents. The term includes said relationships that are created as a result of adoption. In addition, “relative” includes any person who has a family-type relationship with a victim.

(c) “Representative” means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney, or any person recognized in law or custom as a patient’s agent.

(d) “Unanticipated outcome” means the outcome of a medical treatment or procedure that differs from an expected result.

**Source: L. 2003:** Entire section added, p. 940, § 1, effective April 17.

#### ANNOTATION

**Law reviews.** For article, “Apology in the Aftermath of Injury: Colorado’s ‘I’m Sorry’ Law”, see 34 Colo. Law. 47 (April 2005).

**13-25-136. Criminal actions - prenatal drug and alcohol screening - admissibility of evidence.** A court shall not admit in a criminal proceeding information relating to substance use not otherwise required to be reported pursuant to section 19-3-304, C.R.S., obtained as part of a screening or test performed to determine pregnancy or to provide prenatal care for a pregnant woman. This section shall not be interpreted to prohibit prosecution of any claim or action related to such substance use based on evidence obtained through methods other than the screening or testing described in this section.

**Source: L. 2012:** Entire section added, (HB 12-1100), ch. 10, p. 27, § 2, effective March 9.

**Cross references:** For the legislative declaration in the 2012 act adding this section, see section 1 of chapter 10, Session Laws of Colorado 2012.

**13-25-137. Admissibility of commercial packaging.** (1) Labels or packages listing, indicating, or describing the contents or ingredients of any commercially packaged item are admissible in evidence to prove that the item contains the contents or ingredients listed on the label or package. A label or package listing that identifies the contents or ingredients of a container or package constitutes prima facie evidence that the items in the container or package were composed in whole or in part of the contents.

(2) Prior to the admission of evidence pursuant to this section, the court shall make a preliminary determination as to whether the item constitutes a commercially packaged item as described in subsection (1) of this section. This determination may include any evidence the court deems appropriate, including but not limited to evidence of where the item is available for purchase, whether the item is subject to state or federal regulation, or any other evidence observable on the package that indicates or constitutes indicia of the label’s or package’s reliability. Extrinsic evidence that an item is commercially packaged is not a prerequisite to the court’s determination.

**Source: L. 2012:** Entire section added, (HB 12-1310), ch. 268, p. 1391, § 1, effective June 7.

#### ARTICLE 26

#### Uniform Photographic Records Act

**Cross references:** For reproduction of records by a public officer as evidence, see § 24-80-107; for records required to be kept by law, see article 72 of title 24.



13-26-101.	Short title.	13-26-103.	Records of trust departments
13-26-102.	Business and public records as evidence.	13-26-104.	or companies not excepted. Uniform construction.

**13-26-101. Short title.** This article shall be known and may be cited as the "Uniform Photographic Copies of Business and Public Records as Evidence Act".

**Source:** L. 55: p. 374, § 3. CRS 53: § 52-2-3. C.R.S. 1963: § 52-2-3.

**13-26-102. Business and public records as evidence.** If any business, institution, or member of a profession or calling or any department or agency of government in the regular course of business or activity keeps or records any memorandum, writing, entry, print, or representation, or combination thereof, of any act, transaction, occurrence, or event and in the regular course of business has caused any of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, optical disk, or other form of mass storage, electronic imaging, electronic data processing, electronically transmitted facsimile, printout, or other reproduction of electronically stored data, or other process which accurately reproduces or forms a durable medium for reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not, and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

**Source:** L. 55: p. 373, § 1. CRS 53: § 52-2-1. C.R.S. 1963: § 52-2-1. L. 94: Entire section amended, p. 454, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Highlights of the 1955 Colorado Legislative Session — Evidence", see 28 Rocky Mt. L. Rev. 91 (1955).

**13-26-103. Records of trust departments or companies not excepted.** The records of the trust department of a bank or trust company are not such records as are excepted under the phrase "held in a custodial or fiduciary capacity" in section 13-26-102. The originals of such trust records may be reproduced at any time and destroyed at any time, if done in good faith and without wrongful intent. Neither the manner in which an original is destroyed, whether voluntarily or by casualty or otherwise, nor the fact that it may have been destroyed while it was held in a custodial or fiduciary capacity shall affect the admissibility of a reproduction.

**Source:** L. 57: p. 367, § 1. CRS 53: § 52-2-4. C.R.S. 1963: § 52-2-4. L. 87: Entire section amended, p. 1577, § 16, effective July 10.

#### ANNOTATION

**Law reviews.** For article, "One Year Review of Evidence", see 35 Dicta 44 (1958).

**13-26-104. Uniform construction.** This article shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it.

**Source:** L. 55: p. 374, § 2. CRS 53: § 52-2-2. C.R.S. 1963: § 52-2-2.

## FEES AND SALARIES

### ARTICLE 30

#### Compensation of Justices and Judges

13-30-101.	Short title.	13-30-104.	Judicial compensation adjust-
13-30-102.	Legislative declaration.		ment - annual general ap-
13-30-103.	Compensation of justices and judges.		propriations bill.

**13-30-101. Short title.** This article shall be known and may be cited as the "Colorado Judicial Compensation Act".

**Source:** L. 71: p. 581, § 1. C.R.S. 1963: § 56-7-1.

**13-30-102. Legislative declaration.** In carrying out its responsibility to provide for judicial salaries pursuant to section 18 of article VI of the state constitution, the general assembly hereby declares that the purpose of this article is to set the amount of judicial compensation for justices of the supreme court, judges of the court of appeals, judges of the district courts, judges of the county courts, and judges of the probate and juvenile courts of the city and county of Denver.

**Source:** L. 71: p. 581, § 1. C.R.S. 1963: § 56-7-2. L. 80: Entire section R&RE, p. 575, § 1, effective July 1. L. 85: Entire section amended, p. 571, § 7, effective November 14, 1986.

**13-30-103. Compensation of justices and judges.** (1) In addition to the provisions of section 13-30-104, the following salaries for the following officers shall apply:

(a) The chief justice of the supreme court shall receive effective July 1, 1991, an annual salary of seventy-nine thousand dollars, and effective July 1, 1992, an annual salary of eighty-two thousand dollars.

(b) Each associate justice of the supreme court shall receive effective July 1, 1991, an annual salary of seventy-six thousand five hundred dollars, and effective July 1, 1992, an annual salary of seventy-nine thousand five hundred dollars.

(c) The chief judge of the court of appeals shall receive effective July 1, 1991, an annual salary of seventy-four thousand five hundred dollars, and effective July 1, 1992, an annual salary of seventy-seven thousand five hundred dollars.

(d) Each judge of the court of appeals, other than the chief judge, shall receive effective July 1, 1991, an annual salary of seventy-two thousand dollars, and effective July 1, 1992, an annual salary of seventy-five thousand dollars.

(e) The judges of the district courts shall each receive effective July 1, 1991, an annual salary of sixty-seven thousand five hundred dollars, and effective July 1, 1992, an annual salary of seventy thousand five hundred dollars.

(f) Each judge of the juvenile court of the city and county of Denver shall receive effective July 1, 1991, an annual salary of sixty-seven thousand five hundred dollars, and effective July 1, 1992, an annual salary of seventy thousand five hundred dollars.

(g) The judge of the probate court of the city and county of Denver shall receive effective July 1, 1991, an annual salary of sixty-seven thousand five hundred dollars, and effective July 1, 1992, an annual salary of seventy thousand five hundred dollars.



(h) Repealed.

(i) Each judge of the county court of the city and county of Denver shall receive an annual salary as provided by the ordinances of said city and county.

(j) The annual salary of judges of the county court in Class B counties, as defined in section 13-6-201, effective July 1, 1991, shall be sixty thousand five hundred dollars, and effective July 1, 1992, shall be sixty-three thousand five hundred dollars.

(k) Repealed.

(l) (I) Effective July 1, 1998, the annual salary of judges of the county court in each Class C or Class D county, as defined in section 13-6-201, and the annual salaries of all special associate, associate, and assistant county judges shall be determined annually by the chief justice and certified to the general assembly and the controller pursuant to procedures approved by the supreme court. The certification shall include the workload measures developed pursuant to subparagraph (II) of this paragraph (I). In determining the salaries to take effect on July 1 of each year, the chief justice shall use the average number of cases filed annually in each county court during the three-year period ending on the previous December 31.

(II) Procedures used to calculate incremental part-time county judge workload salary levels shall be based on the method used to determine the need for full-time county judges as established and approved by the supreme court and shall take into account case types, case processing requirements, support staff assistance, travel, and such other factors as are relevant to workload assessment. Salaries for part-time county judges shall begin at twenty percent of the amount of a full-time county judge salary, as specified in paragraph (j) of this subsection (1) and section 13-30-104, and increase by five percent increments commensurate with increases in the part-time county judge's workload, up to ninety percent of a full-time county judge workload.

(III) When the workload for a part-time county judge reaches eighty percent of a full-time county judge workload, the chief justice may assign the part-time county judge to serve on a full-time basis, so long as the part-time county judge meets the qualifications established for county judges in Class A and Class B counties, as specified in section 13-6-203. Upon assignment to serve on a full-time basis, the part-time county judge shall be paid the full amount of a county judge salary as specified in paragraph (j) of this subsection (1) and section 13-30-104. Assignment of a part-time county judge to serve on a full-time basis pursuant to this subparagraph (III) shall not affect the statutory classification of the county in which the part-time county judge serves, as specified in section 13-6-201.

(IV) Notwithstanding the provisions of subparagraph (I) of this paragraph (I), the salary of a county judge or special associate, associate, or assistant county judge serving in office as of June 30, 1998, may not be reduced while such judge remains in office. Any reduction in salary for a judge appointed after June 30, 1998, shall take effect at the beginning of such judge's next term of office.

(1.5) Notwithstanding the provisions of subsection (1) of this section, for the fiscal year commencing July 1, 1999, and each fiscal year thereafter, the increase over and above the provisions set forth in this section and section 13-30-104, if any, in compensation of justices and judges shall be determined by the general assembly as set forth in the annual general appropriations bill. Any increase in judicial compensation set forth in an annual general appropriations bill shall be an increase only for the fiscal year of the annual general appropriations bill in which the amount is specified and shall not constitute an increase for any other fiscal year. It is the intent of the general assembly that an increase in judicial compensation specified in an annual general appropriations bill shall be added to the compensation set forth in this section and section 13-30-104 and shall not represent a statutory change.

(2) The annual salaries under this section and as increased by the annual general appropriations bill for the fiscal year commencing July 1, 1999, and for each fiscal year thereafter, shall be paid in equal monthly amounts.

**Source:** L. 71: p. 581, § 1. C.R.S. 1963: § 56-7-3. L. 72: p. 319, § 1. L. 73: p. 634, § 1. L. 76: (1)(b) amended, p. 301, § 30, effective May 20; (2) and (10) amended, p. 591,

§ 2, effective July 1. **L. 77:** (10) R&RE, p. 783, § 3, effective July 1, 1978. **L. 78:** Entire section amended, p. 391, § 1, effective January 1, 1979. **L. 80:** Entire section R&RE, p. 575, § 2, effective July 1. **L. 84:** IP(1) and (1)(a) to (1)(h) R&RE, p. 455, § 5, effective July 1. **L. 85:** (1)(h) repealed, p. 572, § 12, effective November 14, 1986. **L. 87:** IP(1), (1)(a) to (1)(g), (1)(j), and (1)(k)(I) amended, p. 560, § 2, effective July 1. **L. 91:** IP(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), and (1)(j) amended, p. 378, § 1, effective July 1. **L. 97:** (1)(k)(V) and (1)(l) added, p. 767, §§ 1, 2, effective May 1. **L. 98:** (1.5) added and (2) amended, p. 957, § 1, effective May 27.

**Editor's note:** Subsection (1)(k)(V) provided for the repeal of subsection (1)(k), effective July 1, 1998. (See L. 97, p. 767.)

**Cross references:** For compensation of judges outside county of residence, see § 13-3-110.

### ANNOTATION

**Nothing in the language of former subsection (1)(k)(I) indicates or implies that the county court judge salary calculation formula was contractual in nature** or that it could

not be modified or amended in the future. *Alderton v. State of Colo.*, 17 P.3d 817 (Colo. App. 2000).

### **13-30-104. Judicial compensation adjustment - annual general appropriations bill.**

(1) Effective July 1, 1988, the annual compensation of justices and judges in effect on the preceding June 30, as provided in section 13-30-103 (1) (a) to (1) (g) and (1) (j), shall be increased by four thousand five hundred dollars, and the annual compensation of all special associate, associate, and assistant county judges shall be adjusted as a percentage of such amount as provided in section 13-30-103 (1) (k).

(2) (a) Effective July 1, 1995, the annual compensation of justices and judges in effect on the preceding June 30, as provided in section 13-30-103 (1) (a) to (1) (g) and (1) (j) and subsection (1) of this section, shall be increased by four thousand dollars, and the annual compensation of all special associate, associate, and assistant county judges shall be adjusted as a percentage of such amount as provided in section 13-30-103 (1) (k).

(b) Effective July 1, 1996, the annual compensation of justices and judges in effect on the preceding June 30, as provided in section 13-30-103 (1) (a) to (1) (g) and (1) (j), subsection (1) of this section, and paragraph (a) of this subsection (2), shall be increased by three thousand dollars, and the annual compensation of all special associate, associate, and assistant county judges shall be adjusted as a percentage of such amount as provided in section 13-30-103 (1) (k).

(c) Effective July 1, 1997, the annual compensation of justices and judges in effect on the preceding June 30, as provided in section 13-30-103 (1) (a) to (1) (g) and (1) (j), subsection (1) of this section, and paragraphs (a) and (b) of this subsection (2), shall be increased by three thousand dollars, and the annual compensation of all special associate, associate, and assistant county judges shall be adjusted as a percentage of such amount as provided in section 13-30-103 (1) (k).

(3) For the fiscal year commencing July 1, 1999, and for each fiscal year thereafter, the increase over and above the provisions set forth in this section and section 13-30-103, if any, in compensation of justices and judges shall be determined by the general assembly as set forth in the annual general appropriations bill. Any increase in judicial compensation set forth in an annual general appropriations bill shall be an increase only for the fiscal year of the annual general appropriations bill in which the amount is specified and shall not constitute an increase for any other fiscal year. It is the intent of the general assembly that an increase in judicial compensation specified in an annual general appropriations bill shall be added to the compensation set forth in this section and section 13-30-103 and shall not represent a statutory change.

**Source:** **L. 81:** Entire section added, p. 887, § 1, effective January 1, 1982. **L. 84:** Entire section amended, p. 714, § 13, effective July 1. **L. 85:** Entire section repealed, p.



1359, § 7, effective June 28. **L. 87:** Entire section RC&RE, p. 561, § 3, effective July 1. **L. 95:** Entire section amended, p. 739, § 1, effective July 1. **L. 98:** (3) added, p. 958, § 2, effective May 27.

**Editor's note:** The references in subsections (1) and (2) to § 13-30-103 (1)(k) refer to that section as it existed prior to its repeal on July 1, 1998.

## ARTICLE 31

### Compensation of Clerks of Courts and Other Assistants

#### 13-31-101 to 13-31-109. (Repealed)

**Source:** **L. 79:** Entire article repealed, p. 602, § 30, effective July 1.

**Editor's note:** This article was numbered as article 3 of chapter 56 in C.R.S. 1963. For amendments to this article prior to its repeal in 1979, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## ARTICLE 32

### Fees of Clerks of Court

13-32-101.	Docket fees in civil actions - judicial stabilization cash fund - support registry fund created.	13-32-107.	Fee book a public record.
13-32-102.	Fees in probate proceedings - repeal.	13-32-108.	Unclaimed funds - district court.
13-32-103.	Docket fees in special proceedings - repeal.	13-32-109.	Report of unclaimed funds - district court.
13-32-104.	Additional fees of clerks of courts.	13-32-110.	Actions for funds barred in two years.
13-32-105.	Docket fees in criminal actions.	13-32-111.	Refund by decree of court - when.
13-32-105.5.	Docket fees - reduction by rule.	13-32-112.	Unclaimed funds - county court.
13-32-106.	Fee bill and application of fees.	13-32-113.	Exemption from fees.
		13-32-114.	Judicial department information technology cash fund - creation - uses.

**13-32-101. Docket fees in civil actions - judicial stabilization cash fund - support registry fund created.** (1) At the time of first appearance in all civil actions and special proceedings in all courts of record, except in the supreme court and the court of appeals, and except in the probate proceedings in the district court or probate court of the city and county of Denver, and except as provided in subsection (3) of this section and in sections 13-32-103 and 13-32-104, there shall be paid in advance the total docket fees, as follows:

(a) On and after July 1, 2009, by the petitioner in a proceeding for dissolution of marriage, legal separation, or declaration of invalidity of marriage and by the petitioner in an action for a declaratory judgment concerning the status of marriage, a fee of two hundred thirty dollars;

(b) On and after July 1, 2009, by the respondent in a proceeding for dissolution of marriage, legal separation, or declaration of invalidity of marriage and by the respondent to an action for a declaratory judgment concerning the status of marriage, a fee of one hundred sixteen dollars;

(c) (I) and (II) Repealed.

(III) Except as provided in subparagraph (IV) of this paragraph (c):

(A) On and after July 1, 2010, by each plaintiff, petitioner, third-party plaintiff, and

party filing a cross claim or counterclaim, when a money judgment sought is fifteen thousand dollars or less and such action is commenced in a court of record of appropriate limited jurisdiction, a fee in the amount of ninety-seven dollars.

(B) On and after July 1, 2010, by each defendant, respondent, third-party defendant, or other party in such court not filing a cross claim or counterclaim, when a money judgment sought is fifteen thousand dollars or less and such action is commenced in a court of record of appropriate limited jurisdiction, a fee in the amount of ninety-two dollars.

(C) Repealed.

(IV) The general assembly hereby declares that docket fees for actions filed in the small claims division of the county court should reflect the range of the monetary jurisdictional limit established for such actions and that such fees should promote access to the courts and reflect appropriate contributions from litigants using the court system based on the money judgment sought in an action. The general assembly hereby declares that it is appropriate to establish docket fees for the small claims division of the county court as follows:

(A) On and after July 1, 2008, when the money judgment sought by the plaintiff in an action filed in the small claims division of the county court is five hundred dollars or less, a plaintiff shall pay a fee of thirty-one dollars.

(B) On and after July 1, 2008, when the money judgment sought by the plaintiff in an action filed in the small claims division of the county court is five hundred dollars or less, a defendant filing an answer without a counterclaim in such an action shall pay a fee of twenty-six dollars.

(C) On and after July 1, 2008, when the money judgment sought in an action filed in the small claims division of the county court exceeds five hundred dollars and is no more than seven thousand five hundred dollars, a plaintiff shall pay a fee of fifty-five dollars.

(D) On and after July 1, 2008, when the money judgment sought in an action filed in the small claims division of the county court exceeds five hundred dollars and is no more than seven thousand five hundred dollars, a defendant filing an answer without a counterclaim in such an action shall pay a fee of forty-one dollars.

(E) On and after July 1, 2008, if a defendant files an answer with a counterclaim in an action in the small claims division of the county court and the amount sought in the action and amount sought in the counterclaim are each five hundred dollars or less, the fee for such answer and counterclaim shall be thirty-one dollars.

(F) On and after July 1, 2008, if a defendant files an answer with a counterclaim in an action in the small claims division of the county court and the amount sought in either the action or the counterclaim is more than five hundred dollars and is not more than seven thousand five hundred dollars, the fee for such answer and counterclaim shall be forty-six dollars.

(d) On and after July 1, 2008, by each plaintiff, petitioner, third-party plaintiff, and party filing a cross claim or counterclaim filed in a district court of the state, a fee of two hundred twenty-four dollars;

(e) On and after July 1, 2008, by each appellant, a fee of one hundred sixty-three dollars;

(f) On and after July 1, 2008, by an appellee and by each defendant or respondent not filing a cross claim or counterclaim, a fee of one hundred fifty-eight dollars;

(g) On and after July 1, 2008, by a petitioner in adoption proceedings, a fee of one hundred sixty-seven dollars.

(2) On and after July 1, 2008, in any proceeding held pursuant to articles 5, 10, 11, 13, and 14 of title 14, C.R.S., where a decree or final or permanent order has been entered and more than sixty days have passed, there shall be assessed at the time of filing a motion to modify, amend, or alter said decree or order a fee of one hundred five dollars.

(3) (a) Notwithstanding the provisions of subsection (1) of this section, if parties appear jointly, only one fee shall be charged or paid, and no fee shall be charged in any event for the filing of a disclaimer, or for an acknowledgment of service for the purpose of conferring jurisdiction, or for an appearance or answer filed by a guardian ad litem, or by an attorney appointed by the court to represent and protect the interest of any defendant.

(b) (I) No docket fee shall be charged in mental health proceedings under article 10 or 10.5 of title 27, C.R.S.; but, where an estate is thereafter probated for any mental



incompetent, the committing court has a claim against such estate, as a cost of the mental health proceedings, in the sum of twenty dollars, in addition to any other expense of commitment allowed and paid by the county, to be paid by the conservator of such estate as a claim pursuant to section 15-14-429, C.R.S.

(II) On and after July 1, 2009, all claims of twenty dollars that are paid to and collected by the committing court under subparagraph (I) of this paragraph (b) shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in subsection (6) of this section.

(c) No docket fee shall be charged in proceedings concerning dependent or neglected children, relinquishment of children, or delinquent children.

(4) (a) In a civil case in which there is a contested trial to the court or a trial to a jury and a monetary judgment rendered which is paid in whole or in part in cash or other property, there shall be assessed, against the judgment debtor, by the clerk of the court an additional fee as provided in paragraph (b) of this subsection (4). This additional fee shall be paid to the clerk of the district court upon request for full or partial satisfaction of judgment and before the certificate of satisfaction of judgment is issued.

(b) The additional fee to be paid by the judgment debtor, as provided in paragraph (a) of this subsection (4), is as follows:

- (I) Judgments over \$5,000 and not more than \$10,000, a total additional fee of \$10;
- (II) Judgments over \$10,000 and not more than \$20,000, a total additional fee of \$30;
- (III) Judgments over \$20,000 and not more than \$30,000, a total additional fee of \$50;
- (IV) Judgments over \$30,000 and not more than \$50,000, a total additional fee of \$90;
- (V) Judgments over \$50,000, \$90 plus an additional fee of \$2 for each \$1,000 above \$50,000.

(5) (a) Each fee collected pursuant to paragraph (a) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Fifteen dollars shall be deposited in the Colorado children's trust fund created in section 19-3.5-106, C.R.S.;

(II) One hundred fifteen dollars shall be deposited in the performance-based collaborative management incentive cash fund created in section 24-1.9-104, C.R.S.;

(III) Fifty dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section;

(IV) Five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204;

(V) Twenty-six dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section;

(VI) One dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S.;

(VII) Three dollars shall be deposited in the vital statistics records cash fund created in section 25-2-121, C.R.S.;

(VIII) Five dollars shall be deposited in the displaced homemakers fund created in section 8-15.5-108, C.R.S.;

(IX) Five dollars shall be deposited in the Colorado domestic abuse program fund created in section 39-22-802 (1), C.R.S.; and

(X) Five dollars shall be deposited in the family violence justice fund created in section 14-4-107 (1), C.R.S.

(b) Each fee collected pursuant to paragraph (b) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, seventy-five dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, twenty-six dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section, five dollars shall be deposited in the Colorado domestic abuse program fund created in section 39-22-802 (1), C.R.S., and five dollars shall be deposited in the family violence justice fund created in section 14-4-107 (1), C.R.S.

(c) to (f) Repealed.

(g) Each fee collected pursuant to sub-subparagraph (A) of subparagraph (III) of paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and fifty-four dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, thirty-seven dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section, and one dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S.

(h) Each fee collected pursuant to sub-subparagraph (B) of subparagraph (III) of paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and fifty-four dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and thirty-seven dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section.

(i) Each fee collected pursuant to sub-subparagraph (A) of subparagraph (IV) of paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, fourteen dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, eleven dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section, and one dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S.

(j) Each fee collected pursuant to sub-subparagraph (B) of subparagraph (IV) of paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, ten dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and eleven dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section.

(k) Each fee collected pursuant to sub-subparagraph (C) of subparagraph (IV) of paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, thirty-eight dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, eleven dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section, and one dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S.

(l) Each fee collected pursuant to sub-subparagraph (D) of subparagraph (IV) of paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, twenty-five dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and eleven dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section.

(m) Each fee collected pursuant to sub-subparagraph (E) of subparagraph (IV) of paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, fifteen dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be



deposited in the court security cash fund established pursuant to section 13-1-204, and eleven dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section.

(n) Each fee collected pursuant to sub-subparagraph (F) of subparagraph (IV) of paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, thirty dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and eleven dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section.

(o) Each fee collected pursuant to paragraph (d) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, one hundred fifty dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, sixty-eight dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section, and one dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S.

(p) Each fee collected pursuant to paragraph (e) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, ninety dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and sixty-eight dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section.

(q) Each fee collected pursuant to paragraph (f) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, eighty-five dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and sixty-eight dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section.

(r) Each fee collected pursuant to paragraph (g) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, one hundred forty-three dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section, five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, fifteen dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section, one dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S., and three dollars shall be deposited in the vital statistics records cash fund created in section 25-2-121, C.R.S.

(s) Each fee collected pursuant to subsection (2) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, ninety-five dollars shall be deposited in the judicial stabilization cash fund created in subsection (6) of this section and ten dollars shall be deposited in the justice center cash fund created in paragraph (a) of subsection (7) of this section.

(6) There is hereby created in the state treasury the judicial stabilization cash fund, referred to in this subsection (6) as the "fund", that shall consist of all fees required to be deposited in the fund. The moneys in the fund shall be subject to annual appropriation by

the general assembly for the expenses of trial courts in the judicial department. Any moneys in the fund not expended for the purpose of this subsection (6) may be invested by the state treasurer as provided in section 24-36-113, C.R.S. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of any fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or any other fund.

(7) (a) There is hereby created in the state treasury the justice center cash fund, referred to in this subsection (7) as the "fund", that shall consist of all fees required by law to be deposited in the fund and any lease payments received by the judicial department from agencies occupying the state justice center. The moneys in the fund shall be subject to annual appropriation by the general assembly for the expenses related to the design, construction, maintenance, operation, and interim accommodations for the state justice center, including but not limited to payments on any lease-purchase agreements entered into pursuant to the provisions of section 2 of Senate Bill 08-206, as enacted at the second regular session of the sixty-sixth general assembly, collectively referred to in this subsection (7) as "lease-purchase agreements". Any moneys in the fund not expended for the purpose of this subsection (7) may be invested by the state treasurer as provided in section 24-36-113, C.R.S. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of any fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or any other fund.

(b) (I) The general assembly hereby finds and declares:

(A) The state judicial department is in need of additional space;

(B) The state museum and the offices of the state historical society occupy a building on the same block at Fourteenth avenue and Broadway as the current offices of the Colorado supreme court, the Colorado court of appeals, and the supreme court library;

(C) By building a new facility on the entire block at Fourteenth avenue and Broadway, the judicial department will consolidate its offices into a single location and the state judicial department will operate more efficiently and cost-effectively; and

(D) It is appropriate for the judicial department to pay the state museum and the state historical society for its building and for vacating its current location at Fourteenth avenue and Broadway and to assist in relocation expenses so that the entire block is available for use by the state judicial department.

(II) Notwithstanding the provisions of paragraph (a) of this subsection (7):

(A) For the fiscal year commencing July 1, 2008, as moneys become available in the fund, the state treasurer shall transfer from the fund to the state museum cash fund, created in section 24-80-214, C.R.S., all moneys in the fund up to fifteen million dollars.

(B) For the fiscal year commencing July 1, 2009, as moneys become available in the fund, the state treasurer shall transfer from the fund to the state museum cash fund all moneys in the fund up to ten million dollars.

(C) For the fiscal year commencing July 1, 2010, as moneys become available in the fund, the state treasurer shall transfer from the fund to the state museum cash fund all moneys in the fund up to the difference between twenty-five million dollars and the amount of moneys transferred from the fund to the state museum cash fund pursuant to sub-subparagraphs (A) and (B) of this subparagraph (II) for the fiscal years commencing July 1, 2008, and July 1, 2009.

(c) (I) For the fiscal year commencing July 1, 2014, and each fiscal year thereafter so long as there are any payments due under any lease-purchase agreements, the executive director of the department of personnel and administration shall calculate the net savings to the state by locating the department of law and any other executive branch agency in the new state justice center.

(II) For the fiscal year commencing July 1, 2014, and each year thereafter so long as there are payments due on any lease-purchase agreements, the general assembly shall appropriate from the general fund to the fund the amount of savings calculated by the executive director of the department of personnel and administration pursuant to subparagraph (I) of this paragraph (c). Any moneys received in the fund pursuant to this paragraph (c) shall be used to prepay any obligations due pursuant to any lease-purchase agreement.



(8) At the time of filing a motion pursuant to section 19-4-107.3 or 14-10-122 (6), C.R.S., seeking to set aside a final or permanent order concerning parentage based upon DNA evidence establishing the exclusion of the petitioner as the biological father of a child, or to terminate an order requiring the petitioner to pay child support for that child, the petitioner shall pay a fee of seventy dollars. The fee collected pursuant to this subsection (8) shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in subsection (6) of this section.

**Source:** **L. 21:** p. 227, § 1. **C.L. § 7873.** **L. 23:** p. 249, § 1. **CSA: C. 66, § 4.** **L. 47:** p. 456, § 1. **CRS 53:** § 56-5-1. **L. 58:** pp. 241, 249, §§ 6, 19, 20. **L. 60:** p. 144, § 2. **L. 61:** p. 384, § 1. **C.R.S. 1963:** § 56-5-1. **L. 64:** p. 463, § 4. **L. 67:** p. 991, § 1. **L. 69:** p. 388, §§ 3, 4. **L. 72:** p. 598, § 84. **L. 73:** p. 1405, §§ 41, 42. **L. 75:** (1)(c) amended, p. 579, § 1, effective July 1; (1)(d) amended, p. 581, § 1, effective July 1; (2) amended, p. 924, § 17, effective July 1; (2) amended, p. 209, § 22, effective July 16. **L. 76:** (1)(c) amended, p. 302, § 31, effective May 20; (1)(c) amended, p. 520, § 2, effective October 1. **L. 79:** (4) amended, p. 621, § 1, effective June 1; (4)(a) and IP(4)(b) amended, p. 600, § 22, effective July 1. **L. 80:** (4) amended, p. 515, § 1, effective January 29. **L. 81:** (1)(c) amended, p. 2031, § 43, effective July 14. **L. 82:** (1)(c) amended, p. 294, § 1, effective July 1; (1)(d) amended, p. 295, § 1, effective July 1. **L. 83:** (1)(c) amended, p. 2047, § 3, effective October 14. **L. 84:** (1)(a), (1)(b), and (1)(f) amended, p. 455, § 6, effective July 1. **L. 87:** (1)(a), (1)(b), (1)(c)(I), (1)(d), and (1)(f) amended, p. 562, § 4, effective July 1; (1)(c)(II) amended, p. 544, § 3, effective July 1. **L. 90:** (1)(c)(I) amended and (1)(c)(II) R&RE, p. 851, §§ 12, 13, effective May 31; (1)(c)(I) amended and (1)(c)(II) R&RE, p. 856, §§ 5, 6, effective July 1. **L. 91:** (1)(a), (1)(c)(I), and (1)(d) amended and (1)(a.5) and (5) added, pp. 386, 379, §§ 1, 3, effective July 1. **L. 92:** (1)(a.5)(I) amended, p. 218, § 23, effective August 1. **L. 94:** (1)(a.5) amended, p. 1691, § 1, effective July 1. **L. 95:** (1)(a), (1)(b), (1)(d), (1)(f), and (5) amended, p. 740, § 2, effective July 1; (1)(c)(II)(D) and (1)(c)(III) added, pp. 728, 729, §§ 2, 3, effective January 1, 1996. **L. 98:** (1)(a.5)(III) added by revision, pp. 767, 769, §§ 18, 23. **L. 99:** (1)(a.5) amended, p. 1084, § 1, effective July 1. **L. 2000:** (1)(a) amended, p. 1571, § 9, effective July 1; (2) amended, p. 1832, § 4, effective January 1, 2001. **L. 2001:** (1)(a) amended, p. 741, § 6, effective June 1; (1)(c)(I), (1)(c)(II), and (1)(c)(III) amended, pp. 1518, 1516, §§ 12, 10, effective September 1. **L. 2002:** (1)(a) amended, p. 529, § 3, effective May 24; (6) added, p. 671, § 1, effective May 28. **L. 2003:** (1)(a) amended, p. 386, § 2, effective March 5; (1)(a), (1)(b), (1)(c), (1)(d), (1)(f), and (5) amended and (1.5) added, p. 568, § 1, effective March 18. **L. 2004:** (1)(a) amended, p. 1555, § 4, effective May 28. **L. 2007:** (7) added, p. 1268, § 2, effective May 25; (1)(a), (1)(b), (1)(c), (1)(d), (1)(f), (2), and (5) amended, p. 1530, § 19, effective May 31. **L. 2008:** Entire section amended, p. 2114, § 7, effective June 4; (8) added, p. 1658, § 5, effective August 15. **L. 2009:** (1)(a), (1)(b), (5)(a)(VII), (5)(a)(VIII), and (5)(b) amended and (5)(a)(IX) and (5)(a)(X) added, (SB 09-068), ch. 264, p. 1210, § 4, effective July 1; (1)(c)(III)(C) repealed, (SB 09-038), ch. 119, p. 498, § 1, effective July 1.

**Editor's note:** (1) Amendments to subsection (2) by Senate Bill 75-135 and Senate Bill 75-453 were harmonized. Amendments to subsection (4) by House Bill 79-1568 were harmonized in part with and superseded in part by House Bill 79-1206. Amendments to subsection (1)(a) by Senate Bill 03-172 and Senate Bill 03-186 were harmonized. Amendments to this section by Senate Bill 08-206 and Senate Bill 08-183 were harmonized.

(2) Subsection (1)(a.5)(III) provided for the repeal of subsection (1)(a.5), effective January 1, 2001. (See L. 99, p. 1084.)

(3) Subsection (1)(c)(I)(C) provided for the repeal of subsection (1)(c)(I), effective July 1, 2009. (See L. 2008, p. 2114.)

(4) Subsection (5)(c)(II) provided for the repeal of subsection (5)(c), effective July 1, 2009. (See L. 2008, p. 2114.)

(5) Subsections (1)(c)(II)(C), (5)(d)(II), (5)(e)(II), and (5)(f)(II) provided for the repeal of subsections (1)(c)(II), (5)(d), (5)(e), and (5)(f), respectively, effective July 1, 2010. (See L. 2008, p. 2114.)

(6) Subsections (5)(b)(I)(B), (5)(i)(I)(B), (5)(j)(I)(B), (5)(k)(I)(B), (5)(l)(I)(B), (5)(m)(I)(B), (5)(n)(I)(B), (5)(o)(I)(B), (5)(p)(I)(B), (5)(q)(I)(B), (5)(r)(I)(B), and (5)(s)(I)(B) provided for the

repeal of subsections (5)(b)(I), (5)(i)(I), (5)(j)(I), (5)(k)(I), (5)(l)(I), (5)(m)(I), (5)(n)(I), (5)(o)(I), (5)(p)(I), (5)(q)(I), (5)(r)(I), and (5)(s)(I), respectively, effective July 1, 2011. (See L. 2008, p. 2114.)

- Cross references:** (1) For the additional fee assessed against the petitioner of a dissolution of marriage action and deposited in the displaced homemakers fund, see § 14-10-120.5.
- (2) For the legislative declaration contained in the 1990 act amending subsections (1)(c)(I) and (1)(c)(II), see section 1 of chapter 100, Session Laws of Colorado 1990. For the legislative declaration contained in the 2008 act amending this section, see section 1 of chapter 417, Session Laws of Colorado 2008.

ANNOTATION

**Law reviews.** For article, “Expediting Court Procedure”, see 10 Dicta 113 (1933). For article, “Obtaining Costs for Clients — Part 1”, see 14 Colo. Law. 1974 (1985).

**The purpose of this section was to make the clerk’s fees payable in a lump sum** in each suit and chargeable in that manner, instead of in itemized detail as previously. *Newitt v. Bd. of Comm’rs*, 80 Colo. 109, 249 P. 269 (1926).

**For necessary docket fee in appeal from justice court to county court**, see *Bullington v. Root*, 102 Colo. 268, 78 P.2d 628 (1938).

**The conditions for assessment of the additional fee were met** where, after a jury trial, a monetary judgment was entered which was paid in part through a negotiated settlement. The fact

that the judgment was vacated does not alter that it was so entered for purposes of such assessment. *Cabot v. Colo. Charter Lines, Inc.*, 776 P.2d 1151 (Colo. App. 1989).

**A claim that is accompanied by an insufficient funds check for payment of fees is not considered filed for purposes of the statute of limitations.** The claim is not considered filed until the filing fee is actually paid. *Broker House Int’l, Ltd. v. Bendelow*, 952 P.2d 860 (Colo. App. 1998).

**Applied** in *Carls Constr., Inc. v. Gigliotti*, 40 Colo. App. 535, 577 P.2d 1107 (1978); *Ford v. Bd. of County Comm’rs*, 677 P.2d 358 (Colo. App. 1983), cert. dismissed, 679 P.2d 579 (Colo. 1984).

**13-32-102. Fees in probate proceedings.** (1) On and after July 1, 2008, for services rendered by judges and clerks of district or probate courts in all counties of the state of Colorado in proceedings had pursuant to articles 10 to 17 of title 15, C.R.S., the following fees shall be charged:

- (a) Docket fee at the time of filing first papers in any decedent’s estate eligible for summary administrative procedures under section 15-12-1203, C.R.S., or in any small estate of a person under disability qualifying under section 15-14-118, C.R.S., which estates involve no real property .....\$ 68.00
- (b) Docket fee at time of filing first papers in any estate not coming within the provisions of paragraph (a) of this subsection (1) ..... 164.00
- (c) Additional fee payable by petitioner at time of filing petition for supervised administration of a decedent’s estate pursuant to sections 15-12-501 and 15-12-502, C.R.S., except for contested claims ..... 163.00
- (d) Docket fee to be paid by the claimant prior to hearing on any contested claim, which fee shall be taxed by the district or probate court in the same manner as costs in civil actions ..... 163.00
- (e) Registration fee for registration of trust pursuant to article 16 of title 15, C.R.S. .... 163.00
- (f) Docket fee at time of filing first papers in each action relating to a trust .. 164.00
- (g) Nonrefundable fee for any demand for notice filed pursuant to section 15-12-204, C.R.S. .... 30.00
- (h) A fee to be paid by the testator at the time of depositing a will with the court during the testator’s lifetime pursuant to section 15-11-515, C.R.S. .... 15.00
- (2) Repealed.
- (3) to (5) (Deleted by amendment, L. 2008, p. 2129, § 8, effective June 4, 2008.)
- (6) (a) Each fee collected pursuant to paragraph (a) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:
- (I) Repealed.
- (II) On and after July 1, 2009, forty-eight dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the



court security cash fund established pursuant to section 13-1-204, and fifteen dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(b) Each fee collected pursuant to paragraph (b) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, one hundred forty-three dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, fifteen dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a), and one dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S.

(c) Each fee collected pursuant to paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, one hundred forty-three dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and fifteen dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(d) Each fee collected pursuant to paragraph (d) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, one hundred forty-three dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and fifteen dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(e) Each fee collected pursuant to paragraph (e) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, one hundred forty-three dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and fifteen dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(f) Each fee collected pursuant to paragraph (f) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, one hundred forty-three dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, fifteen dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a), and one dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S.

(g) Each fee collected pursuant to paragraph (g) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, twenty-five dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204.

(h) Each fee collected pursuant to paragraph (h) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, ten dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204.

**L. 67:** p. 992, § 3. **L. 74:** Entire section R&RE, p. 273, § 1, effective July 1. **L. 75:** (1)(e) amended and (1)(f) added, p. 587, § 5, effective July 1. **L. 84:** (1)(a) to (1)(f) amended, p. 456, § 7, effective July 1. **L. 87:** (1)(b) to (1)(d) and (1)(f) amended, p. 562, § 5, effective July 1. **L. 91:** IP(1) amended, (1)(g) and (1)(h) added, and (2) repealed, pp. 380, 1443, §§ 4, 3, 4, effective July 1. **L. 94:** (1)(h) amended, p. 1040, § 17, effective July 1, 1995. **L. 95:** (1)(b) to (1)(f) amended, p. 740, § 3, effective July 1, 1997. **L. 2000:** (1)(a) amended, p. 1833, § 5, effective January 1, 2001. **L. 2003:** (3) added, p. 571, § 2, effective March 18. **L. 2007:** (4) added, p. 1268, § 3, effective May 25; (5) added, p. 1534, § 20, effective May 31. **L. 2008:** Entire section amended, p. 2129, § 8, effective June 4.

**Editor's note:** (1) Subsections (6)(a)(I)(B), (6)(b)(I)(B), (6)(c)(I)(B), (6)(d)(I)(B), (6)(e)(I)(B), (6)(f)(I)(B), and (6)(g)(I)(B) provided for the repeal of subsections (6)(a)(I), (6)(b)(I), (6)(c)(I), (6)(d)(I), (6)(e)(I), (6)(f)(I), and (6)(g)(I), respectively, effective July 1, 2010. (See L. 2008, p. 2129.) (2) Subsection (6)(h)(I)(B) provided for the repeal of subsection (6)(h)(I), effective July 1, 2011. (See L. 2008, p. 2129.)

**Cross references:** For the legislative declaration contained in the 2008 act amending this section, see section 1 of chapter 417, Session Laws of Colorado 2008.

### ANNOTATION

**Law reviews.** For article, "The Inventory and Final Report", see 27 Dicta 291 (1950).

**13-32-103. Docket fees in special proceedings.** (1) (a) On and after July 1, 2008, if an appeal is taken from a judgment of a county court in a criminal matter or from a judgment of a municipal court, the appellant shall pay a docket fee of seventy dollars. Such an appeal shall not be subject to the tax imposed by section 2-5-119, C.R.S., for the use of the committee on legal services.

(b) Each fee collected pursuant to paragraph (a) of this subsection (1) shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, forty-five dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and twenty dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(2) (a) On and after July 1, 2008, in cases where a motion to dismiss for failure to file a complaint is filed, the defendant shall pay a docket fee of fifty-five dollars.

(b) Each fee collected pursuant to paragraph (a) of this subsection (2) shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, thirty dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and twenty dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(3) (a) On and after July 1, 2008, in cases where a motion to authorize a sale in accordance with the provisions of rule 120, Colorado rules of civil procedure, is filed, the applicant shall pay a docket fee of two hundred twenty-four dollars.

(b) Each fee collected pursuant to paragraph (a) of this subsection (3) shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, one hundred fifty dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, sixty-eight dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a), and one dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S.

(4) This section shall not apply to the fee charged for filing the record of any birth or death or changes in any certificate thereof.



(5) In cases of domestic abuse pursuant to article 4 of title 14, C.R.S., the plaintiff shall not be required to pay the docket fee set forth in section 13-32-101. At the first hearing held in connection with the action, the court shall set a date for payment of the docket fee unless the court determines that the plaintiff is unable to pay the docket fee pursuant to section 13-16-103.

(6) (a) On and after July 1, 2008, in any supplemental proceeding held pursuant to rule 69, Colorado rules of civil procedure, or rule 369, Colorado rules of county court civil procedure, the judgment creditor, upon commencement of the proceeding, shall pay a docket fee of seventy dollars.

(b) Each fee collected pursuant to paragraph (a) of this subsection (6) shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2010, forty-five dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and twenty dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(7) (Deleted by amendment, L. 2008, p. 2134, § 9, effective June 4, 2008.)

**Source:** L. 21: p. 229, § 2. C.L. § 7874. CSA: C. 66, § 5. L. 47: p. 457, § 2. CRS 53: § 56-5-3. L. 58: pp. 245, 249, §§ 9, 19, 20. C.R.S. 1963: § 56-5-3. L. 64: p. 467, §§ 6, 8. L. 79: (1) amended, p. 600, § 23, effective July 1. L. 84: (1) and (3) amended, p. 456, § 8, effective July 1. L. 91: (5) and (6) added, pp. 239, 380, §§ 2, 5, effective July 1. L. 91, 2nd Ex. Sess.: (6) amended, p. 7, § 1, effective October 7. L. 95: (3) amended, p. 741, § 4, effective July 1, 1997. L. 2003: (1), (2), (3), and (6) amended, p. 571, § 3, effective March 18. L. 2007: (7) added, p. 1268, § 4, effective May 25; (1), (2), (3), and (6) amended, p. 1534, § 21, effective May 31. L. 2008: (1), (2), (3), (6), and (7) amended, p. 2134, § 9, effective June 4.

**Editor's note:** Subsections (1)(b)(I)(B), (2)(b)(I)(B), (3)(b)(I)(B), and (6)(b)(I)(B) provided for the repeal of subsections (1)(b)(I), (2)(b)(I), (3)(b)(I), and (6)(b)(I), respectively, effective July 1, 2011. (See L. 2008, p. 2134.)

**Cross references:** For the legislative declaration contained in the 2008 act amending subsections (1), (2), (3), (6), and (7), see section 1 of chapter 417, Session Laws of Colorado 2008.

**13-32-104. Additional fees of clerks of courts.** (1) On and after July 1, 2008, in addition to the fees provided in sections 13-32-101, 13-32-103, and 13-32-105 (1), the following fees shall be paid to the clerk of the court by the party ordering the same:

(a) For preparing any record on appellate review, or for a copy of any record, proceeding, or paper on file, where the copy is not furnished by the party ordering the same, thirty cents per folio or seventy-five cents per page for photographic copies;

(b) For issuing and docketing each execution, and for filing the sheriff's return of the same, a fee of forty-five dollars;

(c) For a certificate of dismissal or no suit pending, a fee of twenty dollars;

(d) For a certificate of satisfaction of judgment, a fee of twenty dollars;

(e) For taking acknowledgment of any deed or other conveyance, including clerk's certificate thereof, a fee of one dollar;

(f) For certifying a copy of any record, proceeding, or paper on file, a fee of twenty dollars;

(g) For preparing and issuing a transcript of judgment, a fee of twenty-five dollars; except that this fee shall not be charged for a judgment entered pursuant to section 18-1.3-701, C.R.S.;

(h) For a certificate of exemplification of any record, proceeding, or paper on file, a fee of twenty dollars;

(i) For each service of process attempted pursuant to section 13-6-415, a fee of the actual charge of the United States postal service for certified mail;

(j) For issuing a writ of garnishment, a fee of forty-five dollars for each garnishee named in the writ;

(k) For issuing a writ of attachment, a fee of sixty-five dollars.

(2) The clerk of the court shall assess a fifty-dollar penalty against any person who issues a check returned for insufficient funds in payment of any court fees. The penalty provided in this section shall be assessed in addition to any other penalties or interest provided by law. For purposes of this section, the term "insufficient funds" means not having a sufficient balance in account with a bank or other drawee for the payment of a check when presented for payment within thirty days after issue.

(3) (a) Each fee collected pursuant to paragraph (a) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, the entire fee amount shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6).

(b) Each fee collected pursuant to paragraph (b) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, thirty-five dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and ten dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(c) Each fee collected pursuant to paragraph (c) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, fifteen dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and five dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(d) Each fee collected pursuant to paragraph (d) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, fifteen dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and five dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(e) Each fee collected pursuant to paragraph (e) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, the entire fee amount shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6).

(f) Each fee collected pursuant to paragraph (f) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, fifteen dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and five dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(g) Each fee collected pursuant to paragraph (g) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, twenty dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and five dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(h) Each fee collected pursuant to paragraph (h) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, fifteen dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and five dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(i) Each fee collected pursuant to paragraph (i) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:



(I) Repealed.

(II) On and after July 1, 2009, the entire fee amount shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6).

(j) Each fee collected pursuant to paragraph (j) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, thirty-five dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and ten dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(k) Each fee collected pursuant to paragraph (k) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, fifty-five dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and ten dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(4) Each penalty collected pursuant to subsection (2) of this section shall be transmitted to the state treasurer and divided as follows:

(a) Repealed.

(b) On and after July 1, 2009, forty dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6) and ten dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

**Source:** L. 21: p. 230, § 3. C.L. § 7875. CSA: C. 66, § 6. L. 47: p. 458, § 3. CRS 53: § 56-5-4. L. 58: pp. 246, 249, §§ 10, 19, 20. L. 61: p. 385, §§ 1, 2. C.R.S. 1963: § 56-5-4. L. 69: p. 389, § 5. L. 79: IP(1) amended, p. 601, § 24, effective July 1. L. 87: (1)(g) amended, p. 563, § 6, effective July 1. L. 90: (1)(i) added, p. 850, § 8, effective May 31. L. 91: Entire section amended, p. 380, § 6, effective July 1. L. 2003: Entire section amended, p. 572, § 4, effective March 18; (1)(g) amended, p. 1693, § 2, effective August 6. L. 2007: (3) and (4) added, p. 1535, § 22, effective May 31. L. 2008: Entire section amended, p. 2136, § 10, effective June 4.

**Editor's note:** (1) Amendments to this subsection (1)(g) by Senate Bill 03-186 and Senate Bill 03-141 were harmonized.

(2) Subsections (3)(a)(I)(B), (3)(b)(I)(B), (3)(c)(I)(B), (3)(d)(I)(B), (3)(e)(I)(B), (3)(f)(I)(B), (3)(g)(I)(B), (3)(h)(I)(B), (3)(i)(I)(B), (3)(j)(I)(B), (3)(k)(I)(B), and (4)(a)(II) provided for the repeal of subsections (3)(a)(I), (3)(b)(I), (3)(c)(I), (3)(d)(I), (3)(e)(I), (3)(f)(I), (3)(g)(I), (3)(h)(I), (3)(i)(I), (3)(j)(I), (3)(k)(I), and (4)(a), respectively, effective July 1, 2010. (See L. 2008, p. 2136.)

**Cross references:** (1) For the fee paid the clerk of the court for filing a foreign judgment, see § 13-53-106.

(2) For the legislative declaration contained in the 1990 act amending subsection (1)(i), see section 1 of chapter 100, Session Laws of Colorado 1990. For the legislative declaration contained in the 2008 act amending this section, see section 1 of chapter 417, Session Laws of Colorado 2008.

## ANNOTATION

**Clerk may not refuse to issue a transcript of judgment** where creditors tendered the fee after judgment was entered but during a stay of execution. Rocky Mt. Ass'n of Credit Mgt. v. District Court, 193 Colo. 344, 565 P.2d 1345 (1977).

**13-32-105. Docket fees in criminal actions.** (1) (a) At the time of the first appearance of the defendant in all criminal actions in all courts of record, except the county court, court of appeals, and the supreme court, there shall be charged against the defendant a total docket fee of thirty dollars, which shall be payable upon conviction of the defendant. In county courts, the total docket fee in criminal actions shall be eighteen dollars, which shall be payable by the defendant upon conviction. These fees shall cover all clerks' fees prior to judgment.

(b) On and after June 6, 2003, the docket fee in all criminal actions in all courts of

record, except the county court, court of appeals, and the supreme court, shall be increased by five dollars and the docket fee in county court criminal actions shall be increased by three dollars. The additional revenue generated by the docket fee increases shall be transmitted to the state treasurer for deposit in the state commission on judicial performance cash fund created in section 13-5.5-107.

(c) Except as otherwise provided in paragraph (b) of this subsection (1), on and after July 1, 2008, all fees collected under this section shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6).

(2) Repealed.

(3) Pursuant to section 13-1-204 (1) (b), a five-dollar surcharge shall be assessed and collected on each docket fee described in this section concerning criminal convictions entered on and after July 1, 2007.

**Source:** L. 1891: p. 201, § 3. R.S. 08: § 2528. C.L. § 7878. CSA: C. 66, § 8. CRS 53: § 56-5-5. L. 58: pp. 246, 249, §§ 11, 19, 20. C.R.S. 1963: § 56-5-5. L. 64: p. 467, § 7. L. 69: p. 389, § 6. L. 75: (1) amended, p. 579, § 2, effective July 1. L. 77: (1) amended, p. 788, § 2, effective January 1, 1978. L. 79: (2) repealed, p. 602, § 30, effective July 1. L. 87: (1) amended, p. 563, § 7, effective July 1. L. 91: (1) amended, p. 379, § 2, effective July 1; (1) amended, p. 1405, § 3, effective July 1. L. 2003: (1) amended, p. 2671, § 1, effective June 6. L. 2007: (3) added, p. 1269, § 5, effective May 25; (1)(c) added, p. 1536, § 23, effective May 31. L. 2008: (1)(c) amended, p. 2146, § 17, effective June 4.

**Editor's note:** Amendments to subsection (1) by House Bill 91-1108 and House Bill 91-1187 were harmonized.

**Cross references:** For the legislative declaration contained in the 2008 act amending subsection (1)(c), see section 1 of chapter 417, Session Laws of Colorado 2008.

## ANNOTATION

**Law reviews.** For article, "Expediting Court Procedure", see 10 Dicta 113 (1933).

**Right to require deposit.** This section provides that clerks of courts may require a deposit in advance on account of fees. *Drennen v. Johnson*, 65 Colo. 381, 176 P. 479 (1918).

**Deposit may be waived.** If the right to require a deposit in advance on account of fees is not insisted upon at the proper time, the officer must be understood to have waived it, and to have consented that such fees shall abide the result of the suit. *Cunningham v. Quinn*, 12 Colo. 473, 21 P. 488 (1889).

**Provision for deposit is permissive only and not mandatory.** The language, "may require in advance, on account of their fees a deposit of five dollars", appearing in the last paragraph of the section, seems to be permissive only and not mandatory. Plainly the sum is not in payment of any specific fee, but is a deposit on account of all fees in the case. It is a general statute and applies to all cases alike, and to all fees in all courts of record. *Wigton v. Wigton*, 69 Colo. 19, 169 P. 133 (1917); *Drennen v. Johnson*, 65 Colo. 381, 176 P. 479 (1918).

**Payment of the deposit is not jurisdictional but is to be treated as penal in its nature,** and for such reason, it is held that while this deposit may be required as a condition precedent, yet

such payment may be waived by express action of the clerk as in this case. *Wigton v. Wigton*, 69 Colo. 19, 169 P. 133 (1917).

**Docketing the case without fee is immaterial.** The fact that the clerk, in any particular case, chooses to docket the cause without collecting the docket fee in advance, is not material. *Drennen v. Johnson*, 65 Colo. 381, 176 P. 479 (1918).

**And is no ground for remanding the case.** The clerk of the district court could refuse to docket a case until the docket fee was paid, but having actually docketed the case without first obtaining the docket fee the result is the same, so far as the appellee in the district court is concerned, as if the docket fee had been paid; and the cause cannot be remanded simply on the ground that the fee had not been paid. *Drennen v. Johnson*, 65 Colo. 381, 176 P. 479 (1918).

**An appeal may, so far as this section is concerned, be perfected without paying the docket fee.** Provided the clerk actually docketed the case within the prescribed time, a rule of court cannot be so enforced or construed as to nullify the clerk's docketing of the case, simply because the clerk acted without collecting the docket fee. *Drennen v. Johnson*, 65 Colo. 381, 176 P. 479 (1918).

**Mandamus lies after tender of fees.** It being admitted that the clerk's legal fees for the ser-



vices desired have been tendered him the rule that mandamus lies to compel the performance of purely ministerial duties is applicable. *Cunningham v. Quinn*, 12 Colo. 473, 21 P. 488 (1889).

**Payment of docket fees does not violate principles of double jeopardy.** Costs are not a

form of punishment but are essentially civil and are not traditionally considered to be punishment, and the imposition of costs generally does not serve the goals of retribution and deterrence. *People v. McQuarrie*, 66 P.3d 181 (Colo. App. 2002).

**13-32-105.5. Docket fees - reduction by rule.** Notwithstanding the amount specified for any fee in this article, the chief justice of the supreme court by rule or as otherwise provided by law may reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the chief justice by rule or as otherwise provided by law may increase the amount of one or more of the fees as provided in section 24-75-402 (4), C.R.S.

**Source:** L. 98: Entire section added, p. 1330, § 38, effective June 1.

**13-32-106. Fee bill and application of fees.** Any person in interest in any cause is entitled to a certified bill of costs or fees specifically itemized. All fees collected by any clerk or judge shall be paid over to the state treasurer as provided by law, except as provided in section 30-1-112, C.R.S. No clerk of any court of record shall certify a record to the supreme court or to any other court until he collects all clerk's costs and fees then due and payable from the person ordering the record, unless otherwise ordered by the court in which the record reposes or by the court to which the cause was transferred or appealed, or from which appellate review as provided by law and the Colorado appellate rules may issue.

**Source:** L. 1891: p. 309, § 4. R.S. 08: § 2529. C.L. § 7879. CSA: C. 66, § 9. L. 47: p. 458, § 4. CRS 53: § 56-5-6. L. 58: pp. 247, 249, §§ 14, 19, 20. C.R.S. 1963: § 56-5-6. L. 69: p. 386, § 2.

**13-32-107. Fee book a public record.** The fee book to be kept by each clerk is a public record and subject to public inspection as are all other records of his office, except those specifically excluded by statute or order of court.

**Source:** L. 1891: p. 310, § 6. R.S. 08: § 2531. C.L. § 7881. CSA: C. 66, § 11. CRS 53: § 56-5-8. C.R.S. 1963: § 56-5-8. L. 79: Entire section amended, p. 601, § 25, effective July 1.

**13-32-108. Unclaimed funds - district court.** All fees, court costs, trust funds, and other moneys paid to the clerks of the district courts or into the registry of said courts, which have been or shall be unclaimed, for a period of two years after the final determination of any case in which said fees were collected or money paid, may be disposed of as provided in section 13-32-109.

**Source:** L. 31: p. 315, § 1. CSA: C. 66, § 12. CRS 53: § 56-5-9. C.R.S. 1963: § 56-5-9.

#### ANNOTATION

**Continuing jurisdiction.** Where money is deposited in the registry of the court pending determination of an action, the court retains jurisdiction notwithstanding dismissal of the ac-

tion to dispose of the funds in its possession, and such jurisdiction continues until the funds are disposed of. *Schwartz v. Stone*, 135 Colo. 222, 310 P.2d 567 (1957).

**13-32-109. Report of unclaimed funds - district court.** (1) Within sixty days from January 1 in each year, the clerk of the district court of every judicial district shall report to the judge what sums of money are held unclaimed in the clerk's accounts or the registry of the court, for a period of more than two years after the final determination of the case in which said moneys have been paid or deposited, and, if it appears to the court sitting en banc that no claim for said moneys has been presented to the clerk of the court for more than two years, then the court may order that said moneys be paid by the clerk to the state treasurer for deposit in the state general fund; but, if it appears to the court by specific order made in any case, or from any other cause or circumstances, the court in its discretion may withhold making such order in any case.

(2) On and after July 1, 2010, all moneys paid to the state treasurer pursuant to subsection (1) of this section shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6).

**Source:** L. 31: p. 315, § 2. CSA: C. 66, § 13. CRS 53: § 56-5-10. C.R.S. 1963: § 56-5-10. L. 69: p. 257, § 34. L. 2007: Entire section amended, p. 1536, § 24, effective May 31. L. 2008: (2) amended, p. 2146, § 18, effective June 4.

**Cross references:** For the legislative declaration contained in the 2008 act amending subsection (2), see section 1 of chapter 417, Session Laws of Colorado 2008.

**13-32-110. Actions for funds barred in two years.** Any claim for such moneys shall be made within two years from and after the payment thereof into the state general fund and unless so presented to the court shall be forever barred unless the court by proper order made in any case otherwise decrees.

**Source:** L. 31: p. 316, § 3. CSA: C. 66, § 14. CRS 53: § 56-5-11. C.R.S. 1963: § 56-5-11. L. 69: p. 257, § 35.

**13-32-111. Refund by decree of court - when.** If any such moneys have been paid into the state general fund and a claimant appears therefor, if the court upon consideration of the circumstances finds that such claim is valid and should be paid, in that event the state shall refund the same unto the claimant as required by the decree of court.

**Source:** L. 31: p. 316, § 4. CSA: C. 66, § 15. CRS 53: § 56-5-12. C.R.S. 1963: § 56-5-12. L. 69: p. 257, § 36.

**13-32-112. Unclaimed funds - county court.** (1) All moneys in the possession of the clerk of any county court, subject to the provisions of section 13-3-104, as unearned fees of the clerk or judge of such court, that remain in possession of said clerk for a period of two years after the final determination of the cause or proceeding in which such fees were collected shall be paid over by the clerk into the state general fund, except as otherwise provided in subsection (2) of this section.

(2) On and after July 1, 2010, all fees required to be paid over by the clerk into the state general fund pursuant to subsection (1) of this section shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6).

**Source:** L. 29: p. 300, § 4. CSA: C. 66, § 24. CRS 53: § 56-5-13. C.R.S. 1963: § 56-5-13. L. 69: p. 257, § 37. L. 73: p. 1405, § 42. L. 2007: Entire section amended, p. 1536, § 25, effective May 31. L. 2008: (2) amended, p. 2146, § 19, effective June 4.

**Cross references:** For the legislative declaration contained in the 2008 act amending subsection (2), see section 1 of chapter 417, Session Laws of Colorado 2008.



**13-32-113. Exemption from fees.** Delegate child support enforcement units shall be exempt from the payment of any fees authorized in this article when they file proceedings in connection with the establishment and enforcement of child support pursuant to article 13 of title 26, C.R.S., or pursuant to article 5 of title 14, C.R.S.

**Source:** L. 89: Entire section added, p. 796, § 27, effective July 1. L. 90: Entire section amended, p. 900, § 28, effective July 1.

**13-32-114. Judicial department information technology cash fund - creation - uses.** (1) There is hereby created in the state treasury the judicial department information technology cash fund, which shall be referred to in this section as the "fund". The judicial department shall transmit to the state treasurer for deposit in the fund all fees and cost recoveries, which are not otherwise required by law to be deposited in another fund, related to:

- (a) Electronic filings;
- (b) Network access and searches of court databases;
- (c) Electronic searches of court records; and
- (d) Any other information technology services.

(2) The moneys in the fund shall be subject to annual appropriation by the general assembly to the judicial department for any expenses related to the department's information technology needs. Any moneys in the fund not expended for the purpose of this section may be invested by the state treasurer as provided in section 24-36-113, C.R.S. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of any fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or any other fund.

- (3) Repealed.

**Source:** L. 2008: Entire section added, p. 1238, § 1, effective May 27.

**Editor's note:** Subsection (3)(b) provided for the repeal of subsection (3), effective July 1, 2009. (See L. 2008, p. 1238.)

## ARTICLE 33

### Fees of Jurors and Witnesses

13-33-101.	Fees of jurors.		sury - when.
13-33-102.	Fees of witnesses.	13-33-105.	Witness fees - claim for.
13-33-103.	Mileage fees of jurors and witnesses.	13-33-106.	Failure of clerk to comply - penalty.
13-33-104.	Witness fees paid into trea-		

**13-33-101. Fees of jurors.** (1) Trial and grand jurors serving in any court, as defined in the "Colorado Uniform Jury Selection and Service Act", article 71 of this title, shall receive compensation as provided for in that article.

(2) Jury fees for attending any court of record other than a municipal court shall be paid by the state pursuant to section 13-3-104.

(3) Municipalities shall set and pay fees for juror service in a municipal court.

(4) Jurors attending inquests over dead bodies before coroners shall receive the same fees as provided in subsection (1) of this section, which fees shall be paid by the county in which the inquest is held.

**Source:** L. 1891: p. 214, § 10. R.S. 08: § 2541. C.L. § 7905. L. 29: p. 425, § 1. L. 33: p. 653, § 1. CSA: C. 66, § 45. CRS 53: § 56-6-1. L. 55: p. 395, § 1.

**C.R.S. 1963:** § 56-6-1. **L. 64:** p. 386, § 18. **L. 71:** p. 320, § 4. **L. 88:** (1) amended, p. 1124, § 2, effective April 4. **L. 89:** (1) and (3) amended, p. 775, § 6, effective January 1, 1990.

**Cross references:** For fees of jurors in municipal courts, see § 13-10-114 (3).

### ANNOTATION

**Unless court taxes jury fees as costs, county is liable.** The compensation of jurymen is fixed by this section and except where jury fees are taxed to parties litigant, the county must discharge that burden; but neither the service of the juror nor the obligation of the county, comes of appointment or contract. Bd. of County

Comm'rs v. Evans, 99 Colo. 83, 60 P.2d 225 (1936).

**This section places jurors for coroners' inquests on an equality with other jurors,** and they are to be compensated in the same manner; that is, by a per diem while serving as such. Ireland v. County Comm'rs, 6 Colo. 280 (1882).

### 13-33-102. Fees of witnesses.

(1) to (3) (Deleted by amendment, L. 2010, (HB 10-1291), ch. 325, p. 1505, § 1, effective July 1, 2010.)

(4) Witnesses in courts of record called to testify only to an opinion founded on special study or experience in any branch of science or to make scientific or professional examinations and state the result thereof shall receive compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required.

(5) Witness fees for attending criminal trials in any court of record, except a municipal court or the county court of the city and county of Denver, shall be paid as costs as provided in section 16-18-101, C.R.S.

(6) Notwithstanding the provisions of subsections (4) and (5) of this section, the witness fee specified in this section shall not be paid to any witness who at the time of testifying is in the legal custody of any state or federal agency or any local law enforcement agency and whose transportation to court is provided at government expense.

**Source:** **L. 1891:** p. 215, § 11. **R.S. 08:** § 2542. **C.L.** § 7906. **L. 33:** p. 900, § 1. **CSA:** C. 66, § 46. **CRS 53:** § 56-6-2. **C.R.S. 1963:** § 56-6-2. **L. 64:** p. 386, § 19. **L. 71:** p. 320, § 5. **L. 88:** (2) amended, p. 1124, § 3, effective April 4. **L. 91:** (1) amended, p. 358, § 17, effective April 9. **L. 98:** (6) added, p. 947, § 3, effective May 27. **L. 2010:** (1), (2), (3), (4), and (6) amended, (HB 10-1291), ch. 325, p. 1505, § 1, effective July 1, 2010.

**Cross references:** For classification of counties fixing fees, see § 30-1-101.

### ANNOTATION

**Law reviews.** For article, "Expert Witnesses", see 24 Rocky Mt. L. Rev. 418 (1952).

**Application by defendant for procurement of witnesses should be made at earliest opportunity.** Osborn v. People, 83 Colo. 4, 262 P. 892 (1927).

**Expenses of obtaining testimony of witnesses for indigent defendant must be paid by state.** People v. McCabe, 37 Colo. App. 181, 546 P.2d 1289 (1975).

**State is liable for advancement of costs.** Since the state will ultimately pay the costs of securing out-of-state witnesses for the defendant, there is no legal justification for holding that it is not liable for advancement of such costs

as mileage and witness fees. People v. McCabe, 37 Colo. App. 181, 546 P.2d 1289 (1975).

**This section allows experts extra compensation,** and a landowner should be repaid all the necessary expenses incurred in fixing the value of his land, including the preparatory work, time and expenses of experts who testify for him, provided that the sum allowed must be reasonable and that it is within the sound discretion of the trial court as to the exact amount. Rullo v. Pub. Serv. Co., 163 Colo. 99, 428 P.2d 708 (1967).

Subsection (4) authorizes the court, in fixing an expert's fee, to consider time spent by the expert in preparation for trial as well as time



spent in court. Yeager Garden Acres, Inc. v. Summit Constr. Co., 32 Colo. App. 242, 513 P.2d 458 (1973).

Subsection (4) permits additional compensation for expert witnesses, but no such exception exists for lay witnesses. Catlin v. Tormey Bewley Corp., 219 P.3d 407 (Colo. App. 2009).

**In amounts deemed proper by the court.** Under this section courts may allow witness fees to experts, testifying as such, in an amount which they may deem proper. Denver Joint Stock Land Bank v. Bd. of County Comm'rs, 105 Colo. 366, 98 P.2d 283 (1940); Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

The award of expert witness fees, and the amount thereof, is within the sound discretion of the court. Crawford v. French, 633 P.2d 524 (Colo. App. 1981).

**Allowances may include.** The allowances included travel, ordinary witness fees, food and lodging expenses, and preparation of an inventory by consultants, plus \$100 per day as additional fees for each expert for every day of attendance at the trial, whether or not they testified. There is evidence in the record that \$100 per day was a reasonable amount of compensation for services of the kind furnished in the eminent domain hearing. Leadville Water Co. v. Parkville Water Dist., 164 Colo. 362, 436 P.2d 659 (1967).

Allowances awarded may include travel, ordinary witness fees, food, and lodging expenses. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

**Witness's lost wages not a recoverable cost.** A witness's lost wages are not necessarily incurred by reason of the litigation and for the proper preparation for trial so as to be an awardable cost. Catlin v. Tormey Bewley Corp., 219 P.3d 407 (Colo. App. 2009).

**Amount of fee is circumscribed by rule of reason.** While this section allows expert witness fees, the property owner in an eminent domain hearing will not be fully indemnified for any unusual compensation which he might choose to pay his expert witnesses. The awarding of expert witness fees is limited, being circumscribed by a rule of reason, viz., sound judicial discretion. Leadville Water Co. v. Parkville Water Dist., 164 Colo. 362, 436 P.2d 659 (1967); Denver Urban Renewal Auth. v. Hayutin, 40 Colo. App. 559, 583 P.2d 296 (1978).

**In absence of stipulation, court must decide if witness is an expert.** In the absence of a stipulation between the litigants as to whether a witness is an expert, the length of time and the value of time spent in attendance at trial, and the judicial determination of what is a reasonable

fee to be awarded an expert witness in a given case, are all evidentiary questions. Slavsky v. Callaham, 162 Colo. 208, 425 P.2d 686 (1967).

**Party must push motion for expert witness fees in trial court.** The portion of plaintiffs' motion requesting expert witness fees was never called up for hearing or ruled upon by the trial court, although there was ample time for plaintiffs to have duly presented to the trial court their original motion to fix and award expert witness fees prior to the issuance of a writ of error and if disappointed in the trial court's ruling, they could have assigned cross-error on that question, as they had done successfully in their request for statutory interest. Failure to do so is dispositive. Slavsky v. Callaham, 162 Colo. 208, 425 P.2d 686 (1967).

**This section does not require that the amounts actually paid to the expert be assessed as costs;** assessment is addressed to the sound discretion of the trial court. Lamont v. Riverside Irrigation Dist., 179 Colo. 134, 498 P.2d 1150 (1972).

**Award of costs for expert who did not testify.** The winning party is entitled to an award of costs for its expert, even though the expert did not testify. Great W. Sugar Co. v. N. Natural Gas Co., 661 P.2d 684 (Colo. App. 1982).

If the expert was not listed on trial data certificate as scheduled to testify, such costs are not allowed. Schultz v. Linden-Alimak, Inc., 734 P.2d 146 (Colo. App. 1986).

**This section controls costs which may be taxed in eminent domain proceedings.** Denver Urban Renewal Auth. v. Hayutin, 40 Colo. App. 559, 583 P.2d 296 (1978); State Dept. of Hwys. v. Anvil Point Props., 722 P.2d 1024 (Colo. App. 1986).

But this section does not specifically provide for assessment of costs generated by a cost hearing. State Dept. of Hwys. v. Anvil Point Props., 722 P.2d 1024 (Colo. App. 1986).

**In fixing an expert's fees, the court is authorized to consider the time spent by the expert in preparation for trial** in addition to time spent in court. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

**Fees for an expert's assistant** should not be allowed because they are not authorized by statute. Perkins v. Flatiron Structures Co., 849 P.2d 832 (Colo. App. 1992); W. Fire Truck, Inc. v. Emergency One, Inc., 134 P.3d 570 (Colo. App. 2006).

**Fees for pretrial preparation to render an opinion not admitted into evidence** are not recoverable. Perkins v. Flatiron Structures Co., 849 P.2d 832 (Colo. App. 1992).

**Applied** in Spensieri v. Farmers Alliance Mut. Ins., 804 P.2d 268 (Colo. App. 1990).

**13-33-103. Mileage fees of jurors and witnesses.** (1) All jurors entitled to compensation for mileage in accordance with the "Colorado Uniform Jury Selection and Service Act", article 71 of this title, and all witnesses shall receive, in counties of every class, the

same base mileage allowance amount as provided for state officers and employees under section 24-9-104, C.R.S., for each mile actually and necessarily traveled in going from his or her place of residence to the place named in the summons or subpoena and in returning to such place of residence.

(2) No officer of the courts, in which the cause is pending and on which he is in actual attendance in his official capacity, including clerks, sheriffs, bailiffs, jurors, and police officers, shall be entitled to witnesses' fees or mileage as a witness in any criminal case.

(3) No witness before a coroner, commissioner, or magistrate shall be allowed fees unless such witness claims the same under oath before the adjournment of the court.

(4) No witness in any court of record shall be allowed fees unless such witness claims the same under oath, then only for the number of days such witness actually attended such court in the capacity of a witness.

(5) No witness testifying in more than one criminal case on the same day shall be entitled to receive fees as a witness for more than one day by reason thereof, nor more than one day's attendance on any day, though attending in several cases.

(6) The mileage fee shall not be paid to any witness who at the time of testifying is in the legal custody of any state or federal agency or any local law enforcement agency and whose transportation to court is provided at government expense.

**Source:** L. 1891: p. 215, § 12. R.S. 08: § 2543. C.L. § 7907. CSA: C. 66, § 47. CRS 53: § 56-6-3. C.R.S. 1963: § 56-6-3. L. 64: p. 387, § 20. L. 89: (1) amended, p. 775, § 7, effective January 1, 1990. L. 91: (3) amended, p. 359, § 18, effective April 9. L. 98: (6) added, p. 947, § 4, effective May 27. L. 99: (1) amended, p. 680, § 1, effective July 1.

#### ANNOTATION

**Fees of witnesses either for attendance or mileage are purely statutory.** Union Pac. R. R. v. Brower, 60 Colo. 579, 155 P. 312 (1916); Crawford v. French, 633 P.2d 524 (Colo. App. 1981).

**There is no provision allowing a witness mileage from his residence outside of the state.** Union Pac. R. R. v. Brower, 60 Colo. 579, 155 P. 312 (1916).

**Witness cannot claim mileage unless he has been subpoenaed.** It is clearly not the purpose of this section to compensate a witness for the expense of travel, unless incurred in obedience to the command of the court, and hence, it follows that a witness cannot claim mileage unless he has been subpoenaed. Union Pac. R. R. v. Brower, 60 Colo. 579, 155 P. 312 (1916); Welch v. George, 19 P.3d 675 (Colo. 2000).

**Unsubpoenaed, out-of-state witness** testifying at a deposition taken in the state is not entitled to any mileage fee. Crawford v. French, 633 P.2d 524 (Colo. App. 1981).

**Mileage expense is determined by the number of miles necessarily traveled by the witness.** It follows that the distance is to be measured, not in a direct line, but by the route that the witness is necessarily required to travel. Osborn v. People, 83 Colo. 4, 262 P. 892 (1927).

**An expert witness is not entitled to a greater sum for mileage.** Bd. of Comm'rs v. Lee, 3 Colo. App. 177, 32 P. 841 (1893); Osborn v. People, 83 Colo. 4, 262 P. 892 (1927).

**Because appearance of incarcerated inmates to testify as witnesses at criminal trials was compelled by writs of habeas corpus ad testificandum rather than by subpoenas and since their transportation in response to the writs was furnished at state expense, trial court did not err in refusing to order payment of the statutory mileage allowance to them.** Collins v. Bandy, 890 P.2d 266 (Colo. App. 1995).

**Applied in** In re C.R.A.H., 647 P.2d 239 (Colo. App. 1981); Carruthers v. Carrier Access Corp., 251 P.3d 1199 (Colo. App. 2010).

**13-33-104. Witness fees paid into treasury - when.** Any witness fee collected by a clerk of any district court or county court shall be paid to the person entitled to the witness fee, when claimed. Any witness fee collected and not paid to a witness claimant in the same month shall be paid by the clerk of the court to the state treasurer pursuant to section 30-1-112 (2), C.R.S.

**Source:** R.S. pp. 326, 327, §§ 26, 27. G.L. §§ 1155, 1156. G.S. §§ 1412, 1413. R.S. 08: §§ 1403, 1404. C.L. §§ 7908, 7909. CSA: C. 66, §§ 48, 49. CRS 53: § 56-6-4. C.R.S. 1963: § 56-6-4. L. 71: p. 321, § 6. L. 73: p. 1405, § 43.



## ANNOTATION

**It is the duty of the clerk to pay all witness fees into the treasury.** The clerk of the district court was authorized by this section to collect and receive witness fees taxed as costs in actions tried in the district court, and it was made his duty to pay into the treasury of the county all jury fees when collected, and all witness fees that remained in his possession for a period of a month. *Adams v. People*, 25 Colo. 532, 55 P. 806 (1898).

**Deposit of checks, etc., is equivalent to collection.** Where the clerk of a district court received payment of jury and witness fees in checks and drafts which he deposited in bank to

his credit, it was equivalent in law to the collection by him of money, and it was his duty to pay over to the county the money thus collected and for failure to do so he might be prosecuted under a charge of failure to pay over money collected. *Adams v. People*, 25 Colo. 532, 55 P. 806 (1898).

**Clerk may be prosecuted upon failure to pay over such fees.** The clerk of the district court is an officer in this state entrusted by law with the collection and receiving of jury and witness fees and as such is subject to prosecution under § 13-33-106. *Adams v. People*, 25 Colo. 532, 55 P. 806 (1898).

**13-33-105. Witness fees - claim for.** If any person entitled to a witness fee in any district court or county court makes an application to the clerk of such court for payment of the fee, the clerk, if the witness fee claimed was previously collected by him, shall pay the witness claimant the witness fee due. If the fee was not previously collected by the clerk, the state shall pay the witness claimant pursuant to section 13-3-104.

**Source:** R.S. p. 327, § 28. G.L. § 1157. G.S. § 1414. R.S. 08: § 1405. C.L. § 7910. CSA: C. 66, § 50. CRS 53: § 56-6-5. C.R.S. 1963: § 56-6-5. L. 71: p. 321, § 7. L. 73: p. 1405, § 44.

**13-33-106. Failure of clerk to comply - penalty.** Any such clerk who fails to comply with the provisions of sections 13-33-104 and 13-33-105 shall be liable to the state in the penal sum of five hundred dollars for each offense, to be collected as other like fines.

**Source:** R.S. p. 327, § 29. G.L. § 1158. G.S. § 1415. R.S. 08: § 1406. C.L. § 7911. CSA: C. 66, § 51. CRS 53: § 56-6-6. C.R.S. 1963: § 56-6-6. L. 71: p. 321, § 8.

## FORCIBLE ENTRY AND DETAINER

### ARTICLE 40

#### Forcible Entry and Detainer - General Provisions

13-40-101.	Forcible entry and detainer defined.	13-40-113.	Answer of defendant - additional and amended pleadings.
13-40-102.	Forcible entry prohibited.	13-40-114.	Delay in trial - undertaking.
13-40-103.	Forcible detention prohibited.	13-40-115.	Judgment - writ of restitution.
13-40-104.	Unlawful detention defined.	13-40-116.	Dismissal.
13-40-105.	Crops of possessor.	13-40-117.	Appeals.
13-40-106.	Written demand.	13-40-118.	Deposit of rent.
13-40-107.	Notice to quit.	13-40-119.	Rules of practice.
13-40-107.5.	Termination of tenancy for substantial violation - definition - legislative declaration.	13-40-120.	Appellate review.
13-40-108.	Service of notice to quit.	13-40-121.	When deposit of rent is paid.
13-40-109.	Jurisdiction of courts.	13-40-122.	Writ of restitution after judgment.
13-40-110.	Action - how commenced.	13-40-123.	Damages.
13-40-111.	Issuance and return of summons.	13-40-124.	Qualified farm owner-tenant defined. (Repealed)
13-40-112.	Service.	13-40-125.	Rights of qualified farm owner-tenant. (Repealed)

13-40-125.5.	Possession pursuant to agreement - enforcement. (Repealed)	13-40-126.	Priority of proceedings. (Repealed)
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**13-40-101. Forcible entry and detainer defined.** (1) If any person enters upon or into any lands, tenements, mining claims, or other possessions with force or strong hand or multitude of people, whether any person is actually upon or in the same at the time of such entry, or if any person by threats of violence or injury to the party in possession or by such words or actions as have a natural tendency to excite fear or apprehension of danger gains possession of any lands, tenements, mining claims, or other possessions and detains and holds the same, such person so offending is guilty of a forcible entry and detainer within the meaning of this article.

(2) If any person enters peaceably upon any lands, tenements, mining claims, or other possessions, whether any person is actually in or upon the same at the time of such entry and by force turns the party in possession out or, by threats or by words or actions which have a natural tendency to excite fear or apprehension of danger, frightens the party out of possession and detains and holds the same, such person so offending is guilty of a forcible detainer within the meaning of this article.

(3) If any person enters upon or into any lands, tenements, mining claims, or other possessions by force or by threats of violence, or words or actions which have a natural tendency to excite fear or apprehension of danger, and intimidates the party entitled to possession from returning upon or possessing the same, such person so offending is guilty of a forcible entry within the meaning of this article.

**Source:** L. 1887: p. 271, § 2. R.S. 08: § 2600. C.L. § 6366. CSA: C. 70, § 1. CRS 53: § 58-1-1. C.R.S. 1963: § 58-1-1.

#### ANNOTATION

- I. General Consideration.
- II. Necessary Elements.

#### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "A Lawyers' Guide to OPA", see 20 Dicta 195 (1943). For article, "Enforcement of Security Interests in Colorado", see 25 Rocky Mt. L. Rev. 1 (1952). For article, "One Year Review of Property", see 37 Dicta 89 (1960). For note, "Holdover Tenants in Colorado", see 34 Rocky Mt. L. Rev. 320 (1962). For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L.J. 685 (1980). For article, "Remedies of a Landlord Following DeFacto by a Tenant", see 11 Colo. Law. 2588 (1982). For article, "Representation of the Landlord in an Unlawful Detainer Action", see 12 Colo. Law. 69 (1983). For comment, "Francam v. Fail: Waiver of Statutory Notice Under Colorado's Forcible Entry and Detainer Statute", see 55 U. Colo. L. Rev. 125 (1983). For article, "Self-Help for Commercial Landlords", see 19 Colo. Law. 479 (1990). For article, "Enforcement of Leases Through Unlawful Detainer Actions", see 20 Colo. Law. 251 (1991). For article, "Forcible Entry and Detainer: A Primer", see 29 Colo. Law. 89 (October 2000).

**Constitutionality.** The forcible entry and detainer statute, as applied, neither deprives the

tenant of property without due process of law nor violates his right to equal protection of the laws. *Hurricane v. Kanover, Ltd.*, 651 P.2d 1218 (Colo. 1982).

**Doctrine of retaliatory eviction not applicable.** Where a landlord sought to evict a tenant in retaliation for the tenant's claim of water damage to her apartment, the case did not involve retaliation for reporting a housing code violation to a governmental authority and does not create a case for applying the retaliatory eviction doctrine, if this doctrine is even available in Colorado. *W.W.G. Corp. v. Hughes*, 960 P.2d 720 (Colo. App. 1998).

**The modern form of the common-law action of ejectment is forcible entry and detainer** as provided in this article. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

**Common-law principles govern it.** The nature of the action as one in ejectment has not been changed by statutes abolishing fictions or regulating procedure, not even by those adopting a substitute form of action, and resort must still be had to the common law for the principles which govern it. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

**This section is "separate and apart" from the general provisions relating to procedure before justices of the peace.** *General Am. Indus., Inc. v. County Court*, 136 Colo. 86, 316 P.2d 565 (1957).



**It is sui generis.** The forcible entry and unlawful detainer provision are sui generis. *General Am. Indus., Inc. v. County Court*, 136 Colo. 86, 316 P.2d 565 (1957).

**When equitable defense is asserted the action acquires an equitable character.** Where an equitable defense is interposed in an action in forcible entry and detainer, the action acquires an equitable character as to the plaintiff, who then becomes entitled to such equitable relief as the facts indicate. *White v. Widger*, 144 Colo. 566, 358 P.2d 592 (1960).

**Delay in bringing the action may disqualify action.** Where plaintiff had unreasonably delayed exerting his claim in a forcible entry and detainer action until defendant had changed his position, the legal consequence of such delay was disqualification to maintain the action. *White v. Widger*, 144 Colo. 566, 358 P.2d 592 (1960).

**Trial by jury.** Where the predominant issues to be tried in an action under this section are legal, the defendant is entitled to a trial by jury. *Husar v. Larimer County Court*, 629 P.2d 1104 (Colo. App. 1981).

**Applied in** *People v. Bement*, 193 Colo. 435, 567 P.2d 382 (1977); *Francam Bldg. Corp. v. Fail*, 646 P.2d 345 (Colo. 1982).

## II. NECESSARY ELEMENTS.

**The force contemplated by this section is actual force**, and an entry made with no more force than such as is implied in an ordinary trespass is not within the meaning of the section. *Goshen v. People*, 22 Colo. 270, 44 P. 503 (1896).

**Evidence of force or appearances tending to inspire just apprehension of violence is essential.** To constitute a cause of action for forcible entry and detainer, it is necessary to keep that force or appearances tending to inspire a just apprehension of violence was used by defendant in obtaining possession. Such requirement is not satisfied by simply showing that the entry was against the will of the possessor. *Goad v. Heckler*, 19 Colo. App. 479, 76 P. 542 (1904).

Defendant's actions of building a fence to block property access without consulting plaintiffs, using guns in various ways, and posting signs were properly held to have a natural tendency to excite fear and apprehension of danger such that defendants forcibly entered and detained plaintiffs' property. *Schuler v. Oldervik*, 143 P.3d 1197 (Colo. App. 2006).

**Action lies where possession is maintained with force.** Whether the facts stated in the complaint constitute a forcible entry or not is immaterial, as the action lies where the possession is maintained with force and strong hand, although the entry may have been peaceable. *Miller v. Sparks*, 4 Colo. 303 (1878).

**It is necessary to show in the complaint that the defendant entered upon the possession of the plaintiff.** *Miller v. Sparks*, 4 Colo. 303 (1878).

**This need not be expressly averred.** But that which is apparent to the court and appears from a necessary implication out of the record is the same as if it were expressly averred. *Miller v. Sparks*, 4 Colo. 303 (1878).

**That the complaint alleges a demand of possession, when no demand was necessary, does not affect its sufficiency**, or render it obnoxious to the objection that two causes of action are stated in one and the same count. *Miller v. Sparks*, 4 Colo. 303 (1878).

**Section gives no right to tenant forcibly evicted by one having better title.** Our forcible entry statute is like that of Richard II, and not that of Henry VI, in that it gives no right of restitution to a tenant forcibly evicted by one having a better title. *Rudolph v. Thompson*, 66 Colo. 98, 179 P. 151 (1919).

**Color of title is sufficient as against one having no title whatever.** In an action of forcible entry and detainer, it appeared that plaintiff was in possession under a deed from a railroad company which had received a grant of the land; but the patent was withheld pending a question as to the rights of the company. Defendant applied for the land under the homestead act, and was refused, but went on a part of the land, and built a house, and both parties were living on the land when action was commenced. Held, that plaintiff's color of title entitled him to his action against one having no title whatever. *Jenkins v. Tynon*, 1 Colo. App. 133, 27 P. 893 (1891).

**Owner of fee may be guilty of forcible entry.** The owner of the fee, as well as a stranger to the title, may be guilty of an unlawful and forcible entry upon premises demised to his own tenant. *Farncomb v. Stern*, 18 Colo. 279, 32 P. 612 (1893).

**Tenant may complain of entry which destroys his possession.** Forcible entry which disturbs the possession of the tenant can be complained of by the tenant or by a lessee entitled to possession. *Mageon v. Alkire*, 41 Colo. 338, 92 P. 720 (1907).

**Unless lease retains right of entry.** This article takes away the right that existed at common law to make entry by force, although the right to possession may exist. Yet a license reserved in the lease to make such an entry does not contravene it, and, under such a provision, the landlord may enter and remove a tenant upon condition broken, if he uses no unnecessary force to accomplish his purpose. *Goshen v. People*, 22 Colo. 270, 44 P. 503 (1896).

**One who is in the lawful possession of premises may defend such possession.** Possessor will not be held liable criminally for the use of force in defending such possession unless the force used was excessive or unnecessary.

Goshen v. People, 22 Colo. 270, 44 P. 503  
(1896).

**For acts which constitute forcible entry, see**  
Potts v. Magnes, 17 Colo. 364, 30 P. 58 (1892).

**13-40-102. Forcible entry prohibited.** No person shall enter into or upon any real property, except in cases where entry is allowed by law, and in such cases not with strong hand or with a multitude of people, but only in a peaceable manner.

**Source:** L. 1885: p. 224, § 1. R.S. 08: § 2601. C.L. § 6367. CSA: C. 70, § 2. CRS 53: § 58-1-2. C.R.S. 1963: § 58-1-2.

**13-40-103. Forcible detention prohibited.** No person, having peaceably entered into or upon any real property without right to the possession thereof, shall forcibly hold or detain the same as against the person who has a lawful right to such possession.

**Source:** L. 1885: p. 224, § 2. R.S. 08: § 2602. C.L. § 6368. CSA: C. 70, § 3. CRS 53: § 58-1-3. C.R.S. 1963: § 58-1-3.

#### ANNOTATION

**Applied** in Christensen v. Hoover, 643 P.2d 525 (Colo. 1982).

**13-40-104. Unlawful detention defined.** (1) Any person is guilty of an unlawful detention of real property in the following cases:

(a) When entry is made, without right or title, into any vacant or unoccupied lands or tenements;

(b) When entry is made, wrongfully, into any public lands, tenements, mining claims, or other possessions which are claimed or held by a person who may have located, entered, or settled upon the same in conformity with the laws, rules, and regulations of the United States, or of this state, in relation thereto;

(c) When any lessee or tenant at will, or by sufferance, or for any part of a year, or for one or more years, of any real property, including a specific or undivided portion of a building or dwelling, holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of the term for which the same were leased, or after such tenancy, at will or sufferance, has been terminated by either party;

(d) When such tenant or lessee holds over without permission of his landlord after any default in the payment of rent pursuant to the agreement under which he holds, and three days' notice in writing has been duly served upon the tenant or lessee holding over, requiring in the alternative the payment of the rent or the possession of the premises. No such agreement shall contain a waiver by the tenant of the three days' notice requirement of this paragraph (d). It shall not be necessary, in order to work a forfeiture of such agreement, for nonpayment of rent, to make a demand for such rent on the day on which the same becomes due; but a failure to pay such rent upon demand, when made, works a forfeiture.

(d.5) When such tenant or lessee holds over, without the permission of the landlord, contrary to any condition or covenant the violation of which is defined as a substantial violation in section 13-40-107.5, and notice in writing has been duly served upon such tenant or lessee in accordance with section 13-40-107.5;

(e) When such tenant or lessee holds over, without such permission, contrary to any other condition or covenant of the agreement under which such tenant or lessee holds, and three days' notice in writing has been duly served upon such tenant or lessee requiring in the alternative the compliance with such condition or covenant or the delivery of the possession of the premises so held;

(e.5) (I) When a tenant or lessee has previously been served with the notice described in paragraph (e) of this subsection (1) requiring compliance with a condition or covenant of the agreement, and subsequent to that notice holds over, without permission of the tenant or lessee's landlord, contrary to the same condition or covenant.



(II) A tenancy may be terminated at any time pursuant to this paragraph (e.5) on the basis of a subsequent violation. The termination shall be effective three days after service of written notice to quit.

(f) When the property has been duly sold under any power of sale, contained in any mortgage or trust deed that was executed by such person, or any person under whom such person claims by title subsequent to date of the recording of such mortgage or trust deed, and the title under such sale has been duly perfected and the purchaser at such sale, or his or her assigns, has duly demanded the possession thereof;

(g) When the property has been duly sold under the judgment or decree of any court of competent jurisdiction and the party or privies to such judgment or decree, after the expiration of the time of redemption when redemption is allowed by law, refuse or neglect to surrender possession thereof after demand therefor has been duly made by the purchaser at such sale, or his or her assigns;

(h) When an heir or devisee continues in possession of any premises sold and conveyed by any personal representative with authority to sell, after demand therefor is duly made;

(i) When a vendee having obtained possession under an agreement to purchase lands or tenements, and having failed to comply with his agreement, withholds possession thereof from his vendor, or assigns, after demand therefor is duly made.

(2) and (3) Repealed.

(4) (a) It shall not constitute an unlawful detention of real property as described in paragraph (d.5), (e), or (e.5) of subsection (1) of this section if the tenant or lessee is the victim of domestic violence, as that term is defined in section 18-6-800.3, C.R.S., or of domestic abuse, as that term is defined in section 13-14-101 (2), which domestic violence or domestic abuse was the cause of or resulted in the alleged unlawful detention and which domestic violence or domestic abuse has been documented by the following:

(I) A police report; or

(II) A valid civil or emergency protection order.

(b) A person is not guilty of an unlawful detention of real property pursuant to paragraph (a) of this subsection (4) if the alleged violation of the rental or lease agreement is a result of domestic violence or domestic abuse against the tenant or lessee.

(c) A rental, lease, or other such agreement shall not contain a waiver by the tenant or lessee of the protections provided in this subsection (4).

(d) Nothing in this subsection (4) shall prevent the landlord from seeking judgment for possession against the tenant or lessee of the premises who perpetuated the violence or abuse that was the cause of or resulted in the alleged unlawful detention.

**Source:** L. 1885: p. 224, § 3. R.S. 08: § 2603. C.L. § 6369. CSA: C. 70, § 4. CRS 53: § 58-1-4. C.R.S. 1963: § 58-1-4. L. 79: (1)(h) amended, p. 648, § 4, effective July 1. L. 83: (1)(d) amended, p. 631, § 1, effective July 1. L. 86: (1)(c), (1)(f), and (1)(g) amended and (2) added, p. 434, § 7, effective April 18. L. 87: (1)(e) amended, p. 565, § 1, effective March 13; (2)(a)(I), (2)(a)(II), and (2)(b) amended and (3) added, p. 1356, § 6, effective July 1. L. 94: (1)(d.5) added, p. 1467, § 1, effective May 31. L. 95: (1)(e) amended and (1)(e.5) added, p. 271, § 1, effective July 1. L. 98: (1)(c), (1)(f), and (1)(g) amended, p. 819, § 15, effective August 5. L. 2005: (4) added, p. 401, § 1, effective July 1.

**Editor's note:** Subsection (2)(b) provided for the repeal of subsection (2), effective January 31, 1989. (See L. 87, p. 1356.) Subsection (3)(b) provided for the repeal of subsection (3), effective July 1, 1991. (See L. 87, p. 1356.)

## ANNOTATION

- I. General Consideration.
- II. Paragraph (b).
- III. Paragraph (c).
- IV. Paragraph (d).

- V. Paragraph (e).
- VI. Paragraph (f).
- VII. Paragraph (i).
- VIII. Subsection (2).

**I. GENERAL CONSIDERATION.**

**Law reviews.** For article, "Remedies of a Landlord Following Default by a Tenant", see 11 Colo. Law. 2588 (1982). For article, "Representation of the Landlord in an Unlawful Detainer Action", see 12 Colo. Law. 69 (1983). For comment, "Francam v. Fail: Waiver of Statutory Notice Under Colorado's Forcible Entry and Detainer Statute", see 55 U. Colo. L. Rev. 125 (1983). For article, "A Review of Agricultural Law: Hard Times and Hard Choices", see 15 Colo. Law. 629 (1986). For article, "The Colorado Farm Homestead Protection Act", see 15 Colo. Law. 1642 (1986). For article, "The Agricultural Credit Act of 1987", see 17 Colo. Law. 611 (1988). For article, "An Analysis of the Effect of S.B. 123 on Foreclosures", see 17 Colo. Law. 845 (1988).

**No force is necessary to complete a cause of action in unlawful detention.** Northrup v. Nicklas, 115 Colo. 207, 171 P.2d 417 (1946).

**The only question to be determined in an action for unlawful detainer is the right to possession** of the premises, and no demand for damages or rent can be joined in such action. Tyler v. McKenzie, 43 Colo. 233, 95 P. 943 (1908); Beman v. Rocky Ford Nat'l Bank, 100 Colo. 64, 65 P.2d 708 (1937); Stone v. Lerner, 118 Colo. 455, 195 P.2d 964 (1948).

**Title cannot be tried.** In ordinary actions of forcible entry and detainer, title to the property is not involved and cannot be tried. Kelly v. E. F. Hallack Lumber & Mfg. Co., 22 Colo. 221, 43 P. 1003 (1896); Wise v. Schimmel, 76 Colo. 184, 230 P. 786 (1924).

**Where a determination of the right of possession cannot be had** without a trial of title, the plaintiff must fail. Hamill v. Bank of Clear Creek County, 22 Colo. 384, 45 P. 411 (1896).

**Muniments of title may be put in evidence.** In an action of forcible entry and detainer, title may not be tried, but muniments of plaintiff's title may be put in evidence to show the character of his possession. Jenkins v. Tynon, 1 Colo. App. 133, 27 P. 893 (1891).

**As a bearing on right of possession, title may indirectly be a subject of inquiry.** When the action is for unlawful detention, under subsection (1)(f), equitable defenses may be interposed, and indirectly, but only as bearing on the right of possession, title to the property may be a subject of inquiry. Hamill v. Bank of Clear Creek County, 22 Colo. 384, 45 P. 411 (1896).

**Lessee cannot deny lessor's title.** In an action of unlawful detainer, plaintiff having proved the execution of a lease and defendant's possession under it, defendant offered to show that his wife had erected buildings on the leased premises and claimed ownership. The court held that, as lessee of plaintiff, defendant could not deny his title, nor set up an outstanding title in another, and the evidence was properly rejected. Eckles v. Booco, 11 Colo. 522, 19 P. 465 (1898).

**Specific performance of a verbal agreement to execute a lease of lands** cannot be had in an action for the wrongful detainer of the lands. Adcock v. Lieber, 51 Colo. 373, 117 P. 993 (1911).

**Court may sustain motion for judgment on the pleadings.** Where, in an action in forcible entry and detainer, defendant raised no issue and none was shown by the pleadings, there was nothing left for a jury to determine, and regardless of any contention otherwise, the county court could, and did, properly sustain the motion for judgment on the pleadings. Jorden v. Ellis, 128 Colo. 350, 262 P.2d 275 (1953).

**Contempt sanction available in forcible entry and detainer (FED) proceedings** in appropriate circumstances. Nothing in C.R.C.P. 107 or the FED statute precludes the remedy of contempt in an FED action under appropriate circumstances. Hartsel Springs Ranch v. Cross Slash Ranch, 179 P.3d 237 (Colo. App. 2007).

**Applied** in Burrows v. Greene, 198 Colo. 167, 599 P.2d 258 (1979); Hoffman v. Brown, 42 Colo. App. 444, 599 P.2d 959 (1979); Maxwell v. District Court, 641 P.2d 931 (Colo. 1982); Christensen v. Hoover, 643 P.2d 525 (Colo. 1982).

**II. PARAGRAPH (b).**

**For evidence of title being admissible when possessor's title comes from the public domain,** see Kelley v. Andrew, 3 Colo. App. 122, 32 P. 175 (1893).

**III. PARAGRAPH (c).**

**Paragraph (c) provides that any tenant shall be deemed guilty of an unlawful detention who shall hold over,** and continue in possession of, the demised premises, after the expiration of the term of occupancy. MacKenzie v. Porter, 40 Colo. 340, 91 P. 916 (1907).

**The holding over itself constitutes an unlawful detention.** This paragraph itself does not say that a holding, only after refusal to surrender on demand, or notice to quit, but that such a holding over itself, constitutes an unlawful detention. Dulmaine v. Reed Bldg. Co., 46 Colo. 469, 104 P. 1038 (1909).

**It is inapplicable where tenancy fixed and certain.** Where a lease is not from year to year or for an indefinite term, but is a lease where the tenancy is fixed and certain, the provisions of this section do not apply. Koch v. Monaghan, 119 Colo. 557, 205 P.2d 652 (1949), citing Millage v. Spahn, 115 Colo. 444, 175 P.2d 982 (1946).

**Notice to quit not necessary when term ends at a certain time.** The applicable rule would seem to be that notice to quit is not required where, by the express words of the contract, the term is to end at a certain time.



Dulmaine v. Reed Bldg. Co., 46 Colo. 469, 104 P. 1038 (1909); Swaim v. Swanson, 118 Colo. 509, 197 P.2d 624 (1948); July Bldg. Corp. v. Heathrow & Co., Ltd., 679 P.2d 1120 (Colo. App. 1984).

**Action under this paragraph does not bar action for rent.** Although each party should bring forward all demands existing at the time of bringing an action in a justice court which can be consolidated, and, upon failure so to do, shall be debarred from afterwards suing for any such demand, a landlord is not barred from bringing an action for rent, which was due at the time of bringing an action of unlawful detainer for the premises under this paragraph (c). MacKenzie v. Porter, 40 Colo. 340, 91 P. 916 (1907).

**Demand for rent cannot be joined in action for possession of premises.** The action of unlawful detainer is not a common-law action, but is purely statutory, and, in the absence of statutory provisions therefore, a demand for damages or rent cannot be joined in an action for possession of the premises. MacKenzie v. Porter, 40 Colo. 340, 91 P. 916 (1907).

**Nor is landlord's right to bring action of unlawful detention affected because tenant must bring action for forcible entry.** The right to immediate possession being in the tenant, the action for forcible entry must be brought by her; but that by no means interferes with the right of the landlord to bring the action of unlawful detention upon the determination of the tenancy for any of the causes for which that action will lie under this section. Mageon v. Alkire, 41 Colo. 338, 92 P. 720 (1907).

**Complainant alleging tenancy and holding over cannot recover on evidence showing occupation under agreement to purchase.** In an action of unlawful detainer where the complainant alleges a tenancy and a holding over, and there is evidence tending to show that the defendant is in occupation under an agreement to purchase, it was not error to instruct the jury that, if they should find the defendant went in under an agreement to purchase, the plaintiff could not recover. Keller v. Klopfer, 3 Colo. 132 (1876).

**For action not being commenced prematurely,** see Beman v. Rocky Ford Nat'l Bank, 100 Colo. 64, 65 P.2d 708 (1937).

#### IV. PARAGRAPH (d).

**Paragraph (d) relates only to cases of forfeiture by tenants for nonpayment of rent.** Getty v. Miller, 10 Colo. App. 331, 51 P. 166 (1897).

**Tender of rent renders attempt to terminate lease ineffectual.** A tender of rent due under the terms of a lease, if properly made and kept good, renders an attempt to terminate it for nonpayment of rent ineffectual, the tender being equivalent to payment so far as the term of the

lease is concerned. Barlow v. Hoffman, 103 Colo. 286, 86 P.2d 239 (1938).

**Tender must be sufficient.** A tender of rent due on leased premises is ineffectual where the amount of the tender is insufficient to cover the amount in default. Barlow v. Hoffman, 103 Colo. 286, 86 P.2d 239 (1938).

**Landlord may forfeit lease even if he has a deposit.** Deposit of funds to be applied to the payment of rent for the last eight months of a five-year lease does not deprive the landlord of his right to forfeit the lease if currently accruing rent becomes overdue. Barlow v. Hoffman, 103 Colo. 286, 86 P.2d 239 (1938).

**Service of notice constituting election of remedies.** Service of notice on a tenant in possession under lease to quit with a demand for possession, made for the express purpose of terminating the lease, constitutes an election of remedies and after such service the landlord has no right to ignore it or to bring an action based on any other theory than that the lease was terminated. Barlow v. Hoffman, 103 Colo. 286, 86 P.2d 239 (1938).

The general rule in Colorado is that a notice to pay or quit constitutes an election by the landlord to terminate the lease unless the notice is rendered ineffective by the tenant's payment of rent. Aigner v. Cowell Sales Co., 660 P.2d 907 (Colo. 1983).

**Bringing of suit for rent is an irrevocable election to waive the forfeiture.** Perry v. White, 69 Colo. 234, 193 P. 543 (1920).

**A judgment in a forcible detainer suit cannot go beyond an adjudication of the right to possession as between the parties except when suit is brought under paragraph (d).** Hendron v. Bolander, 101 Colo. 414, 74 P.2d 706 (1937).

**A dismissed unlawful detainer case is not res judicata** as to the defendant in a subsequent suit involving the same cause of action, and he is not bound by the position he took in the original case where the dismissal was without prejudice. Barlow v. Hoffman, 103 Colo. 286, 86 P.2d 239 (1938).

**Complaint must show three days' notice in writing.** A complaint under the forcible entry and detainer act, where the only breach is failure to pay rent, is deficient, if it does not show three days' notice in writing requiring in the alternative the payment of rent or possession of the premises. Perry v. White, 69 Colo. 234, 193 P. 543 (1920).

**Alternative demands required.** A notice sent for alleged default in rental payment, under subsection (1)(d), must include in the alternative a demand for payment within three days or possession of the premises. If it does not include the alternative demands it is insufficient to work a forfeiture for nonpayment of rent. Tumbarello v. Byers, 37 Colo. App. 61, 543 P.2d 1278 (1975).

**Waiver of notice.** The notice requirement of subsection (1)(d) may be waived by lease provisions. *Francam Bldg. Corp. v. Fail*, 646 P.2d 345 (Colo. 1982).

**Sufficiency of service of notice.** The posting of a notice pursuant to the provisions of § 13-40-108 was sufficient to satisfy the three-day notice requirement under paragraph (d) and provide jurisdiction for entry of the judgment for possession. *Magliocco v. Olson*, 762 P.2d 681 (Colo. App. 1987).

**A failure to serve the demand three days before filing suit is not cured by the mere act of appending a copy of the demand to the complaint.** *Rocky Mtn. Props. v. Purified H2O*, 3 P.3d 485 (Colo. App. 2000).

**Statutory notice provision complied with where landlord did not file an unlawful detainer action until ten days after his demand notice was served upon lessee.** *W. Cities Broad. v. Schueller*, 830 P.2d 1074 (Colo. App. 1991), *aff'd in part and rev'd in part on other grounds*, 849 P.2d 44 (Colo. 1993).

**An unlawful detention action sounds in tort.** Federal court predicted that the Colorado supreme court would conclude that an unlawful detention action under subsection (1)(d) sounds in tort. Plaintiff's action for unlawful detention is thus subject to the Federal Tort Claims Act and its administrative remedies, which must be exhausted before an action in district court may be filed. *Boehme v. United States Postal Serv.*, 343 F.3d 1260 (10th Cir. 2003).

## V. PARAGRAPH (e).

**Where the lessees failed to put the premises to the use required by the lease**, the lessees were in breach of the lease and an unlawful detainer action was proper. *Edlen Co. v. Nashville Mgmt., Inc.*, 680 P.2d 1331 (Colo. App. 1984).

**Return of rent matured and collected is not required.** The landlord, declaring a forfeiture of the lease for the tenant's violation of its conditions, is not required to return any part of the rent matured and collected. The tenant violating the conditions of the lease loses both the term and the rent. *Hepp Wall Paper & Mercantile Co. v. Deahl*, 53 Colo. 274, 125 P. 491 (1912).

**Landlord's acceptance of rent in ignorance of tenant's violation of conditions of lease is no waiver** of the condition, or the breach of it. *Hepp Wall Paper & Mercantile Co. v. Deahl*, 53 Colo. 274, 125 P. 491 (1912).

**Three-day notice required** before commencement of unlawful detainer action. *W. Cities Broad. v. Schueller*, 830 P.2d 1074 (Colo. App. 1991), *aff'd in part and rev'd in part on other grounds*, 849 P.2d 44 (Colo. 1993).

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served upon lessee. *W. Cities Broad. v. Schueller*, 830 P.2d 1074 (Colo. App. 1991), *aff'd in part and rev'd in part on other grounds*, 849 P.2d 44 (Colo. 1993).

## VI. PARAGRAPH (f).

**Where grantor in trust deed does not unlawfully detain mortgaged premises after trustee's sale**, the purchaser has no occasion to resort to the provisions of the forcible entry and detainer statute. *Lane v. Morris*, 77 Colo. 343, 237 P. 154 (1925).

**The recovery provided for in paragraph (f) was not intended as a penalty** for the unlawful withholding of mortgaged premises by the owner after foreclosure sale, but as compensation for the use thereof. *Lane v. Morris*, 77 Colo. 343, 237 P. 154 (1925).

**Deed of trust, trustee's deed, and demand for possession with officer's return make prima facie case.** In an action for possession under a foreclosure sale, when the plaintiff had introduced in evidence the deed of trust, the trustee's deed, and demand for possession with the officer's return on the demand, he had proven a prima facie case, and upon defendant's failure to offer any evidence, plaintiff was entitled to judgment. *Ensley v. Page*, 13 Colo. App. 452, 59 P. 225 (1899).

**Foreclosure and sale in violation of contract is a defense.** It is a defense to an action for unlawful detention brought under paragraph (f) against the grantor of a deed of trust that it was foreclosed and a sale made thereunder in violation of a contract between him and the beneficiary that a foreclosure should not take place until the happening of certain contingencies, and then only in a certain manner. *Hamill v. Bank of Clear Creek County*, 22 Colo. 384, 45 P. 411 (1896).

## VII. PARAGRAPH (i).

**Law reviews.** For article, "Must Colorado Real Property Installment Sale Contracts Be Foreclosed as Mortgages?", see 9 *Dicta* 320 (1932). For note, "Vendor's Remedies Under Colorado Executory Land Contracts", see 22 *Rocky Mt. L. Rev.* 296 (1950). For note, "Relief upon Default Under a Contract for Purchase and Sale of Land", see 29 *Dicta* 7 (1952).

**It is immaterial whether the contract to convey is designated a "contract to purchase" or a "contract of purchase".** *Schiffner v. Chicago Title & Trust Co.*, 79 Colo. 249, 244 P. 1012 (1926).

**Vendor may sue for unlawful detainer or in ejectment.** Unlawful detainer will lie where a vendee in possession under a contract to purchase withholds possession from the vendor after default and demand. *Schiffner v. Chicago*



Title & Trust Co., 79 Colo. 249, 244 P. 1012 (1926).

**Vendee cannot question vendor's title.**

Where a vendee went into possession of real estate in pursuance of a contract of sale, he cannot be heard to question his vendor's title in an action by the vendor to recover the premises for a failure on the part of the vendee to comply with the contract, and a complaint that alleges such contract of sale and the failure of the vendee to comply therewith is sufficient as against a general demurrer without an allegation

of ownership. *Ruth v. Smith*, 29 Colo. 154, 68 P. 278 (1901).

**VIII. SUBSECTION (2).**

The language of subsection (2)(a) refers to § 13-40-124 for the definition of a qualified farm owner-tenant and the circumstances under which the attendant rights can be exercised. *Fed. Land Bank of Wichita v. Needham*, 759 P.2d 799 (Colo. App. 1988) (decided prior to repeal of subsection (2)).

**13-40-105. Crops of possessor.** In all cases arising under section 13-40-104 (1) (c) to (1) (i), the person in possession is entitled to cultivate and gather the crops, if any, planted or sown by him previous to the service of the demand to deliver up possession, and then grown or growing on the premises, and shall have the right to enter such premises for the purpose of cultivating or removing such crops, first paying or tendering to the party entitled to the possession of said premises a reasonable compensation for the use of the land before removing such crops.

**Source:** L. 1885: p. 225, § 4. R.S. 08: § 2604. C.L. § 6370. CSA: C. 70, § 5. CRS 53: § 58-1-5. C.R.S. 1963: § 58-1-5.

**ANNOTATION**

**Where a tenancy is from year to year this section is applicable** and under it the tenant has the right to "away-going" crops sown by him previous to the service of the demand to deliver up possession of the premises, unless there is a specific agreement providing otherwise. *Millage v. Spahn*, 115 Colo. 444, 175 P.2d 982 (1946).

**But not where tenancy is for a fixed term.** But where the tenancy is fixed certain, that is, where the tenant knows when he sows crops precisely when the lease will end, and it is plain he cannot reap before the lease terminates, he has no right to the crops remaining unharvested, or at lease not to those that do not mature until after the termination of the lease. *Millage v. Spahn*, 115 Colo. 444, 175 P.2d 982 (1946).

**This section does not apply to a lease that is extinguished upon the foreclosure of a deed of trust.** Rather, it applies only to forcible entry and detainer actions where a landlord has evicted a tenant after a crop has been planted, but before it has been harvested. *Elrick v. Merrill*, 10 P.3d 689 (Colo. App. 2000).

**Lessee will not be entitled to crops after fixed term expires.** Thus, where tenancy was

for a five-year period, and lessee knew the date of termination of the lease at the time he planted his crop and was cautioned in regard thereto, the provisions of this section did not apply, and lessee was not entitled to the crops remaining unharvested at the termination of the lease. *Koch v. Monaghan*, 119 Colo. 557, 205 P.2d 652 (1949), citing *Millage v. Spahn*, 115 Colo. 444, 175 P.2d 982 (1946).

**Where notice of termination is given after tilling, tenant may harvest.** Where tenant summer-tilled some of the land before receiving notice of termination of the tenancy, he was entitled to his share of the crop on the acres tilled before receiving the notice. *Hemberger v. Hagemann*, 120 Colo. 431, 210 P.2d 995 (1949).

**Right to crops is not a defense to forcible entry and detainer.** The right of a tenant under certain circumstances to growing crops is not in and of itself a valid defense to a complaint in forcible entry and detainer. *Orebaugh v. Dorskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

**13-40-106. Written demand.** The demand required by section 13-40-104 shall be made in writing, specifying the grounds of the demandant's right to the possession of such premises, describing the same, and the time when the same shall be delivered up, and shall be signed by the person claiming such possession, his agent, or his attorney.

**Source:** L. 1885: p. 226, § 5. R.S. 08: § 2605. C.L. § 6371. CSA: C. 70, § 6. CRS 53: § 58-1-6. C.R.S. 1963: § 58-1-6.

## ANNOTATION

**The Colorado supreme court has recognized the rule requiring a demand for rent due prior to the exercise of the right of reentry.** Lessor, before he exercises the right of reentry reserved for breach of covenant to pay rent, must make an actual demand of the amount of rent due, in strict compliance with the requirements of the common law. Whenever a forfeiture for the nonpayment of rent is to be established, it is necessary to prove such a demand. *Audubon Commercial Area Co. v. Skelly Oil Co.*, 268 F. Supp. 883 (D. Colo. 1967).

**Demand must be in writing and left with the party.** A demand, formal according to all of the requirements of the law, and set out in writing, if read to the party, is not sufficient. It must be made in writing and left with the party or it is no demand. *Doss v. Craig*, 1 Colo. 177 (1869).

**A party cannot be guilty of wrongful detainer until after this demand has been made upon him.** *Doss v. Craig*, 1 Colo. 177 (1869).

**A distinction in respect to necessity of demand exists between action for forcible entry, and action for unlawful detainer** after a peaceable and lawful entry. *Farncomb v. Stern*, 18 Colo. 279, 32 P. 612 (1893).

**No demand is necessary where entry was forcible.** In an action of forcible entry and detainer, where the entry complained of was forcible and illegal, the plaintiff need not make a

demand for the possession of the premises before commencing his action. *Farncomb v. Stern*, 18 Colo. 279, 32 P. 612 (1893).

**Demand may be signed by an agent or attorney.** This section expressly provides that the demand for possession may be signed by the agent or attorney of the person claiming such possession. *Ensley v. Page*, 13 Colo. App. 452, 59 P. 225 (1899).

**Sufficiency of notice cannot be questioned in appellate court when due service was conceded.** Where, in wrongful detainer by landlord against tenant, the latter concedes, in the court below, due service of notice to quit, he will not be heard to question the sufficiency of the notice upon error. *Hepp Wall Paper & Mercantile Co. v. Deahl*, 53 Colo. 274, 125 P. 491 (1912).

**Omission to make demand is not cured by plea of title in defendant or by verdict.** In an action for unlawful detainer under this section the plaintiff must aver and prove a demand in writing for possession of the premises which he seeks to recover, and the omission to make such demand is not cured by plea of title in defendant nor by verdict. *Doss v. Craig*, 1 Colo. 177 (1869).

**The common-law necessity for a demand of rent may be obviated by a provision in the lease or by the acts of the parties.** *Audubon Com. Area Co. v. Skelly Oil Co.*, 268 F. Supp. 883 (D. Colo. 1967).

**13-40-107. Notice to quit.** (1) A tenancy may be terminated by notice in writing, served not less than the respective period fixed before the end of the applicable tenancy, as follows:

- (a) A tenancy for one year or longer, ninety-one days;
- (b) A tenancy of six months or longer but less than a year, twenty-eight days;
- (c) A tenancy of one month or longer but less than six months, seven days;
- (d) A tenancy of one week or longer but less than one month, or a tenancy at will, three days;
- (e) A tenancy for less than one week, one day.

(2) Such notice shall describe the property and the particular time when the tenancy will terminate and shall be signed by the landlord or tenant, the party giving such notice or his agent or attorney.

(3) Any person in possession of real property with the assent of the owner is presumed to be a tenant at will until the contrary is shown.

(4) No notice to quit shall be necessary from or to a tenant whose term is, by agreement, to end at a time certain.

(5) Except as otherwise provided in section 38-33-112, C.R.S., the provisions of subsections (1) and (4) of this section shall not apply to the termination of a residential tenancy during the ninety-day period provided for in said section.

**Source:** L. 1885: p. 226, § 6. R.S. 08: § 2606. C.L. § 6372. CSA: C. 70, § 7. CRS 53: § 58-1-7. L. 55: p. 407, § 3. C.R.S. 1963: § 58-1-7. L. 79: (5) added, p. 1399, § 2, effective June 21. L. 2012: (1)(a), (1)(b), and (1)(c) amended, (SB 12-175), ch. 208, p. 825, § 9, effective July 1.



**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1)(a), (1)(b), and (1)(c) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Law reviews.** For note, "Holdover Tenants in Colorado", see 34 Rocky Mt. L. Rev. 320 (1962). For article, "The Effect of Zoning Violations on the Enforceability of Leases", see 19 Colo. Law. 2077 (1990).

**Constitutionality.** The forcible entry and detainer statute, as applied, neither deprives the tenant of property without due process of law nor violates his right to equal protection of the laws. *Hurricane v. Kanover, Ltd.*, 651 P.2d 1218 (Colo. 1982).

**Notice to quit purporting to be by landlord's attorney is good.** *Ensley v. Page*, 13 Colo. App. 452, 59 P. 225 (1899).

**It is not essential that the landlord's notice to quit should be upon a single piece of paper.** Two papers, relating to the same matter, and served at the same time, are necessarily construed as one document. *Hepp Wall Paper & Mercantile Co. v. Deahl*, 53 Colo. 274, 125 P. 491 (1912).

**Provision for notice to tenant has no application where tenant voluntarily vacates.** This section, which provides that a tenant from month to month is entitled to 10 days notice to quit to terminate the tenancy, has no application to an action to recover rent for premises occupied without a lease from month to month, or other definite period, brought after the premises had been voluntarily vacated by the tenant. *Salomon v. O'Donnell*, 5 Colo. App. 35, 36 P. 893 (1894).

**Notice to quit is not required where, by the express words of the lease, the term ends at a day certain.** *Dulmaine v. Reed Bldg. Co.*, 46 Colo. 469, 104 P. 1038 (1909); *Hancock v. Central Shoe & Clothing Co.*, 53 Colo. 190, 125 P. 123 (1912); *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948); *Mahaney v. Field*, 120 Colo. 518, 211 P.2d 827 (1949).

**Notice to quit not required.** Defendants were tenants at sufferance with a possessory interest pursuant to an agreement which expired at a time certain. Therefore, a notice to quit was not a condition precedent to maintaining an action for unlawful detention. *July Bldg. Corp. v. Heathrow & Co., Ltd.*, 679 P.2d 1120 (Colo. App. 1984).

**Payment of rent at stated periods is a criterion as to duration of term.** The reservation of rent and its payment at stated periods, as for

a year or month, is, in the absence of express agreement as to length of the lease, one of the principal criterions to determine the duration of the term. *Hurd v. Whitsett*, 4 Colo. 77 (1878).

**Month to month tenant entitled to ten days notice from landlord** who was purchaser of premises at federal tax sale. *Danyew v. Phelps*, 676 P.2d 707 (Colo. App. 1983).

**This section recognizes a monthly tenancy as distinct from one from year to year.** *Hurd v. Whitsett*, 4 Colo. 77 (1878).

**Holding merely at will of landlord deemed tenancy from year to year.** A holding merely at the will of the landlord, according to the ancient meaning of the term "tenancy at will", is an estate unknown in modern times, unless where created by express agreement between the parties, or by clear implication. All such tenancies are, for the purpose of a notice to quit, deemed to be tenancies from year to year. *Hurd v. Whitsett*, 4 Colo. 77 (1878).

**Where term is for less than year holding over is implied to be for like term.** Where a tenant for a year or for years holds over after the expiration of his term, with the assent of his landlord, the holding is implied to be from year to year. But where the term is for a shorter period than a year, according to the current of authorities, both English and American, the holding over is implied to be for a like term, and the notice to quit is determined thereby, and is sufficient if it equals the length of the term or the interval between the times of payment of rent. *Hurd v. Whitsett*, 4 Colo. 77 (1878).

**Where there was a holding over by a tenant from month to month, after conveyance by the original lessor,** with the assent of both the landlord and tenant, it was held that such holding over was upon the same terms as the prior letting, and, in the absence of a new lease, the character of the tenancy continued the same. *Hurd v. Whitsett*, 4 Colo. 77 (1878).

**Where a tenant occupied premises for several years, and then entered into a lease for one year certain,** it was held that his former occupancy did not inure to his benefit and constitute him a tenant from year to year and so entitle him to three months notice to quit under this section. *Brandenburg v. Reithman*, 7 Colo. 323, 3 P. 577 (1884).

**Applied** in *Maxwell v. District Court*, 641 P.2d 931 (Colo. 1982).

**13-40-107.5. Termination of tenancy for substantial violation - definition - legislative declaration.** (1) The general assembly finds and declares that:

(a) Violent and antisocial criminal acts are increasingly committed by persons who base their operations in rented homes, apartments, and commercial properties;

(b) Such persons often lease such property from owners who are unaware of the dangerous nature of such persons until after the persons have taken possession of the property;

(c) Under traditional landlord and tenant law, such persons may have established the technical, legal right to occupy the premises for a fixed term which continues long after they have demonstrated themselves unfit to coexist with their neighbors and co-tenants; furthermore, such persons often resist eviction as long as possible;

(d) In certain cases it is necessary to curtail the technical, legal right of occupancy of such persons in order to protect the equal or greater rights of neighbors and co-tenants, the interests of property owners, the values of trust and community within neighborhoods, and the health, safety, and welfare of all the people of this state.

(2) It is declared to be an implied term of every lease of real property in this state that the tenant shall not commit a substantial violation while in possession of the premises.

(3) As used in this section, "substantial violation" means any act or series of acts by the tenant or any guest or invitee of the tenant that, when considered together:

(a) Occurs on or near the premises and endangers the person or willfully and substantially endangers the property of the landlord, any co-tenant, or any person living on or near the premises; or

(b) Occurs on or near the premises and constitutes a violent or drug-related felony prohibited under article 3, 4, 6, 7, 9, 10, 12, or 18 of title 18, C.R.S.; or

(c) Occurs on the tenant's leased premises or the common areas, hallway, grounds, parking lot, or other area located in the same building or complex in which the tenant's leased premises are located and constitutes a criminal act in violation of federal or state law or local ordinance that:

(I) Carries a potential sentence of incarceration of one hundred eighty days or more; and

(II) Has been declared to be a public nuisance under state law or local ordinance based on a state statute.

(4) (a) A tenancy may be terminated at any time on the basis of a substantial violation. The termination shall be effective three days after service of written notice to quit.

(b) The notice to quit shall describe the property, the particular time when the tenancy will terminate, and the grounds for termination. The notice shall be signed by the landlord or by the landlord's agent or attorney.

(5) (a) In any action for possession under this section, the landlord has the burden of proving the occurrence of a substantial violation by a preponderance of the evidence.

(b) In any action for possession under this section, it shall be a defense that:

(I) (Deleted by amendment, L. 2005, p. 402, § 2, effective July 1, 2005.)

(II) The tenant did not know of, and could not reasonably have known of or prevented, the commission of a substantial violation by a guest or invitee but immediately notified a law enforcement officer of his or her knowledge of the substantial violation.

(c) (I) The landlord shall not have a basis for possession under this section if the tenant or lessee is the victim of domestic violence, as that term is defined in section 18-6-800.3, C.R.S., or of domestic abuse, as that term is defined in section 13-14-101 (2), which domestic violence or domestic abuse was the cause of or resulted in the alleged substantial violation and which domestic violence or domestic abuse has been documented pursuant to the provisions set forth in section 13-40-104 (4).

(II) Nothing in this paragraph (c) shall prevent the landlord from seeking possession against a tenant or lessee of the premises who perpetuated the violence or abuse that was the cause of or resulted in the alleged substantial violation.

**Source:** L. 94: Entire section added, p. 1467, § 2, effective May 31. L. 98: IP(3) and (3)(b) amended and (3)(c) added, p. 419, § 1, effective April 21. L. 2003: (5)(b)(I) amended, p. 1010, § 11, effective July 1. L. 2005: (5) amended, p. 402, § 2, effective July 1.



## ANNOTATION

**Section does not conflict with city ordinances** that impose strict liability for over-occupancy. To the contrary, the section and the ordinances appear to be complimentary in that they provide mechanisms to deal with lease violations. *Boulder County Apt. Ass'n v. City of Boulder*, 97 P.3d 332 (Colo. App. 2004).

**Lessee committed no substantial breach that would allow landowners to defeat the lease pursuant to this section.** Whether a breach of a contract is material, and therefore excuses further performance by a party, is a question of fact. Because the trial court's findings that no breach of a lease to remove sand, gravel, and rock from a landowner's property

are supported by the record, lessee committed no substantial breach. *Carder, Inc. v. Cash*, 97 P.3d 174 (Colo. App. 2003).

**Court erred in granting restitution of the premises where owner failed to prove by a preponderance of the evidence that tenant violated lease covenant by committing criminal activity.** Unlawful detention for violation of a lease covenant requires proof by a preponderance of the evidence that the covenant was actually violated, not merely that the owner had reasonable grounds to believe that it was violated. *Miles v. Fleming*, 214 P.3d 1054 (Colo. 2009).

**13-40-108. Service of notice to quit.** A notice to quit or demand for possession of real property may be served by delivering a copy thereof to the tenant or other person occupying such premises, or by leaving such copy with some person, a member of the tenant's family above the age of fifteen years, residing on or in charge of the premises, or, in case no one is on the premises at the time service is attempted, by posting such copy in some conspicuous place on the premises.

**Source:** L. 1885: p. 226, § 7. R.S. 08: § 2607. C.L. § 6373. CSA: C. 70, § 8. CRS 53: § 58-1-8. L. 61: p. 390, § 1. C.R.S. 1963: § 58-1-8.

## ANNOTATION

**Law reviews.** For comment on *Hemberger v. Hagemann*, appearing below, see 22 Rocky Mt. L. Rev. 196 (1950).

**Acknowledgment of receipt of notice is equivalent to any statutory method of service** so long as the notice reaches the hands of the person sought to be notified in sufficient time.

Sufficiency of the notice or the manner of service thereof cannot be questioned where notice was conceded to have been received. *Hemberger v. Hagemann*, 120 Colo. 431, 210 P.2d 995 (1949).

**Applied** in *Hurricane v. Kanover, Ltd.*, 651 P.2d 1218 (Colo. 1982).

**13-40-109. Jurisdiction of courts.** The district courts in their respective districts and county courts in their respective counties have jurisdiction of all cases of forcible entry, forcible detainer, or unlawful detainer arising under this article, and the person entitled to the possession of any premises may recover possession thereof by action brought in any of said courts in the manner provided in this article. On and after January 1, 1991, in all actions brought before county courts under section 13-40-104 (1) (f) to (1) (i), where the allegations of the complaint are put in issue by a verified answer and in actions in which the verified answer alleges a monthly rental value of the property in excess of fifteen thousand dollars, the county court, upon the filing of said answer, shall suspend all proceedings therein and certify said cause and transmit the papers therein to the district court of the same county. Causes so certified by the county court shall be proceeded within the courts to which they have been so certified in all respects as if originally begun in the court to which they have been certified. On and after January 1, 1991, the jurisdiction of the county court to enter judgment for rent, or damages, or both and to render judgment on a counterclaim in forcible entry and detainer shall be limited to a total of fifteen thousand dollars in favor of either party, exclusive of costs and attorney fees.

**Source:** L. 1885: p. 226, § 8. L. 1887: p. 271, § 3. R.S. 08: § 2608. C.L. § 6374. CSA: C. 70, § 9. CRS 53: § 58-1-9. C.R.S. 1963: § 58-1-9. L. 64: p. 469, § 1. L. 75: Entire section amended, p. 562, § 2. L. 82: Entire section amended, p. 642, § 1, effective

June 1. **L. 90:** Entire section amended, p. 850, § 9, effective May 31; entire section amended, p. 856, § 7, effective July 1. **L. 2001:** Entire section amended, p. 1518, § 13, effective September 1.

**Cross references:** For the legislative declaration contained in the 1990 act amending this section, see section 1 of chapter 100, Session Laws of Colorado 1990.

### ANNOTATION

**Law reviews.** For article, "Colorado's New Court System", see 41 Den. L. Ctr. J. 140 (1964).

**In forcible entry and detainer suit court may give judgment on pleadings.** Where, in an action in forcible entry and detainer, defendant raised no issue and none was shown by the pleadings, there was nothing left for a jury to determine, and, regardless of any contention otherwise, the county court could, and did, properly sustain the motion for judgment on the pleadings. *Jorden v. Ellis*, 128 Colo. 350, 262 P.2d 275 (1953).

**Forcible entry and detainer action in county court is limited to question of posses-**

**sion**, and title to the land involved may not be an issue for resolution there. *Aasgaard v. Spar Consol. Mining & Dev. Co.*, 185 Colo. 157, 522 P.2d 726 (1974).

**When a party validly raises the issue of ownership in a district court forcible entry and detainer action that directly affects the party's right to possession, the district court must determine ownership prior to ruling on possession.** A forcible entry and detainer proceeding in district court is not rendered inappropriate simply because the issue of ownership arises. *Schuler v. Oldervik*, 143 P.3d 1197 (Colo. App. 2006).

**13-40-110. Action - how commenced.** (1) An action under this article is commenced by filing with the court a complaint in writing describing the property with reasonable certainty, the grounds for the recovery thereof, the name of the person in possession or occupancy, and a prayer for recovery of possession. The complaint may also set forth the amount of rent due, the rate at which it is accruing, the amount of damages due, and the rate at which they are accruing and may include a prayer for rent due or to become due, present and future damages, costs, and any other relief to which plaintiff is entitled.

(2) In an action for termination of a tenancy in a mobile home park, the complaint, in addition to the requirements of subsection (1) of this section, shall specify the particular reasons for termination as such reasons are stated in section 38-12-203, C.R.S. Such complaint shall specify the approximate time, place, and manner in which the tenant allegedly committed the acts giving rise to the complaint. If the action is based on the mobile home or mobile home lot being out of compliance with the rules and regulations adopted pursuant to section 38-12-203 (1) (c), C.R.S., the complaint shall specify that the home owner was given thirty days from the date of service or posting of the notice to quit to cure the noncompliance and that thirty days have passed and the noncompliance has not been cured.

**Source:** **L. 1885:** p. 226, § 9. **L. 1887:** p. 272, § 4. **R.S. 08:** § 2609. **C.L.** § 6375. **L. 33:** p. 481, § 1. **CSA:** C. 70, § 10. **CRS 53:** § 58-1-10. **L. 55:** p. 406, § 1. **L. 61:** p. 390, § 2. **C.R.S. 1963:** § 58-1-10. **L. 85:** Entire section amended, p. 578, § 1, effective July 1. **L. 96:** (2) amended, p. 670, § 1, effective July 1.

### ANNOTATION

**Law reviews.** For article, "Highlights of the 1955 Colorado Legislative Session — Real Property", see 28 Rocky Mt. L. Rev. 58 (1955). For article, "Representation of the Landlord in an Unlawful Detainer Action", see 12 Colo. Law. 69 (1983).

**Substantial facts must be set out in complaint.** This section requires that the substantial facts, upon which the plaintiff relies, shall be set

out in the complaint. *Klopfer v. Keller*, 1 Colo. 410 (1871).

**Fact of written demand for the premises.** It is the duty of the plaintiff, if demand in writing for the premises was made, to set it out in his petition as a substantial fact, as required in this section. *Doss v. Craig*, 1 Colo. 177 (1869).

**Allegation held one of material facts and not of mere evidence.** An allegation that defen-



dant by “beating plaintiff, and by superior strength and numbers, with threats of violence, did forcibly eject plaintiff”, is an allegation not of mere evidence, but of material facts. *Kenny v. Daugherty*, 67 Colo. 56, 185 P. 471 (1919).

**This and § 13-40-113 are the only sections of the act in any way relating to the pleadings required of the parties, where the action is commenced in a justice court and by implication**

exclude necessity for further written pleadings. *Joss v. Hallett*, 39 Colo. 392, 89 P. 809 (1907).

**Verification permitted at close of case.** In a forcible entry and detainer action brought under this article in the district court, plaintiffs were properly permitted at the close of their case to verify their complaint. *Franklin v. Macedonia Baptist Church*, 123 Colo. 432, 231 P. 2d 793 (1951).

**13-40-111. Issuance and return of summons.** (1) Upon filing the complaint as provided in section 13-40-110, the clerk of the court or the attorney for the plaintiff shall issue a summons. The summons shall command the defendant to appear before the court at a place named in such summons and at a time and on a day which shall be not less than seven days nor more than fourteen days from the day of issuing the same to answer the complaint of plaintiff. The summons shall also contain a statement addressed to the defendant stating: “If you fail to file with the court, at or before the time for appearance specified in the summons, an answer to the complaint setting forth the grounds upon which you base your claim for possession and denying or admitting all of the material allegations of the complaint, judgment by default may be taken against you for the possession of the property described in the complaint, for the rent, if any, due or to become due, for present and future damages and costs, and for any other relief to which the plaintiff is entitled. If you are claiming that the landlord’s failure to repair the residential premises is a defense to the landlord’s allegation of nonpayment of rent, the court will require you to pay into the registry of the court, at the time of filing your answer, the rent due less any expenses you have incurred based upon the landlord’s failure to repair the residential premises.”

(2) Repealed.

(3) For actions commenced pursuant to section 13-40-104 (1) (f) and (1) (g) only, if no answer to the complaint is filed as provided in subsection (1) of this section, the court shall examine the complaint, and, if satisfied that venue is proper and the plaintiff is entitled to possession of the premises, the court shall dispense with appearances by the plaintiff or a hearing and shall forthwith enter a judgment for possession, present or future damages, and costs.

**Source:** L. 1885: p. 227, § 10. L. 1887: p. 272, § 5. L. 1891: p. 227, § 1. R.S. 08: § 2610. C.L. § 6376. CSA: C. 70, § 11. CRS 53: § 58-1-11. L. 61: p. 391, § 3. C.R.S. 1963: § 58-1-11. L. 64: p. 470, § 2. L. 75: Entire section amended, p. 582, § 1, effective July 1. L. 87: Entire section amended, p. 565, § 2, effective March 13. L. 2004: Entire section amended, p. 594, § 1, effective July 1. L. 2006: (3) added, p. 1479, § 35, effective July 1. L. 2007: (3) amended, p. 1830, § 1, effective January 1, 2008. L. 2008: (1) amended, p. 1819, § 1, effective September 1. L. 2012: (1) amended and (2) repealed, (SB 12-175), ch. 208, p. 825, § 10, effective July 1.

**Editor’s note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) and repealing subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Unsuccessful party by appeal waives irregularities in the summons.** The unsuccessful party, by taking an appeal from a judgment of a justice of the peace, waives all irregularities in

the summons and service thereof. *Fort v. Demmer*, 91 Colo. 285, 14 P.2d 489 (1932).

**Applied** in *Maxwell v. District Court*, 641 P.2d 931 (Colo. 1982).

**13-40-112. Service.** (1) Such summons may be served by personal service as in any civil action. A copy of the complaint must be served with the summons.

(2) If personal service cannot be had upon the defendant by a person qualified under the Colorado rules of civil procedure to serve process, after having made diligent effort to make

such personal service, such person may make service by posting a copy of the summons and the complaint in some conspicuous place upon the premises. In addition thereto, the plaintiff shall mail, no later than the next business day following the day on which he or she files the complaint, a copy of the summons, or, in the event that an alias summons is issued, a copy of the alias summons, and a copy of the complaint to the defendant at the premises by postage prepaid, first-class mail.

(3) Personal service or service by posting shall be made at least seven days before the day for appearance specified in such summons, and the time and manner of such service shall be endorsed upon such summons by the person making service thereof.

(4) For purposes of this section, "business days" means any calendar day excluding Saturdays, Sundays, and legal holidays.

**Source:** L. 1885: p. 227, § 11. L. 1887: p. 273, § 6. R.S. 08: § 2611. C.L. § 6377. CSA: C. 70, § 12. CRS 53: § 58-1-12. L. 61: p. 392, § 4. C.R.S. 1963: § 58-1-12. L. 64: p. 470, § 3. L. 83: (2) and (3) amended, p. 632, § 1, effective May 26. L. 84: (2) and (3) amended, p. 465, § 1, effective March 16. L. 87: (2) amended, p. 566, § 3, effective March 13. L. 2004: (2) and (3) amended and (4) added, p. 594, § 2, effective July 1. L. 2012: (3) amended, (SB 12-175), ch. 208, p. 825, § 11, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For the procedure for service of process, see C.R.C.P. 4.

#### ANNOTATION

**An actual appearance always cures a defective service of a summons**, when, except for such defect, the court would have jurisdiction of the person and the subject matter of the suit. Tyler v. McKenzie, 43 Colo. 233, 95 P. 943 (1908).

**Landlord properly can take possession of abandoned apartment** without resort to legal process. Martinez v. Steinbaum, 623 P.2d 49 (Colo. 1981).

**13-40-113. Answer of defendant - additional and amended pleadings.** (1) The defendant shall file with the court, at or before the time specified for his appearance in the summons, an answer in writing setting forth the grounds on which he bases his claim for possession and admitting or denying all of the material allegations of the complaint and presenting every defense which then exists and upon which he intends to rely, either by including the same in his answer or by filing simultaneously therewith motions setting forth every such defense.

(2) The court for good cause may permit the filing of additional and amended pleadings where such will not result in delay prejudicial to the defendant.

**Source:** L. 1885: p. 227, § 12. R.S. 08: § 2612. C.L. § 6378. CSA: C. 70, § 13. CRS 53: § 58-1-13. L. 55: p. 406, § 2. L. 61: p. 392, § 5. C.R.S. 1963: § 58-1-13.

#### ANNOTATION

**Structure of F.E.D. statute evinces a legislative intent to accelerate trial settings in order to provide expeditious remedy.** Butler v. Farner, 704 P.2d 853 (Colo. 1985).

**Due process is satisfied so long as F.E.D. statute permits continuances in cases requiring intensive trial preparation.** Butler v. Farner, 704 P.2d 853 (Colo. 1985).

**Defendant failing to file answer admits allegations of complaint.** A defendant, by failing to file an answer to the complaint in an unlawful detainer action, admits the allegations therein contained. Feste v. People, 93 Colo. 206, 25 P.2d 177 (1933).

A defendant in an unlawful detainer action who fails to answer within the required time



thereby admits the allegations set forth in the complaint. *Spar Consol. Mining & Dev. Co. v. Aasgaard*, 33 Colo. App. 35, 516 P.2d 127 (1973), *aff'd*, 185 Colo. 157, 522 P.2d 726 (1974).

**Failure to answer results in default judgment.** Failure of defendant in a county court proceeding for forcible entry and detainer to file a timely answer in writing properly results in a default judgment against him. *Spar Consol. Mining & Dev. Co. v. Aasgaard*, 33 Colo. App. 35, 516 P.2d 127 (1973), *aff'd*, 185 Colo. 157, 522 P.2d 726 (1974).

**If no answer is filed, there is no issue to be tried.** In an unlawful detainer action where a written complaint is filed in compliance with § 13-40-110, if defendant fails to file a written answer, there is no issue to be tried, and defendant is in default in both original and appellate courts, if an appeal be taken from a judgment against him. *Fort v. Demmer*, 91 Colo. 285, 14 P.2d 489 (1932).

**Where defendant's answer admits possession, plaintiff need not prove it.** In an action of forcible entry and detainer, where the defendant in her answer admits possession, it is not necessary for plaintiff to prove possession. *Ensley v. Page*, 13 Colo. App. 452, 59 P. 225 (1899).

**Answers held insufficient.** An answer denying that plaintiff gave defendant an option to purchase the premises and that defendant was to pay a specified sum, and denying that defendant had forfeited any rights to the property by virtue of an option to purchase the same, or otherwise, allegations of such facts appearing in the complaint, was held insufficient. *Bonnell v. Gill*, 41 Colo. 59, 92 P. 13 (1907).

**Answer in a forcible entry and detainer action stating mere conclusions is insufficient** under this section. *Ensley v. Page*, 13 Colo. App. 452, 59 P. 225 (1899); *McCrimmon v. Raymond*, 77 Colo. 81, 234 P. 1058 (1925).

**An answer merely denying that defendants took possession by force was held not compliance with this section.** *Kenney v. Daugherty*, 67 Colo. 56, 185 P. 471 (1919).

**Motion for bill of particulars is not provided for in this section,** and it does not constitute an answer because it fails to admit or deny the material allegations. *Spar Consol. Mining & Dev. Co. v. Aasgaard*, 33 Colo. App. 35, 516 P.2d 127 (1973), *aff'd*, 185 Colo. 157, 522 P.2d 726 (1974).

**13-40-114. Delay in trial - undertaking.** If either party requests a delay in trial longer than five days, the court in its discretion may, upon good cause shown, require either of the parties to give bond or other security approved and fixed by the court in an amount for the payment to the opposite party of such sum as he may be damaged due to the delay.

**Source:** L. 1885: p. 228, § 13. R.S. 08: § 2613. C.L. § 6379. CSA: C. 70, § 14. CRS 53: § 58-1-14. L. 61: p. 393, § 6. C.R.S. 1963: § 58-1-14. L. 87: Entire section amended, p. 566, § 4, effective March 13.

**A defendant as such is not barred from denying a plaintiff's title,** but it is a tenant who is not allowed to deny the landlord's title. The latter relation must exist to apply the rule. The plaintiff may allege that the defendant is a tenant and introduce evidence to prove it, but that is not conclusive upon the defendant. The latter may go forward and prove that he never was a tenant, but a purchaser or mortgagor in possession, for instance, and, for that reason, entitled to remain. *Reitze v. Humphreys*, 53 Colo. 171, 125 P. 522 (1912).

**Defendant may set up defense that he is a mortgagor.** In an action of wrongful detainer by landlord against tenant, the defendant may set up as a defense that he is the owner in equity of the premises, and the plaintiff, though invested with the title, a mere mortgagee. And he may prove such relation of mortgagor and mortgagee, thus disproving the relation of landlord and tenant, averred in the complaint. The rule that the tenant may not deny the landlord's title has no application. *Reitze v. Humphreys*, 53 Colo. 171, 125 P. 522 (1912).

**Equitable defenses may be interposed** in actions of forcible entry and detainer. *Adcock v. Lieber*, 51 Colo. 373, 117 P. 993 (1911); *McCrimmon v. Raymond*, 77 Colo. 81, 234 P. 1058 (1925).

**Defendant may offer all facts entitling him to possession at law or equity.** All the substantial facts upon which a defendant relies, entitling him to the possession of the property, include such facts as will entitle him to the possession at law or in equity. *Adcock v. Lieber*, 51 Colo. 373, 117 P. 993 (1911).

**Fact that possessor did not know plaintiff's residence is no defense.** The allegation in the answer that defendant was not able to surrender and deliver up to plaintiff possession of the premises described in the demand, because she was not acquainted with him, and did not know his place of residence, constitutes no defense at all. No livery of seisin was necessary, and all that was necessary for defendant to have done in order to have complied with the demand was to have vacated the premises. *Ensley v. Page*, 13 Colo. App. 452, 59 P. 225 (1899).

**Section does not require pleading of evidence.** The provision of this section that the answer shall set forth "all the substantial facts", does not require the pleading of evidence. *W.H. Swanson Theater Co. v. Pueblo Opera Block Inv. Co.*, 70 Colo. 83, 197 P. 762 (1921).

## ANNOTATION

This section does not authorize the trial court to issue a default judgment for failure to comply with the court's order requiring the posting of bond. Rather, the remedy for failure to post the bond required by the court is immediate trial. *Beeghly v. Mack*, 20 P.3d 610 (Colo. App. 2001).

This section is applicable when a forcible entry and detainer action is brought, regardless of whether other issues regarding ownership may be raised and resolved during the pendency of such action. *Beeghly v. Mack*, 20 P.3d 610 (Colo. App. 2001).

**13-40-115. Judgment - writ of restitution.** (1) Upon the trial of any action under this article if service was had only by posting in accordance with section 13-40-112 (2) and if the court finds that the defendant has committed an unlawful detainer, the court shall enter judgment for the plaintiff to have restitution of the premises and shall issue a writ of restitution. The court may also continue the case for further hearing from time to time and may issue alias and pluries summonses until personal service upon the defendant is had.

(2) Upon such trial or further hearing under this article after personal service is had upon the defendant in accordance with section 13-40-112 (1), if the court or jury has not already tried the issue of unlawful detainer, it may do so, and, if it finds that the defendant has committed an unlawful detainer, the court shall enter judgment for the plaintiff to have restitution of the premises and shall issue a writ of restitution. In addition to such judgment for restitution, the court or jury shall further find the amount of rent, if any, due to the plaintiff from the defendant at the time of trial, the amount of damages, if any, sustained by the plaintiff to the time of the trial on account of the unlawful detention of the property by the defendant, and damages sustained by the plaintiff to the time of trial on account of injuries to the property, and judgment shall enter for such amounts, together with reasonable attorney's fees and costs, upon which judgment execution shall issue as in other civil actions. Nothing in this section shall be construed to permit the entry of judgment in excess of the jurisdictional limit of the court.

(3) A writ of restitution that is issued by the court pursuant to subsection (1) or (2) of this section shall remain in effect for forty-nine days after issuance and shall automatically expire thereafter.

**Source:** L. 1885: p. 228, § 14. R.S. 08: § 2614. C.L. § 6380. CSA: C. 70, § 15. CRS 53: § 58-1-15. L. 61: p. 393, § 7. C.R.S. 1963: § 58-1-15. L. 2005: (3) added, p. 263, § 1, effective August 8. L. 2012: (3) amended, (SB 12-175), ch. 208, p. 826, § 12, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Law reviews.** For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L.J. 685 (1980). For article, "Representation of the Landlord in an Unlawful Detainer Action", see 12 Colo. Law. 69 (1983).

**Jury trials possible.** By this section, the general assembly recognized that there could be jury trials in forcible entry and detainer actions. *Husar v. Larimer County Court*, 629 P.2d 1104 (Colo. App. 1981).

**For landlord's liability for damage to tenant's property during removal from premises,** see *Christensen v. Hoover*, 643 P.2d 525 (Colo. 1982).

**Where legal relationship between parties and entitlement to possession of home was still in dispute,** district court was in error to issue an order for a writ of restitution. *Lindsay v. District Court*, 694 P.2d 843 (Colo. 1985).

**Res judicata of judgment.** The entry of a default judgment on the issue of possession properly entered pursuant to this section is a final order and is res judicata on the issue. *Magliocco v. Olson*, 762 P.2d 681 (Colo. App. 1987).

**Statute allows a plaintiff in an FED action to recover damages for past due rent in addition to restitution of the premises.** Plaintiff's



damages are not limited to the reasonable rental value of the use of the premises during the period of the unlawful detainer. *Renco Assocs. v. D'Lance, Inc.*, 214 P.3d 1069 (Colo. App. 2009).

When this section is read with § 13-40-123, it is clear that the award of attorney fees in a forcible entry and detainer action is in the nature of compensatory damages. Thus, any prevailing party in a forcible entry and detainer action is entitled to attorney fees, and the trial court erred in refusing to award them. *Wilcox v. Clark*, 42 P.3d 29 (Colo. App. 2001).

**Contempt sanction available in forcible entry and detainer (FED) proceedings** in appropriate circumstances. Nothing in C.R.C.P. 107 or the FED statute precludes the remedy of

contempt in an FED action under appropriate circumstances. *Hartsel Springs Ranch v. Cross Slash Ranch*, 179 P.3d 237 (Colo. App. 2007).

**Court erred in granting restitution of the premises where owner failed to prove by a preponderance of the evidence that tenant violated lease covenant by committing criminal activity.** Unlawful detention for violation of a lease covenant requires proof by a preponderance of the evidence that the covenant was actually violated, not merely that the owner had reasonable grounds to believe that it was violated. *Miles v. Fleming*, 214 P.3d 1054 (Colo. 2009).

**Applied** in *Maxwell v. District Court*, 641 P.2d 931 (Colo. 1982).

**13-40-116. Dismissal.** If the plaintiff's action brought for any of the causes mentioned in this article, upon the trial thereon, is dismissed or the action fails to prove the plaintiff's right to the possession of the premises described in the complaint, the defendant shall have judgment and execution for his costs.

**Source:** L. 1885: p. 229, § 16. **R.S. 08:** § 2616. **C.L.** § 6382. **CSA:** C. 70, § 17. **CRS 53:** § 58-1-17. **C.R.S. 1963:** § 58-1-17.

**Cross references:** For dismissal of actions generally, see C.R.C.P. 41.

**13-40-117. Appeals.** (1) If either party feels aggrieved by the judgment rendered in such action before the county court, he may appeal to the district court, as in other cases tried before the county court, with the additional requirements provided in this article.

(2) Upon the court's taking such appeal, all further proceedings in the case shall be stayed, and the appellate court shall thereafter issue all needful writs and process to carry out any judgment which may be rendered thereon in the appellate court.

(3) If the appellee believes that he may suffer serious economic harm during the pendency of the appeal, he may petition the court taking the appeal to order that an additional undertaking be required of the appellant to cover the anticipated harm. The court shall order such undertaking only after a hearing and upon a finding that the appellee has shown a substantial likelihood of suffering such economic harm during the pendency of the appeal and that he will not adequately be protected under the appeals bond and the other requirements for appeal pursuant to sections 13-40-118, 13-40-120, and 13-40-123.

**Source:** L. 1885: p. 229, § 17. **R.S. 08:** § 2617. **C.L.** § 6383. **CSA:** C. 70, § 18. **CRS 53:** § 58-1-18. **C.R.S. 1963:** § 58-1-18. **L. 64:** p. 470, § 4. **L. 84:** Entire section amended, p. 466, § 1, effective July 1. **L. 85:** (1) amended, p. 571, § 8, effective November 14, 1986.

## ANNOTATION

**This section gives to either party the right of appeal.** *Dulmaine v. Reed Bldg. Co.*, 46 Colo. 469, 104 P. 1038 (1909).

**Judgment for immediate possession is proper.** In an action by a landlord against a tenant, judgment for immediate possession is proper. The only effect of this section is to stay enforcement of the judgment for 48 hours, in order that an appeal may in the meantime be

perfected. *Dulmaine v. Reed Bldg. Co.*, 46 Colo. 469, 104 P. 1038 (1909).

**It will be assumed that the appeal bond was tendered and filed on the day of its approval,** in the absence of a filing mark. *Fort v. Demmer*, 91 Colo. 285, 14 P.2d 489 (1932).

**Applied** in *Maxwell v. District Court*, 641 P.2d 931 (Colo. 1982); *Francam Bldg. Corp. v. Fail*, 687 P.2d 991 (Colo. App. 1984).

**13-40-118. Deposit of rent.** In all appeals from the judgment of a county court, in an action founded upon section 13-40-104 (1) (d), the defendant, at the time of the filing thereof, shall deposit with the court the amount of rent found due and specified in such judgment. Unless such deposit is made, the appeal is not perfected, and proceedings upon such judgment shall thereupon be had accordingly. If the appeal is perfected, the court shall transmit such deposit to the clerk of the appellate court, with the papers in such case; and the appellant thereafter, at the time when the rents become due as specified in the judgment appealed from and as often as the same become due, shall deposit the amount thereof with the clerk of such appellate court. In case the appellant, at any time during the pendency of such appeal and before final judgment therein, neglects or fails to make any deposit of rent, falling due at the time specified in the judgment appealed from, the court in which such appeal is pending, upon such fact being made to appear and upon motion of the appellee, shall affirm the judgment appealed from with costs; and proceedings thereupon shall be had as in like cases determined upon the merits.

**Source:** L. 1885: p. 229, § 18. R.S. 08: § 2618. C.L. § 6384. CSA: C. 70, § 19. CRS 53: § 58-1-19. C.R.S. 1963: § 58-1-19. L. 64: p. 471, § 5. L. 84: Entire section amended, p. 467, § 2, effective July 1.

#### ANNOTATION

This section, which relates to appeals of judgments for possession in cases involving the nonpayment of rent, states that an appeal shall not be deemed taken and perfected unless a deposit of rentals be made in the justice of the peace court. It further provides that during the pendency of the action in the county court on appeal, further deposits of rent be made in the county court. *General Am. Indus., Inc. v. County Court*, 136 Colo. 86, 316 P.2d 565 (1957).

**Rent owed is not included in general damages under § 13-40-117.** Since this section requires a deposit of rent in nonpayment of rent cases, rentals were excluded as items of damage recoverable under the provision requiring an undertaking to cover damages which had accrued or would accrue. *General Am. Indus., Inc.*

*v. County Court*, 136 Colo. 86, 316 P.2d 565 (1957).

**Appeals must be perfected in strict compliance with statutes.** Appeals are creatures of statute, and a party desiring to avail himself of the right must comply with its terms, and unless he does so, and the appeal is perfected in strict compliance therewith, the appellate court has no power to make any order other than the order of dismissal. *Erbaugh v. Fields*, 77 Colo. 254, 235 P. 568 (1925).

**This provision does not apply where land is rented for share of products from livestock.** *Routen v. J. & O. Ranch Co.*, 91 Colo. 53, 11 P.2d 566 (1932).

**Applied in** *Francam Bldg. Corp. v. Fail*, 687 P.2d 991 (Colo. App. 1984).

**13-40-119. Rules of practice.** In all actions brought under any provision of this article in any court, the proceedings shall be governed by the rules of practice and the provisions of law concerning civil actions in such court, except as may be otherwise provided in this article.

**Source:** L. 1885: p. 230, § 20. R.S. 08: § 2620. C.L. § 6386. CSA: C. 70, § 21. CRS 53: § 58-1-21. L. 61: p. 394, § 8. C.R.S. 1963: § 58-1-21.

#### ANNOTATION

**Allegations must be supported by proof.** The rule which requires that the proof shall support the allegation is as applicable to the action of unlawful detainer as to any other. *Klopfert v. Keller*, 1 Colo. 410 (1871).

**Misjoinder of causes of action must be demurred to in trial court.** Objections on the ground that several causes of action have been improperly united, as well as on the ground of misjoinder of parties, must be taken by demurrer

or otherwise in the trial court, or they are to be deemed waived. This rule is as applicable to actions for forcible entry and detainer as to other civil actions. *Farncomb v. Stern*, 18 Colo. 279, 32 P. 612 (1893).

**Evidence tending to disprove the facts stated in the complaint is admissible** on the part of the defendant, although such evidence might also tend to prove another case upon which the plaintiff might, if he had so declared,



maintain his action. *Klopfert v. Keller*, 1 Colo. 410 (1871).

**Defendant may show he entered premises as purchaser and not as tenant.** In an action of unlawful detainer against a tenant holding over, for the purpose of disproving the tenancy, the defendant may show that he entered as a purchaser and not as a tenant, and this whether the agreement to purchase was good or bad. *Klopfert v. Keller*, 1 Colo. 410 (1871).

**A directed verdict may be given.** Where, in an action for unlawful detainer, there was no evidence which should have gone to the jury, nor any matter presented for the jury's determination which would deprive the landlord of his right of reentry and possession under the terms of a written lease, the court properly directed a verdict for plaintiff. *Mageon v. Alkire*, 41 Colo. 338, 92 P. 720 (1907).

**13-40-120. Appellate review.** Appellate review of the judgment of the district courts of this state, in proceedings under this article, is allowed as provided by law and the Colorado appellate rules. In cases of appeal from judgments founded upon causes of action embraced in section 13-40-104 (1) (d), the deposit of rent money during pendency of appeal shall be made, or judgment of affirmance shall be entered, in the manner provided in section 13-40-118.

**Source:** L. 1885: p. 230, § 22. L. 1891: p. 228, § 1. R.S. 08: § 2622. C.L. § 6388. CSA: C. 70, § 23. CRS 53: § 58-1-23. C.R.S. 1963: § 58-1-22. L. 64: p. 472, § 6. L. 84: Entire section amended, p. 467, § 3, effective July 1. L. 85: Entire section amended, p. 571, § 9, effective November 14, 1986.

#### ANNOTATION

**Under this section the unsuccessful party may come to the supreme court on appeal or by writ of error.** *Kilker v. Herrington*, 77 Colo. 581, 238 P. 41 (1925).

**Right of appeal is subject to general law regulating appeals.** The right of appeal under this statute was held subject to the conditions prescribed by the code of civil procedure, or other general law regulating appeals to the supreme court, and other additional conditions, as provided in this section. *Crane v. Farmer*, 14 Colo. 294, 23 P. 455 (1900); *Brennan Mercantile Co. v. Vickers*, 31 Colo. 323, 73 P. 45 (1903).

**Strict compliance with the statutory requirements is mandated.** *Morgan v. District Court*, 192 Colo. 418, 559 P.2d 712 (1977).

**Act abolishing appeals does not apply to unlawful detainer proceedings.** The act "in relation to appeals and writs of error" found in the former code of civil procedure, abolishing appeals, did not apply to, amend, or repeal the detainer act, or other statutes creating special proceedings. *Hewitt v. Landis*, 75 Colo. 277, 225 P. 842 (1924).

**Applied in** *Maxwell v. District Court*, 641 P.2d 931 (Colo. 1982); *Francam Bldg. Corp. v. Fail*, 687 P.2d 991 (Colo. App. 1984).

**13-40-121. When deposit of rent is paid.** The rent money deposited, as provided for in this article, shall be paid to the landlord entitled thereto, upon the order of the court wherein the same is deposited and at such time and in such manner as the court determines necessary to protect the rights of the parties.

**Source:** L. 1885: p. 231, § 23. R.S. 08: § 2623. C.L. § 6389. CSA: C. 70, § 24. CRS 53: § 58-1-24. C.R.S. 1963: § 58-1-23.

**13-40-122. Writ of restitution after judgment.** (1) No writ of restitution shall issue upon any judgment entered in any action under the provisions of this article out of any court until after the expiration of forty-eight hours from the time of the entry of such judgment; and such writs shall be executed by the officer having the same only in the daytime and between sunrise and sunset. Any writ of restitution governed by this section may be executed by the county sheriff's office in which the property is located by a sheriff, undersheriff, or deputy sheriff, as described in section 16-2.5-103 (1) or (2), C.R.S., while off duty or on duty at rates charged by the employing sheriff's office in accordance with section 30-1-104 (1) (gg), C.R.S.

(2) The officer that executes a writ of restitution under subsection (1) of this section and the law enforcement agency that employs such officer shall be immune from civil liability

for any damage to a tenant's personal property that was removed from the premises during the execution of the writ. A landlord who complies with the lawful directions of the officer executing a writ of restitution shall be immune from civil and criminal liability for any act or omission related to a tenant's personal property that was removed from the premises during or after the execution of a writ of restitution.

(3) A landlord has no duty to store or maintain a tenant's personal property that is removed from the premises during or after the execution of a writ of restitution. Regardless of whether a landlord elects to store or maintain the personal property so removed, the landlord shall have no duty to inventory the personal property or to determine ownership of or the condition of the personal property. Such storage shall not create either an implied or express bailment of the personal property, and the landlord shall be immune from liability for any loss or damage to the personal property.

(4) A landlord who elects to store a tenant's personal property that was removed from the premises during or after the execution of a writ of restitution may charge the tenant the reasonable costs of storing the personal property. To recover such costs, the landlord may either dispose of the personal property under any lien rights the landlord has under part 1 of article 20 of title 38, C.R.S., or the landlord may allow the tenant to recover the personal property after paying the reasonable storage charges incurred by the landlord.

**Source:** L. 1885: p. 231, § 24. R.S. 08: § 2624. C.L. § 6390. CSA: C. 70, § 25. CRS 53: § 58-1-25. C.R.S. 1963: § 58-1-24. L. 64: p. 472, § 7. L. 98: Entire section amended, p. 630, § 1, effective August 5. L. 2004: (1) amended, p. 510, § 1, effective August 4.

#### ANNOTATION

**Section limits time of enforcement of judgment, not judgment itself.** The provision of this section that upon judgment for the plaintiff in wrongful detainer no writ of restitution shall issue until the expiration of 48 hours from its entry does not import that judgment may not be given for immediate possession. Its only effect is to stay the enforcement of the judgment for the period specified. *Dulmaine v. Reed Bldg. Co.*, 46 Colo. 469, 104 P. 1038 (1909).

**Sheriff subject to minimum standard of care.** In carrying out his statutory duties, an officer or sheriff is subject to a minimum standard of care. *Christensen v. Hoover*, 643 P.2d 525 (Colo. 1982).

**Duty to remove tenant and property.** It is the officer's duty not only to remove the tenant,

but also to remove the tenant's personal property and effects from the premises. *Christensen v. Hoover*, 643 P.2d 525 (Colo. 1982).

**No duty to safeguard property following eviction.** The sheriff has no duty to safeguard the tenant's possessions after a lawful eviction has occurred, even though he knows the tenant's belongings might be taken if they are left unattended. *Christensen v. Hoover*, 643 P.2d 525 (Colo. 1982).

**For landlord's liability for damage to tenant's property during removal from premises**, see *Christensen v. Hoover*, 643 P.2d 525 (Colo. 1982).

**13-40-123. Damages.** The prevailing party in any action brought under the provisions of this article is entitled to recover damages, reasonable attorney fees, and costs of suit; except that a residential landlord or tenant who is a prevailing party shall not be entitled to recover reasonable attorney fees unless the residential rental agreement between the parties contains a provision for either party to obtain attorney fees. Nothing in this section shall be construed to permit the entry of judgments in any single proceeding in excess of the jurisdictional limit of said court.

**Source:** L. 1885: p. 231, § 25. R.S. 08: § 2625. C.L. § 6391. CSA: C. 70, § 26. CRS 53: § 58-1-26. L. 61: p. 394, § 9. C.R.S. 1963: § 58-1-25. L. 84: Entire section amended, p. 467, § 4, effective July 1. L. 2008: Entire section amended, p. 1819, § 2, effective September 1.

**Cross references:** For assessment for expense and inconvenience in litigation, see C.R.C.P. 3(a); for awarding of attorney fees in civil actions generally, see § 13-17-102.



## ANNOTATION

**Former provisions violated constitutional rights.** Provisions of this section prior to the 1984 amendment, by imposing a pecuniary penalty on defendants for the benefit of prevailing plaintiffs without granting defendants a corresponding right, violated the defendants' fourteenth amendment right to the equal protection of law and was contrary to art. II, § 6, Colo. Const. *More v. Johnson*, 193 Colo. 489, 568 P.2d 437 (1977).

**In a case involving multiple issues, the prevailing party for purposes of this section is the party adjudged to have the right to possession.** *Integra Fin. Inc. v. Grynberg Petroleum Co.*, 74 P.3d 347 (Colo. App. 2002).

**The definition of "action" for purposes of this section excludes claims and counterclaims relating to nonpossessory issues.** *Integra Fin. Inc. v. Grynberg Petroleum Co.*, 74 P.3d 347 (Colo. App. 2002).

**Damages are recoverable where lessee retains land after termination of the lease.** Where possession of leased property is wrongfully retained by the lessee after termination of the lease, damages are recoverable against him. *Strauss v. Boatright*, 160 Colo. 581, 418 P.2d 878 (1966).

**It seems to be well settled that the measure of such damages is the reasonable rental value for the time that possession was wrongfully withheld.** *Strauss v. Boatright*, 160 Colo. 581, 418 P.2d 878 (1966).

**Allowance of attorney's fees as part of judgment where not pursuant to contract expressed or implied.** *Gulf, Colo. and Santa Fe v. Ellis*, 165 U.S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897); *Los Angeles Gold Mining Co. v. Campbell*, 13 Colo. App. 1, 56 P. 246 (1899); *Davidson v. Jennings*, 27 Colo. 187, 60 P. 354 (1900); *Pacific Mut. Life Insurance Co. v. Van Fleet*, 47 Colo. 401, 107 P.1087 (1909); *Commodore Mining Co. v. People*, 82 Colo. 77, 257 P. 259 (1927); *Denver Bldg. and Construction Trade Council v. Henry Shore*, 132 Colo. 187, 287 P.2d 267 (1955).

**This section provides for an award of attorney fees as damages for injury sustained**

during time landlord is deprived of possession of property. *Allmer v. Andrews*, 153 Colo. 487, 386 P.2d 705 (1963).

**In a separate or supplemental proceeding.** This section provides for such an award of attorney fees to be determined either in a separate action or in supplemental proceedings in the principal action and are in the nature of damages for injury sustained during the time he shall have been deprived of possession of the premises. *Allmer v. Andrews*, 153 Colo. 487, 386 P.2d 705 (1963).

**Claims that do not bear on the right to possession are not part of a forcible entry and detainer action for purposes of awarding attorney fees.** *Schuler v. Oldervik*, 143 P.3d 1197 (Colo. App. 2006).

**It is proper, however, to award attorney fees concerning an ownership claim if it is necessary for the court to determine ownership of the property prior to making a determination regarding possession.** *Schuler v. Oldervik*, 143 P.3d 1197 (Colo. App. 2006).

**The amount of damages a prevailing plaintiff may recover in an F.E.D. action is the reasonable rental value of the premises during the time the other party continued an unlawful detainer.** *Behr v. Burge*, 940 P.2d 1084 (Colo. App. 1996).

**Where property was sold at a tax sale, the court erroneously awarded damages to plaintiffs for the rental value of property from the time the tax lien was recorded until dispossession of defendants since those damages could not begin to accrue at least until the execution and delivery of the director's deed.** *Behr v. Burge*, 940 P.2d 1084 (Colo. App. 1996).

**When this section is read with § 13-40-115, it is clear that the award of attorney fees in a forcible entry and detainer action is in the nature of compensatory damages.** Thus, any prevailing party in a forcible entry and detainer action is entitled to attorney fees, and the trial court erred in refusing to award them. *Wilcox v. Clark*, 42 P.3d 29 (Colo. App. 2001).

**Applied in** *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

### 13-40-124. Qualified farm owner-tenant defined. (Repealed)

**Source:** L. 86: Entire section added, p. 436, § 8, effective April 18. L. 87: (1)(f)(I), (1)(g), (3), and (4) amended and (1)(j) and (5) added, p. 1357, §§ 7, 8, effective July 1; (1)(i) amended, p. 1577, § 17, effective July 10.

**Editor's note:** Subsection (4) provided for the repeal of subsections (1) to (4), effective January 31, 1989. (See L. 87, p. 1357.) Subsection (5)(b) provided for the repeal of subsection (5), effective July 1, 1991. (See L. 87, p. 1357.)

**13-40-125. Rights of qualified farm owner-tenant. (Repealed)**

**Source:** L. 86: Entire section added, p. 437, § 8, effective April 18. L. 87: (1) to (4) amended and (3.5) and (5) added, p. 1358, §§ 9, 10.

**Editor's note:** Subsection (4) provided for the repeal of subsections (1) to (4), effective January 31, 1989. (See L. 87, p. 1358.) Subsection (5)(b) provided for the repeal of subsection (5), effective July 1, 1991. (See L. 87, p. 1358.)

**13-40-125.5. Possession pursuant to agreement - enforcement. (Repealed)**

**Source:** L. 87: Entire section added, p. 1360, § 11, effective July 1.

**Editor's note:** Subsection (4) provided for the repeal of this section, effective January 31, 1989. (See L. 87, p. 1360.)

**13-40-126. Priority of proceedings. (Repealed)**

**Source:** L. 86: Entire section added, p. 438, § 9, effective April 18. L. 87: Entire section amended, p. 1361, § 12, effective July 1.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective January 31, 1989. (See L. 87, p. 1361.)

**HABEAS CORPUS****ARTICLE 45****Habeas Corpus - General  
Provisions**

13-45-101.	Petition for writ - criminal cases.	13-45-112.	Judge refusing or delaying writ - penalty.
13-45-102.	Petition for relief - civil cases.	13-45-113.	Failure to obey writ - penalty.
13-45-103.	Hearing - pleadings - discharge.	13-45-114.	Avoiding writ - penalty.
13-45-104.	Witnesses - duty of sheriff.	13-45-115.	Failure to deliver process - penalty. (Repealed)
13-45-105.	Court to examine witnesses.	13-45-116.	Detention after release - penalty.
13-45-106.	Bail - recognizance - binding witness.	13-45-117.	Forfeitures go to use of prisoner.
13-45-107.	Remand - second writ - offenses not bailable.	13-45-118.	Recovery of forfeiture not bar to civil suit.
13-45-108.	Second writ - bailable offense.	13-45-119.	Writ to testify or be surrendered - run to any county - copy - fees.
13-45-109.	Once discharged - reimprisonment.	13-45-120.	When county court can issue writ. (Repealed)
13-45-110.	Prisoner not to be removed - when.	13-45-121.	Powers of county court. (Repealed)
13-45-111.	Removal of prisoners - causes.		

**13-45-101. Petition for writ - criminal cases.** (1) If any person is committed or detained for any criminal or supposed criminal matter, it is lawful for him to apply to the supreme or district courts for a writ of habeas corpus, which application shall be in writing and signed by the prisoner or some person on his behalf setting forth the facts concerning his imprisonment and in whose custody he is detained, and shall be accompanied by a copy of the warrant of commitment, or an affidavit that the said copy has been demanded of the



person in whose custody the prisoner is detained, and by him refused or neglected to be given. The court to which the application is made shall forthwith award the writ of habeas corpus, unless it appears from the petition itself, or from the documents annexed, that the party can neither be discharged nor admitted to bail nor in any other manner relieved. Said writ, if issued by the court, shall be under the seal of the court, and directed to the person in whose custody the prisoner is detained, and made returnable forthwith.

(2) To the intent that no officer, sheriff, jailer, keeper, or other person to whom such writ is directed may pretend ignorance thereof, every writ shall be endorsed with the words "by the habeas corpus act". When the writ is served by any person upon the sheriff, jailer, or keeper, or other person to whom the same is directed, or brought to him, or left with any of his underofficers or deputies at the jail or place where the prisoner is detained, he or some of his underofficers or deputies, upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the court awarding the said writ and endorsed thereon not exceeding fifteen cents per mile and upon sufficient security given to pay the charges of carrying him back if he is remanded, shall make return of the writ and bring, or cause to be brought, the body of the prisoner before the court which granted the writ and certify the true cause of his imprisonment within three days thereafter, unless the commitment of such person is in a place beyond the distance of twenty miles from the place where the writ is returnable; if it is beyond the distance of twenty miles and not above one hundred miles, the writ shall be returned within ten days and, if beyond the distance of one hundred miles, within twenty days after the delivery of the writ, and not longer.

**Source:** R.S. p. 352, § 1. G.L. § 1323. G.S. § 1609. R.S. 08: § 2917. C.L. § 6486. CSA: C. 77, § 1. CRS 53: § 65-1-1. C.R.S. 1963: § 65-1-1.

**Cross references:** For the constitutional bar to suspension of habeas corpus, see § 21 of art. II, Colo. Const.; for the availability of writ, see C.R.C.P. 106(a).

## ANNOTATION

- I. General Consideration.
  - A. In General.
  - B. Civil Proceeding.
- II. Grounds for Issuance.
  - A. In General.
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- III. Duties of Court.
  - A. In General.
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### I. GENERAL CONSIDERATION.

#### A. In General.

**Law reviews.** For note, "Jurisdiction of Custody Matters in Colorado", see 28 Rocky Mt. L. Rev. 393 (1956). For note, "Habeas Corpus in Colorado for the Convicted Criminal", see 30 Rocky Mt. L. Rev. 145 (1958). For note, "Habeas Corpus Procedure", see 41 Den. L. Ctr. J. 111 (1964). For note, "Federal Habeas Corpus Confronts the Colorado Courts: Catalyst or Catalystism?", see 39 U. Colo. L. Rev. 83 (1966). For article, "Habeas Corpus", which discusses Tenth Circuit decisions dealing with habeas corpus, see 62 Den. U. L. Rev. 241 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses cases relating to habeas

corpus, see 15 Colo. Law. 1618 (1986). For article, "Criminal Law", which discusses Tenth Circuit decisions dealing with habeas corpus, see 64 Den. U. L. Rev. 225 (1987). For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with habeas corpus, see 65 Den. U. L. Rev. 553 (1988).

**Habeas corpus has been designated the greatest of all writs**, and the precious safeguard of personal liberty, concerning which courts are admonished that there is no higher duty than to maintain it unimpaired. Its ascendancy among the writs should be ever sustained. *Geer v. Alaniz*, 138 Colo. 177, 331 P.2d 260 (1958).

**A complaint in the nature of mandamus may be treated as a habeas corpus proceeding.** A complaint labeled for relief in the nature of mandamus, filed as an original proceeding in the supreme court seeking release of persons allegedly illegally confined, is essentially a proceeding in habeas corpus rather than mandamus. *Riley v. City & County of Denver*, 137 Colo. 312, 324 P.2d 790 (1958).

**The purpose of proceedings in habeas corpus** is to determine whether or not the person instituting them is illegally restrained of his liberty. *Ex parte Casper*, 26 Colo. App. 344, 144 P. 1137 (1914); *Riley v. City & County of Denver*, 137 Colo. 312, 324 P.2d 790 (1958); *Hithe v. Nelson*, 172 Colo. 179, 471 P.2d 596

(1970); *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973); *Collins v. Gunter*, 834 P.2d 1283 (Colo. 1992).

The essential purpose to be served with a writ of habeas corpus is to resolve the issue of whether a person is unlawfully detained. *Ryan v. Cronin*, 191 Colo. 487, 553 P.2d 754 (1976); *Mulkey v. Sullivan*, 753 P.2d 1226 (Colo. 1988); *Johnson v. Gunter*, 852 P.2d 1263 (Colo. 1993).

Therefore, because the issues involved in habeas corpus proceedings are very narrow, Crim. P. 54(b)(2) provides that the rules of criminal procedure are not applicable to habeas corpus proceedings, and a court may only authorize discovery under said rules if an appellant clearly shows the information sought will be relevant to the very narrow issues of the habeas corpus hearing. *Temen v. Barry*, 695 P.2d 745 (Colo. 1984).

**Where imprisonment is without warrant or authority, the prisoner is entitled to discharge.** *Harper v. Montez*, 149 Colo. 569, 370 P.2d 154 (1962).

**It is incumbent upon a defendant to exhaust his legal remedies** before asking the indulgence of the court in the issuance of a writ of habeas corpus. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963); *Garrett v. Knight*, 173 Colo. 419, 480 P.2d 569 (1971).

**A writ of habeas corpus cannot be substituted for a writ of error.** Where the trial judge and defendant's counsel misconceived the law and permitted defendant to be subjected to a penitentiary sentence when the court was limited in its judgment to imposing a sentence for a term in the county jail, the judgment of the trial court could and should have been corrected by a writ of error issued out of the supreme court. A habeas corpus writ is an extraordinary writ which may be procured, not as a matter of right, but in the discretion of the court, when the defendant has exhausted his legal remedies. *Hart v. Best*, 119 Colo. 569, 205 P.2d 787 (1949); *People ex rel. Metzger v. District Court*, 121 Colo. 141, 215 P.2d 327 (1949); *Farrell v. District Court*, 135 Colo. 329, 311 P.2d 410 (1957); *Zimmerman v. Angele*, 137 Colo. 129, 321 P.2d 1105 (1958); *Lewis v. Tinsley*, 138 Colo. 117, 330 P.2d 532 (1958); *Mendez v. Tinsley*, 139 Colo. 127, 336 P.2d 706 (1959); *Gallegos v. Tinsley*, 139 Colo. 157, 337 P.2d 386 (1959); *Lowe v. People*, 139 Colo. 578, 342 P.2d 631 (1959); *McKenna v. Tinsley*, 141 Colo. 63, 346 P.2d 584 (1959), cert. denied, 362 U.S. 981, 80 S. Ct. 1066, 4 L. Ed.2d 1015 (1960); *Medberry v. Patterson*, 142 Colo. 180, 350 P.2d 571 (1960); *Moore v. Tinsley*, 142 Colo. 516, 351 P.2d 456 (1960); *Valentine v. Tinsley*, 143 Colo. 19, 351 P.2d 825 (1960); *Bates v. Tinsley*, 143 Colo. 390, 353 P.2d 76 (1960); *Nickle v. Reeder*, 144 Colo. 593, 357 P.2d 921 (1960); *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963); *Specht v. Tinsley*, 153 Colo. 235, 385

P.2d 423 (1963); *Smith v. Tinsley*, 223 F. Supp. 68 (D. Colo. 1963); *Saxton v. Patterson*, 370 F.2d 112 (10th Cir. 1966); *Martinez v. Patterson*, 382 F.2d 1002 (10th Cir. 1967); *McGill v. Leach*, 180 Colo. 331, 505 P.2d 374 (1973).

The writ of habeas corpus may not be used as a substitute for an appeal and a hearing on a writ of habeas corpus may not be used as a basis for reviewing issues resolved by another court. *Ryan v. Cronin*, 191 Colo. 487, 553 P.2d 754 (1976).

Erroneous judgments are not subject to attack by use of the writ of habeas corpus. It is to be used only where the judgment is void. *Ryan v. Cronin*, 191 Colo. 487, 553 P.2d 754 (1976); *Mulkey v. Sullivan*, 753 P.2d 1226 (Colo. 1988).

**It may not be used to consider sufficiency of evidence.** Sufficiency of evidence may not be raised in a habeas corpus proceeding for it is not a substitute for a writ of error. *Johnson v. Tinsley*, 155 Colo. 346, 394 P.2d 842 (1964).

**Prisoner may not attack validity of foreign detainer through habeas corpus petition.** It is improper for a prisoner serving a sentence in Colorado to attack the validity of a foreign detainer through a habeas corpus petition. The proper procedure was to obtain disposition of the charges in the state where they were pending. *Russell v. Cooper*, 724 P.2d 1302 (Colo. 1986); *Butler v. Zavaras*, 924 P.2d 1060 (Colo. 1996).

**A writ of habeas corpus does not run against the people of the state of Colorado.** *Oates v. People*, 136 Colo. 208, 315 P.2d 196 (1957); *Olson v. People*, 138 Colo. 310, 332 P.2d 486 (1958); *Lowe v. People*, 139 Colo. 578, 342 P.2d 631 (1959); *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963); *Petition of Gallegos v. Schooley*, 155 Colo. 215, 393 P.2d 573 (1964); *People v. Calyer*, 736 P.2d 1204 (Colo. 1987).

**The only parties before a trial court in a habeas corpus proceeding are the petitioner and the person having him in custody,** and the only question properly before the trial court is the authority of the respondent to restrain petitioner of his liberty. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963); *Cardiel v. Brittan*, 833 P.2d 748 (Colo. 1992); *Johnson v. Gunter*, 852 P.2d 1263 (Colo. 1993).

**The persons to whom the writ was directed must make return to the writ.** The return which can only be filed by the individuals to whom the writ is directed is a return to the writ and not a return to the petition. *Petition of Gallegos v. Schooley*, 155 Colo. 215, 393 P.2d 573 (1964); *Ede v. Bray*, 178 Colo. 99, 495 P.2d 1139 (1972).

**The failure to make a formal return neither invalidates a hearing on the merits nor does it operate to discharge the prisoner.** *Ferrell v. Vogt*, 161 Colo. 549, 423 P.2d 844 (1967); *Marshall v. Geer*, 140 Colo. 305, 344



P.2d 440 (1959); Ede v. Bray, 178 Colo. 99, 495 P.2d 1139 (1972).

**One may seek a writ of habeas corpus without running any risk whatever** other than having the petition denied or being charged with costs. One may seek a writ of habeas corpus without running any risk whatsoever, other than the risk of having his petition denied and the possibility of being chargeable with the costs of the proceedings. He cannot in such proceedings, whereby he seeks release from illegal restraint, be legally incarcerated on other grounds. *Stillely v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**Poor person may seek habeas corpus without payment of costs.** The legal device existing in the state of Colorado which provides this equal protection in the postconviction civil remedy of habeas corpus is contained in and governed by § 13-16-103, which allows a poor person to proceed without the payment of costs in a civil action on his making a showing of poverty. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

**Either while seeking the writ or after its dismissal.** The supreme court sees no difference of substance save subtlety between the "invidious discrimination" worked by a fee imposed upon an indigent before he is allowed to petition, which he cannot pay, and a fee saddled upon him after dismissal, which he also cannot pay. Both practices are effective deterrents. To interpose any financial consideration between an indigent prisoner of the state and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

**Financial hurdles must not be permitted to condition its exercise.** There is no higher duty than to maintain the federal writ of habeas corpus unimpaired and unsuspended save only in the cases specified in the federal constitution. When an equivalent right is granted by a state, financial hurdles must not be permitted to condition its exercise. *Williams v. District Court*, 160 Colo. 348, 417 P.2d 496 (1966).

**The only issue to be resolved at a habeas corpus proceeding** is whether the custodian has authority to deprive the petitioner of liberty. *Johnson v. Gunter*, 852 P.2d 1263 (Colo. 1993).

**The "return" referred to in subsection (2) is the return of the writ, not the return of the petition for the writ.** Subsection (1) requires the court to issue the writ unless the petition or supporting documents indicate that no relief is available. Thus, where the court did not issue the writ, the petitioner had no right to a return of the writ. *People v. Calyer*, 736 P.2d 1204 (Colo. 1987); *Wiedemer v. People*, 784 P.2d 739 (Colo. 1989).

**Writ issued did not comply with requirements of this section.** Where writ did not refer to the Habeas Corpus Act, did not require cer-

tification of the cause of imprisonment, and did not give notice of nature of proceeding, the order based on the writ purporting to release the prisoner was invalid. *People v. Calyer*, 736 P.2d 1204 (Colo. 1987).

**Writ served to improper respondent.** Superintendent of correctional facility was not proper respondent for purposes of the act where superintendent had no responsibility for supervising petitioner's conduct at another facility, even if superintendent may have been deemed agent of department of corrections for purposes of service of process. *People v. Calyer*, 736 P.2d 1204 (Colo. 1987).

**Insufficient notice to state authorities.** Notice to district attorney was insufficient notice to all involved in state administrative authority for purposes of determining whether proper notice had been given of petitioner's habeas corpus proceeding. *People v. Calyer*, 736 P.2d 1204 (Colo. 1987).

**Service must be made upon person who has custody of a petitioner in habeas corpus action** and therefore the director of the department of corrections or the attorney general must be personally served. *Zaborski v. Colo. Dept. of Corr.*, 812 P.2d 236 (Colo. 1991).

**Crim. P. 35(c) governing postconviction remedies did not provide basis for granting habeas corpus relief** where petition was not filed under postconviction rule, even though petition was assigned case number of petitioner's original criminal action. *People v. Calyer*, 736 P.2d 1204 (Colo. 1987).

**Allegation that the trial court lacked subject matter jurisdiction to adjudicate defendant as an habitual criminal was properly raised in a C.R.C.P. 35(c) motion for postconviction relief rather than a petition for habeas corpus** where original information did not charge defendant as an habitual criminal. *Johnson v. Gunter*, 852 P.2d 1263 (Colo. 1993).

**An improperly filed pro se habeas corpus petition should be treated as a Crim. P. 35(c) motion in order to provide review on the merits of the claims raised by a petitioner.** *Chatfield v. Colo. Court of Appeals*, 775 P.2d 1168 (Colo. 1989).

Rather than dismissing an improper habeas corpus petition, the court should convert such petition into a motion under Crim. P. 35(c) where the petitioner is acting pro se, the petitioner raises issues in the habeas corpus petition which should have been raised in a Crim. P. 35(c) motion, and the petitioner's claims are not barred by the statute of limitations. *Graham v. Gunter*, 855 P.2d 1384 (Colo. 1993).

Pro se habeas corpus petition was improperly filed in case where an invalid judgment of conviction and sentence were rendered since relief was available under Crim. P. 35 and Crim. P. 36 and the district court should have treated petition as motion under section (c) (2) of Crim. P.

35. *Kailey v. Colo. Dept. of Corr.*, 807 P.2d 563 (Colo. 1991); *Johnson v. Gunter*, 852 P.2d 1263 (Colo. 1993).

**A petition for habeas corpus relief which fails to establish prima facie that the petitioner is not validly confined** and is thus entitled to immediate release or that the petitioner has suffered a serious infringement of a fundamental constitutional right resulting in a significant loss of liberty is insufficient and should be dismissed without a hearing. *Jones v. Zavaras*, 926 P.2d 579 (Colo. 1996).

**Defendant's challenges to procedures by which he was sentenced rather than the legality of his confinement may be raised by means of a Crim. P. 35(c) motion but not by means of a habeas corpus petition.** *Jones v. Zavaras*, 926 P.2d 579 (Colo. 1996).

**Remedy of habeas corpus was available to person who was detained in Colorado** pursuant to request from Nevada parole authorities and who challenged the validity of proceedings under the Parole Supervision Act. *People v. Velarde*, 739 P.2d 845 (Colo. 1987).

**Trial court's error of failing to convert habeas corpus petition into a motion for post-conviction relief was cured by defendant's filing of postconviction motion in sentencing court.** *Johnson v. Gunter*, 852 P.2d 1263 (Colo. 1993).

**Remand required for hearing on the propriety of defendant's continued confinement as an habitual criminal after second degree assault conviction used to support habitual criminal adjudication was reversed on grounds that the trial court failed to determine defendant's competence to stand trial.** *Johnson v. Gunter*, 852 P.2d 1263 (Colo. 1993).

**The remedy of habeas corpus cannot be pursued to redress an unlawful restraint where the petitioner is not in the custody of the respondent.** *Van Riper v. Sheriff of Jefferson County*, 868 P.2d 395 (Colo. 1994).

**The relief requested in a habeas corpus proceeding must have a practical effect on the restraint of the prisoner at the time of the habeas corpus hearing.** Habeas corpus cannot be granted based on a complaint of former punitive segregation. *Brant v. Fielder*, 883 P.2d 17 (Colo. 1994).

**Where petitioner was a prisoner of the state of Wisconsin and was imprisoned in the Colorado prison system under the Interstate Corrections Compact, petitioner was being detained for a criminal matter and the district court properly applied the provisions of this section.** *Brant v. Fielder*, 883 P.2d 17 (Colo. 1994).

**Habeas corpus not appropriate to contest DOC reclassification due to the existence of a detainer** because such reclassification does not rise to the level of a constitutional violation. *Reed v. People*, 745 P.2d 235 (Colo. 1987); *Butler v. Zavaras*, 924 P.2d 1060 (Colo. 1996).

## B. Civil Proceeding.

**Habeas corpus is a civil proceeding.** *Geer v. Alaniz*, 137 Colo. 432, 326 P.2d 71 (1958); *Wright v. Tinsley*, 148 Colo. 258, 365 P.2d 691 (1961); *Buhler v. People*, 151 Colo. 345, 377 P.2d 748 (1963); *Hithe v. Nelson*, 172 Colo. 179, 471 P.2d 596 (1970); *Mote v. Koch*, 173 Colo. 82, 476 P.2d 255 (1970).

**Habeas corpus is a civil proceeding independent of the criminal charge.** *Mulkey v. Sullivan*, 753 P.2d 1226 (Colo. 1988).

**Habeas corpus is independent of the criminal charge.** An application for a writ of habeas corpus is a civil action, independent of the criminal charge, and is no part of an inquiry based on an information. *Oates v. People*, 136 Colo. 208, 315 P.2d 196 (1957); *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963); *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

**Public providing of counsel is not authorized.** Proceedings in habeas corpus are civil actions. There is no constitutional or statutory provision which permits the appointment of counsel for plaintiffs in civil actions. Therefore the appointment of counsel and the payment of fees therefor out of public funds is not authorized and is not and cannot be sanctioned. *McGrath v. Tinsley*, 138 Colo. 18, 328 P.2d 579 (1958).

**Judgment is reviewable by writ of error.** Actions in habeas corpus are civil in nature, and a judgment therein is reviewable by writ of error. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**The rules of civil procedure do not govern the procedure and practice in any special statutory proceeding so far as they are inconsistent or in conflict therewith; this section concerning habeas corpus in criminal matters is such special statutory proceeding and its provisions are controlling.** *Wright v. Tinsley*, 148 Colo. 258, 365 P.2d 691 (1961).

Because this section is a special statutory proceeding, the rules of civil procedure do not apply insofar as they are inconsistent or in conflict with the provisions of this section. *Evans v. District Court*, 194 Colo. 299, 572 P.2d 811 (1977).

**There is no conflict between C.R.C.P. 98 and this section.** *Evans v. District Court*, 194 Colo. 299, 572 P.2d 811 (1977).

**Neither do rules governing proceedings on error in criminal cases.** Habeas corpus is in the nature of a civil action, hence the rules governing proceedings on error in criminal cases do not apply, and an abstract of the record and assignments of error are not necessary. *Barrett v. People*, 136 Colo. 144, 315 P.2d 192 (1957), overruled on another point, *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**No class action may be brought.** Although habeas corpus is a civil proceeding, the rules of



civil procedure, providing for class actions, do not apply. The very nature of habeas corpus proceedings forbids class actions. *Riley v. City & County of Denver*, 137 Colo. 312, 324 P.2d 790 (1958).

**Rules of civil procedure do govern venue.** Suits seeking relief by habeas corpus being civil in nature, the question of venue is governed by Colorado rules of civil procedure. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

Habeas corpus being civil in nature, C.R.C.P. 98 governs venue. *Evans v. District Court*, 194 Colo. 299, 572 P.2d 811 (1977).

**Jurisdictional requirement.** Requirement that petitions for writs of habeas corpus shall be accompanied by a copy of the warrant of commitment is a mandatory requirement and is therefore jurisdictional. Prisoners must comply with the requirement, and the courts may not waive it. *Evans v. District Court*, 194 Colo. 299, 572 P.2d 811 (1977); *Butler v. Zavaras*, 924 P.2d 1060 (Colo. 1996).

**Rules of civil procedure apply to habeas corpus actions** when the rules are not in conflict with habeas corpus statutes. *Zaborski v. Dept. of Corr.*, 812 P.2d 236 (Colo. 1991).

**This act contemplates a less structured and more abbreviated hearing procedure** than that used in other civil proceedings. Under the act, the court shall act in a summary way. *Cardiel v. Brittain*, 833 P.2d 748 (Colo. 1992).

**Applied in** *Gomez v. Colo. State Parole Bd.*, 470 F. Supp. 778 (D. Colo. 1979); *Shea v. Heggie*, 624 F.2d 175 (10th Cir. 1980); *Beals v. Wilson*, 631 P.2d 1181 (Colo. App. 1981); *Holder v. Ricketts*, 650 P.2d 544 (Colo. 1982); *Schumm v. Nelson*, 659 P.2d 1389 (Colo. 1983).

## II. GROUNDS FOR ISSUANCE.

### A. In General.

**In order to invoke the remedy of habeas corpus, adequate grounds must be alleged.** *McKenna v. Tinsley*, 141 Colo. 63, 346 P.2d 584 (1959), cert. denied, 362 U.S. 981, 80 S. Ct. 1066, 4 L. Ed.2d 1015 (1960).

**Habeas corpus is a limited remedy in Colorado.** *Smith v. Tinsley*, 223 F. Supp. 68 (D. Colo. 1963); *Martinez v. Tinsley*, 241 F. Supp. 730 (D. Colo. 1965).

**In a habeas corpus action by a person convicted of a crime, the sole question for consideration** is whether the petitioner therein was convicted in a court having jurisdiction of his person and of the charge in the information, and the judgment and sentence were within the statutory limitations. *Freeman v. Tinsley*, 135 Colo. 62, 308 P.2d 220, cert. denied, 355 U.S. 843, 78 S. Ct. 65, 2 L. Ed.2d 52 (1957); *McGrath v. Tinsley*, 138 Colo. 18, 328 P.2d 579 (1958); *Mendez v. Tinsley*, 139 Colo. 127, 336 P.2d 706 (1959); *Lowe v. People*, 139 Colo. 578,

342 P.2d 631 (1959); *McKenna v. Tinsley*, 141 Colo. 63, 346 P.2d 584 (1959), cert. denied, 362 U.S. 981, 80 S. Ct. 1066, 4 L. Ed.2d 1015 (1960); *Medberry v. Patterson*, 142 Colo. 180, 350 P.2d 571 (1960); *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L. Ed.2d 507 (1962); *Kostal v. Tinsley*, 152 Colo. 196, 381 P.2d 43 (1963); *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963); *Titmus v. Tinsley*, 153 Colo. 96, 384 P.2d 728 (1963); *Specht v. Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963); *Smith v. Tinsley*, 223 F. Supp. 68 (D. Colo. 1963); *King v. Tinsley*, 158 Colo. 99, 405 P.2d 689 (1965); *Martinez v. Tinsley*, 241 F. Supp. 730 (D. Colo. 1965); *Shearer v. Patterson*, 159 Colo. 319, 411 P.2d 247 (1966).

### B. Rights Protected.

**Right to speedy trial is protected by habeas corpus.** The proceeding by habeas corpus is the proper remedy, under the statute of this state, to protect the right of persons charged with the higher class of crimes to a speedy trial, according to law. *In re Garvey*, 7 Colo. 502, 4 P. 758 (1884); *Cummins v. People*, 4 Colo. App. 71, 34 P. 734 (1893); *Rader v. People*, 138 Colo. 397, 334 P.2d 437 (1959).

**Right to speedy trial may now be raised under Crim. P. 35(b).** When the issues before a trial court in a habeas corpus proceeding raise substantive constitutional questions concerning the right to a speedy trial, the issues are within the purview of postconviction remedy, and a petition for habeas corpus would be treated as a motion under Crim. P. 35(b). *Dodge v. People*, 178 Colo. 71, 495 P.2d 213 (1972).

**Defendant's writ of habeas corpus was properly denied because speedy trial claims should be pursued through C.A.R. 21 petitions and post-conviction remedies under Crim. P. 35.** *Vreeland v. Weaver*, 193 P.3d 836 (Colo. App. 2008).

**Habeas corpus is not the proper remedy to accomplish modification of a sentence.** *Wright v. Tinsley*, 148 Colo. 258, 365 P.2d 691 (1961).

**Or when an arraignment is faulty.** Habeas corpus is not available for an alleged denial of due process occasioned by a faulty arraignment or a coerced plea. *Smith v. Tinsley*, 223 F. Supp. 68 (D. Colo. 1963). See *Specht v. Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963).

**Or for involuntary pleas.** Habeas corpus is not the proper remedy to secure an accused's release from the penitentiary after the imposition of sentence upon a plea of guilty, on the ground that the plea was involuntarily made. *Lowe v. People*, 139 Colo. 578, 342 P.2d 631 (1959).

**Where allegations of a petition for habeas corpus relief go to validity of petitioner's plea of guilty, they are properly brought under Crim.**

P. 35(b). *Martinez v. Tinsley*, 158 Colo. 236, 405 P.2d 943 (1965).

**Crim. P. 35 also affords a remedy for an improper sentence.** Crim. P. 35 in no way seeks to impose any conditions on the issuance of habeas corpus writs — it only affords a remedy for those seeking a proper sentence, a remedy which the prisoner may seek or not seek at his election. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**Incarceration in an institution other than that provided by law is void.** Habeas corpus does not lie to obtain release from an erroneous sentence, but a sentence beyond the jurisdiction of the sentencing court, or providing for incarceration in an institution other than that provided by law is void. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**Trial judge's discretion as to institution not reviewable by habeas corpus.** Where the sentence of one convicted of a crime to the state reformatory or to the penitentiary rests in the discretion of the trial court, a petition for a writ of habeas corpus is properly denied where the record discloses that the petitioners, who were 18 years of age, had four previous convictions for various offenses and the probation officer recommended sentences to the penitentiary rather than to the state reformatory, and petitioners were so sentenced. *Roy v. Tinsley*, 142 Colo. 241, 350 P.2d 564 (1960).

**An adjudication that an insane person has been restored to reason cannot be had in habeas corpus proceedings.** *Pigg v. Tinsley*, 158 Colo. 160, 405 P.2d 687 (1965).

**Once adjudged sane, a person's imprisonment may be tested by habeas corpus.** The proper method for appellant who was transferred to state penitentiary from state hospital after acquittal on grounds of insanity to test the constitutionality of his imprisonment is by a habeas corpus proceeding either in the state or federal courts. *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967).

**A person on parole can resort to the remedy of habeas corpus where parole officers are not following the statutory mandate with regard to revocation proceedings.** *Schooley v. Wilson*, 150 Colo. 483, 374 P.2d 353 (1962).

**When parolee is actually, instead of constructively, imprisoned.** Parolee's actual imprisonment at a time when he should have been only constructively imprisoned constituted an unlawful restraint of his liberty. *Schooley v. Wilson*, 150 Colo. 483, 374 P.2d 353 (1962).

**Prisoner extradited to Colorado cannot contest extradition by this writ.** Detention under extradition and detention following conviction of a crime relate to different procedures, and an illegal extradition is impotent to endanger a jurisdictional question arising out of the criminal charge. *Lowe v. People*, 139 Colo. 578, 342 P.2d 631 (1959).

**Sheriff's holding of fugitive prior to extradition to another state may.** A habeas corpus petitioner charged as an out-of-state fugitive, not the sheriff-respondent, has the burden of going forward with clear and convincing evidence to prove that he was not in the demanding state at the time of the crime or that he is not the individual named in the extradition papers. *Ede v. Bray*, 178 Colo. 99, 495 P.2d 1139 (1972).

**Where the record does not show that the petitioner for writ of habeas corpus is charged with any offense under the laws of the demanding state, a warrant for arrest issued pursuant to a demand for extradition is without authority of law.** *Buhler v. People*, 151 Colo. 345, 377 P.2d 748 (1963).

**The issuance of a governor's warrant is prima facie evidence that a habeas corpus petitioner is substantially charged with a crime and is a fugitive from justice.** *Ede v. Bray*, 178 Colo. 99, 495 P.2d 1139 (1972).

**Remedy for improper treatment in mental hospital.** Writ of habeas corpus is a proper remedy for persons committed to a state hospital after a plea of not guilty by reason of insanity to challenge a lack of treatment and to obtain a remedy addressing appropriate treatment short of immediate release. *Marshall v. Kort*, 690 P.2d 219 (Colo. 1984).

**Denial of free transcript is not grounds for issuance of writ.** The denial of a request for a free transcript, even if timely made, affords no basis for the issuance of a writ of habeas corpus. *McKenna v. Tinsley*, 141 Colo. 63, 346 P.2d 584 (1959), cert. denied, 362 U.S. 981, 80 S. Ct. 1066, 4 L. Ed.2d 1015 (1960); *Medberry v. Patterson*, 142 Colo. 180, 350 P.2d 571 (1960).

**Habeas corpus is not the correct vehicle to allege invasion of attorney-client relationship by electronic eavesdropping.** It should be brought to the attention of the trial court either by a pre-trial motion to suppress or at the trial when the prosecution offers evidence which the defendant claims is "tainted", because of the manner in which it was obtained by the prosecution. *Ferrell v. Vogt*, 161 Colo. 549, 423 P.2d 844 (1967).

**Writ of habeas corpus is proper remedy for claim that defendant is being unconstitutionally denied the opportunity to be considered for parole as other postconviction relief for such claim is not available.** *Naranjo v. Johnson*, 770 P.2d 784 (Colo. 1984); *White v. People*, 866 P.2d 1371 (Colo. 1994).

**Inquiry undertaken in a habeas corpus proceeding is limited to a determination of the validity of the petitioner's confinement at the time of the hearing.** *White v. People*, 866 P.2d 1371 (Colo. 1994); *Brant v. Fielder*, 883 P.2d 17 (Colo. 1994).

**Any restriction in excess of legal restraint that substantially infringes on basic rights may be remedied through habeas corpus, even if**



total discharge does not result. *Naranjo v. Johnson*, 770 P.2d 784 (Colo. 1989).

**Habeas corpus action will not lie with respect to an inmate's department of corrections security level** because such classification does not involve a constitutional right. *Reed v. People*, 745 P.2d 235 (Colo. 1987).

**Habeas corpus relief is not available for review of loss of good-time credits resulting from prison disciplinary proceeding** because other remedies are available, and the requested relief would have no current effect on petitioner's confinement. *Kodama v. Johnson*, 786 P.2d 417 (Colo. 1990).

**The court is precluded from granting a writ of habeas corpus where another legal remedy exists.** Where the prisoner is subject to the jurisdiction of the Wisconsin authorities, but is in Colorado under the provisions of the Interstate Corrections Compact, a legal avenue exists for him to be returned to the sending state. *Brant v. Fielder*, 883 P.2d 17 (Colo. 1994).

**Habeas corpus petition should be dismissed without a hearing** unless factual allegations in the petition make a prima facie showing of invalid confinement or demonstrate a serious infringement of a fundamental constitutional right. *White v. People*, 866 P.2d 1371 (Colo. 1994).

**Habeas corpus petition is properly dismissed** where petitioner fails to allege that he is entitled to discharge or that a fundamental constitutional right was violated. *Deason v. Kautzky*, 786 P.2d 420 (Colo. 1990).

Habeas corpus petition is properly dismissed where petitioner has not alleged he is entitled to immediate release but instead alleges he has been denied credit for earned good time which would grant him an earlier parole date. *Pearson v. Diesslan*, 848 P.2d 364 (Colo. 1993); *Badger v. Diesslan*, 850 P.2d 149 (Colo. 1993); *Rather v. Colo. State Bd. of Parole*, 856 P.2d 860 (Colo. 1993).

Habeas corpus petition is properly dismissed because allegation that department denied prisoner the use of his color television does not allege violation of a fundamental constitutional right. *Brant v. Fielder*, 883 P.2d 17 (Colo. 1994).

**Habeas corpus petition properly dismissed as premature** when inmate could not show he was entitled to release at time petition was filed. *Thorson v. Dept. of Corr.*, 801 P.2d 540 (Colo. 1990).

**When the municipal court properly had jurisdiction** over both the subject matter and the defendant, the failure of the court to advise the defendant of his right to counsel during a guilty plea hearing was not subject to correction by habeas corpus. *Mulkey v. Sullivan*, 753 P.2d 1226 (Colo. 1988).

**Petition under this section moot** where petitioner was provided a parole revocation hearing and was represented by counsel prior to the

scheduled hearing on the petition made pursuant to this section. *Blea v. Colo. State Bd. of Parole*, 779 P.2d 1353 (Colo. 1989).

**A prisoner mistakenly released before serving a complete sentence** is not entitled to have credited against his sentence the time he subsequently served in another state for convictions unrelated to the original sentence because reincarceration would not be inconsistent with fundamental principles of liberty and justice in that the prisoner's conduct after being mistakenly released was not such as to reestablish himself in the community, but to leave the state at his first opportunity and be arrested and convicted of charges in another jurisdiction. *Brown v. Brittain*, 773 P.2d 570 (Colo. 1989).

**Writ of habeas corpus properly denied as inmate's right to payment of postage fees by the state** for mailing costs associated with litigation is not a fundamental constitutional right protected by habeas corpus proceeding. *Reece v. Johnson*, 793 P.2d 1152 (Colo. 1990).

### III. DUTIES OF COURT.

#### A. In General.

**A habeas corpus writ is an extraordinary writ** which may be procured, not as a matter of right, but in the discretion of the court. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**Writ not necessarily issued without probable cause.** The writ of habeas corpus is a writ of right, but not necessarily a writ issuable without a showing of probable cause. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**This section, prescribing the duty of the court upon application for a writ of habeas corpus, is mandatory,** and to impose other or additional conditions on one seeking the writ is to do that which the constitution and the statute have said shall not be done and amounts pro tanto to a suspension of the writ. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**Petitions for habeas corpus must be treated as such and granted or denied.** *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**Prohibition does not lie, in the supreme court or district courts, to prevent courts having jurisdiction of habeas corpus** from proceeding to grant or deny the relief requested. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**A court has no power to stay proceedings upon an order** directing the unconditional discharge of a prisoner upon a writ of habeas corpus. *Geer v. Alaniz*, 137 Colo. 432, 326 P.2d 71 (1958).

**Petition for a writ of habeas corpus can only be considered after a final judgment.** In a criminal prosecution where the defendant stands unarraigned and untried, a petition for a writ of habeas corpus filed in such action and

relating only to preliminary proceedings cannot be considered by the supreme court in the absence of a final judgment. *Oates v. People*, 136 Colo. 208, 315 P.2d 196 (1957).

**Courts will not ordinarily entertain successive applications for writs of habeas corpus** based upon the same grounds and the same facts, or on other grounds or facts which existed when the first application was made, whether or not they were presented at that time. *Marshall v. Geer*, 140 Colo. 305, 344 P.2d 440 (1959).

**The judgment of guilt and the sentence imposed on that judgment are presumed to be valid** until the contrary is made to appear. *Lowe v. People*, 139 Colo. 578, 342 P.2d 631 (1959); *Medberry v. Patterson*, 142 Colo. 180, 350 P.2d 571 (1960); *Bates v. Tinsley*, 143 Colo. 390, 353 P.2d 76 (1960).

**Regulatory provisions for parole contemplate grant of parole by parole board** and thereafter either rescission or suspension is necessary to curtail effectiveness prior to release of prisoner. Although parole agreement is anticipated, it is not a condition to grant of parole but a condition to release on parole. Regulations do not suggest that grant of parole not effective until prisoner actually released from custody. Prisoner granted parole to a county detainer and serving consecutive sentence on another conviction made prima facie case for writ of habeas corpus relief when he alleged that parole had not been suspended or rescinded. *Cardiel v. Brittan*, 833 P.2d 748 (Colo. 1992); *Van Riper v. Sheriff of Jefferson County*, 868 P.2d 395 (Colo. 1994).

#### B. Action on Petition.

**Where a petition on its face is insufficient, a court is correct in denying it.** *McGrath v. Tinsley*, 138 Colo. 18, 328 P.2d 579 (1958); *Valentine v. Tinsley*, 143 Colo. 19, 351 P.2d 825 (1960); *Furlow v. Tinsley*, 151 Colo. 280, 377 P.2d 132 (1962); *Bitner v. Tinsley*, 151 Colo. 367, 378 P.2d 203 (1963); *Titmus v. Tinsley*, 153 Colo. 96, 384 P.2d 728 (1963); *Minor v. Tinsley*, 154 Colo. 249, 389 P.2d 850 (1964); *Bizup v. Tinsley*, 155 Colo. 131, 393 P.2d 556 (1964); *Coleman v. Tinsley*, 155 Colo. 245, 393 P.2d 739 (1964); *King v. Tinsley*, 158 Colo. 99, 405 P.2d 689 (1965).

**This is not a denial of due process or equal protection.** Denial of a petition for a writ of habeas corpus, which shows upon its face that petitioner is not entitled to any relief, does not deny him due process or equal protection of the law. *Hatch v. Tinsley*, 143 Colo. 170, 352 P.2d 670 (1960); *Bitner v. Tinsley*, 151 Colo. 367, 378 P.2d 203 (1963).

**Petition for writ must be discharged if it is not accompanied by the warrant of commitment.** Failure to follow the provisions of this section, requiring that a petition for a writ of habeas corpus in any supposed criminal matter

shall be accompanied by a copy of the warrant of commitment, precludes review of judgment denying petition on writ of error, since the supreme court has nothing but allegations of pleading from which to determine specific convictions upon which commitment was made. *Wright v. Tinsley*, 148 Colo. 258, 365 P.2d 691 (1961); *Garrett v. Knight*, 173 Colo. 419, 480 P.2d 569 (1971).

**Denial of petition for writ of habeas corpus held correct.** *People v. Jackson*, 180 Colo. 135, 502 P.2d 1106 (1972); *Reece v. Johnson*, 793 P.2d 1152 (Colo. 1990).

**Facts establishing prima facie case entitle petitioner to hearing.** Where a petition for a writ of habeas corpus alleged that the petitioner entered his plea of guilty to an information charging him with obtaining moneys by means and use of the confidence game, under the mistaken belief that the charge in the information was proper and correct, whereas in fact all of the acts, deeds, activities, intentions, and actions of petitioner were sufficient at law only to make him guilty of a misdemeanor and service of sentence was begun but was vacated and petitioner discharged by court order, but petitioner was again imprisoned by the warden against his will, such facts were sufficient to establish a prima facie case entitling petitioner to a hearing. *People ex rel. Metzger v. District Court*, 121 Colo. 141, 215 P.2d 327 (1949); *Espinoza v. Tinsley*, 154 Colo. 347, 390 P.2d 941 (1964); *Osborne v. Van Cleave*, 166 Colo. 398, 443 P.2d 988 (1968).

**District court incorrectly decided that petitioner had not established a prima facie case** where the petitioner presented a notice of parole board action granting parole and no evidence was presented that parole had been rescinded or suspended, as required by parole board regulations. The motion to dismiss should have been denied. *Cardiel v. Brittan*, 833 P.2d 748 (Colo. 1992).

**If no prima facie case is established on face of petition, there is no right to a hearing.** *Reed v. People*, 745 P.2d 235 (Colo. 1987).

#### C. Jurisdiction.

**District courts have original jurisdiction in habeas corpus proceedings.** *Ex parte Arakawa*, 78 Colo. 193, 240 P. 940 (1925); *Petition of Phillips*, 93 Colo. 203, 24 P.2d 755 (1933); *Rogers v. Best*, 115 Colo. 245, 171 P.2d 769 (1946); *Hart v. Best*, 119 Colo. 569, 205 P.2d 787 (1949); *Stilley v. Tinsley*, 156 Colo. 66, 385 P.2d 677 (1963).

**Jurisdiction conferred by this section and constitution.** District courts have jurisdiction in habeas corpus proceedings under this section as well as under the provisions of § 11 of art. VI, Colo. Const. *People ex rel. Metzger v. District Court*, 121 Colo. 141, 215 P.2d 327 (1949).



**This section uses the plural "district courts", without any limitation.** To say that any district court is without jurisdiction to determine questions properly presented by petitions for habeas corpus runs head-on into and does violence to the above legislative pronouncement. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**Applicant may seek the writ in the most convenient forum.** This supreme court accepts this section at its face value and so construes it as to make applications for the writ available in the forum most convenient for the applicant, and recognize no restrictions attempted to be imposed upon the right of one to choose any forum provided by statute for asserting his rights and the protection afforded by the constitution and statutes. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**Petitions should be addressed to the district court, not an individual judge.** Except in vacation, petitions should be addressed to the district court, not to an individual judge, because the power to act is the court's, not the man's. *People ex rel. Wyse v. District Court*, 180 Colo. 88, 503 P.2d 154 (1972).

**Jurisdiction will be presumed to issue the writ.** By this section the district courts and the judges thereof are given general jurisdiction to issue the writ of habeas corpus, and the jurisdiction to issue the writ in a particular case will be presumed in the absence of a showing to the contrary. *People v. District Court*, 6 Colo. 534 (1883); *Atchison, T. & S. F. R. R. v. Nicholls*, 8 Colo. 188, 6 P. 512 (1885); *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 22 P. 790 (1889).

**The supreme court may also assume original jurisdiction** in habeas corpus cases, but the writ in such a case may not be used as a writ of error. *People ex rel. Burchinell v. District Court*, 22 Colo. 422, 45 P. 402 (1896); *In re Popejoy*, 26 Colo. 32, 55 P. 1083 (1899); *Martin v. District Court*, 37 Colo. 110, 86 P. 82 (1906); *Ex parte Stidger*, 37 Colo. 407, 86 P. 219 (1906); *Ex parte Arakawa*, 78 Colo. 193, 240 P. 940 (1925); *Hart v. Best*, 119 Colo. 569, 205 P.2d 787 (1949).

**The justices of the supreme court acting singly or out of term, are without constitutional jurisdiction** and authority to issue the writ of habeas corpus or to hear or determine the matters arising thereon, despite the authority attempted to be given by this section. *In re Garvey*, 7 Colo. 502, 4 P. 758 (1884).

**Writ of habeas corpus may not be prosecuted in a district court to challenge an order of a different district court in another judicial district** concerning presentence confinement credit. *Pipkin v. Brittain*, 713 P.2d 1358 (Colo. App. 1985).

**A court may correct an excessive sentence.** Where a judgment is merely excessive and the court which pronounces it is one of general

jurisdiction, it is not void ab initio because of the excess, but is good so far as the power of the court extends, and is invalid only as to the excess, and therefore a person in custody under such sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as it is within the power of the court to impose. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**If an illegal sentence has been pronounced, the court has power to substitute a legal sentence,** and this power is not impaired by the expiration of the term of court, during which the judgment was pronounced. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**An improper mittimus will be corrected, but prisoner will not be discharged.** Where upon petitioner's own showing, the only relief to which he was entitled was a correction of the wording of the mittimus under which he was confined to conform to the judgment, the issuance of a new mittimus and the denial of discharge on a writ of habeas corpus was proper. *Sexton v. People*, 143 Colo. 35, 351 P.2d 842 (1960); *Bernard v. Tinsley*, 144 Colo. 244, 355 P.2d 1098 (1960), cert. denied, 365 U.S. 830, 81 S. Ct. 718, 5 L. Ed.2d 708 (1961).

**Unless the mittimus is void.** Where release on habeas corpus is sought on the ground that the sentence imposed on a petitioner is void, and the court determines that mittimus under which the warden of a prison held the petitioner is void, the court's only duty is to order the petitioner released from the custody of the warden. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

**Or a commutation superceded the mittimus.** The alleged commutation, if true, may entitle petitioner to some relief. The commutation superceded the mittimus issued upon the original conviction and reduced the petitioner's minimum sentence. Unless it be shown by some evidence in a hearing that the commutation of the governor was revoked, the petitioner could not be required by the warden or the parole board, or anyone else, to resume serving the five year minimum sentence originally imposed by the court. They are not apparent on the face of the petition. It may be that, had a hearing been held and these records produced, the court would have been justified in discharging the writ. The error committed is the summary refusal by the court to issue the writ or grant a hearing when the allegations on the face of the petition indicated recitals that entitled the petitioner to the writ forthwith. *Sharp v. Tinsley*, 147 Colo. 84, 362 P.2d 859 (1961).

**Petitioner may seek federal habeas corpus when all state remedies are exhausted.** Where the Colorado supreme court had reached a conclusion on the substantive issue of the legality of a search and seizure, this portion of the decision was only dictum and therefore not binding upon

a trial court where it is stated in such a way that under ordinary circumstances, a trial court would feel bound by the decision, and would therefore deny a motion made pursuant to Crim. P. 35(b) on the grounds that the Colorado supreme court had already decided the question; where habeas corpus was unavailable to the petitioner, for all practical purposes the petitioner has exhausted his state remedies and a petition for federal habeas corpus was properly before the district court. *Peters v. Dillon*, 227 F. Supp. 487 (D. Colo. 1964), *aff'd* on other grounds, 341 F.2d 337 (10th Cir. 1965).

**But, not so long as trial court had jurisdiction over the crime, defendant, and sentence.** Habeas corpus will never lie to afford relief from a conviction obtained at a trial at which

any of the defendant's federal or state constitutional procedural rights have been violated, so long as the trial court in question had jurisdiction over the crime and over the defendant and imposed a sentence within statutory limits. No matter how unfair the trial, no matter what constitutional rights were violated, habeas corpus cannot be used to remedy the wrong. *Peters v. Dillon*, 227 F. Supp. 487 (D. Colo. 1964), *aff'd* on other grounds, 341 F.2d 337 (10th Cir. 1965).

**Petitions dismissed for failure to exhaust state judicial remedies.** Petitions for federal writ of habeas corpus were dismissed on the grounds that the petitioner had failed to exhaust available state judicial remedies which could provide the relief he sought. *Peterson v. Ricketts*, 495 F. Supp. 312 (D. Colo. 1980).

**13-45-102. Petition for relief - civil cases.** When any person not being committed or detained for any criminal or supposed criminal matter is confined or restrained of his liberty under any color or pretense whatever, he may proceed by appropriate action as prescribed by the Colorado rules of civil procedure in the nature of habeas corpus which petition shall be in writing, signed by the party or some person on his behalf, setting forth the facts concerning his imprisonment and wherein the illegality of such imprisonment consists, and in whose custody he is detained. The petition shall be verified by the oath or affirmation of the party applying or some other person on his behalf. If the confinement or restraint is by virtue of any judicial process or order, a copy thereof shall be annexed thereto or an affidavit made that the same has been demanded and refused. The same proceedings shall thereupon be had in all respects as are directed in section 13-45-101.

**Source:** R.S. 353, § 2. G.L. § 1324. G.S. § 1610. R.S. 08: § 2918. C.L. § 6487. CSA: C. 77, § 2. CRS 53: § 65-1-2. C.R.S. 1963: § 65-1-2.

## ANNOTATION

**Law reviews.** For article, "One Year Review of Criminal Law and Procedure", see 36 *Dicta* 34 (1959). For article, "Recovering the Parentally Kidnapped Child", see 12 *Colo. Law.* 1798 (1983).

**The purpose of habeas corpus proceedings is to determine whether a person is unlawfully restrained of his liberty.** *Johnson v. Black*, 137 Colo. 119, 322 P.2d 99 (1958).

**A juvenile court has exclusive jurisdiction of adoption matters, but such jurisdiction has nothing to do with habeas corpus proceedings involving unlawful restraint.** *Johnson v. Black*, 137 Colo. 119, 322 P.2d 99 (1958).

**Strict technicalities of habeas corpus that are applied in criminal case have no application in custodial questions.** *Fackerell v. District Court*, 133 Colo. 370, 295 P.2d 682 (1956).

**Habeas corpus is a proper remedy where a mother is not a party to an adoption.** *Fackerell v. District Court*, 133 Colo. 370, 295 P.2d 682 (1956).

**Mother may proceed by habeas corpus to regain custody of children from guardians.** Where a full hearing was accorded guardians in a habeas corpus proceeding by a mother to

regain custody of her child from guardians, as such, this did not cure the infirmity which resulted from the failure of the juvenile court to give guardians notice of mother's prior petition to dismiss guardianship proceedings. *Woodson v. Ingram*, 173 Colo. 65, 477 P.2d 455 (1970).

**Stranger may not utilize writ to get children from parents.** Habeas corpus is an available remedy to adjudicate custody of children under certain circumstances. But, a stranger lacks standing to maintain habeas corpus looking to an award of custody as against the parents of the child who are presumed to be entitled to the custody. *Lopez v. Smith*, 146 Colo. 180, 360 P.2d 967 (1961).

**One who seeks custody through habeas corpus must show a prima facie right to custody.** The habeas corpus petition alleges abandonment of the child by the parents. It seeks to establish a right based on past custody in fact although admittedly not in law. In the absence of a right to custody based on an adjudication decreeing adoption on one of the statutory grounds or on a finding of dependency under that statute, a third person may not maintain a habeas corpus action seeking an award of cus-



tody of a child as against the child's natural parents upon an allegation of prior abandonment by the parents. *Lopez v. Smith*, 146 Colo. 180, 360 P.2d 967 (1961).

**A district court in habeas corpus proceedings has jurisdiction to determine whether a child is being unlawfully restrained by the grandparents.** Such determination cannot in any manner affect the outcome of any adoption proceedings. An adjudication in the habeas corpus proceedings cannot be considered as an adjudication of abandonment as defined in the adoption statute or as used in the dependent and neglected children statute, for two reasons: (1) The question of abandonment is not an issue; (2) the district court has no jurisdiction over abandonment. *Johnson v. Black*, 137 Colo. 119, 322 P.2d 99 (1958).

**Habeas corpus may be utilized to determine custody of child originally domiciled in another state in an emergency.** In the ordinary case, absent an emergency situation affecting the

immediate needs and welfare of the child, an award of custody of a minor child domiciled in another state, made by a court having jurisdiction to do so, will be recognized under the long established custom of comity among the several states. However, under the doctrine of *parens patriae*, where an emergency exists concerning the immediate needs and welfare of a child within this state, our courts may, in such circumstances, enter custodial orders for the protection of such child, notwithstanding the child's domicile elsewhere and the existence of otherwise valid orders to the contrary theretofore entered in a sister state having jurisdiction of the parties. Such power may be exercised not only in ordinary custody proceedings, but also in habeas corpus proceedings as were pending in the present controversy. *Wilson v. Wilson*, 172 Colo. 566, 474 P.2d 789 (1970).

**Applied in** *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974).

**13-45-103. Hearing - pleadings - discharge.** (1) Upon the return of the writ of habeas corpus, a day shall be set for the hearing of the cause of imprisonment or detainer not exceeding five days thereafter, unless the prisoner requests a longer time. The prisoner may deny any of the material facts set forth in the return or may allege any fact to show either that the imprisonment or detention is unlawful or that he is then entitled to his discharge, which allegations or denials shall be made on oath. The return may be amended by leave of the court, before or after the same is filed as also may all suggestions made against it, that thereby all material facts may be ascertained. The court shall proceed in a summary way to settle the facts by hearing the testimony and arguments of all parties interested civilly, if there are any, as well as of the prisoner and the person who holds him in custody and shall dispose of the prisoner as the case may require.

(2) If it appears that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes:

(a) Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum, or person;

(b) Where, though the original imprisonment was lawful, yet by some act, omission, or event which has subsequently taken place, the party has become entitled to his discharge;

(c) Where the process is defective in some substantial form required by law;

(d) Where the process, though in proper form, has been issued in a case or under circumstances where the law does not allow process or orders for imprisonment or arrest to issue;

(e) Where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him;

(f) Where the process appears to have been obtained by false pretense or bribery;

(g) Where there is no general law, nor any judgment, order, or decree of a court to authorize the process, if in a civil suit, nor any conviction if in a criminal proceeding.

(3) No court on the return of a habeas corpus shall inquire into the legality or justice of a judgment or decree of a court legally constituted, in any other manner. In all cases where the imprisonment is for a criminal or supposed criminal matter, if it appears to the court that there is sufficient legal cause for the commitment of the prisoner although such commitment may have been informally made, or without due authority, or the process may have been executed by a person not authorized, the court shall make a new commitment, in proper form and directed to the proper officer, or admit the party to bail if the case is bailable.

**Source:** R.S. p. 353, § 3. G.L. § 1325. G.S. § 1611. R.S. 08: § 2919. C.L. § 6488. CSA: C. 77, § 3. CRS 53: § 65-1-3. C.R.S. 1963: § 65-1-3.

## ANNOTATION

**Law reviews.** For article, "Post-Convention Remedies in Colorado Criminal Cases", see 31 Rocky Mt. L. Rev. 249 (1951). For note, "Habeas Corpus in Colorado for the Convicted Criminal", see 30 Rocky Mt. L. Rev. 145 (1958).

To warrant a habeas corpus hearing the court must have jurisdiction of the respondent and the person allegedly suffering restraint. To satisfy this requirement it usually is necessary that the alleged restraint shall be exercised upon such person within the state. Nevertheless, if it appears that respondent is able to produce such person, it is generally considered that the writ may issue, notwithstanding he is not within the state. Ex parte Emerson, 107 Colo. 83, 108 P.2d 866 (1940).

In a habeas corpus proceeding by a person convicted of a crime, the sole question for consideration is whether the petitioner was convicted in a court having jurisdiction over his person of the charge in the information and whether judgment and sentence were within the statutory limitations. In re Garvey, 7 Colo. 384, 3 P. 903 (1884); Petition of Phillips, 93 Colo. 203, 24 P.2d 755 (1933); People ex rel. Metzger v. District Court, 121 Colo. 141, 215 P.2d 327 (1949); Farrell v. District Court, 135 Colo. 329, 311 P.2d 410 (1957); Stilley v. Tinsley, 153 Colo. 66, 385 P.2d 677 (1963); Ruark v. Tinsley, 158 Colo. 565, 408 P.2d 969, cert. denied, 380 U.S. 946, 85 S. Ct. 1032, 13 L. Ed.2d 965 (1965); Henry v. Tinsley, 344 F.2d 109 (10th Cir. 1965); People ex rel. Patterson v. District Court, 157 Colo. 69, 401 P.2d 88 (1965); Breckenridge v. Patterson, 374 F.2d 857 (10th Cir.), cert. denied, 389 U.S. 801, 88 S. Ct. 9, 19 L. Ed.2d 56 (1967); De Baca v. Trujillo, 167 Colo. 311, 447 P.2d 533 (1968).

In habeas corpus proceedings, judicial inquiry generally is limited to an investigation of the validity of the petitioner's confinement at the time of the hearing. Where petitioner alleged only that his place of confinement should be altered, rather than that the particular circumstances of his place of confinement deprived him of constitutionally protected rights, the petitioner's request for habeas corpus relief was properly dismissed. White v. Ricketts, 684 P.2d 239 (Colo. 1984).

A writ of habeas corpus will not issue to enable the supreme court to review a judgment that is merely irregular or erroneous. It is only where there has been no conviction, or, what is the same thing, a conviction that is wholly void, and not where there has been an erroneous conviction before a competent tribu-

nal, that the prisoner may be released on habeas corpus under this section. Ex parte Farnham, 3 Colo. 545 (1877).

There is a distinction between a void and erroneous judgment, and where the court has jurisdiction of the subject matter and of the person, its judgment will not be void; at most, it is erroneous, in which case it can be corrected by the court which pronounced it or by the supreme court. In a collateral habeas corpus proceeding the validity of the judgment cannot be questioned. Hart v. Best, 119 Colo. 569, 205 P.2d 787 (1949).

**Hearing is required.** Ordinarily, there can be no doubt that under this section where the person allegedly restrained has challenged the truth of the officer's return on its face, the court must settle the facts by hearing the testimony and arguments and then dispose of the prisoner as the case may require. Ex parte Emerson, 107 Colo. 83, 108 P.2d 866 (1940).

**Final determination is based on hearing.** Final determination of a habeas corpus proceeding is not to be had on the petition. It can only be had upon the answer and return to the writ. Minor v. Tinsley, 154 Colo. 249, 389 P.2d 850 (1964).

**Continuance not in interest of petitioner improperly granted.** The trial court improperly continued the hearing on the habeas corpus petition beyond the five-day statutory time limit. A child could not be said to have requested the continuance by filing a custody petition through his mother where the legal custodian of the child by habeas corpus seeks expeditious enforcement of the custody order, while the mother by a custody proceeding seeks a determination concerning the child's permanent custody. A continuance in the habeas corpus proceeding entirely defeats the purpose for which the custodian and the child pursued that course of action — immediate restoration of the child to his legal custodian. Nelson v. District Court, 186 Colo. 381, 527 P.2d 811 (1974).

**In habeas corpus proceeding, burden rested upon petitioner to allege facts entitling him to relief.** Pigg v. Tinsley, 158 Colo. 160, 405 P.2d 687 (1965).

**Petitioner may have right to habeas corpus due to some happening after commitment.** This section provides that a prisoner can be discharged where though the original imprisonment was lawful, yet by some act, omission or event, which has subsequently taken place, the party has become entitled to his discharge. Kostal v. Tinsley, 152 Colo. 196, 381 P.2d 43 (1963).



**Such as prison board forfeiting "good time" credit.** Subsection (2) is an authorization to test the legality of the prison board proceedings in the state courts whereby good time credits were forfeited by the prison board following the return of the appellant to prison after an escape. *Henry v. Patterson*, 363 F.2d 443 (10th Cir. 1966).

**Formal defects in information will not entitle prisoner to discharge.** The omission from a criminal information, otherwise above exception, of the concluding phrase "and against the peace and dignity of the same", goes to matter of form, and in no degree impairs the jurisdiction of the court and one convicted upon such information will not be discharged on habeas corpus. *Chemgas v. Tynan*, 51 Colo. 35, 116 P. 1045 (1911).

**Satisfaction of judgment entitles petitioner to release.** A petition to have the trial court determine that he had in fact satisfied a valid judgment of the court and was therefore entitled to release from the penitentiary comes within the provisions of writ of habeas corpus. *Saiz v. People*, 156 Colo. 43, 396 P.2d 963 (1964).

**Writ improperly discharged.** Although the district court properly proceeded in a summary way to settle the petitioner's request for release from the custody of the department of corrections on the basis that the petitioner fully served his sentences, the court improperly discharged

the writ. The district court incorrectly decided that petitioner had not established a prima facie case where the petitioner presented a notice of parole board action granting parole and no evidence was presented that parole had been rescinded or suspended, as required by parole board regulations. The motion to dismiss should have been denied. *Brittian v. Brittian*, 833 P.2d 748 (Colo. 1992).

**Writ of habeas corpus properly denied** as prisoners do not have any constitutional right to a particular classification level within a correctional system, and the department of corrections' classification of petitioner did not impermissibly invade any retained liberty interest. *Andretti v. Johnson*, 779 P.2d 382 (Colo. 1989).

**Writ of habeas corpus properly denied as inmate's right to payment of postage fees by the state** for mailing costs associated with litigation is not fundamental constitutional right protected by habeas corpus proceeding. *Reece v. Johnson*, 793 P.2d 1152 (Colo. 1990).

**In using the telephone as the transmission mechanism for hearing the parties' legal theories**, the court did not abuse its discretion as to the manner of a hearing under this section. *Spoto v. Colo. State Dept. of Corr.*, 883 P.2d 11 (Colo. 1994).

**Applied in** *Beverly v. Davis*, 648 P.2d 621 (Colo. 1982); *Schumm v. Nelson*, 659 P.2d 1389 (Colo. 1983).

**13-45-104. Witnesses - duty of sheriff.** When a habeas corpus is issued to bring the body of any prisoner committed as aforesaid, unless the court issuing the same deems it wholly unnecessary and useless, the court shall issue a subpoena to the sheriff of the county where said person is confined, commanding him to summon the witnesses therein named to appear before the court at the time and place where such habeas corpus is returnable. It is the duty of the sheriff to serve such subpoena, if it is possible, in time to enable such witnesses to attend. It is the duty of the witnesses thus served with said subpoena to attend and give evidence before the court issuing the same on pain of being deemed guilty of a contempt of court and proceeded against accordingly by said court.

**Source:** R.S. p. 253, § 243. G.L. § 848. G.S. § 989. R.S. 08: § 2920. C.L. § 6489. CSA: C. 77, § 4. CRS 53: § 65-1-4. C.R.S. 1963: § 65-1-4.

**13-45-105. Court to examine witnesses.** On the hearing of any habeas corpus, it is the duty of the court who hears the same to examine the witnesses aforesaid, and such other witnesses as the prisoner may request, touching any offense named in the warrant of commitment whether or not said offense is technically set out in the commitment.

**Source:** R.S. p. 254, § 244. G.L. § 849. G.S. § 990. R.S. 08: § 2921. C.L. § 6490. CSA: C. 77, § 5. CRS 53: § 65-1-5. C.R.S. 1963: § 65-1-5.

**13-45-106. Bail - recognizance - binding witness.** (1) When any person is admitted to bail on habeas corpus, he shall enter into recognizance with one or more securities in such sum as the court directs, having regard to the circumstances of the prisoner and the nature of the offense, conditioned upon his appearance at the district court held in and for the county where the offense was committed or where the same is to be tried. Where any court admits to bail or remands any prisoner brought before it on any writ of habeas corpus, it is

the duty of the court to bind all such persons who declare anything material to prove the offense with which the prisoner is charged by recognizance to appear at the proper court having cognizance of the offense, upon a date certain, to give evidence touching the offense and not to depart the court without leave.

(2) The recognizance so taken, together with the recognizance entered into by the prisoner when he is admitted to bail, shall be certified and returned to the proper court. If any such witness neglects or refuses to enter into a recognizance when required, it is lawful for the court to commit him to jail until he enters into such recognizance or he is otherwise discharged by due course of law. If any judge neglects or refuses to bind any such witness or prisoner by recognizance when taken as aforesaid, he is guilty of a misdemeanor in office and shall be proceeded against accordingly.

**Source:** R.S. p. 354, § 4. G.L. § 1326. G.S. § 1612. R.S. 08: § 2922. C.L. § 6491. CSA: C. 77, § 6. CRS 53: § 65-1-6. C.R.S. 1963: § 65-1-6.

#### ANNOTATION

**Admission to bail pending proceedings for review of an order or judgment in a habeas corpus proceeding is largely statutory.** Thus, apart from applicable statute authorizing admission to bail in such a case, where the habeas corpus proceedings were dismissed and the prisoner remanded, the court will not admit to bail pending an appeal and thereby grant indirectly the very relief which was previously denied him. *People ex rel. Patterson v. District Court*, 157 Colo. 69, 401 P.2d 88 (1965).

**Prisoner cannot be freed by bail on appeal from denial of habeas corpus.** In a habeas corpus proceeding, where the trial court has heard the case and discharged the writ, that court has no power to release a prisoner on bond who has been legally convicted and sentenced for commission of a crime, pending a review of the judgment dismissing the writ. *People ex rel. Patterson v. District Court*, 157 Colo. 69, 401 P.2d 88 (1965).

**13-45-107. Remand - second writ - offenses not bailable.** When any prisoner brought up on a habeas corpus is remanded to prison, it is the duty of the court remanding him to make out and deliver to the sheriff, or other person to whose custody he is remanded, an order in writing stating the cause of remanding him. If such prisoner obtains a second writ of habeas corpus, it is the duty of such sheriff or other person to whom the same is directed to return therewith the order aforesaid. If it appears that the prisoner was remanded for any offense not bailable, it shall be taken and received as conclusive, and the prisoner shall be remanded without further proceedings.

**Source:** R.S. p. 355, § 5. G.L. § 1327. G.S. § 1613. R.S. 08: § 2923. C.L. § 6492. CSA: C. 77, § 7. CRS 53: § 65-1-7. C.R.S. 1963: § 65-1-7.

#### ANNOTATION

**Law reviews.** For article, "Enforcement of Justice Court Judgments", see 12 *Dicta* 274 (1935).

**13-45-108. Second writ - bailable offense.** It is unlawful for any court, on a second writ of habeas corpus obtained by the prisoner to discharge the prisoner if he is clearly and specifically charged in the warrant of commitment with a criminal offense; but the court on the return of such second writ has power only to admit such prisoner to bail, where the offense is bailable by law, or remand him to prison where the offense is not bailable or where such prisoner fails to give the bail required.

**Source:** R.S. p. 355, § 6. G.L. § 1328. G.S. § 1614. R.S. 08: § 2924. C.L. § 6493. CSA: C. 77, § 8. CRS 53: § 65-1-8. C.R.S. 1963: § 65-1-8.



**13-45-109. Once discharged - reimprisonment.** (1) No person who has been discharged by order of a court on a habeas corpus shall be again imprisoned, restrained, or kept in custody for the same cause, unless he is afterwards indicted for the same offense or unless by the legal order or process of the court wherein he is bound by recognizance to appear.

(2) The following shall not be deemed to be the same cause:

(a) If, after a discharge for a defect of proof or on any material defect in the commitment in a criminal case, the prisoner is again arrested on sufficient proof and committed by legal process for the same offense;

(b) If, in a civil suit, the party has been discharged for any illegality in the judgment or process and is afterwards imprisoned by legal process for the same cause of action;

(c) Generally, when the discharge has been ordered on account of the nonobservance of any of the forms required by law, the party may be a second time imprisoned if the cause is legal and the forms required by law observed.

**Source:** R.S. p. 355, § 7. G.L. § 1329. G.S. § 1615. R.S. 08: § 2925. C.L. § 6494. CSA: C. 77, § 9. CRS 53: § 65-1-9. C.R.S. 1963: § 65-1-9.

#### ANNOTATION

**When prisoner is discharged by writ of habeas corpus, no court may stay such discharge.** Staying a prisoner's discharge by a subsequent order is tantamount to keeping him in custody for the same cause notwithstanding his discharge by a writ of habeas corpus. Such action by a court is forbidden by the law. For it is provided in part by this section that no person who has been discharged by order of a court of judge on a habeas corpus shall be again imprisoned, restrained, or kept in custody for the same cause, unless he be afterwards indicted for the same offense, nor unless by the legal order or process of the court wherein he is bound by recognizance to appear. *Geer v. Alaniz*, 137 Colo. 432, 326 P.2d 71 (1958).

**The doctrine of res judicata should not be employed to prevent the correction of errors**

**or cure insufficiencies** in extradition proceedings. *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

**Or when the facts and issues are different.** Generally, whether a discharge on habeas corpus of one held for extradition bars a subsequent extradition proceeding depends on whether the court in the second proceeding is required to pass upon the same or different matters from those ruled upon by the court in the first proceeding; if facts and the issues are different from those raised by the first petition, court is not precluded from reaching a different conclusion than it did on the initial petition. *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

**13-45-110. Prisoner not to be removed - when.** To prevent any person from avoiding or delaying his trial, it is unlawful to remove any prisoner on habeas corpus under this article out of the county in which he is confined within fifteen days next preceding the date certain set for trial except if it is to convey him into the county where the offense with which he stands charged is properly cognizable.

**Source:** R.S. p. 356, § 9. G.L. § 1331. G.S. § 1617. R.S. 08: § 2927. C.L. § 6495. CSA: C. 77, § 10. CRS 53: § 65-1-10. C.R.S. 1963: § 65-1-10.

**13-45-111. Removal of prisoners - causes.** Any person committed to any prison or in the custody of any officer, sheriff, jailer, keeper, or other person, or his underofficer or deputy, for any criminal or supposed criminal matter shall not be removed from the prison or custody into any other prison or custody, unless it is by habeas corpus or some other legal writ; or where the prisoner is delivered to some common jail; or is removed from one place to another within the county, in order to effect his discharge or trial in due course of law; or in case of sudden fire, infection, or other necessity; or where the sheriff commits such prisoner to the jail of an adjoining county for the want of a sufficient jail in his own county, as provided in section 17-26-119, C.R.S.; or where the prisoner, in pursuance of a law of the United States, is claimed or demanded by the executive of the United States or territories. If any person, after such commitment, makes out, signs, or countersigns any

warrant for such removal except as before excepted, then he shall forfeit to the prisoner or aggrieved party a sum not exceeding three hundred dollars to be recovered by the prisoner or party aggrieved in the manner provided in section 13-45-117.

**Source:** R.S. p. 356, § 10. G.L. § 1332. G.S. § 1618. R.S. 08: § 2928. C.L. § 6496. CSA: C. 77, § 11. CRS 53: § 65-1-11. C.R.S. 1963: § 65-1-11. L. 79: Entire section amended, p. 1634, § 23, effective July 19.

#### ANNOTATION

**This section and § 13-45-117 have to do with the improper removal of a prisoner from a county jail** and providing for the forfeiture to such an aggrieved party of a sum not to exceed \$300. *Kostal v. People*, 160 Colo. 64, 414 P.2d 123, cert. denied, 385 U.S. 939, 87 S. Ct. 305, 17 L. Ed.2d 218 (1966).

**Common jail given its ordinary meaning.** Usage of "common jail" was to distinguish the numerous municipal and county jails from state-operated correctional institutions. *Kinney v. Young*, 689 P.2d 614 (Colo. 1984).

**13-45-112. Judge refusing or delaying writ - penalty.** Any judge of a court empowered by this article to issue writs of habeas corpus who corruptly refuses to issue such writ when legally applied for in a case where such writ may lawfully issue or who, for the purpose of oppression, unreasonably delays the issuing of such writ shall for every such offense forfeit to the prisoner or party aggrieved a sum not exceeding five hundred dollars.

**Source:** R.S. p. 356, § 11. G.L. § 1333. G.S. § 1619. R.S. 08: § 2929. C.L. § 6497. CSA: C. 77, § 12. CRS 53: § 65-1-12. C.R.S. 1963: § 65-1-12.

**13-45-113. Failure to obey writ - penalty.** If any officer, sheriff, jailer, keeper, or other person to whom any such writ is directed neglects or refuses to make the returns or to bring the body of the prisoner according to the command of said writ within the time required by this article, such officer, sheriff, jailer, keeper, or other person is guilty of contempt of the court which issued said writ; whereupon the court shall issue an attachment against such officer, sheriff, jailer, keeper, or other person and cause him to be committed to the jail of the county, there to remain without bail, until he obeys the writ. Such officer, sheriff, jailer, keeper, or other person shall also forfeit to the prisoner or aggrieved party a sum not exceeding five hundred dollars and shall be incapable of holding or executing his said office.

**Source:** R.S. p. 357, § 12. G.L. § 1334. G.S. § 1620. R.S. 08: § 2930. C.L. § 6498. CSA: C. 77, § 13. CRS 53: § 65-1-13. C.R.S. 1963: § 65-1-13.

#### ANNOTATION

**For evidence of custody being insufficient to justify holding in contempt**, see *Atchel v. Lanphere*, 170 Colo. 545, 463 P.2d 457 (1970).

**13-45-114. Avoiding writ - penalty.** Anyone having a person in his or her custody or under his or her restraint, power, or control for whose relief a writ of habeas corpus is issued who, with the intent to avoid the effect of such writ, transfers such person to the custody, or places him or her under the control, of another or conceals him or her or changes the place of his or her confinement with intent to avoid the operation of such a writ or with intent to remove him or her out of this state commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S. In any prosecution for the penalty incurred under this section, it shall not be necessary to show that the writ of habeas corpus had issued at the time of the removal, transfer, or concealment therein mentioned if it is proved that the acts therein forbidden were done with the intent to avoid the operation of such writ.



**Source:** R.S. p. 357, § 13. G.L. § 1335. G.S. § 1621. R.S. 08: § 2931. C.L. § 6499. CSA: C. 77, § 14. CRS 53: § 65-1-14. L. 62: p. 170, § 1. C.R.S. 1963: § 65-1-14. L. 77: Entire section amended, p. 877, § 43, effective July 1, 1979. L. 89: Entire section amended, p. 827, § 32, effective July 1. L. 2002: Entire section amended, p. 1488, § 123, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 21, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

#### ANNOTATION

**For penalties imposed on custodian not affecting custodial status of prisoner,** see *Ex parte Emerson*, 107 Colo. 83, 108 P.2d 866 (1940).

#### 13-45-115. Failure to deliver process - penalty. (Repealed)

**Source:** R.S. p. 357, § 14. G.L. § 1336. G.S. § 1622. R.S. 08: § 2932. C.L. § 6500. CSA: C. 77, § 15. CRS 53: § 65-1-15. C.R.S. 1963: § 65-1-15. L. 91: Entire section repealed, p. 428, § 1, effective May 24.

**13-45-116. Detention after release - penalty.** Any person, knowing that another has been discharged by order of a competent tribunal on a habeas corpus, who, contrary to the provisions of this article, arrests or detains him again, for the same cause which was shown on the return of such writ, shall forfeit five hundred dollars for the first offense and one thousand dollars for every subsequent offense.

**Source:** R.S. p. 357, § 15. G.L. § 1337. G.S. § 1623. R.S. 08: § 2933. C.L. § 6501. CSA: C. 77, § 16. CRS 53: § 65-1-16. C.R.S. 1963: § 65-1-16.

**13-45-117. Forfeitures go to use of prisoner.** All pecuniary forfeitures under this article shall inure to the use of the party for whose benefit the writ of habeas corpus issued and shall be sued for and recovered, with costs, in the name of the state by every person aggrieved.

**Source:** R.S. p. 357, § 16. G.L. § 1338. G.S. § 1624. R.S. 08: § 2934. C.L. § 6502. CSA: C. 77, § 17. CRS 53: § 65-1-17. C.R.S. 1963: § 65-1-17.

**Cross references:** For actions in the name of the state for the benefit of another, see C.R.C.P. 17(a).

#### ANNOTATION

**This section and § 13-45-111 have to do with the improper removal of a prisoner from a county jail and providing for the forfeiture to such an aggrieved party of a sum not to exceed \$300.** *Kostal v. People*, 160 Colo. 64, 414 P.2d 123, cert. denied, 385 U.S. 939, 87 S. Ct. 305, 17 L. Ed.2d 218 (1966).

**Plaintiff not entitled to costs against state** pursuant to this section because there is no express authorization allowing costs to be assessed against the state. *McFarland v. Gunter*, 829 P.2d 510 (Colo. App. 1992).

**13-45-118. Recovery of forfeiture not bar to civil suit.** The recovery of the said penalties shall not be a bar to a civil suit for damages.

**Source:** R.S. p. 358, § 18. G.L. § 1340. G.S. § 1626. R.S. 08: § 2936. C.L. § 6504. CSA: C. 77, § 19. CRS 53: § 65-1-18. C.R.S. 1963: § 65-1-18.

**13-45-119. Writ to testify or be surrendered - run to any county - copy - fees.** The supreme and district courts within this state have power to issue writs of habeas corpus to bring the body of any person confined in any jail before them to testify or to be surrendered in discharge of bail. When a writ of habeas corpus is issued to bring into court any person to testify, or the principal to be surrendered in discharge of bail and such principal or witness is confined in any jail in this state out of the county in which such principal or witness is required to be surrendered or to testify, the writ may run into any county in this state and there be executed and returned by any officer to whom it is directed. The principal, after being surrendered or his bail discharged, or a person testifying as aforesaid shall be returned by the officer executing such writ by virtue of an order of the court for the purpose aforesaid, an attested copy of which, lodged with the jailer, exonerates such jailer of liability for an escape. The party praying out such writ of habeas corpus shall pay to the officer executing the same a reasonable sum for his services as adjudged by the courts respectively.

**Source:** R.S. p. 358, § 19. G.L. § 1341. G.S. § 1627. R.S. 08: § 2937. C.L. § 6505. CSA: C. 77, § 20. CRS 53: § 65-1-19. C.R.S. 1963: § 65-1-19.

#### **13-45-120. When county court can issue writ. (Repealed)**

**Source:** L. 1879: p. 84, § 1. G.S. § 1628. R.S. 08: § 2938. CSA: C. 77, § 21. CRS 53: § 65-1-20. C.R.S. 1963: § 65-1-20. L. 75: Entire section repealed, p. 209, § 23, effective July 16.

#### **13-45-121. Powers of county court. (Repealed)**

**Source:** L. 1879: p. 84, § 2. G.S. § 1629. R.S. 08: § 2939. C.L. § 6507. CSA: C. 77, § 22. CRS 53: § 65-1-21. C.R.S. 1963: § 65-1-21. L. 75: Entire section repealed, p. 209, § 23, effective July 16.

## **JOINT RIGHTS AND OBLIGATIONS**

### **ARTICLE 50**

#### **Joint Rights and Obligations**

**Cross references:** For partnerships, see articles 60 to 64 of title 7; for negotiable instruments, see article 3 of title 4; for joint tenancy of mines and minerals, see article 44 of title 34; for proof of joint tenancy in estate matters, see § 15-15-102; for joint parties, pleading, and proof, see §§ 13-25-117 and 13-25-118; for joint tenancy in realty, see § 38-31-101; for joint tenancy in bank accounts, see § 11-105-105.

13-50-101.	Joint obligations and covenants.	13-50-104.	Right of surety.
13-50-102.	Joint debtors - release - effect.	13-50-105.	Actions by and against partnerships and associations - what property bound by judgment.
13-50-103.	Liability of remaining debtor.		

**13-50-101. Joint obligations and covenants.** All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants.

**Source:** R.S. p. 368, § 3. G.L. § 1408. G.S. § 1834. R.S. 08: § 3604. C.L. § 5124. CSA: C. 92, § 4. CRS 53: § 76-1-1. C.R.S. 1963: § 76-1-1.



## ANNOTATION

**Law reviews.** For note "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933). For article, "Duties and Rights Under Joint and Several Contracts in Colorado", see 7 Rocky Mt. L. Rev. 247 (1935). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For article, "One Year Review of Contracts", see 34 Dicta 85 (1957).

**Release abrogates section's applicability.** This section and §§ 13-50-102 and 13-50-103 did not apply where the defendant guarantors expressly agreed that the release of coguarantors would not affect defendants' liability in any way. *United States v. Immordino*, 386 F. Supp. 611 (D. Colo. 1974), *aff'd*, 534 F.2d 1378 (10th Cir. 1976).

**Joint agreements are several**, and suit may be brought against any of the parties liable or against all of them. *Bennett v. Morse*, 6 Colo. App. 122, 39 P. 582 (1894).

**Under which the liability of the parties is joint and several.** Where a contract provided that, in consideration of a certain sum of money having been paid to one of the parties of the first part, the parties of the first part would pay the same to the party of the second part if such sum were not paid by a third party within a specified time, such obligation of the parties of the first part is joint and several within this section. *Doyle v. Nesting*, 37 Colo. 522, 88 P. 862 (1906).

**Under this section "obligation" means a written contract.** Whenever the word "obligation" is used in a statute as the name of a contract (as in this section), an agreement in

writing is meant; but where it is used with reference to a legal duty or liability, the term includes any indebtedness arising from contract, express or implied, oral or written. *Exch. Bank v. Ford*, 7 Colo. 314, 3 P. 449 (1884); *Sawyer v. Armstrong*, 23 Colo. 287, 47 P. 391 (1896).

**This section has no application to oral contracts.** *Townsend v. Heath*, 106 Colo. 273, 103 P.2d 691 (1940).

**The liability upon a promissory note is clearly rendered several by this section.** *Exch. Bank v. Ford*, 7 Colo. 314, 3 P. 449 (1884); *Hochmark v. Richler*, 16 Colo. 263, 26 P. 818 (1891).

**For the applicability of this section to negotiable instruments**, see *Hamill v. Ward*, 14 Colo. 277, 23 P. 330 (1890); *Tabor v. Miles*, 5 Colo. App. 127, 38 P. 64 (1894).

**Partnership contracts are excluded from this section.** Doubt is cast upon the applicability of this statute to partnership contracts; and whatever may be said of our previous decisions, their effect certainly is to exclude partnership contracts from the provisions of this section. *Thompson v. White*, 25 Colo. 226, 54 P. 718 (1898).

**Equitable doctrine that partnership debts are joint and several does not obtain in a purely legal action.** *Exch. Bank v. Ford*, 7 Colo. 314, 3 P. 449 (1884).

**Satisfaction must be pleaded to release joint debtor.** Plea that contract is joint and several, and that plaintiff has already recovered judgment but not alleging satisfaction, is insufficient. *Fitzgerald v. Burke*, 14 Colo. 559, 23 P. 993 (1890).

**13-50-102. Joint debtors - release - effect.** A creditor of joint debtors may release one or more of such debtors, and such release shall operate as a full discharge of such debtor so released, but such release shall not release or discharge or affect the liability of the remaining debtor. Such release shall be taken and held to be a payment in the indebtedness of the full proportionate share of the debtor so released.

**Source:** L. 1899: p. 239, § 1. R.S. 08: § 3605. C.L. § 5125. CSA: C. 92, § 5. CRS 53: § 76-1-2. C.R.S. 1963: § 76-1-2.

## ANNOTATION

**Release abrogates section's applicability.** This section and §§ 13-50-101 and 13-50-103 did not apply where the defendant guarantors expressly agreed that the release of coguarantors would not affect defendants' liability in any way. *United States v. Immordino*, 386 F. Supp. 611 (D. Colo. 1974), *aff'd*, 534 F.2d 1378 (10th Cir. 1976).

**A plaintiff can lawfully release any coguarantor from liability** without thereby releasing the other guarantors from their obliga-

tion to contribute their several proportions. *Taylor v. Hake*, 92 Colo. 330, 20 P.2d 546 (1933).

**For the rule as to release of one joint tortfeasor**, see *Price v. Baker*, 143 Colo. 264, 352 P.2d 90 (1960); *Hamm v. Thompson*, 143 Colo. 298, 353 P.2d 73 (1960).

**A co-judgment debtor may take an assignment of the judgment** against his codebtor and enforce it to the extent of the latter's proportionate liability thereon under this and the following section, irrespective of the amount paid for the

assignment. *Simpson v. Morgan*, 124 Colo. 441, 238 P.2d 200 (1951).

**A loan receipt is not a release.** *Wilson v. Anderson*, 113 Colo. 396, 157 P.2d 690 (1945).

**Release of some joint debtors extinguishes the obligation of any remaining joint debtors** to pay so much of the debt as was deemed paid by the released joint debtors. *Smith v. Weindrop*, 833 P.2d 856 (Colo. App. 1992).

**Where release of one of the debtors from liability in promissory note included liability for attorney fees, other debtors are each liable for their proportionate share of any liability for fees.** *A. Tenenbaum & Co., Inc. v. Colantuno*, 3 P.3d 456 (Colo. App. 1999), *aff'd*, 23 P.3d 708 (Colo. 2001).

**A creditor may not collect more than the original debt.** For example, a creditor is owed \$100 by three joint and several debtors. One debtor pays \$25 and obtains a complete release from further liability. The remaining debtors are

now severally liable for the balance. The proportionate share of each remaining debtor is \$33.33. If, however, the settling debtor pays \$60, the proportionate share of each of the remaining debtors is still \$33.33. The creditor can collect up to \$33.33 from each remaining debtor until the obligation is paid in full. This collection could be \$33.33 from one and \$7.67 from the other. *A. Tenenbaum & Co., Inc. v. Colantuno*, 117 P.3d 20 (Colo. App. 2004).

**Proportionate shares should be determined by dividing the debt equally, per capita, among promissory note judgment debtors who were jointly liable for attorney fees prior to release of one of the debtors** and, if a debtor pays more than his percentage share to satisfy the attorney fee indebtedness, the debtor may file an action for contribution against the other debtors. *A. Tenenbaum & Co., Inc. v. Colantuno*, 3 P.3d 456 (Colo. App. 1999), *aff'd*, 23 P.3d 708 (Colo. 2001).

**13-50-103. Liability of remaining debtor.** In case one or more joint debtors are released, no one of the remaining debtors shall be liable for more than his proportionate share of the indebtedness, unless he is the principal debtor and the debtor released was his surety, in which case the principal debtor is liable for the whole of the remainder of the indebtedness.

**Source:** L. 1899: p. 239, § 2. R.S. 08: § 3606. C.L. § 5126. CSA: C. 92, § 6. CRS 53: § 76-1-3. C.R.S. 1963: § 76-1-3.

#### ANNOTATION

**Release abrogates section's applicability.** This section and §§ 13-50-101 and 13-50-102 did not apply where the defendant guarantors expressly agreed that the release of coguarantors would not affect defendants' liability in any way. *United States v. Immordino*, 386 F. Supp. 611 (D. Colo. 1974), *aff'd*, 534 F.2d 1378 (10th Cir. 1976).

**Remaining debtors are only liable for their proportionate share.** A release of one or more joint debtors is held to be payment on the indebtedness of the full proportionate share of such debtor or debtors and further that none of the remaining debtors shall be liable for more than his proportionate share of indebtedness. *Hosler v. Ireland*, 219 F. 489 (8th Cir. 1915).

**Release executed by plaintiff in favor of co-obligors** reduces defendant's liability. *Smith v. Weindrop*, 833 P.2d 856 (Colo. App. 1992).

**Release of some joint debtors extinguishes the obligation of any remaining joint debtors** to pay so much of the debt as was deemed paid by the released joint debtors. *Smith v. Weindrop*, 833 P.2d 856 (Colo. App. 1992).

**Where release of one of the debtors from liability in promissory note included liability for attorney fees, other debtors are each liable for their proportionate share of any liability for fees.** *A. Tenenbaum & Co., Inc. v. Colantuno*, 3 P.3d 456 (Colo. App. 1999), *aff'd*, 23 P.3d 708 (Colo. 2001).

**Proportionate shares should be determined by dividing the debt equally, per capita, among promissory note judgment debtors who were jointly liable for attorney fees prior to release of one of the debtors** and, if a debtor pays more than his percentage share to satisfy the attorney fee indebtedness, the debtor may file an action for contribution against the other debtors. *A. Tenenbaum & Co., Inc. v. Colantuno*, 3 P.3d 456 (Colo. App. 1999), *aff'd*, 23 P.3d 708 (Colo. 2001).

**Court erred in reducing doctor's liability** to account for fault apportioned to the nurses by the jury. In light of "captain of the ship" doctrine, no evidence exists to qualify doctor and nurses as joint debtors. *Ochoa v. Vered*, 212 P.3d 963 (Colo. App. 2009).

**13-50-104. Right of surety.** Nothing in sections 13-50-102 to 13-50-104 affects or changes the right of a surety who has paid his proportionate share of an indebtedness of recovering the same from his principal debtor.



**Source:** L. 1899: p. 239, § 3. R.S. 08: § 3607. C.L. § 5127. CSA: C. 92, § 7. CRS 53: § 76-1-4. C.R.S. 1963: § 76-1-4.

**13-50-105. Actions by and against partnerships and associations - what property bound by judgment.** A partnership or other unincorporated association may sue or be sued in an action in its common name to enforce for or against it a substantive right; except that in such action only the property of the partnership or other unincorporated association, the joint property of the associates, and the separate property of any individual member thereof who is named as a party individually and over whom individually the court has acquired jurisdiction either by entry of appearance or by service of process may be bound by the judgment therein.

**Source:** L. 55: p. 497, § 1. CRS 53: § 76-1-6. C.R.S. 1963: § 76-1-6.

**Cross references:** For judgment against partnership, see C.R.C.P. 54(e).

#### ANNOTATION

**Law reviews.** For article, "Highlights of the 1955 Colorado Legislative Session — Partnerships", see 28 Rocky Mt. L. Rev. 64 (1955).

**This section is permissive and not mandatory.** *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979).

**Suit in common name or in names of partners.** A partnership or limited partnership may sue or be sued either in its common name or by naming its partners. *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979); *Rush v. Winker*, 892 P.2d 328 (Colo. App. 1994).

**This section provides that an unincorporated association may sue in its common name.** This wording is permissive, not mandatory. *Morrison-Knudson Co. v. Rocky Mt. Chapter, Nat'l Elec. Contractors Ass'n*, 236 F. Supp. 436 (D. Colo. 1964).

**This section applies to joint ventures.** There appears to be no Colorado case specifically holding that a joint venture comes within this section, but there is no reason why a "joint venture" should not fall within the "unincorporated association" language of this section. *Morrison-Knudson Co. v. Rocky Mt. Chapter, Nat'l Elec. Contractors Ass'n*, 236 F. Supp. 436 (D. Colo. 1964).

**This section does not deem a joint venture a jural entity for all purposes;** it would seem to do so only for procedural purposes as venue and service of process. *Morrison-Knudson Co. v. Rocky Mt. Chapter, Nat'l Elec. Contractors Ass'n*, 236 F. Supp. 436 (D. Colo. 1964).

**Notice to general partners sufficient for limited partnership.** Because the general partners possess sole management responsibility for a limited partnership, notice to them in their capacities as general partners affords that notice to the limited partnership which is necessary to satisfy the demands of due process. *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979).

**Whether plaintiff qualified as a partnership or as an unincorporated association** is applied in *Johnson v. Chilcote*, 599 F. Supp. 224 (D. Colo. 1984).

**For judgment against partnership,** see *Thomas v. Dunne*, 131 Colo. 20, 279 P.2d 427 (1955).

**Where the only reference to an entity in a complaint in which a default judgment has been entered is in the context of its status as an alleged partner of a named defendant,** the entity was not a party defendant in the case. *Rush v. Winker*, 892 P.2d 328 (Colo. App. 1994).

**If a church is considered an unincorporated association,** it can not be represented in court by its pastor who is not an attorney. *People v. LaPorte Church of Christ*, 830 P.2d 1150 (Colo. App. 1992).

**This section and C.R.C.P. 106 can be construed harmoniously.** C.R.C.P. 106 (a)(5) complements § 13-50-105 by providing the procedure for subjecting an unnamed partner to the court's jurisdiction after judgment enters against his partnership. *Resolution Trust Corp. v. Teem P'ship*, 835 F. Supp. 563 (D. Colo. 1993).

**C.R.C.P. 106 (a)(5) does not provide an "alternate, cumulative remedy" to this section** that a party may elect in lieu of naming a defendant during the pendency of an action where a corporate respondent was a member of the partnership whose identity was known by plaintiff but not named in the original action based upon a friendship with plaintiff's counsel. *Gutrich v. LaPlante*, 942 P.2d 1266 (Colo. App. 1996), *aff'd sub nom. Gutrich v. Cogswell & Wehrle*, 961 P.2d 1115 (Colo. 1998).

**C.R.C.P. 106(a)(5) may provide relief in the context of partnership law when:** (1) The plaintiff could not have determined the existence or status of individual partners despite reason-

able attempts to ascertain their identities; (2) the plaintiff could not bring about personal jurisdiction in the original action; or (3) some other reason beyond the plaintiff's control prevented the plaintiff from naming and serving the individual partners. *Gutrich v. Cogswell & Wehrle*, 961 P.2d 1115 (Colo. 1998).

**A judgment against the partnership does not bind the individual partners unless they are individually named and subject to the personal jurisdiction of the court.** Where plaintiffs sued the partnership under its common name and failed to sue individual partners, plaintiffs were barred from seeking recovery of the judgment against the partnership from the individual partners. *Gutrich v. Cogswell & Wehrle*, 961 P.2d 1115 (Colo. 1998).

This section and C.R.C.P. 54(e) contain clear requirements that an individual partner must be named, personally served, and subjected to the jurisdiction of the court to seek recovery from the individual. Plaintiffs actually knew the identity of some of the individual partners but made a conscious decision not to name and serve them. The plaintiffs' judgment was enforceable only against the assets of the partnership. *Gutrich v. Cogswell & Wehrle*, 961 P.2d 1115 (Colo. 1998).

**Applied** in *Collection Agency, Inc. v. Golding*, 44 Colo. App. 421, 616 P.2d 988 (1980); *Heinold Hog Mkt., Inc. v. McCoy*, 700 F.2d 611 (10th Cir. 1983).

ARTICLE 50.5

Uniform Contribution Among  
Tortfeasors

**Law reviews:** For article, "The Apportionment of Tort Responsibility", see 14 Colo. Law. 741 (1985); for article, "Legal Aspects of Health and Fitness Clubs: A Healthy and Dangerous Industry", see 15 Colo. Law. 1787 (1986); for article, "Set-Off Under the Contribution and Collateral Source Statutes", see 21 Colo. Law. 1421 (1992).

13-50.5-101.	Short title.	13-50.5-103.	Pro rata shares.
13-50.5-102.	Right to contribution - contract or agreement provision to indemnify or hold harmless void against public policy.	13-50.5-104.	Enforcement.
		13-50.5-105.	Release or covenant not to sue.
		13-50.5-106.	Uniformity of interpretation.

**13-50.5-101. Short title.** This article shall be known and may be cited as the "Uniform Contribution Among Tortfeasors Act".

**Source: L. 77:** Entire article added, p. 808, § 1, effective July 1.

ANNOTATION

**Law reviews.** For article, "Immunity to Direct Action: Is it a Defense to a Contribution Claim?", see 52 U. Colo. L. Rev. 151 (1980). For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982). For article, "Application of Comparative Negligence and Contribution Statutes to Third-Party Defendants", see 13 Colo. Law. 626 (1984). For article, "Set-Off Under the Contribution and Collateral Source Statutes", see 21 Colo. Law. 1421 (1992).

**Traditional theories of loss allocation in tort altered.** The general assembly has altered traditional theories of loss allocation in tort with the passage of this act and with the introduction of a comparative negligence scheme into Colorado law, § 13-21-111, Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

**Act remedies harsh common-law rule.** This act is designed to remedy a harsh common-law

rule. Changing rules of tort liability have expanded the number of parties who can be considered joint tortfeasors, while the rule of joint and several liability left the plaintiff with control over who would ultimately bear the losses. The contribution act remedied this situation by permitting the shifting of losses equitably among those tortfeasors who caused the damages. *Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056 (Colo. 1983).

**Employer covered under workmen's compensation not liable for contribution.** Because the workmen's compensation act immunizes an employer from tort liability to a covered employee, the employer is not "jointly liable in tort" and therefore contribution is barred. *Hammond v. Kolberg Mfg. Corp.*, 542 F. Supp. 662 (D. Colo. 1982).

**Emphasis on intent to define scope of general releases effectuates the purpose of this**



article in that it retains the liability of joint tortfeasors unless the releaser intended to release all claims. *Neves v. Potter*, 769 P.2d 1047 (Colo. 1989).

**Applied** in *Martinez v. Stefanich*, 195 Colo. 341, 577 P.2d 1099 (1978); *Hillman v. Bray*

Lines, 41 Colo. App. 493, 591 P.2d 1332 (1978); *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982).

**13-50.5-102. Right to contribution - contract or agreement provision to indemnify or hold harmless void against public policy.** (1) Except as otherwise provided in this article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(2) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(3) There is no right of contribution in favor of any tortfeasor who has intentionally, willfully, or wantonly caused or contributed to the injury or wrongful death.

(4) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(5) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(6) This article does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(7) This article shall not apply to breaches of trust or of other fiduciary obligation.

(8) In the event that a public contract or agreement for the construction, alteration, repair, or maintenance of any building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other works dealing with construction, or any moving, demolition, or excavation connected with such construction, contains any covenant, promise, agreement, or combination thereof to indemnify or hold harmless any public entity from that public entity's own negligence, then such covenant, promise, agreement, or combination thereof is void as against public policy and wholly unenforceable. This subsection (8) shall not apply to construction bonds, contracts of insurance, contract clauses regarding insurance, or contract clauses regarding costs of defense of litigation arising out of the work or to any covenant, promise, agreement, or combination thereof to indemnify or hold harmless a contracting party against claims arising out of the negligent acts of the indemnitor and its subcontractors in the performance of the work under the contract. However, no contracting party shall be required to indemnify or hold harmless from any liability or damages arising from the negligent acts of the indemnified party. This subsection (8) is intended only to affect the contractual relationship between the parties relating to indemnification of public entities for the negligent acts of the public entity, and nothing in this subsection (8) shall affect any other rights or remedies of public entities or contracting parties.

**Source:** **L. 77:** Entire article added, p. 808, § 1, effective July 1. **L. 87:** (6) amended, p. 1577, § 18, effective July 10. **L. 88:** (8) added, p. 404, § 2, effective May 17. **L. 89:** (8) amended, p. 760, § 1, effective March 15.

## ANNOTATION

**Law reviews.** For article, "Immunity to Direct Action: Is it a Defense to a Contribution Claim?", see 52 U. Colo. L. Rev. 151 (1980). For article, "The Harm in Hold Harmless Clauses", see 19 Colo. Law. 1081 (1990). For article, "Application of the Pro Rata Liability, Comparative Negligence and Contribution Statutes", see 23 Colo. Law. 1717 (1994). For article, "S.B. 07-087 and the Enforceability of Indemnification Provisions in Colorado Construction Contracts", see 36 Colo. Law. 59 (September 2007).

**Doctrine of indemnity abolished.** The doctrine of indemnity, insofar as it requires one of two joint tortfeasors to reimburse the other for the entire amount paid by the other as damages to a party injured as the result of the negligence of both joint tortfeasors, is no longer viable, and is hereby abolished. *Brochner v. W. Ins. Co.*, 724 P.2d 1293 (Colo. 1986).

**A tortfeasor no longer may unfairly be forced to pay all or a disproportionate share of damages** suffered by an injured party as the result of negligent conduct by two or more joint tortfeasors. *Brochner v. W. Ins. Co.*, 724 P.2d 1293 (Colo. 1986).

**Joint tortfeasors are now subject to contribution among themselves based upon their relative degrees of fault.** That principal is at odds with the essential characteristic of our present rule of indemnity that, without regard to apportionment of fault, a single tortfeasor may ultimately pay the expenses of all injuries sustained by a third party as a result of negligent conduct by two or more tortfeasors. There can be no mistake concerning the intent of the general assembly to establish the policy of responsibility related to proportionate fault in the context of personal injury litigation. *Brochner v. W. Ins. Co.*, 724 P.2d 1293 (Colo. 1986).

**Right of contribution is statutory.** The right of contribution in Colorado is in all respects a creature of statutory origin. *Greer v. Intercole Automation, Inc.*, 553 F. Supp. 275 (D. Colo. 1982).

**Contribution** is right of recovery by one joint tortfeasor from a co-tortfeasor and has nothing to do with the rights of the injured party to recover from the tortfeasors. *Greenemeier By Redington v. Spencer*, 694 P.2d 850 (Colo. App. 1984), *aff'd*, 719 P.2d 710 (Colo. 1986).

**Joint or several liability required for contribution.** To recover contribution against a person, that person must be found as a party jointly or severally liable with the ones seeking contribution. *Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 645 P.2d 1321 (Colo. App. 1981); *Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 650 P.2d 571 (Colo. App. 1981), *aff'd*, 662 P.2d 1056 (Colo. 1983); *Tex-Ark Joist Co. v. Derr & Gruenewald Const.*, 719 P.2d 384

(Colo. App. 1986), *aff'd*, 749 P.2d 431 (Colo. 1988).

The right of contribution "vests" only upon the existence of a common liability. *Greer v. Intercole Automation, Inc.*, 553 F. Supp. 275 (D. Colo. 1982).

The uniform act is clear and unequivocal in its requirement that joint or common liability in tort exist as a precondition to the right of contribution. *Greer v. Intercole Automation, Inc.*, 553 F. Supp. 275 (D. Colo. 1982).

The term "common liability" must be interpreted in light of the final sentence of subsection (2) that "No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability." *Kussman v. City and County of Denver*, 706 P.2d 776 (Colo. 1985).

Common liability exists only when tortfeasors are "jointly or severally liable" in tort for the same injury. *Kussman v. City and County of Denver*, 706 P.2d 776 (Colo. 1985).

Joint and several liability means each tortfeasor may be held liable for the entire damages arising from a single injury. *Kussman v. City and County of Denver*, 706 P.2d 776 (Colo. 1985).

**Employee and employer not joint tortfeasors within the meaning of the Uniform Contribution Among Tortfeasors Act** where the initial complaint alleged that employee was negligent but that employer was liable based only on a theory of respondeat superior, not negligence. Since employee and employer were not joint tortfeasors with the meaning of the act, the act does not bar employee's indemnity action against employer. *Serna v. Kingston Enters.*, 72 P.3d 376 (Colo. App. 2002).

**Individual tortfeasor not entitled to right of contribution.** Where judgment is rendered against a tortfeasor for no more than its proportionate share of liability, it is not eligible for deduction of a settling tortfeasor's settlement amount from the judgment. *Kussman v. City and County of Denver*, 706 P.2d 776 (Colo. 1985).

**One immune from liability for injury cannot be liable for contribution.** An employer who is immune from common-law liability for an injury cannot become "jointly or severally liable in tort" so as to trigger a right of contribution under this section. *Greer v. Intercole Automation, Inc.*, 553 F. Supp. 275 (D. Colo. 1982).

**Contribution provision does not apply** where jury finds one of the tortfeasors not negligent. *Wesley v. United Servs. Auto Ass'n*, 694 P.2d 855 (Colo. App. 1984).

**Contribution from nonparty permitted.** An insurer of a tortfeasor found liable in a prior action can recover contribution from a nonparty to that prior action. *Nat'l Farmers Union Prop.*



& Cas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983).

The language "liable in tort" in subsection (1) refers to a person's exposure to a civil action and not to the existence of final judgment in tort. This section only requires that a person become "liable in tort" before the right of contribution arises. The right to collect contribution, of course, depends on a binding and final determination of fault among joint tortfeasors, obtained either in the initial lawsuit by asserting a claim of contribution or in a separate action. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983); Cachne Nat'l Bank v. Hinman, 626 F. Supp. 1341 (D. Colo. 1986); Patten v. Knutzen, 646 F. Supp. 427 (D. Colo. 1986).

**Since the Workmen's Compensation Act is intended to be the exclusive forum for determining employer liability for job-related injuries,** a third-party claim for contribution under this section is denied. Williams v. White Mountain Const. Co., 749 P.2d 423 (Colo. 1988); Tex-Ark Joist Co. v. Derr and Gruenewald, Const., 749 P.2d 431 (Colo. 1988).

**Subsection (2) does not bar recovery by corporation for claims it owes third-parties even though those claims have not yet been, and may never be, paid.** In re Stat-Tech Securities Litigation, 905 F. Supp. 1416 (D. Colo. 1995).

**Nonparty not bound by determination of relative fault.** A nonparty to a suit cannot be conclusively bound by the jury's determination of relative fault in a subsequent declaratory judgment action for contribution. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983).

**An employer who complies with the workmen's compensation act cannot be subject to a third-party action for contribution.** Borroel v. Lakeshore, Inc., 618 F. Supp. 354 (D. Colo. 1985).

**13-50.5-103. Pro rata shares.** The relative degrees of fault of the joint tortfeasors shall be used in determining their pro rata shares.

**Source:** L. 77: Entire article added, p. 809, § 1, effective July 1. L. 86: Entire section amended, p. 681, § 2, effective July 1.

## ANNOTATION

**Law reviews.** For comment, "Multiple Defendants in Negligence Actions: Mountain Mobile Mix, Inc. v. Gifford", see 56 U. Colo. L. Rev. 303 (1985). For article, "1986 Colorado Tort Reform Legislation", see 15 Colo. Law. 1363 (1986). For article, "Negligent Entrust-

**ment**", see 16 Colo. Law. 642 (1987). For article, "Recovery of Interest: Part I — Personal Injury", see 18 Colo. Law. 1063 (1989).

**Applied** in Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981); McCall v. Roper, 685 P.2d 230 (Colo. App. 1984); D.R. Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

**Section 13-21-111.5 is not exclusive remedy for contribution.** Nothing in the language of § 13-21-111.5 indicates it is intended to be the exclusive mechanism for litigating the relative fault of all joint tortfeasors. A claim for contribution may be made under this section when a party has not been formally designated in the action under § 13-21-111.5. Watters v. Pelican Intern., Inc., 706 F. Supp. 1452 (D. Colo. 1989).

**The abolition of joint and several liability by § 13-21-111.5 does not extinguish a defendant's right to contribution from joint tortfeasors.** The language of subsection (1) does not evince an intention by the general assembly to require a defendant to establish both joint liability and several liability as a prerequisite to the defendant's right of contribution. A defendant is permitted to establish the several liability of one or more parties as a cause of the same injury to the plaintiff. Graber v. Westaway, 809 P.2d 1126 (Colo. App. 1991).

**Applied** in Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981); McCall v. Roper, 685 P.2d 230 (Colo. App. 1984); D.R. Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

**13-50.5-104. Enforcement.** (1) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(2) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(3) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(4) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either:

(a) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment; or

(b) Agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(5) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(6) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

**Source:** L. 77: Entire article added, p. 809, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Immunity to Direct Action: Is it a Defense to a Contribution Claim?", see 52 U. Colo. L. Rev. 151 (1980).

**A contribution action may brought within one year of the underlying judgment becoming final by lapse of the time for appeal, regardless of whether the parties have agreed to forego appellate proceedings.** Gibraltar Cas. v. Walters, 185 F.3d 1103 (10th Cir. 1999).

**Nonparty not bound by determination of relative fault.** A nonparty to a suit cannot be

conclusively bound by a jury's determination of relative fault in a subsequent declaratory judgment action for contribution. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983).

**Applied** in Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 645 P.2d 1321 (Colo. App. 1981); Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 650 P.2d 571 (Colo. App. 1981).

**13-50.5-105. Release or covenant not to sue.** (1) When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for their several pro rata shares of liability for the injury, death, damage, or loss unless its terms so provide; but it reduces the aggregate claim against the others to the extent of any degree or percentage of fault or negligence attributable by the finder of fact, pursuant to section 13-21-111 (2) or (3) or section 13-21-111.5, to the tortfeasor to whom the release or covenant is given; and

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

**Source:** L. 77: Entire article added, p. 810, § 1, effective July 1. L. 86: (1)(a) amended, p. 681, § 3, effective July 1.



## ANNOTATION

**Law reviews.** For article, "Collecting Pre- and Post-Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753 (1986). For article, "1986 Colorado Tort Reform Legislation", see 15 Colo. Law. 1363 (1986). For article, "New Role for Nonparties in Tort Actions — The Empty Chair", see 15 Colo. Law. 1650 (1986). For article, "Partial Settlements in Multiparty Tort Actions: The Latest Chapter", see 22 Colo. Law. 2529 (1993). For article, "Protecting the Professional: Contribution Bar Orders in Securities Cases", see 24 Colo. Law. 775 (1995). For comment, "Settlements with Nonparties: A Closer Look at Colorado's Collateral Source and Contribution Statutes", see 66 U. Colo. L. Rev. 195 (1995).

**Formerly, release of one constituted release of all.** Prior to July 1, 1977, the effective date of this section, absent a manifestation of a contrary intent, a release of one joint tortfeasor released all joint tortfeasors. *Mills v. Standard Title Ins. Co.*, 195 Colo. 281, 577 P.2d 756 (1978).

This section overrules the common-law rule that the release of an original tortfeasor operates to release a subsequent treating physician, absent specific language in the release to the contrary. *Summey v. Lacy*, 42 Colo. App. 1, 588 P.2d 892 (1978).

**This section was currently formulated to encourage settlements** and combined with the retention of the joint and several liability rule means that nonsettling tortfeasors may be forced to bear more than the portion of damages attributed to their relative degree of fault. *Kussman v. City and County of Denver*, 706 P.2d 776 (Colo. 1985).

**For history of common-law joint tortfeasor release rule in Colorado**, see *Cingoranelli v. St. Paul Fire & Marine Ins. Co.*, 658 P.2d 863 (Colo. 1983).

**Release rule inapplicable to personal injury protection claims.** The original rationale for the general joint tortfeasor release rule — that there is only one cause of action — is clearly not applicable to personal injury protection claims under § 10-4-701 et seq., which gives rise to a separate cause of action in contract. *Cingoranelli v. St. Paul Fire & Marine Ins. Co.*, 658 P.2d 863 (Colo. 1983).

**Within the meaning of this section tortfeasors are "liable in tort for the same injury" only when judgment is rendered against the nonsettling tortfeasor for an amount greater than its proportionate share of damages as measured by its degree of fault.** Where tortfeasor is found liable for an amount in excess of its proportionate share of damages, it may deduct the settlement amount paid by another tortfeasor from its liability up to the judgment amount in excess of its proportionate

share of damages. *Kussman v. City and County of Denver*, 706 P.2d 776 (Colo. 1985).

**Tortfeasors' contribution from joint tortfeasor was not barred** where a release was given by the injured parties to all persons liable in tort for the same injury and where the tortfeasors paid the injured parties the full amount of the settlement and then sought contribution from the joint tortfeasors for their pro rata share. *Miller v. Jarrell*, 684 P.2d 954 (Colo. App. 1984).

**Release or covenant not to sue from claimant insulates tortfeasor from contribution to other tortfeasors.** *W. Ins. Co. v. Brochner*, 682 P.2d 1213 (Colo. App. 1983), rev'd on other grounds, 724 P.2d 1293 (Colo. 1986); *Kussman v. City and County of Denver*, 706 P.2d 776 (Colo. 1985).

**Section not applicable where joint tortfeasors were not liable for the "same injury".** *Panther v. Raybestos-Manhattan, Inc.*, 701 P.2d 145 (Colo. App. 1985).

**Settlement amount deducted from the total judgment** rather than from the joint and several portion only, which means that a nonsettling tortfeasor will be liable for any part of the settling tortfeasor's pro rata share of damages that is greater than the amount paid in settlement. *Perlmutter v. Blessing*, 706 P.2d 777 (Colo. 1985); *Greenmeier by Redington v. Spencer*, 719 P.2d 710 (Colo. 1986).

**Absent special circumstances, jury should be informed of the fact of settlement, but not the amount paid.** *Greenmeier by Redington v. Spencer*, 719 P.2d 710 (Colo. 1986).

**Failure to inform jury of settlement not reversible error.** When jury was explicitly instructed to award damages which would reasonably compensate plaintiffs for injuries, and to consider any physical pain, mental suffering, or permanent injury or disability plaintiffs have suffered, plaintiffs were not prejudiced by jury's lack of knowledge of prior settlement. *Greenmeier by Redington v. Spencer*, 719 P.2d 710 (Colo. 1986).

**This section and § 13-21-111.6 must be reconciled, if possible, to give effect to both sections.** Therefore, this section should apply when a percentage of negligence has been attributed by the fact finder to the non-party while § 13-21-111.6 should control if the fact finder attributes no fault to the non-party. *Gutierrez v. Bussey*, 837 P.2d 272 (Colo. App. 1992).

**Parole evidence** may be used to vary or contradict a general release when the litigation is between a party to the release and a stranger thereto. *Neves v. Potter*, 769 P.2d 1047 (Colo. 1989).

**Money received under loan receipt agreement not a payment** entitling co-tortfeasors to a reduction in judgment, because plaintiff's con-

tingent obligation to return money advanced by settling defendants precludes double recovery. *Balistreri Greenhouses v. Roper Corp.*, 767 P.2d 736 (Colo. App. 1988) (decided under former law), cert. dismissed, 773 P.2d 1074 (Colo. 1989).

Because under the original statute there typically was no determination made at trial as to whether those who had settled were "liable in tort", the current statute, which created a procedure for the fact finder at trial routinely to determine the liability of a tortfeasor who had settled before the trial, should not be construed to require such a finding before a reduction in the amount of the settlement is permitted. *Simon v. Coppola*, 876 P.2d 10 (Colo. App. 1993).

This section applies to those who pay compensation to an injury victim because they are facing exposure to being held "liable in tort" at trial, as distinct from those who provide payments from a collateral source, such as an insurance contract. *Simon v. Coppola*, 876 P.2d 10 (Colo. App. 1993).

Right to setoff by joint tortfeasors is limited to the amounts actually collected from settling defendants, rather than the amounts provided for in settlement agreements. *Fireboard Corp. v. Fenton*, 845 P.2d 1168 (Colo. 1993).

Full compensation for plaintiff, as intended by the general assembly, was ensured where the trial court set off the judgment against defendants for any amount collected by plaintiff in settlement of claims against defendants no longer parties and where in the event the settlement from one defendant could not be collected, other defendants remained liable. *Fenton v. Fibreboard Corp.*, 827 P.2d 564 (Colo. App. 1991).

When the jury assigns fault to a settling party as a nonparty pursuant to § 13-21-111.6, the trial verdict shall be reduced by an amount equal to the cumulative percentage of fault attributed to the settling nonparties. The amount to be reduced from the trial verdict shall be calculated by multiplying the total percentage of liability attributed to the settling nonparties by the total trial verdict awarded the plaintiff. *Smith v. Zufelt*, 880 P.2d 1178 (Colo. 1994).

Settlement of lawsuit brought by one partner "d/b/a" the partnership precluded subsequent claim by other partner and partnership itself under the common law theory of claim preclusion. *Cruz v. Benine*, 984 P.2d 1173 (Colo. 1999).

Release of one partner and limited partnership did not bar claims against remaining partner or employee of limited partnership who were sued as joint tortfeasors. However, recovery in the second action must be reduced by any degree or percentage of fault attributed to

the released partner and limited partnership. *Cruz v. Benine*, 984 P.2d 1173 (Colo. 1999).

The duty of good faith extends to non-settling tortfeasors. *Stubbs v. Copper Mtn., Inc.*, 862 P.2d 978 (Colo. App. 1993), aff'd sub nom. *Copper Mtn., Inc. v. Poma of Am., Inc.*, 890 P.2d 100 (Colo. 1995).

The test for determining if a settlement was made in bad faith is whether the agreement was the product of collusive conduct intended to prejudice the interests of non-settling defendants. Whether a settlement is low compared with plaintiff's estimate of total damage is not sufficient to establish bad faith. *Stubbs v. Copper Mtn., Inc.*, 862 P.2d 978 (Colo. App. 1993), aff'd sub nom. *Copper Mtn., Inc. v. Poma of Am., Inc.*, 890 P.2d 100 (Colo. 1995).

Proof of collusion requires more than an agreement which results in the termination of a right of contribution. *Stubbs v. Copper Mtn., Inc.*, 862 P.2d 978 (Colo. App. 1993), aff'd sub nom. *Copper Mtn., Inc. v. Poma of Am., Inc.*, 890 P.2d 100 (Colo. 1995).

The party challenging the good faith of a settlement barring a claim for contribution has the burden of establishing that the settlement was collusive. *Stubbs v. Copper Mtn., Inc.*, 862 P.2d 978 (Colo. App. 1993), aff'd sub nom. *Copper Mtn., Inc. v. Poma of Am., Inc.*, 890 P.2d 100 (Colo. 1995).

The settlement agreement did not indicate a lack of good faith when it required a party to remain in a case to provide its own expert witnesses to respond to an "empty chair" defense and afforded an injured person prompt payment of funds for her losses. *Stubbs v. Copper Mtn., Inc.*, 862 P.2d 978 (Colo. App. 1993), aff'd sub nom. *Copper Mtn., Inc. v. Poma of Am., Inc.*, 890 P.2d 100 (Colo. 1995).

Since none of the amount paid by defendant to settle a remaining claim could be attributed to breach of warranty by a co-defendant, the trial court did not err in refusing to allow defendant to proceed with a cross claim against the co-defendant for damages paid based on such a claim. *Stubbs v. Copper Mtn., Inc.*, 862 P.2d 978 (Colo. App. 1993), aff'd sub nom. *Copper Mtn., Inc. v. Poma of Am., Inc.*, 890 P.2d 100 (Colo. 1995).

This section does not apply to reduce a defendant's liability under § 13-21-111.5 (4) where two or more persons act in concert to commit a tort. The joint liability provision, as the more recently enacted statute, must be deemed controlling to the extent of any inconsistency. *Pierce v. Wiglesworth*, 903 P.2d 656 (Colo. App. 1994); *Toothman v. Freeborn & Peters*, 80 P.3d 804 (Colo. App. 2002).

Plaintiff's fault may not reduce an intentional tortfeasor's liability. *Toothman v. Freeborn & Peters*, 80 P.3d 804 (Colo. App. 2002).

Proportionate fault is not applicable in a securities law context. *Toothman v. Freeborn & Peters*, 80 P.3d 804 (Colo. App. 2002).



**Applied** in *Cingoranelli v. St. Paul Fire & Marine Ins. Co.*, 636 P.2d 1285 (Colo. App. 1981); *McCall v. Roper*, 685 P.2d 230 (Colo. App. 1984); *Rupert v. Clayton Brokerage Co. of St. Louis*, 705 P.2d 988 (Colo. App. 1985); *Forsyth v. Associated Grocers of Colo.*, 724 P.2d 1360 (Colo. App. 1986); *Hauser v. Pub. Serv. Co.*, 797 F.2d 876 (10th Cir. 1986); *Rupert v.*

*Clayton Brokerage Co.*, 737 P.2d 1106 (Colo. 1987), overruling on other grounds *Rupert v. Clayton Brokerage Co.*, 705 P.2d 988 (Colo. App. 1985); *McKown-Katy v. Rego Co.*, 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990); *Padilla v. Ghuman*, 183 P.3d 653 (Colo. App. 2007).

**13-50.5-106. Uniformity of interpretation.** This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

**Source:** L. 77: Entire article added, p. 810, § 1, effective July 1.

## JUDGMENTS AND EXECUTIONS

### ARTICLE 51

#### Declaratory Judgments

**Law reviews:** For article, "Declaratory Judgment Actions to Resolve Insurance Coverage Questions", see 18 Colo. Law. 2299 (1989).

13-51-101.	Short title.	13-51-108.	Purposes of declaration.
13-51-102.	Legislative declaration.	13-51-109.	Not a limitation.
13-51-103.	Definitions.	13-51-110.	When court may refuse.
13-51-104.	Interpretation and construction.	13-51-111.	Review.
13-51-105.	Power and force of declaration.	13-51-112.	Further relief.
13-51-106.	Who may obtain declaration.	13-51-113.	Issues of fact.
13-51-107.	Contract construed anytime.	13-51-114.	Costs.
		13-51-115.	Parties - ordinances - statutes.

**13-51-101. Short title.** This article shall be known and may be cited as the "Uniform Declaratory Judgments Law".

**Source:** L. 23: p. 271, § 16. CSA: C. 93, § 92. CRS 53: § 77-11-15. C.R.S. 1963: § 77-11-15.

**Cross references:** For declaratory judgments generally, see also C.R.C.P. 57.

### ANNOTATION

**Law reviews.** For note, "The Colorado Declaratory Judgment Act", see 1 Rocky Mt. L. Rev. 52 (1928). For article, "Twenty-six Years Under the Colorado Declaratory Judgments Act", see 27 Dicta 177 (1950). For article, "Trusts and Estates", see 30 Dicta 435 (1953).

**For constitutionality of the declaratory judgment act,** see *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 26 P.2d 537 (1933).

**This article is designed to afford parties relief from uncertainty** with respect to their rights and status under law. *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976); *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984).

**This article is to be liberally construed and administered.** *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976); *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984); *Trinen v. City & County of Denver*, 725 P.2d 65 (Colo. App. 1986).

**Who may seek judicial determination of rights.** One whose rights are favorably affected by a statute is entitled to seek a judicial determination thereof so long as the court is provided with a properly adverse context. *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976).

One whose rights or status may be affected by

statute is entitled to have any question of construction determined provided that a substantial controversy between adverse parties of sufficient immediacy to warrant the issuance of a declaratory judgment exists. *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976).

**Prerequisites to jurisdiction such as exhaustion of remedies apply when a party seeks declaratory relief from agency action.** *City & County of Denver v. United Air Lines, Inc.*, 8 P.3d 1206 (Colo. 2000).

**Burden on moving party in summary judgment on constitutional issues in context of declaratory judgment.** Party seeking declaratory relief must demonstrate challenged statute or ordinance will cause tangible detriment to its activities and that statute or ordinance is unconstitutional beyond a reasonable doubt. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984).

**13-51-102. Legislative declaration.** This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.

**Source:** L. 23: p. 270, § 12. CSA: C. 93, § 89. CRS 53: § 77-11-12. C.R.S. 1963: § 77-11-12.

#### ANNOTATION

**Law reviews.** For article, "Twenty-six Years Under the Colorado Declaratory Judgments Act", see 27 *Dicta* 177 (1950).

**The purpose of the statute and the rule is to be remedial and to afford relief from uncertainty and insecurity.** The statute and rule expressly provide that they be liberally construed and administered. *Colo. State Bd. of Optometric Exam'rs v. Dixon*, 165 Colo. 488, 440 P.2d 287 (1968).

This article is designed to afford parties relief from uncertainty with respect to their rights and status under law. *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976).

**Liberal construction makes this section applicable to decisions to be made by board or commission.** A liberal construction of the statute and the rule rejects the proposition that a person adversely affected by a statute and seeking relief from uncertainty and insecurity with respect to his rights by reason of a statute or a rule of a board or commission must take the risk of prosecutions, fines, imprisonment, loss of property, or loss of profession in order to secure adjudication of his rights. *Colo. State Bd. of Optometric Exam'rs v. Dixon*, 165 Colo. 488, 440 P.2d 287 (1968).

**This article is to be liberally construed and administered.** *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976).

**Who may seek judicial determination of rights.** One whose rights are favorably affected

**Time limitations of appeal process cannot be circumvented by attempting to obtain declaratory relief.** *Trinen v. City & County of Denver*, 725 P.2d 65 (Colo. App. 1986).

**This statute neither expands nor contracts the jurisdiction of Colorado's courts.** In creating a new remedy the general assembly did not by implication grant political subdivisions of the state the right to sue the state. *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37 (Colo. 1995); *City & County of Denver v. United Air Lines, Inc.*, 8 P.3d 1206 (Colo. 2000).

**Applied in Bd. of County Comm'rs v. Fifty-first Gen. Ass'y**, 198 Colo. 302, 599 P.2d 887 (1979); *Citizens for Free Enter. v. Dept. of Rev.*, 649 P.2d 1054 (Colo. 1982); *Denver & R. G. W. R. R. v. City & County of Denver*, 673 P.2d 354 (Colo. 1983).

by a statute is entitled to seek a judicial determination thereof so long as the court is provided with a properly adverse context. *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976).

One whose rights or status may be affected by statute is entitled to have any question of construction determined provided that a substantial controversy between adverse parties of sufficient immediacy to warrant the issuance of a declaratory judgment exists. *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976); *Buckley Powder Co. v. State*, 924 P.2d 1133 (Colo. App. 1996), *aff'd in part and rev'd in part on other grounds*, 945 P.2d 841 (Colo. 1997).

**This statute neither expands nor contracts the jurisdiction of Colorado's courts.** In creating a new remedy the general assembly did not by implication grant political subdivisions of the state the right to sue the state. *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37 (Colo. 1995).

**Declaratory judgment action is an appropriate means of testing the validity of a decree and resolving uncertainty** as to the legal rights and status of the parties, even if the controversy has not yet ripened into litigation. *In re Lockwood*, 857 P.2d 557 (Colo. App. 1993).

**Trial court properly exercised its jurisdiction to review a Wyoming dissolution decree** where the marital status of the parties was at



issue and could be speedily and efficiently resolved through a declaratory judgment action. In re Lockwood, 857 P.2d 557 (Colo. App. 1993).

**Applied** in Toncray v. Dolan, 197 Colo. 382, 593 P.2d 956 (1979); Citizens Progressive Alli-

ance v. S.W. Water Conservation Dist., 97 P.3d 308 (Colo. App. 2004).

**13-51-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Person" means any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

**Source:** L. 23: p. 271, § 13. CSA: C. 93, § 90. CRS 53: § 77-11-13. C.R.S. 1963: § 77-11-13.

**13-51-104. Interpretation and construction.** This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

**Source:** L. 23: p. 271, § 15. CSA: C. 93, § 91. CRS 53: § 77-11-14. C.R.S. 1963: § 77-11-14.

**13-51-105. Power and force of declaration.** Courts of record within their respective jurisdictions have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

**Source:** L. 23: p. 268, § 1. CSA: C. 93, § 78. CRS 53: § 77-11-1. C.R.S. 1963: § 77-11-1.

## ANNOTATION

**Declaratory judgment is conclusive as to questions raised by parties** and passed upon by court. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973).

**Declaratory judgment does not constitute absolute bar** to subsequent proceedings where parties are seeking other remedies, even though based upon claims which could have been asserted in original action. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973); Near v. Calkins, 946 P.2d 537 (Colo. App. 1997).

**The judgment leaves the parties to pursue the remedies which the law provides**, after performing its office of declaring the existence of a certain liability. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

**Declaratory judgment on contract validity held not res judicata in subsequent action for reformation, rescission, and damages.** Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973).

**Judgment is res judicata as to questions of statutory construction raised between the parties.** Preventive relief in some instances is

just as properly a matter of judicial function as remedial relief and if given by a declaratory order in the construction of a statute, it is res judicata as to the questions of construction raised between the parties and passed upon. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

**Subsequent relief may be sought by separate action.** Subsequent relief sought by party to prior declaratory judgment action need not be sought by amendment of complaint in original action, but may be sought by separate action. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973).

**Declaratory judgment should not be accorded to try a controversy piecemeal.** In granting the remedy of declaratory judgment, it should not be accorded, however, to try a controversy by piecemeal, or to try particular issues without settling the entire controversy. Lane v. Page, 126 Colo. 560, 251 P.2d 1078 (1952).

**Act not intended to be a substitute for proper pleading.** The uniform act was never intended to be a substitute for, or a short cut to, proper pleading and specifically provides that all issues of fact shall be tried and determined as in

other cases. *Home Owners' Loan Corp. v. Meyer*, 110 Colo. 501, 136 P.2d 282 (1943).

**For the procedure in cases when issues involve equity and actions at law**, see *Beacon Theatre, Inc. v. Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed.2d 988 (1959).

**Declaratory judgment action is an appropriate means of testing the validity of a decree and resolving uncertainty** as to the legal rights and status of the parties, even if the controversy has not yet ripened into litigation. *In re Lockwood*, 857 P.2d 557 (Colo. App. 1993).

**Applied** in *Colo. & Utah Coal Co. v. Walter*, 75 Colo. 489, 226 P. 864 (1924); *Rice v. Frank-*

*lin Loan & Fin. Co.*, 82 Colo. 163, 258 P. 223 (1927); *Bedford v. Colo. Nat'l Bank*, 104 Colo. 311, 91 P.2d 469 (1939); *Colo. Nat'l Bank v. Bedford*, 105 Colo. 373, 98 P.2d 1120, aff'd, 310 U.S. 41, 60 S. Ct. 800, 84 L. Ed. 1067 (1940); *Gordon v. Wheatridge Water Dist.*, 107 Colo. 128, 109 P.2d 899 (1941); *McNichols v. City & County of Denver*, 109 Colo. 269, 124 P.2d 601 (1942); *Carpenter v. Carman Distrib. Co.*, 111 Colo. 566, 144 P.2d 770 (1943); *Woodridge v. Denver & R. G. R.*, 118 Colo. 25, 191 P.2d 882 (1948); *Comm'n's Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976); *Pennobscot, Inc. v. Bd. of County Comm'rs*, 642 P.2d 915 (Colo. 1982).

**13-51-106. Who may obtain declaration.** Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

**Source:** L. 23: p. 268, § 2. CSA: C. 93, § 79. CRS 53: § 77-11-2. C.R.S. 1963: § 77-11-2.

## ANNOTATION

- I. General Consideration.
- II. Actions Subject to Declaratory Judgment.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Twenty-six Years Under the Colorado Declaratory Judgments Act", see 27 *Dicta* 177 (1950). For article, "One Year Review of Criminal Law and Procedure", see 39 *Dicta* 81 (1962). For comment, "Pre-Enforcement Judicial Review: CF&I Steel Corp. v. Colo. Air Pollution Control Commission", see 58 *Den. L.J.* 693 (1981).

**This act was not intended to repeal the statute prohibiting judges from giving legal advice**, nor to impose the duties of the profession upon the courts, nor to provide advance judgments as the basis of commercial enterprises, nor to settle mere academical questions. *Gabriel v. Bd. of Regents of Univ. of Colo.*, 83 Colo. 582, 267 P. 407 (1928); *City & County of Denver v. Lynch*, 92 Colo. 102, 18 P.2d 907 (1932).

**Primary purpose of declaratory judgment procedure** is to provide a speedy, inexpensive, and readily accessible means of determining actual controversies which depend on the validity or interpretation of some written instrument of law. *Toncray v. Dolan*, 197 Colo. 382, 593 P.2d 956 (1979).

The purpose of this statute is to afford relief from the uncertainty surrounding legal rights

and legal relations. It is remedial in nature and should be liberally construed and administered. *Cnty. Tele-Communications v. Heather Corp.*, 677 P.2d 330 (Colo. 1984).

**No proceeding lies under our declaratory judgment act to obtain merely an advisory opinion.** *Farmers Elevator Co. v. First Nat'l Bank*, 176 Colo. 168, 489 P.2d 318 (1971).

**A proceeding for declaratory judgment must be based upon an actual controversy.** *Farmers Elevator Co. v. First Nat'l Bank*, 176 Colo. 168, 489 P.2d 318 (1971); *Beacom v. Bd. of County Comm'rs*, 657 P.2d 440 (Colo. 1983); *Cnty. Tele-Communications v. Heather Corp.*, 677 P.2d 330 (Colo. 1984).

A controversy exists where an insured has submitted a claim and the insurer determined that it did not intend unilaterally to admit liability, even though the insurer had not in fact denied such claim. *Am. Family Mut. Ins. Co. v. Bowser*, 779 P.2d 1376 (Colo. App. 1989).

Plaintiff must demonstrate that there is an existing legal controversy that can be effectively resolved by a declaratory judgment, and not a mere possibility of a future legal dispute. *Bd. of County Comm'rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045 (Colo. 1992).

**A justiciable controversy existed, and so the dismissal of a declaratory judgment claim was an abuse of discretion**, where a town's ordinance limited a developer's rights under an existing contract with the town, notwithstanding the fact that the developer had not applied for a



permit from the town. *Lot Thirty-Four Venture, L.L.C. v. Town of Telluride*, 976 P.2d 303 (Colo. App. 1998), *aff'd* on other grounds, 3 P.3d 30 (Colo. 2000).

**Injury in fact and interest legally protected by law give rise to standing.** Cable television company was injured in fact by city ordinance granting unlawful permit to competitor without holding franchise election, and cable television company had a legally protected interest in conducting its business in a lawful manner satisfying requirements for standing under this act. *Cnty. Tele-Communications v. Heather Corp.*, 677 P.2d 330 (Colo. 1984).

**Judgment creditor of insured has standing** to defend against claim for reformation of insurance policy. *Cont'l Western v. Jim's Hardwood Fl.*, 12 P.3d 824 (Colo. App. 2000).

**As does another insurer of judgment debtor.** *Cont'l Western v. Jim's Hardwood Fl.*, 12 P.3d 824 (Colo. App. 2000).

**The questions presented must not be uncertain or hypothetical.** The questions presented here are not uncertain or hypothetical, and because they are presented in an action seeking a declaratory judgment are no less justiciable than if presented by injunction or otherwise. *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 26 P.2d 537 (1933).

**Courts need not reply to mere "speculative inquiries".** The court cannot decide any other of the various questions raised, however desirable it might be to have them settled, unless it is now willing to answer questions "which have not yet arisen and which may never arise" and reply to mere "speculative inquiries". It cannot thus permit the courts to be converted into legal aid bureaus. *Gabriel v. Bd. of Regents of Univ. of Colo.*, 83 Colo. 582, 267 P. 407 (1928).

**A court should not enter into a speculative inquiry for the purpose of upholding or condemning statutory provisions,** the effect of which, in concrete situations not yet developed, could not be definitely perceived. *Am. Fed'n of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944).

**Or determine validity of a proposed city ordinance.** A declaratory judgment may not issue under the provisions of this article on the validity of a city ordinance to create a storm sewer district, where the proposed ordinance is in contemplation only and has not been passed by the city council. *City & County of Denver v. Denver Land Co.*, 85 Colo. 198, 274 P. 743 (1929).

**Especially in the absence of the necessary parties.** Desirable as it might be to have an announcement of the court upon a question, it would be improper to decide the question in the absence of the necessary parties. *City & County of Denver v. Denver Land Co.*, 85 Colo. 198, 274 P. 743 (1929); *Cont'l Mut. Ins. Co. v. Cochrane*, 89 Colo. 462, 4 P.2d 308 (1931).

**A declaratory judgment can only be taken to be a determination** as to the rights of the parties before the court. *Farmers Elevator Co. v. First Nat'l Bank*, 176 Colo. 168, 489 P.2d 318 (1971).

For a declaratory judgment to be binding, the necessary parties must be before the court. *Beacom v. Bd. of County Comm'rs*, 657 P.2d 440 (Colo. 1983).

**A judicial tribunal is not required to render a judicial opinion on a matter which has become moot.** A judicial opinion would not serve to terminate any controversy or put to an end any uncertainty, which in this complaint and petition evaporated when the election was concluded. *Crowe v. Wheeler*, 165 Colo. 289, 439 P.2d 50 (1968).

**Possible financial loss makes one an interested party.** Junior college districts, which would suffer loss of funds if an act were declared unconstitutional, have the right to intervene in a declaratory judgment suit. *Mesa County Junior Coll. Dist. v. Donner*, 150 Colo. 156, 371 P.2d 442 (1962).

**This statute neither expands nor contracts the jurisdiction of Colorado's courts.** In creating a new remedy the general assembly did not by implication grant political subdivisions of the state the right to sue the state. *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37 (Colo. 1995).

**An anticipatory declaratory judgment action must be independent of and separable from the underlying action.** This determination constitutes the third standard that a trial court must consider in determining whether an anticipatory declaratory judgment action is appropriate. *Constitution Assoc. v. N.H. Ins. Co.*, 930 P.2d 556 (Colo. 1996).

An anticipatory declaratory judgment action is more likely to be independent of and separable from the underlying action if no duty to defend in the underlying action has arisen. However, even if the duty has arisen, a party may bring the action if the party can demonstrate that a justiciable controversy exists, the judgment will finally resolve the controversy as to all parties, and independence and separability from the underlying action exists. *Constitution Assoc. v. N.H. Ins. Co.*, 930 P.2d 556 (Colo. 1996).

To have standing, a party seeking declaratory relief must demonstrate that the challenged statute or regulation will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984); *Citizens Progressive Alliance v. S.W. Water Conservation Dist.*, 97 P.3d 308 (Colo. App. 2004).

Since the southwestern water conservation district's rights were affected by a request made pursuant to the Colorado Open Records Act (CORA), and the district had a legitimate basis for believing that it could not respond to the

request within the CORA time limits because of the breadth of and lack of specificity in the request, the district was entitled to have the court determine whether, under CORA, it was required to respond to the request within the statutory time limits. Such a declaration is the type of relief expressly contemplated under the declaratory judgments law. *Citizens Progressive Alliance v. S.W. Water Conservation Dist.*, 97 P.3d 308 (Colo. App. 2004).

To have standing a plaintiff seeking a declaratory judgment on the validity of a regulatory scheme need not violate the regulation and thus become subject to punishment in order to secure the adjudication of uncertain legal rights. *Bd. of County Comm'rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045 (Colo. 1992).

Injury-in-fact element of standing satisfied when allegations of complaint, along with other evidence on issue of standing, establish that regulatory scheme threatens to cause injury to a legally protected interest of the plaintiff. *Bd. of County Comm'rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045 (Colo. 1992).

**Plaintiff has no standing to bring a declaratory judgment action against defendant's insurance company before obtaining a judgment against the defendant.** *Farmers Ins. Exch. v. District Court for the Fourth Judicial Dist.*, 862 P.2d 944 (Colo. 1993).

**An injured party in the underlying action cannot initiate an anticipatory declaratory judgment action against the other party's insurance company** because the injured party does not have an enforceable judgment against nor a contractual relationship with either the other party or the other party's insurer. *Constitution Assoc. v. N.H. Ins. Co.*, 930 P.2d 556 (Colo. 1996).

**Applied in** *In re Estate of Daigle*, 634 P.2d 71 (Colo. 1981); *Dolores Huerta Prep. High v. Colo. State Bd. of Educ.*, 215 P.3d 1229 (Colo. App. 2009).

## II. ACTIONS SUBJECT TO DECLARATORY JUDGMENT.

The courts have jurisdiction over certain enumerated actions seeking declaratory judgments. The general assembly is without power to require courts to exercise nonjudicial functions; but it is not without the power to impose upon courts jurisdiction over certain enumerated actions seeking declaratory judgments on matters that lend themselves to and receive judicial determination in otherwise litigated cases, as it at once appears, such would not be nonjudicial in their nature. *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 26 P.2d 537 (1933).

**Section may be employed by an insurance company to determine its liability.** An action for declaratory judgment may be properly main-

tained by an insurance company to determine if it will be liable to its insured for a defense and for payment of a possible judgment arising from a specified occurrence. *Beeson v. State Auto. & Cas. Underwriters*, 32 Colo. App. 62, 508 P.2d 402 (1973).

An insurer may seek a declaration of its contractual responsibilities of defense and indemnification in connection with a claim filed against a person who arguably qualified as an "insured" under the insurance contract. *Hartford Ins. Group v. District Court*, 625 P.2d 1013 (Colo. 1981).

The factual nature of the inquiry surrounding an action for declaratory judgment brought by an insurance company to determine its liability under a policy does not bar action. *Am. Family Mut. Ins. Co. v. Bowser*, 779 P.2d 1376 (Colo. App. 1989).

**The section is applicable to a dispute over the right to the use of spring waters** not tributary to any natural stream. *Colo. & Utah Coal Co. v. Walter*, 75 Colo. 489, 226 P. 864 (1924); *Stratton v. Beaver Farmers' Canal & Ditch Co.*, 82 Colo. 118, 257 P. 1077 (1927).

**Proposed game procedures, rules, and materials that were not the subject of seizure by the department of revenue** do not constitute a present controversy. *Snizek v. Dept. of Rev.*, 113 P.3d 1280 (Colo. App. 2005).

**Validity of statute may be tested.** Where results to occur from the enforcement of a statutory provision can be predicted with certainty or where the basic right of the state to enter legislative fields said to be the domain of the federal government is questioned, a court properly may declare with respect to the validity of a statute. *Am. Fed'n of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944).

One whose rights are affected by a statute may have its construction or validity determined by declaratory judgment. *Toncray v. Dolan*, 197 Colo. 382, 593 P.2d 956 (1979).

Where the taxpayers' liability for income taxes turns on the construction of a statute and the validity, or invalidity, of regulations purporting to interpret that statute, the case is well within the purpose of declaratory judgment. *Toncray v. Dolan*, 197 Colo. 382, 593 P.2d 956 (1979).

**Where all administrative remedies within a labor organization have been exhausted and union officials are charged with fraud**, trial court may properly assume jurisdiction of action by railroad company for declaratory judgment to determine rights under proposed contract. *Wooldrige v. Denver & R. G. R. R.*, 118 Colo. 25, 191 P.2d 882 (1948).

**Declaratory judgment is not proper procedure by which to make preenforcement challenge to regulation** promulgated by a state agency. *CF&I Steel Corp. v. Colo. Air Pollution*



Control Comm'n, 199 Colo. 270, 610 P.2d 85 (1980).

**For declaring a note or chattel mortgage void for usury**, see *Rice v. Franklin Loan & Fin. Co.*, 82 Colo. 163, 258 P. 223 (1927).

**For applicability to determination of rights under teachers' salary law**, see *Washington County High Sch. Dist. v. Bd. of Comm'rs*, 85 Colo. 72, 273 P. 879 (1928).

**For determination of certain levies**, see *Denver Land Co. v. Moffat Tunnel Imp. Dist.*, 87 Colo. 1, 284 P. 339 (1930).

**A lawsuit seeking a declaratory judgment may not be instituted** if it impermissibly seeks to chill or freeze the defendant's protected political speech. *Bd. of County Comm'rs v. Shroyer*, 662 F. Supp. 1542 (D. Colo. 1987).

**A cognizable claim is stated under this section and rule 57 of the Colorado Rules of**

**Civil Procedure** where towing carriers claimed that a Colorado state patrol policy invalidly abrogates a claimed legal right of such carriers to impose a lien on personal property obtained through rendition of towing services. *Jam Action, Inc. v. Colo. State Patrol*, 890 P.2d 210 (Colo. App. 1994).

**Declaratory judgment actions may be filed to determine the existence of, or rights under, an oral contract.** *Berenergy Corp. v. Zab, Inc.*, 94 P.3d 1232 (Colo. App. 2004), *aff'd*, 136 P.3d 252 (Colo. 2006).

**A trial court may grant declaratory relief in oral contract disputes where relief would terminate the controversy or remove an uncertainty.** *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252 (Colo. 2006).

**13-51-107. Contract construed anytime.** A contract may be construed either before or after there has been a breach thereof.

**Source:** L. 23: p. 268, § 3. CSA: C. 93, § 80. CRS 53: § 77-11-3. C.R.S. 1963: § 77-11-3.

#### ANNOTATION

**Validity of contract or question arising under contract must be pleaded.** In an action under this article to determine the validity of a contract, the complaint failing to allege that the validity of the contract had been questioned, or that a question had arisen under it, no cause of action was stated. *Gabriel v. Bd. of Regents of Univ. of Colo.*, 83 Colo. 582, 267 P. 407 (1928).

**Contracts interpreted only when all necessary facts determinable.** Although this section and C.R.C.P. 57 provide that a contract may be interpreted prior to breach, these provisions are inapplicable where the dispute requires an inter-

pretation in light of extrinsic facts which are not yet determinable. *McDonald's Corp. v. Rocky Mt. McDonald's, Inc.*, 42 Colo. App. 143, 590 P.2d 519 (1979).

**Insurer may seek declaration of contractual responsibilities of defense against "insured".** An insurer may seek a declaration of its contractual responsibilities of defense and indemnification in connection with a claim filed against a person who arguably qualifies as an "insured" under the insurance contract. *Hartford Ins. Group v. District Court*, 625 P.2d 1013 (Colo. 1981).

**13-51-108. Purposes of declaration.** (1) Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, a mental incompetent, or an insolvent may have a declaration of rights or legal relations in respect thereto:

- (a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or other; or
- (b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
- (c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

**Source:** L. 23: p. 269, § 4. CSA: C. 93, § 81. CRS 53: § 77-11-4. C.R.S. 1963: § 77-11-4. L. 75: IP(1) amended, p. 925, § 18, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Express Trusts in Colorado", see 10 Rocky Mt. L. Rev. 9 (1937).

**This section does not authorize advice on matters not before the court.** The court at the request of the parties will determine all questions that have properly arisen, but will decline to determine those which had not arisen and which might never arise during the administration of the trust. Neither under the equity practice nor under this act are the courts required to give general advice and instructions upon matters which have not arisen at the time their

jurisdiction is invoked. *Mulcahy v. Johnson*, 80 Colo. 499, 252 P. 816 (1927).

**It confers no new authority concerning wills and trusts.** District courts had full and complete jurisdiction before the passage of that act to construe wills and trusts and to control executors and trustees in the administration of estates. *Mulcahy v. Johnson*, 80 Colo. 499, 252 P. 816 (1927).

**Applied in** *In re Estate of Daigle*, 634 P.2d 71 (Colo. 1981).

**13-51-109. Not a limitation.** The enumeration in sections 13-51-106 to 13-51-108 does not limit or restrict the exercise of the general powers conferred in section 13-51-105, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

**Source:** L. 23: p. 269, § 5. CSA: C. 93, § 82. CRS 53: § 77-11-5. C.R.S. 1963: § 77-11-5.

## ANNOTATION

**Although § 13-51-106 and C.R.C.P. 57(b) detail situations in which declaratory judgment actions may be brought,** they do not restrict the court's ability to grant declaratory relief in other situations when appropriate. *Berenergy Corp. v. Zab, Inc.*, 94 P.3d 1232 (Colo. App. 2004), *aff'd* on other grounds, 136 P.3d 252 (Colo. 2006).

**Declaratory judgment action is an appropriate means of testing the validity of a decree and resolving uncertainty** as to the legal

rights and status of the parties, even if the controversy has not yet ripened into litigation. *In re Lockwood*, 857 P.2d 557 (Colo. App. 1993).

**A trial court may exercise its discretion to declare the existence of an oral contract** and, if one exists, the terms of that contract, where such relief would "terminate the controversy or remove an uncertainty." *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252 (Colo. 2006).

**13-51-110. When court may refuse.** The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

**Source:** L. 23: p. 269, § 6. CSA: C. 93, § 83. CRS 53: § 77-11-6. C.R.S. 1963: § 77-11-6.

**13-51-111. Review.** All orders, judgments, and decrees under this article may be reviewed as other orders, judgments, and decrees.

**Source:** L. 23: p. 269, § 7. CSA: C. 93, § 84. CRS 53: § 77-11-7. C.R.S. 1963: § 77-11-7.

**13-51-112. Further relief.** Further relief based on a declaratory judgment or decree may be granted when necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

**Source:** L. 23: p. 269, § 8. CSA: C. 93, § 85. CRS 53: § 77-11-8. C.R.S. 1963: § 77-11-8.



## ANNOTATION

**Relief is not limited by language of statute or rule to prevailing party in declaratory judgment action.** *Atchison v. City of Englewood*, 180 Colo. 407, 506 P.2d 140 (1973).

**Reversal of an underlying declaratory judgment is not the "further relief" contemplated by this section and C.R.C.P. 57(h) but**

**is, instead, ordinary postjudgment relief.** While "further relief" is not limited to the original prevailing party, nevertheless, such relief must seek remedies different from those granted in the declaratory judgment. *Spencer v. Bd. of County Comm'rs*, 39 P.3d 1272 (Colo. App. 2001).

**13-51-113. Issues of fact.** When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of facts are tried and determined in other civil actions in the court in which the proceeding is pending.

**Source:** L. 23: p. 270, § 9. CSA: C. 93, § 86. CRS 53: § 77-11-9. C.R.S. 1963: § 77-11-9.

## ANNOTATION

**Factual determinations may be necessary in order to declare rights, status or legal relations.** An action for declaratory judgment may be properly maintained by an insurance company to fix liability vel non, notwithstanding that factual determinations are necessary to make a declaration on the controlling issue. *O'Herron v. State Farm Mut. Auto. Ins. Co.*, 156 Colo. 164, 397 P.2d 227 (1964); *Am. Family Mut. Ins. Co. v. Bowser*, 779 P.2d 1376 (Colo. App. 1989).

**Parties are entitled to jury trial if issue would have matured into one at law.** If the action in which declaratory relief is sought would have been an action at law had it been permitted to mature without intervention of declaratory procedure, the right to trial by jury of disputed questions of fact is not affected. *Baumgartner v. Schey*, 143 Colo. 373, 353 P.2d 375 (1960).

**13-51-114. Costs.** In any proceeding under this article, the court may make such award of costs as may seem equitable and just.

**Source:** L. 23: p. 270, § 10. CSA: C. 93, § 87. CRS 53: § 77-11-10. C.R.S. 1963: § 77-11-10.

## ANNOTATION

**County treasurer is entitled to attorney fees in mandamus suit against board of commissioners.** Where county treasurer seeks writ of mandamus requiring board of commissioners to approve salaries set by treasurer and requests declaratory judgment construing and interpreting relative rights, powers and duties of treasurer and board under statute, treasurer is entitled to reasonable attorney fees incurred in prosecuting action. *Kanaly v. Wadlow*, 31 Colo.

App. 193, 502 P.2d 83 (1972), modified, 511 P.2d 484 (1973).

**This section does not evince a legislative intent to authorize cost awards against public entities,** because this section neither explicitly refers to such entities nor to any action that can be brought only against such entities. *Farmers Reservoir & Irrigation Co. v. City of Golden*, 113 P.3d 119 (Colo. 2005).

**13-51-115. Parties - ordinances - statutes.** When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or

franchise, such municipality shall be made a party and is entitled to be heard, and, if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

**Source:** L. 23: p. 270, § 11. CSA: C. 93, § 88. CRS 53: § 77-11-11. C.R.S. 1963: § 77-11-11.

**Cross references:** For similar provisions in court rules, see C.R.C.P. 57(j).

ANNOTATION

**Law reviews.** For note, “Has the Colorado IRA Met an Advisory Death?”, see 8 Rocky Mt. L. Rev. 140 (1936).

**All persons who have an interest shall be made parties.** This section provides that all persons who claim an interest in the litigation which would be affected by the declaration sought shall be made parties. Mesa County Junior Coll. Dist. v. Donner, 150 Colo. 156, 371 P.2d 442 (1962).

**It was appropriate for the insurer to name the injured party in the underlying action as a party defendant in the anticipatory declaratory judgment action** to ensure that the declaratory judgment would resolve the controversy at issue with regard to all parties. Once named, it was appropriate for the injured party in the underlying action to defend against the declaratory judgment action brought by the insurer. Constitution Assoc. v. N.H. Ins. Co., 930 P.2d 556 (Colo. 1996).

**Any person or entity not named as a party to an anticipatory declaratory judgment action is not bound** by the court’s ruling in the action. Constitution Assoc. v. N.H. Ins. Co., 930 P.2d 556 (Colo. 1996).

**Possible loss of funds is sufficient interest.** Under this section all persons claiming an interest in the litigation to be affected by the declaration sought shall be made parties. It is error to deny petitions of intervention of junior colleges

whose rights would be directly affected by a declaration of unconstitutionality depriving them of funds. Mesa County Junior Coll. Dist. v. Donner, 150 Colo. 156, 371 P.2d 442 (1962).

**Neither this section nor C.R.C.P. 57 (j) applies to regulations promulgated pursuant to legislative grant of authority;** therefore, in challenging a regulation, the attorney general need not be joined. Continental Liquor Co. v. Kalbin, 43 Colo. App. 438, 608 P.2d 353 (1977).

**Nor do they address situation where constitutional question arises during trial.** This section and C.R.C.P. 57 (j), mandating notice to the attorney general when allegations of unconstitutionality are made, do not address the situation where the question of constitutionality arises for the first time during the course of trial. Howell v. Woodlin Sch. Dist. R-104, 198 Colo. 40, 596 P.2d 56 (1979).

**In suit seeking declaratory judgment that tax statute is unconstitutional,** the attorney general, governor, state property tax commissioner, and county attorney are not proper parties defendant, but the state of Colorado and county officials are proper parties defendant. Lucchesi v. State, 807 P.2d 1185 (Colo. App. 1990).

**Applied** in Hide-A-Way Massage Parlor, Inc. v. Bd. of County Comm’rs, 198 Colo. 175, 597 P.2d 564 (1979); Empire Sav., Bldg. & Loan Ass’n v. Otero Sav. & Loan Ass’n, 640 P.2d 1151 (Colo. 1982).

ARTICLE 51.5

Review of Land Use Decisions

**Cross references:** For the legislative declaration contained in the 1997 act enacting this article, see section 1 of chapter 78, Session Laws of Colorado 1997.

13-51.5-101.	Scope and purpose of article.	13-51.5-103.	Request for administrative record - certification - time limits.
13-51.5-102.	Definitions.		

**13-51.5-101. Scope and purpose of article.** This article applies to judicial review of local land use decisions in cases where it is alleged that a governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion and there is no plain, speedy, and adequate remedy



otherwise provided by law. Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

**Source: L. 97:** Entire article added, p. 214, § 2, effective July 1.

**13-51.5-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Development permit" means any zoning permit, subdivision approval, certification, special exception, variance, or any other similar action of a governmental entity that has the effect of authorizing the development of real property. "Development permit" does not include a building permit.

(2) "Governmental entity" includes any municipal, county, or regional government with the authority to plan and zone land. "Governmental entity" does not include the state of Colorado, any agency of the state of Colorado, the United States, or any agency of the United States.

(3) "Local land use decision" means any action of a governmental entity that has or will have the effect of granting, denying, or granting with conditions an application for a development permit.

**Source: L. 97:** Entire article added, p. 214, § 2, effective July 1.

**Editor's note:** Subsections (2) and (3), as they were enacted in House Bill 97-1156, were renumbered on revision in 2002 as (3) and (2), respectively.

**13-51.5-103. Request for administrative record - certification - time limits.**

(1) Unless the court specifically orders otherwise upon a showing of good cause for delay, a defendant governmental body or officer shall file the record pursuant to rule 106 (a) (4) (III), C.R.C.P., or any successor rule thereto within thirty-five days after the filing of the complaint.

(2) Except as otherwise provided in this section, all aspects of the proceeding shall be conducted in accordance with the Colorado rules of civil procedure, including without limitation C.R.C.P. 106 and any successor thereto.

**Source: L. 97:** Entire article added, p. 214, § 2, effective July 1. **L. 2012:** (1) amended, (SB 12-175), ch. 208, p. 826, § 13, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Section does not confer any legally protected interest for purposes of establishing standing.** Purpose of section is to provide more expeditious disposition of land use decisions

being reviewed under C.R.C.P. 106(a)(4) when standing otherwise independently exists. *Reeves v. City of Fort Collins*, 170 P.3d 850 (Colo. App. 2008).

## ARTICLE 52

### Property Subject to Levy

**Cross references:** For procedure for revival of judgments, see C.R.C.P. 54(h); for actions that survive and procedure for maintenance thereof, see C.R.C.P. 25.

13-52-101. Property first levied on.  
13-52-102. Property subject to execution  
- lien - real estate.

13-52-103. Change of name of debtor -  
record.  
13-52-104. Transcript of federal judg-

	ment filed - lien.		attachment prior to judgment.
13-52-105.	Legal and equitable interests.	13-52-109.	Property sold in parcels.
13-52-106.	Certificate holders included.	13-52-110.	Execution to any county.
13-52-107.	What moneys may be levied on.	13-52-111.	Return - endorsement - entry.
13-52-108.	Concerning garnishment and		

**13-52-101. Property first levied on.** The judgment creditor in execution may elect on what property he will have the same levied except the land on which the judgment debtor resides, which shall be last taken in execution, excepting and reserving, however, to the judgment debtor in execution such property as is, or may be, by law exempted from execution.

**Source:** R.S. p. 372, § 9. G.L. § 1415. G.S. § 1847. R.S. 08: § 3608. C.L. § 5897. CSA: C. 93, § 1. CRS 53: § 77-1-1. C.R.S. 1963: § 77-1-1. L. 90: Entire section amended, p. 1839, § 15, effective May 31.

#### ANNOTATION

**Law reviews.** For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "Election to Sue on a Mortgage Note in Lieu of Foreclosure", which discusses executions on homestead property, see 13 Colo. Law. 621 (1984).

**Debtor should be able to designate property to be taken in place of his residence.** In case of the levy of an execution on land on which the debtor resides, without giving him an opportunity, when practicable, to designate other property of his sufficient to satisfy the writ, the levy ought to be set aside, upon a timely application by the debtor, accompanied with a satisfactory showing of other property, subject to levy, sufficient to satisfy the execution. *Victor Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 P. 349 (1912).

**Attorney should give directions to officer making levy.** The attorney controlling an exe-

cution owes to his client the duty to give the officer to whom the writ is committed proper directions. But even where a levy upon the lands where the execution defendant is residing is contemplated, such attorney is under no duty to the defendant to notify him of the intended levy. *Victor Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 P. 349 (1912).

**Officer need not notify debtor that a levy on his realty is to be made.** No decided case has been brought to our notice in which it was held that a failure of the officer to notify the defendant in the execution, before levying upon his real estate, would authorize a court of equity to set aside the sheriff's sale and deed, after the expiration of the statutory period of redemption. *Victor Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 P. 349 (1912).

**13-52-102. Property subject to execution - lien - real estate.** (1) All goods and chattels, lands, tenements, and real estate of every person against whom any judgment is obtained in any court of record in this state, either at law or in equity, or against whom any foreign judgment is filed with the clerk of any court of this state in accordance with the provisions of the "Uniform Enforcement of Foreign Judgments Act" pursuant to article 53 of this title, which judgment, in either case, is for any debt, damages, costs, or other sum of money are liable to be sold on execution to be issued upon such judgment. A transcript of the judgment record of such judgment, certified by the clerk of such court, may be recorded in any county; and from the time of recording such transcript, and not before, the judgment shall become a lien upon all the real estate, not exempt from execution in the county where such transcript of judgment is recorded, owned by such judgment debtor or which such judgment debtor may afterwards acquire in such county, until such lien expires. The lien of such judgment shall expire six years after the entry of judgment unless, prior to the expiration of such six-year period, such judgment is revived as provided by law and a transcript of the judgment record of such revived judgment, certified by the clerk of the court in which such revived judgment was entered, is recorded in the same county in which the transcript of the original judgment was recorded, in which event the lien shall continue for six years from the entry of the revived judgment. A lien may be obtained with respect to a revived judgment in the same manner as an original judgment and the lien of a revived



judgment may be continued in the same manner as the lien of an original judgment. The lien of any judgment shall expire if the judgment is satisfied or considered as satisfied as provided in this section. The lien created by recording a notice of lien of a judgment for child support or maintenance or arrears thereof or child support debt pursuant to section 14-10-122, C.R.S., shall be governed by such section. The lien created by recording a transcript of an order for restitution pursuant to section 16-18.5-104 (5) (a), C.R.S., shall be governed by article 18.5 of title 16, C.R.S.

(2) (a) Except as provided in paragraph (b) of this subsection (2), execution may issue on any judgment described in subsection (1) of this section to enforce the same at any time within twenty years from the entry thereof, but not afterwards, unless revived as provided by law, and, after twenty years from the entry of final judgment in any court of this state, the judgment shall be considered as satisfied in full, unless so revived.

(b) (I) With respect to judgments entered in county courts on or after July 1, 1981, the time limitation within which execution may issue is six years from the entry thereof, but not afterwards, unless revived as provided by law, and, after six years from the entry of final judgment in any county court of this state, the judgment shall be considered as satisfied in full, unless so revived.

(II) The twenty-year limitation contained in paragraph (a) of this subsection (2) shall not apply to judgments entered for restitution pursuant to article 18.5 of title 16, C.R.S. Execution may issue on judgments for restitution at any time until paid in full.

(c) If, after the date that a transcript of judgment is recorded in a county, some portion or all of such county is merged with, annexed to, or otherwise becomes part of some other county or city and county, whether then existing or newly formed, then:

(I) It shall not be necessary to record the transcript of judgment in such other county or city and county in order to continue the lien of the judgment and the priority thereof as to any real estate that the judgment debtor acquired before or acquires after the date of recording of the transcript of judgment if such real estate was in the county in which the transcript of judgment was recorded on or after the date of recording of the transcript of judgment; and

(II) If such judgment is revived as provided by law, timely recording of a transcript of the revived judgment in such other county or city and county is necessary to continue the lien of the original judgment and the priority thereof with respect to any real estate that was in the county in which the transcript of the original judgment was recorded on or after the date of recording of the transcript of the original judgment but, at the time of recording of the transcript of the revived judgment, is in such other county or city and county.

(3) The term "real estate" as used in this section includes all interests of the defendant or any person to his use held or claimed by virtue of any deed, bond, covenant, or otherwise for a conveyance or as mortgagor of lands in fee, for life, or for years.

(4) (a) Any person, including a title insurance company as defined by article 11 of title 10, C.R.S., who makes representations concerning the existence of any judgment lien on the real property of another shall have the duty to make a bona fide good faith effort, prior to the making of such representations, to determine whether the person against whom the judgment was obtained is the same person as the person who holds an interest in the real property which is the subject of the representation. If a bona fide good faith effort is made and such effort fails to disclose satisfactory information as to whether or not the person against whom the judgment was obtained is the same person as the person who holds an interest in the real property which is the subject of the representation, then, in that event, the person or title insurance company who makes the representation may require the person who holds an interest in the real property which is the subject of the representation to provide satisfactory evidence or information that he is not the same person as the judgment debtor.

(b) Any person, including a title insurance company as defined by article 11 of title 10, C.R.S., who makes representations concerning the existence of any judgment lien on the real property of another without making a bona fide good faith effort, prior to the making of such representations, to determine whether the person against whom the judgment was obtained is the same person as the person who holds an interest in the real property which is the subject of the representation is liable to any person damaged by the failure to make

such effort in a sum of not less than one hundred dollars nor more than one thousand dollars for his actual and exemplary damages. The prevailing party shall recover the costs of the action together with reasonable attorney fees, as determined by the court. No action pursuant to this paragraph (b) shall be brought more than one year after the date of the representation concerning the existence of the judgment lien.

(c) As used in this subsection (4), "bona fide good faith effort" means honesty in fact in the effort to discover and determine the actual and true identity of the judgment debtor against whom the judgment lien attaches. The effort shall include but need not be limited to an examination of the judgment debtor's social security number, his driver's license, his address, his birth record, and the court record in the action which resulted in the judgment lien, if available.

**Source:** R.S. p. 370, § 1. G.L. § 1409. G.S. § 1835. L. 1891: p. 246, § 1. L. 01: p. 231, § 1. R.S. 08: § 3609. L. 17: p. 329, § 1. C.L. § 5898. CSA: C. 93, § 2. CRS 53: § 77-1-2. C.R.S. 1963: § 77-1-2. L. 80: (4) added, p. 517, § 1, effective July 1. L. 81: (2) amended, p. 889, § 1, effective July 1. L. 92: (1) amended, p. 218, § 24, effective August 1. L. 93: (1) amended, p. 1563, § 14, effective September 1. L. 2000: (1) and (2) (b) amended, p. 1051, § 23, effective September 1. L. 2002: (1), (2) (a), and (2) (b) (II) amended and (2) (c) added, p. 49, § 1, effective March 21.

**Cross references:** For procedures in execution and other proceedings after judgment, see C.R.C.P. 69.

## ANNOTATION

- I. General Consideration.
- II. Interests Subject to Execution.
- III. Nature and Extent of Lien.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "State Statutes of Limitation Contrasted and Compared", see 3 Rocky Mt. L. Rev. 106 (1931). For article, "Enforcement of Justice Court Judgments", see 12 Dicta 274 (1935). For note, "Revived Judgments and the Full Faith and Credit Clause", see 22 Rocky Mt. L. Rev. 87 (1949). For article, "Reaching Fraudulent Conveyances and Equitable Interests of Debtors", see 27 Dicta 137 (1950). For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950). For article, "Transmissibility of Future Interest in Colorado", see 27 Rocky Mt. L. Rev. 1 (1954). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record", see 34 Dicta 7 (1957). For article, "One Year Review of Domestic Relations", see 38 Dicta 84 (1961). For comment, "The Effect of Certified Realty Corp. v. Smith on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For article, "Some Malpractice Pitfalls in Collection Cases", which discusses malpractice by collection attorneys, see 13 Colo. Law. 2235 (1984). For article, "The Nuts and Bolts of Collecting Support", see 19 Colo. Law. 1595 (1990).

**The duly recorded judgment became a lien upon all real property** which the judgment debtor then owned or thereafter acquired. Sky

Harbor, Inc. v. Jenner, 164 Colo. 470, 435 P.2d 894 (1968).

**Under this section, execution may issue at any time within 20 years** after the entry of the judgment. Balfe v. Rumsey & Sikemeier Co., 55 Colo. 97, 133 P. 417 (1913).

**The running of the six-year statute of limitations established by this section** for collection of payment of a debt through execution on a judgment lien does not extinguish the debt. It bars execution of the judgment lien, but payment of the debt may be enforced by other available legal means. Mortgage Invs. Corp. v. Battle Mtn. Corp., 70 P.3d 1176 (Colo. 2003).

**Section also governs time within which body executions may issue.** The sections relating to body executions do not prescribe any different time limit than that mentioned in the instant section for the issuance of such executions. Both body executions and property executions are issued on judgments, "to enforce the same". In our opinion this section prescribes the time within which body executions may issue. Roll v. Davis, 85 Colo. 594, 277 P. 767 (1929).

**The general assembly may, while a judgment is in full life, extend the time within which execution may issue.** Balfe v. Rumsey & Sikemeier Co., 55 Colo. 97, 133 P. 417 (1913).

**Generally, court may not impair creditor's right to enforce collection.** As a general rule, a court may not stay execution and thereby impair or destroy the statutory right of a judgment creditor to enforce collection of its judgment against nonexempt property of the judgment debtor. First Nat'l Bank v. District Court, 652 P.2d 613 (Colo. 1982).



**Right to enforce may be statutorily limited.**

The substantive right of a judgment creditor to enforce collection of the judgment may be statutorily limited, as by § 7-60-128. *First Nat'l Bank v. District Court*, 652 P.2d 613 (Colo. 1982).

**A judgment directing restitution of money is a judgment for a "sum of money"** as that phrase is used in this section. *Scott v. Woodhams*, 79 Colo. 528, 246 P. 1027 (1926).

**Execution may issue on order for permanent and temporary alimony.** Under the provisions of this section an execution is authorized not only on an order for permanent alimony, but on temporary alimony also. *Daniels v. Daniels*, 9 Colo. 133, 10 P. 657 (1886); *Paul v. Marty*, 72 Colo. 399, 211 P. 667 (1922); *Hauck v. Schuck*, 143 Colo. 324, 353 P.2d 79 (1960).

**Alimony and support installments are judgments**, and are enforceable during the entire period of the statute of limitations. *Hauck v. Schuck*, 143 Colo. 324, 353 P.2d 79 (1960).

**Creditor may file bill in equity to remove fraudulent obstruction.** The right of a judgment creditor to come into a court of equity to remove a fraudulent obstruction to the collection of his judgment, and to enforce a claim against property which ought to be subject thereto, is well established. *Barnes v. Beighly*, 9 Colo. 475, 12 P. 906 (1887).

**Once lien exists.** In some way the lien must be acquired and exist at the time a bill is filed in equity to remove fraudulent obstructions. *Barnes v. Beighly*, 9 Colo. 475, 12 P. 906 (1887).

**Levy must become visible and accessible to be valid.** The designation is a mental act; but, in order that it may be valid as a levy, it must be embodied in some visible memorial—some record of what was done, accessible to the judgment debtor and to the public. Strictly speaking, the record is not itself a levy, it is merely the evidence that the levy was made, but as the statute does not require that the record shall be made upon the writ, no reason is apparent why it may not be made elsewhere, provided it is equally public and permanent. *Herr v. Broadwell*, 5 Colo. App. 467, 39 P. 70 (1895); *Jones v. Olson*, 17 Colo. App. 144, 67 P. 349 (1902).

**Judgment itself does not constitute a lien** upon realty; the creditor must go a step further and acquire a specific lien. *Robison v. Gumaer*, 43 Colo. 310, 95 P. 935 (1908).

**Mere recording of transcript does not effect execution.** The recording of the transcript of judgment does not, in and of itself, effect an execution upon the property of the debtor. *Rocky Mt. Ass'n of Credit Mgt. v. District Court*, 193 Colo. 344, 565 P.2d 1345 (1977).

**Creditor may, prior to sale, bring action to determine nature and extent of debtor's interest in land.** While under the statute every

interest in land, whether legal or equitable, is subject to levy and sale on execution, and the purchaser of such interest may maintain an action to determine the extent thereof, yet the judgment creditor may resort to an action prior to the sale. for the purpose of having the debtor's interest determined, and the question of title settled in advance of the sale. *O'Connell v. Taney*, 16 Colo. 353, 27 P. 888 (1891).

**Estate, not subjected specifically to a judgment lien before it was homesteaded, is exempt from execution.** *Weare v. Johnson*, 20 Colo. 363, 38 P. 374 (1894).

**Proviso as to suspension of statute applies to supersedeas on appeal.** The proviso in the statute, suspending the running of the statute when issue of execution is restrained by injunction, applies to a suspension of issue by supersedeas on appeal. *Gottlieb v. Thatcher*, 151 U.S. 271, 14 S. Ct. 319, 38 L. Ed. 157 (1894).

**General appearance and motion to quash by debtor waives defects in service.** A general appearance, and motion to quash an execution, upon the sole ground that more than 10 (now 20) years elapsed between the entry of judgment and the issuance of execution, and that the judgment had not been revived, is a waiver of all defects and irregularities in the service or return of the summons. *Balfe v. Rumsey & Sikemeier Co.*, 55 Colo. 97, 133 P. 417 (1913).

**Court-ordered foreclosure need not conform to this section.** The district court's order foreclosing the chattel mortgages and directing sale of the personalty was not entered by way of execution. The procedures specified in articles 51 to 61 of title 13 for levies on execution were not violated by the district court's order of foreclosure and sale. *Terrell v. Walter E. Heller & Co.*, 165 Colo. 463, 439 P.2d 989 (1968).

**Judicial liens in bankruptcy.** Judicial liens impair a bankruptcy debtor's equity where they are created subsequent to the establishment of a homestead right and no waiver is obtained from the property owner. Consequently, pursuant to 11 U.S.C. § 522 and §§ 13-54-107, 38-41-201 and 38-41-202, these liens are null and void as judicial liens. *Lincoln v. Cherry Creek Homeowners Ass'n*, 30 Bankr. 905 (Bankr. D. Colo. 1983).

**Good faith improver doctrine did not apply** to exempt a residence from a judgment lien which had been recorded against judgment debtor before debtor's successor in interest began construction of such residence. *Mooring v. Brown*, 763 F.2d 386 (10th Cir. 1985).

**For execution sale by one creditor not divesting lien of another creditor,** see *Casserleigh v. Spar Consol. Mining Co.*, 23 Colo. App. 239, 128 P. 863 (1912).

**Personal and real property not owned by judgment debtor is not subject to execution,** absent another statute creating liability. *Brink v. McNeil*, 761 P.2d 271 (Colo. App. 1988).

**Twenty-year period prescribed for execution upon judgments in this section and not the six-year period in § 13-80-103.5 is the applicable statute of limitations for child support arrearages.** In re Aragon, 773 P.2d 1110 (Colo. App. 1989).

**Seizure of jointly held personal property pursuant to writ of attachment or execution to secure debt of one joint owner does not constitute conversion.** Ruscitti v. Sackheim, 817 P.2d 1046 (Colo. App. 1991).

**Property subject to homestead exemption is exempt from execution and therefore from judgment lien.** City Ctr. Nat'l Bank v. Barone, 807 P.2d 1251 (Colo. App. 1991).

**If bank could not assert a lien against property while party retained title, it could not enforce a lien against the party's grantees, provided the transaction was bona fide.** City Ctr. Nat'l Bank v. Barone, 807 P.2d 1251 (Colo. App. 1991).

**Issuance of a writ of execution and the filing of a certificate of levy does not extend the six-year term of a judgment lien.** Regardless of when acquired, writs of execution or certificates of levy merely serve as means to enforce the lien. Great W. Exch., Inc. v. Walters, 819 P.2d 1093 (Colo. App. 1991).

**When calculating the six-year time limit on a judgment lien under this section that originated as a foreign judgment lien under the Uniform Enforcement of Foreign Judgments Act, the time begins to run when the judgment was entered in the foreign jurisdiction, not when it was filed in Colorado.** Baum v. Baum, 820 P.2d 1122 (Colo. 1991); Mortgage Inv. Corp. v. Battle Mtn. Corp., 56 P.3d 1104 (Colo. App. 2001), rev'd on other grounds, 70 P.3d 1176 (Colo. 2003).

**Judgment lien, based on a domesticated out-of-state judgment, must be revived under Colorado procedural law for the lien to be extended.** To extend a judgment lien beyond six years after the date of judgment, Colorado procedural law requires a judgment to be revived pursuant to C.R.C.P. 54(h) and a transcript of the revival to be filed with the clerk and recorder. Wells Fargo Bank, N.A. v. Kopfman, 205 P.3d 437 (Colo. App. 2008), aff'd, 226 P.3d 1068 (Colo. 2010).

**Personal property not owned by judgment debtor not subject to execution to satisfy judgment.** Ruscitti v. Sackheim, 817 P.2d 1046 (Colo. App. 1991).

**Applied in** Baker v. Allen, 34 Colo. App. 363, 528 P.2d 922 (1974); Mohler v. Buena Vista Bank & Trust Co., 42 Colo. App. 4, 588 P.2d 894 (1978); Lucero v. Sec. Indus. Bank, 4 Bankr. 659 (Bankr. D. Colo. 1980); Trimble v. McCoy Bros., 11 Bankr. 512 (Bankr. D. Colo. 1981); Lease Fin. Inc. v. Cohen, 705 P.2d 1008 (Colo. App. 1985).

## II. INTERESTS SUBJECT TO EXECUTION.

**Under this section every interest in land, whether legal or equitable, is subject to levy and sale on execution.** McFarran v. Knox, 5 Colo. 217 (1880); Stock-Growers' Bank v. Newton, 13 Colo. 245, 22 P. 444 (1889); O'Connell v. Taney, 16 Colo. 353, 27 P. 888 (1891); Arnett v. Coffey, 1 Colo. App. 34, 27 P. 614 (1891).

**It is to be presumed that when the general assembly used the term "real estate" it intended a lien upon whatever real estate on which there might be a levy.** McFarran v. Knox, 5 Colo. 217 (1880).

**Creditor's interest is superior to third party's equitable interest if he has no notice.** A creditor who, acting in good faith and without notice of equitable interests, acquires a lien under the statutes against the apparent interest of his judgment debtor, acquires a valid lien superior to a third party's equitable interests. Sky Harbor, Inc. v. Jenner, 164 Colo. 470, 435 P.2d 894 (1968); Shearton Serv. Corp. v. Johnson, 5 P.3d 395 (Colo. App. 2000).

**Filing dissolution action does not give a debtor's spouse any rights that predate attachment of a judgment lien creditor's rights.** Thus, if judgment lien creditor perfects a lien on real property before debtor's spouse asserts and perfects a claim to the property in dissolution proceeding, then the rights of debtor's spouse to the property are subordinate to those of the judgment lien creditor. Shearton Serv. Corp. v. Johnson, 5 P.3d 395 (Colo. App. 2000).

**A lease of land for a term of years is real estate.** Liggett v. Enneking, 101 Colo. 254, 72 P.2d 1118 (1937).

**The equity of redemption of a mortgagor in chattels is not subject to an execution at law where the possession of the chattels has been transferred to the mortgagee.** Metzler v. James, 12 Colo. 322, 19 P. 885 (1888).

**Where one also has right of possession, land is subject to execution.** Twogood v. Ocsay, 97 Colo. 300, 49 P.2d 437 (1935).

**Where a judgment debtor had neither a legal nor an equitable interest in a property, recording a judgment does not create a lien on the property, because there is no interest on which the lien could attach.** Junior creditor who successfully exposes a fraudulent transfer by filing suit takes priority over senior creditors holding judgments recorded prior to the junior creditor uncovering the fraud. Shepler v. Whalen, 119 P.3d 1084 (Colo. 2005).

**The interest must be vested and based on legal or equitable title.** Under this provision it is clear that if appellant was vested with any interest in the property, either legal or equitable, then such interest was liable to seizure and sale under the execution. It must appear, however,



that the interest was a vested interest, which attached to the body of the land itself, and was held by him under a legal or equitable title, within the meaning of the law. *Fallon v. Worthington*, 13 Colo. 559, 22 P. 960 (1889).

**A chose in action is not such an interest.** A vendor of real estate who enters into a subsequent contract with his vendee, whereby the trust-deed given to secure instalments of purchase money is released, a lien merely being reserved, has only a chose in action, and no interest in the land which can be subjected to sale on execution. *Fallon v. Worthington*, 13 Colo. 559, 22 P. 960 (1889).

**An inchoate interest is liable to execution.** The inchoate interest of a purchaser of lands, under an executory agreement for the future conveyance thereof, is liable to execution. under this section. *Salisbury v. La Fitte*, 57 Colo. 358, 141 P. 484 (1914).

**Interest of joint tenants unsatisfactory to creditor of one joint tenant.** The real property interest of two joint tenants cannot be used to satisfy the judgment creditor of one joint tenant. *First Nat'l Bank v. Energy Fuels Corp.*, 200 Colo. 540, 618 P.2d 1115 (1980).

**For ineffectiveness of judgment against lessee of debtor whose leasehold interest antedates recordation**, see *Routt County Mining Co. v. Stutheit*, 101 Colo. 254, 72 P.2d 692 (1937).

**For C.R.C.P. 69(a) not curtailing rights given by this section**, see *Jones v. District Court*, 135 Colo. 468, 312 P.2d 503 (1957).

### III. NATURE AND EXTENT OF LIEN.

**Lien attaches immediately upon filing and recording of judgment.** A judgment being filed for record and recorded as required by the statutes, a lien attaches at once upon the real estate of the judgment debtor. *Gottlieb v. Thatcher*, 151 U.S. 271, 14 S. Ct. 319, 38 L. Ed. 157 (1894).

**Or upon levy of execution.** A judgment creditor has no lien upon real property by virtue of his judgment until he files a transcript of the judgment with the county clerk and recorder or levies execution upon the property. *Routt County Min. Co. v. Stutheit*, 101 Colo. 254, 72 P.2d 692 (1937).

**In each county where the transcript is filed.** The filing of a transcript of a judgment in La Plata county fastened a lien securing its payment upon the interest of the coal and coke company in its real estate in that county, under this statute. *Schofield v. Ute Coal & Coke Co.*, 92 F. 269 (8th Cir. 1879).

The recording of the transcript of judgment establishes a lien only against property owned by the debtor within the county where it is recorded. *Mtn. States Bank v. Irvin*, 809 P.2d 1113 (Colo. App. 1991).

**Lien is not lost by failure to return execution within 90 days.** The lien on real estate created by the filing of a transcript of judgment in the office of the county recorder is not lost by the failure to return an execution issued on the judgment within 90 days as required by law. *Davis Bros. Drug Co. v. Counter*, 75 Colo. 239, 225 P. 245 (1924).

**It attaches not only to property owned at the time the execution was so received, but to property acquired thereafter** while the writ is in force. In this respect, the execution lien in the present case is similar to the lien of a chattel mortgage covering after-acquired property. *Indian Creek Coal Mining Co. v. Home Sav. & Merchants' Bank*, 80 Colo. 96, 249 P. 499 (1926); *Robinson v. Wright*, 90 Colo. 417, 9 P.2d 618 (1932).

**An attachment lien merges in that of the judgment when a judgment lien is acquired**, but the latter relates back to the date of the former. *Floyd v. Sellers*, 7 Colo. App. 498, 44 P. 373 (1896).

**And its priority is preserved.** When a transcript of the judgment is filed with the recorder, it becomes a lien upon all the real estate of the judgment defendant situated in the county for six years from the rendition of the judgment. The lien of the attachment becomes merged in that of the judgment, but its priority is preserved, and the lien of the judgment, insofar as the specific real estate attached is concerned, relates back to the lien of the attachment. *Floyd v. Sellers*, 7 Colo. App. 498, 44 P. 373 (1896).

**It continues for six years where the creditor secures no judgment lien** by the filing of a transcript of the judgment docket. *Emery v. Yount*, 7 Colo. 107, 1 P. 686 (1883); *Floyd v. Sellers*, 7 Colo. App. 498, 44 P. 373 (1896).

**Purchaser who fails to record deed is inferior to judgment creditor who thereafter files transcript without knowledge of conveyance.** Where a judgment debtor having the record title to real property conveys it to another, he parts with his title and thereafter does not have even a naked legal title; and yet if before the recording of the deed, the judgment creditor, without notice of the conveyance, files a transcript of the judgment, the lien of his judgment is superior to the rights of the grantee in the deed. *Wedman v. Carpenter*, 65 Colo. 63, 173 P. 57 (1918); *Donahue v. Kohler-McLister Paint Co.*, 81 Colo. 244, 254 P. 989 (1927).

**For judgment creditor's priority over resulting trust**, see *W. Chem. Mfg. Co. v. McCaffrey*, 47 Colo. 397, 107 P. 1081 (1910).

**A proper lien is necessary before judgment creditor may bring bill for discovery.** A bill will not lie by a judgment creditor for discovery, and to have land in another county than that in which the judgment was rendered, alleged to be held in trust for the judgment debtor, who is residing on such land, made subject to the judg-

ment, where the judgment has not been made a lien upon the land claimed to be subjected by filing a transcript of the judgment with the recorder of the county in which the land is situated, as is provided by this section. *Barnes v. Beighly*, 9 Colo. 475, 12 P. 906 (1887).

**A judgment must be a lien on the real estate sought to be subjected to sale on execution through the aid of a creditor's bill,** where it has not been made a lien on real estate

in another county in the manner herein provided. *Barnes v. Beighly*, 9 Colo. 475, 12 P. 906 (1887).

**No lien created on property** where the debt created by a recorded judgment was discharged in bankruptcy prior to the acquisition of the property. *In re Yates*, 47 Bankr. 460 (D. Colo. 1985).

**13-52-103. Change of name of debtor - record.** If a transcript of judgment is placed of record against any judgment debtor who, after the rendition of the judgment, changes his name and by such new name acquires real estate, the judgment creditor, or someone in his behalf, shall record in the office of the recorder of the county where such real estate is located notice of such judgment and change of name. Unless such notice and change of name are recorded, such judgment shall not be operative against an innocent purchaser of such property for value without actual or constructive notice of such lien and change of name.

**Source:** L. 25: p. 335, § 1. CSA: C. 93, § 3. CRS 53: § 77-1-3. C.R.S. 1963: § 77-1-3.

**13-52-104. Transcript of federal judgment filed - lien.** (1) A transcript of the docket entry of any judgment or decree, either at law or in equity, for any debt, damages, costs, or other sum of money, entered or registered in any district court of the United States within this state, duly certified by the clerk of such district court of the United States, may be recorded in any county in the same manner as the transcript of the judgment record of any similar judgment of the court of general jurisdiction of this state may be recorded.

(2) From the time of the recording of such transcript, and not before, such judgment or decree shall be a lien upon all the real estate, not exempt from execution in the county where such transcript of judgment is recorded, owned by the judgment debtor or which the judgment debtor may afterwards acquire in such county, in the same manner and to the same extent and under the same conditions as if such judgment or decree had been entered by a court of general jurisdiction of this state.

**Source:** L. 1889: p. 456, §§ 1, 2. R.S. 08: §§ 3610, 3611. C.L. §§ 5899, 5900. CSA: C. 93, §§ 4, 5. CRS 53: §§ 77-1-4, 77-1-5. C.R.S. 1963: §§ 77-1-4, 77-1-5. L. 2002: Entire section amended, p. 51, § 2, effective March 21.

#### ANNOTATION

**Law reviews.** For article, "The Perennial Problem of Security Priority and Recordation", see 24 Rocky Mt. L. Rev. 180 (1952).

**13-52-105. Legal and equitable interests.** Every interest in land, legal and equitable, shall be subject to levy and sale under execution, and the claim or possessory right of any defendant in execution in or to any public lands may be levied upon and sold under execution in the same manner as if the same were held by such defendant in fee simple. Nothing contained in articles 51 to 61 of this title and part 2 of article 41 of title 38, C.R.S., shall be so construed as to give any plaintiff in execution the right to levy on any lands filed on by any person in the Colorado state office of the bureau of land management, department of the interior, and occupied as a homestead by the defendant in execution.

**Source:** R.S. p. 384, § 52. G.L. § 1453. G.S. § 1883. R.S. 08: § 3613. C.L. § 5901. CSA: C. 93, § 6. CRS 53: § 77-1-6. C.R.S. 1963: § 77-1-6.



## ANNOTATION

The proviso in this section has reference solely to lands the title of which still remains in the government. It was inserted as a precautionary measure to prevent any apparent clash between the state statute and the provision of the federal statute making a homestead taken thereunder exempt from liability for any debt contracted prior to the issuance of patent. *Weare v. Johnson*, 20 Colo. 363, 38 P. 374 (1894).

It refers only to lands filed upon and held merely by possessory title. The language of the statute clearly indicates that the proviso refers to lands filed upon and held merely by possessory title, and not to lands after final proof has been made and to which a receiver's receipt has been issued. *Weare v. Johnson*, 20 Colo. 363, 38 P. 374 (1894).

Creditor may restrain threatened sale of property in which debtor has equitable interest. A plaintiff is entitled to maintain an action to restrain a threatened sale of property. Under the allegations of the complaint, the judgment creditor was contending that the judgment debtor had an equitable title to the lode claim upon which execution was levied, and neither upon principle nor reason must the plaintiff claiming to be the real owner of all of the property, be compelled to sit back and wait until the claim of the judgment creditor had ripened into a complete and perfect claim. *Bell v. Murray*, 13 Colo. App. 217, 57 P. 488 (1899).

**13-52-106. Certificate holders included.** The legal holder by record of any certificate of purchase of lands of the United States shall be deemed to be within the true intent and meaning of articles 51 to 61 of this title and part 2 of article 41 of title 38, C.R.S.

**Source:** R.S. p. 371, § 3. G.L. § 1411. G.S. § 1843. R.S. 08: § 3614. C.L. § 5902. CSA: C. 93, § 7. CRS 53: § 77-1-7. C.R.S. 1963: § 77-1-7.

**13-52-107. What moneys may be levied on.** All paper currency, coins, bank bills, and other evidence of debt used or circulated or intended to be used or circulated as money and issued by any corporation or state, or by the United States, may be levied upon under any execution or writ of attachment as other personal property is levied upon or attached and shall be returned by the officer making such levy as so much money collected without sale.

**Source:** R.S. p. 383, § 45. G.L. § 1446. G.S. § 1876. R.S. 08: § 3615. C.L. § 5903. CSA: C. 93, § 8. CRS 53: § 77-1-8. C.R.S. 1963: § 77-1-8.

## ANNOTATION

Money of debtor taken by sheriff when imprisoning him is subject to execu-

tion. *McMillen v. Yost*, 69 Colo. 462, 194 P. 938 (1921).

**13-52-108. Concerning garnishment and attachment prior to judgment.** (1) No order of attachment prior to judgment on any garnishee shall be made out or issued in any court of record in this state for any sum less than twenty dollars.

(2) Wages, fees, or commissions shall not be subject to a writ of garnishment made out or issued in any court of record in this state until a complaint has been filed. After a defendant in any case has become subject to the jurisdiction of a court of record in this state, no wages, fees, or commissions shall be subject to any writ of garnishment theretofore or thereafter made out or issued in such case except in aid of execution of judgment.

(3) The provisions of this section shall not apply to methods of enforcing collections provided in article 79 of title 8, C.R.S.

(4) The provisions of this section shall be subject to article 5 of the "Uniform Consumer Credit Code".

**Source:** R.S. p. 383, § 44. G.L. § 1445. G.S. § 1875. R.S. 08: § 3616. C.L. § 5904. CSA: C. 93, § 9. CRS 53: § 77-1-9. C.R.S. 1963: § 77-1-9. L. 65: p. 805, § 1. L. 71: p. 852, § 2.

**Cross references:** For the "Uniform Consumer Credit Code", see articles 1 to 9 of title 5.

### ANNOTATION

**Law reviews.** For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den. L.J. 82 (1970).

**13-52-109. Property sold in parcels.** When any real or personal property is taken in execution, if such property is susceptible of division, it shall be sold in such quantities as may be necessary to satisfy such execution and costs.

**Source:** R.S. p. 372, § 10. G.L. § 1416. G.S. § 1848. R.S. 08: § 3623. C.L. § 5911. CSA: C. 93, § 10. CRS 53: § 77-1-10. C.R.S. 1963: § 77-1-10.

### ANNOTATION

**Sale en masse is not always void.** The action of the sheriff in selling en masse does not render the sale void at the suit of the execution debtor if it should appear that the property was first offered in parcels and no bids were received — or, if he received bids, that the bid he received for all the property was greater than the aggregate of the bids for the parcels. *Leppel v. Kus*, 38 Colo. 292, 88 P. 448 (1908).

**The presumption exists that the sheriff first offered the property in parcels** and there were no bidders, or, if bids were received for the parcels, that the bid for the whole of the property was greater than the aggregate bids in parcels. *Leppel v. Kus*, 38 Colo. 292, 88 P. 448 (1908).

**Proof necessary to overcome presumption.** Where it is asserted that this section has not

been complied with, there should be proof that a part of the property would have sold for a sum sufficient to satisfy the execution. *White v. Crow*, 110 U.S. 183, 4 S. Ct. 71, 28 L. Ed. 113 (1884); *Leppel v. Kus*, 38 Colo. 292, 88 P. 448 (1906).

**Only parties to the judgment may object.** The facts made it unnecessary to inquire whether the objection to a sale en masse could be successfully made after the time for redemption had passed, where both the party making the objection and the party claiming under the sale were strangers to the judgment. *White v. Crow*, 110 U.S. 183, 4 S. Ct. 71, 28 L. Ed. 113 (1884).

**13-52-110. Execution to any county.** It is lawful for the party in whose favor any judgment may be obtained to have executions in the usual form directed to any county in this state against the goods, chattels, lands, and tenements of such party defendant, or upon his body, when the same is authorized by law.

**Source:** R.S. p. 371, § 5. G.L. § 1413. G.S. § 1845. L. 03: p. 299, § 1. R.S. 08: § 3625. C.L. 5912. CSA: C. 93, § 11. CRS 53: § 77-1-11. C.R.S. 1963: § 77-1-11.

### ANNOTATION

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950).

**Writs to different counties may issue at the same time.** If there is authority for the issuing of a writ to a county other than that in which the judgment was recovered, the remedies to issue the writ to the different counties are concurrent, and hence a writ to each of the counties may properly issue or be in existence at the same time. *People ex rel. Kenfield v. Finch*, 19 Colo. App. 512, 76 P. 1120 (1904).

**This fact constitutes no defense in an action against a sheriff for making a false return.** In an action against a sheriff and the sureties on his official bond, for damages sustained by plaintiff, by an alleged false return upon an execution, an answer which alleges as a defense the issuance of two executions on the same day to different counties, states no defense to the action, as, under this section, executions may issue on a judgment to different counties at the same time. *People ex rel. Kenfield v. Finch*, 19 Colo. App. 512, 76 P. 1120 (1904).



**Under this section a body execution may be directed to any county in the state.** Roll v. Davis, 85 Colo. 594, 277 P. 767 (1929).

**13-52-111. Return - endorsement - entry.** All executions shall be made returnable ninety days after date, and no writ of execution shall bind the personal property, goods, or chattels of any person against whom such writ is issued until the writ is delivered to the sheriff or other officer for execution. For a better manifestation of the time, the sheriff or other officer, on receipt of every such writ, shall endorse upon the back thereof the hour, day of the month, and the year when the same was received by him and shall immediately enter the receipt of said writ and the time of receiving it in a book to be kept for that purpose at the office of the sheriff. Said book shall be a public record and open to the inspection of the public. The execution shall be returned within ninety days from date of issue, unless sale is pending under levy made.

**Source:** R.S. p. 371, § 8. G.L. § 1414. G.S. § 1846. L. 03: p. 219, § 1. R.S. 08: § 3626. C.L. 5913. CSA: C. 93, § 12. CRS 53: § 77-1-12. C.R.S. 1963: § 77-1-12.

### ANNOTATION

**Law reviews.** For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950).

**Execution lien attaches upon receipt of execution by sheriff.** It has been held repeatedly that under this section an execution lien upon the personal property of the debtor attaches upon receipt of the execution by the sheriff. Williams v. Mellor, 12 Colo. 1, 19 P. 839 (1888); Joslin v. Spangler, 13 Colo. 491, 22 P. 804 (1889); Ankele v. Elder, 19 Colo. App. 330, 75 P. 29 (1904); Lewin v. Telluride Iron Works Co., 272 F. 590 (8th Cir. 1921); First Nat'l Bank v. Monte Vista Hdwe. Co., 75 Colo. 440, 226 P. 154 (1924); First State Bank v. Fox, 10 F.2d 116 (8th Cir. 1925).

**Such liens are entitled to priority in accordance with the respective dates of their delivery.** Joslin v. Spangler, 13 Colo. 491, 22 P. 804 (1889).

**The lien thus created is not a secret lien,** for the statute requires the sheriff, upon receipt of the writ, to indorse thereon, and to enter in a book kept for that purpose in his office, the exact time when the writ was received. Robinson v. Wright, 90 Colo. 419, 9 P.2d 618 (1932).

**Executions are returnable without reference to any term of court.** The practice of returning the execution in term time has been changed by this section. Executions are made returnable within 90 days from date, without reference to any term of court. Brown v. People, 3 Colo. 115 (1876).

**Executions may be returned prior to expiration of 90-day period.** While it may be true that, in his discretion, the sheriff may take upon himself the responsibility of returning it at an earlier date, the fact that he does so, and that, too, at the request of defendant's counsel, is a circumstance which the court or judge may rightfully consider in determining the question

whether all legal means have been exhausted to recover the fine and costs, when an application is made for the prisoner's discharge on the ground of the insufficiency of his estate wherewith to pay them. Tate v. People, 25 Colo. 335, 53 P. 1050 (1898).

**When sheriff delays in serving execution by directions of creditor, lien is delayed.** If because of any direction by, or of any understanding with, the execution creditor, the sheriff delays making a levy upon the debtor's property, the lien is held to be waived during the period of such delay. Williams v. Mellor, 12 Colo. 1, 19 P. 839 (1888); Lewin v. Telluride Iron Works Co., 272 F. 590 (8th Cir. 1921); Robinson v. Wright, 90 Colo. 417, 9 P.2d 618 (1932).

**Unreasonable delay is presumed to be by creditor's direction.** Where the sheriff delays an unreasonable time to make a levy, it is presumed, in the absence of an explanation for such delay, that the delay was caused by direction of the execution creditor. Robinson v. Wright, 90 Colo. 417, 9 P.2d 618 (1932).

**Where there is no evidence of such instructions, it is error to submit the question to the jury.** Where there is no evidence of instructions, or of an understanding on delivery of an execution to the sheriff, that a levy should be delayed, except the omission to make a levy for 20 days, and the testimony of the execution debtor to propositions for further time, which were not accepted, it is error, in replevin by mortgagees for goods levied on under the execution, to submit to the jury the question whether there were such instructions or understanding. Williams v. Mellor, 12 Colo. 1, 19 P. 839 (1888).

**For when circumstances reasonably explain the delay in making the levy,** see Robinson v. Wright, 90 Colo. 417, 9 P.2d 618 (1932).

**Action for false return on execution.** In an action against a sheriff and the sureties on his

official bond for damages sustained by plaintiff by reason of an alleged false return upon an execution, a demurrer should be sustained to a defense which shows upon its face that it involves a contradiction of the sheriff's return upon the execution, as evidence would not be admissible to support such defense. People ex rel. Kenfield v. Finch, 19 Colo. App. 512, 76 P. 1120 (1904).

A lost execution's day of receipt may be shown by the sheriff's fee book when the sheriff is dead. Bruns v. Clase, 9 Colo. 225, 11 P. 79 (1886).  
Applied in In re Harms, 7 Bankr. 398 (Bankr. D. Colo. 1980).

ARTICLE 53

Uniform Enforcement of Foreign  
Judgments

13-53-101.	Short title.	13-53-105.	Stay.
13-53-102.	Definitions.	13-53-106.	Fees.
13-53-103.	Filing and status of foreign judgments.	13-53-107.	Optional procedure.
13-53-104.	Notice of filing.	13-53-108.	Uniformity of interpretation.

**13-53-101. Short title.** This article shall be known and may be cited as the "Uniform Enforcement of Foreign Judgments Act".

**Source:** L. 69: p. 563, § 1. C.R.S. 1963: § 77-13-1.

ANNOTATION

**Law reviews.** For article, "Enforcing Foreign Country Judgments in Colorado", see 13 Colo. Law. 381 (1984).

**13-53-102. Definitions.** As used in this article, unless the context otherwise requires:  
(1) "Foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court, except a protection order or a restraining order as described in section 13-14-104 that is entitled to full faith and credit in this state.

**Source:** L. 69: p. 563, § 1. C.R.S. 1963: § 77-13-2. L. 98: Entire section amended, p. 1234, § 6, effective July 1. L. 2004: (1) amended, p. 554, § 8, effective July 1.

**13-53-103. Filing and status of foreign judgments.** A copy of any foreign judgment authenticated in accordance with the act of congress or the laws of this state may be filed in the office of the clerk of any court of this state which would have had jurisdiction over the original action had it been commenced first in this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of the court of this state in which filed and may be enforced or satisfied in like manner.

**Source:** L. 69: p. 563, § 1. C.R.S. 1963: § 77-13-3.

**Cross references:** For foreign actions and decrees, see §§ 13-80-110 and 14-11-101.

ANNOTATION

**Full faith and credit inapplicable without judgment itself.** Where the only documents filed were: (1) An affidavit of petitioner stating that an order requiring payment of child support by respondent had been entered and that respondent was in arrears in the payments; (2) an order



of court that a writ of fieri facias be issued; and (3) the writ of fieri facias, full faith and credit is inapplicable as none of these is a judgment order. *Manley v. Manley*, 41 Colo. App. 458, 591 P.2d 1042 (1978).

**Fines imposed by a foreign court** which have been reduced to final judgment and are not subject to modification are judgments entitled to full faith and credit. *Gedeon v. Gedeon*, 630 P.2d 579 (Colo. 1981), appeal dismissed, 454 U.S. 1050, 102 S. Ct. 592, 70 L. Ed.2d 585 (1981).

**While a court asked to enforce foreign judgment cannot redetermine merits** of case or wisdom of judgment, it always has power to inquire into jurisdiction of foreign court to issue judgment. *Hansen v. Pingnot*, 739 P.2d 911 (Colo. App. 1987).

**"Uniform Enforcement of Foreign Judgments Act" does not create defenses to foreign judgments** which violate the full faith and credit clause of the federal constitution. *Marworth, Inc. v. McGuire*, 810 P.2d 653 (Colo. 1991).

**To allow Colorado courts to reexamine foreign judgments on their merits** would violate intent and purpose of this act and the full faith and credit clause. *Marworth, Inc. v. McGuire*, 810 P.2d 653 (Colo. 1991).

**Where respondents were given notice and opportunity to be heard in foreign court**, due process rights were not violated and foreign judgment should be enforced pursuant to this act. *Marworth, Inc. v. McGuire*, 810 P.2d 653 (Colo. 1991).

**Colorado court should have given full faith and credit** to Illinois dissolution order which granted the wife sole ownership of federal income tax refund check proceeds since wife became sole owner before checks came into creditor's possession and creditor's judgment did not give the creditor any interest in said checks. No provision of this act or the failure of party to act pursuant to the provisions of this act affects the obligation of the court. *Pardee v. Mostow*, 757 P.2d 1148 (Colo. App. 1988).

**Enforcement Act applies to a foreign judgment recognized under the principles of comity** and is entitled to full faith and credit. *Milhoux v. Linder*, 902 P.2d 856 (Colo. App. 1995).

**Court has no authority to enter orders or issue writs to enforce foreign judgment when**

**plaintiff fails to file authenticated copy of such judgment** but merely files affidavit describing the foreign judgment. *Griggs v. Gibson*, 754 P.2d 783 (Colo. App. 1988).

**If foreign judgment was rendered without personal jurisdiction over the defendant**, the judgment is void and will not be enforced. *Tucker v. Vista Fin. Corp.*, 192 Colo. 440, 560 P.2d 453 (1977); *O'Brien v. Eubanks*, 701 P.2d 614 (Colo. App. 1984), cert. denied, 474 U.S. 904, 106 S. Ct. 272, 88 L. Ed.2d 233 (1985).

Where foreign default judgment was silent on issue of jurisdiction and plaintiff tendered no evidence contradicting defendant's affidavit stating that he did not transact any business in foreign state within meaning of foreign state's long-arm statute, plaintiff failed to establish that foreign state existence of default judgment raised presumption of valid jurisdiction. *Hansen v. Pingnot*, 739 P.2d 911 (Colo. App. 1987).

**Since a foreign judgment filed in Colorado is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a Colorado court**, trial court must hear defendant's motion for relief from judgment based on defenses brought under C.R.C.P. 60. *Marworth v. McGuire*, 787 P.2d 200 (Colo. App. 1989).

**Institution of an original action based on the constitutional provisions of full faith and credit is not required to enforce a foreign judgment; filing under this act is sufficient.** *Marworth v. McGuire*, 787 P.2d 200 (Colo. App. 1989).

**Judgment lien, based on a domesticated out-of-state judgment, must be revived under Colorado procedural law for the lien to be extended.** To extend a judgment lien beyond six years after the date of judgment, Colorado procedural law requires a judgment to be revived pursuant to C.R.C.P. 54(h) and a transcript of the revival to be filed with the clerk and recorder. *Wells Fargo Bank, N.A. v. Kopfman*, 205 P.3d 437 (Colo. App. 2008), aff'd, 226 P.3d 1068 (Colo. 2010).

**A party may file a foreign judgment in any court that would have had jurisdiction over the underlying action** had it been filed in Colorado. It does not require, as a condition of enforceability, that the county in which it is filed be a proper venue under C.R.C.P. 98. *L & R Exploration Venture v. Grynberg*, \_\_ P.3d \_\_ (Colo. App. 2011).

**13-53-104. Notice of filing.** (1) At the time of the filing of the foreign judgment, the judgment creditor or his lawyer shall make and file with the clerk of court an affidavit setting forth the name and last-known post-office address of the judgment debtor and the judgment creditor.

(2) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post-office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment

to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

(3) No execution or other process for enforcement of a foreign judgment filed under this article shall issue until ten days after the date the judgment is filed.

**Source:** L. 69: p. 563, § 1. C.R.S. 1963: § 77-13-4.

#### ANNOTATION

**Notice provisions satisfy due process.** Where the basic requirements of notice and hearing have been met in a foreign court, the post-judgment notice provisions of this section

satisfy the requirements of due process. *Gedeon v. Gedeon*, 630 P.2d 579 (Colo. 1981), appeal dismissed, 454 U.S. 1050, 102 S. Ct. 592, 70 L. Ed.2d 585 (1981).

**13-53-105. Stay.** (1) If the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(2) If the judgment debtor shows the court any ground upon which enforcement of a judgment of a court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period upon requiring the same security for satisfaction of the judgment which is required in this state.

**Source:** L. 69: p. 564, § 1. C.R.S. 1963: § 77-13-5.

**Cross references:** For stay of proceedings to enforce a judgment, see C.R.C.P. 62.

#### ANNOTATION

**Colorado court is not required to stay enforcement of a judgment from another state without a bond being posted** even though the judgment could have been stayed in the state in

which the judgment was entered without the posting of a bond. *Dependable Ins. v. Auto. Warranty*, 797 P.2d 1308 (Colo. App. 1990).

**13-53-106. Fees.** (1) (a) On and after July 1, 2008, any person filing a foreign judgment shall pay to the clerk of the court one hundred sixty-six dollars.

(b) Fees for docketing, transcription, or other enforcement proceedings shall be as provided for judgments of the courts of this state.

(c) Each fee collected pursuant to paragraph (a) of this subsection (1) shall be transmitted to the state treasurer and divided as follows:

(I) Ninety dollars shall be deposited in the general fund;

(II) Sixty dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6);

(III) Fifteen dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a); and

(IV) One dollar shall be deposited in the general fund pursuant to section 2-5-119, C.R.S.

(2) Notwithstanding the amount specified for the fee in subsection (1) of this section, the chief justice of the supreme court by rule or as otherwise provided by law may reduce the amount of the fee if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of the fee is credited. After the uncommitted reserves of the fund are sufficiently reduced, the chief justice by rule or as otherwise provided by law may increase the amount of the fee as provided in section 24-75-402 (4), C.R.S.



**Source:** L. 69: p. 564, § 1. C.R.S. 1963: § 77-13-6. L. 84: Entire section amended, p. 456, § 9, effective July 1. L. 95: Entire section amended, p. 741, § 5, effective July 1, 1997. L. 98: Entire section amended, p. 1330, § 39, effective June 1. L. 2003: (1) amended, p. 574, § 5, effective March 18. L. 2007: (1) amended, p. 1537, § 26, effective May 31. L. 2008: (1) amended, p. 2142, § 11, effective June 4.

**Cross references:** For the legislative declaration contained in the 2008 act amending subsection (1), see section 1 of chapter 417, Session Laws of Colorado 2008.

**13-53-107. Optional procedure.** The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this article remains unimpaired.

**Source:** L. 69: p. 564, § 1. C.R.S. 1963: § 77-13-7.

**13-53-108. Uniformity of interpretation.** This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**Source:** L. 69: p. 564, § 1. C.R.S. 1963: § 77-13-8.

## ARTICLE 54

### Property and Earnings Exempt

**Cross references:** For nature of and procedure for claiming homestead exemption, see part 2 of article 41 of title 38.

**Law reviews:** For article, “An Overview of Colorado Exemption Laws”, see 21 Colo. Law. 1883 (1992).

13-54-101.	Definitions.		and levy under execution or attachment.
13-54-102.	Property exempt.		
13-54-102.5.	Child support payments - exemption - deposit into custodial account.	13-54-105.	No exemption for taxes.
		13-54-106.	Exemptions applicable to all writs - exception for child support.
13-54-103.	No exemption for purchase price.		
		13-54-107.	Exemptions in bankruptcy.
13-54-104.	Restrictions on garnishment		

**13-54-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Debtor” means a person whose property or earnings are subject to attachment, execution, or garnishment.

(2) “Dependent” means a person who receives more than one-half of his support from the debtor.

(2.5) “Disabled debtor”, “disabled spouse”, or “disabled dependent” means a debtor, spouse, or dependent who has a physical or mental impairment that is disabling and that, because of other factors such as age, training, experience, or social setting, substantially precludes the debtor, spouse, or dependent from engaging in a useful occupation as a homemaker, a wage-earner, or a self-employed person in any employment that exists in the community for which he or she has competence.

(3) “Earnings” means wages, salaries, commissions, fees, and all crops, livestock, poultry, dairy products, and agricultural products grown, raised, or produced by any debtor as a result of the personal efforts of a debtor or any dependent of such debtor.

(3.5) “Elderly debtor”, “elderly spouse”, or “elderly dependent” means a debtor, spouse, or dependent who is sixty years of age or older.

(4) “Household goods” means, by way of illustration, household furniture, furnishings, dishes, utensils, cutlery, tableware, napery, pictures, prints, appliances, stoves, microwave

ovens, beds and bedding, freezers, refrigerators, washing machines, dryers, exercise equipment, musical instruments, bicycles, sewing machines, toys, and home electronics, including but not limited to cameras, television sets, radios, stereos, computers, facsimile machines, telephones, and other audio and video equipment.

(5) "Value" means the fair market value of any property less the amount of any lien thereon valid as between the owner of the property and the holder of any such lien.

**Source:** L. 59: p. 529, § 1. CRS 53: § 77-13-1. C.R.S. 1963: § 77-2-1. L. 81: Entire section R&RE, p. 892, § 1, effective July 1. L. 2000: (4) amended, p. 715, § 1, effective May 23. L. 2007: (2.5) and (3.5) added and (4) amended, p. 875, § 2, effective May 14.

**Cross references:** For the legislative declaration contained in the 2007 act enacting subsections (2.5) and (3.5) and amending subsection (4), see section 1 of chapter 226, Session Laws of Colorado 2007.

### ANNOTATION

**Law reviews.** For article, "Legislative Update", see 11 Colo. Law. 2142 (1982). For article, "Rights of the Debtor and Creditor to Retirement Plan Benefits; An Update", see 25 Colo. Law. 45 (May 1996).

**Movie camera and movie projector are not exempt "household goods"** for purposes of a bankruptcy proceedings, but are recreational items. *General Fin. Corp. v. Ruppe*, 3 Bankr. 60 (Bankr. D. Colo. 1980); *In re Whitney*, 70 Bankr. 443 (Bankr. D. Colo. 1987).

**Stereo system is household goods.** *In re Whitney*, 70 Bankr. 443 (Bankr. D. Colo. 1987).

**Applied** in *In re Hellman*, 474 F. Supp. 348 (D. Colo. 1979); *Redin v. Fidelity Fin. Servs.*, 14 Bankr. 727 (Bankr. D. Colo. 1981); *In re Alvarez*, 14 Bankr. 940 (Bankr. D. Colo. 1981); *In re Ferguson*, 15 Bankr. 439 (Bankr. D. Colo. 1981); *In re Janesofsky*, 22 Bankr. 973 (Bankr. D. Colo. 1982).

**13-54-102. Property exempt.** (1) The following property is exempt from levy and sale under writ of attachment or writ of execution:

(a) The necessary wearing apparel of the debtor and each dependent to the extent of one thousand five hundred dollars in value;

(b) Watches, jewelry, and articles of adornment of the debtor and each dependent to the extent of two thousand dollars in value;

(c) The library, family pictures, and school books of the debtor and the debtor's dependents to the extent of one thousand five hundred dollars in value; except that this paragraph (c) shall not apply to any such property constituting all or part of the stock in trade of the debtor;

(d) Burial sites, including spaces in mausoleums, to the extent of one site or space for the debtor and each dependent;

(e) The household goods owned and used by the debtor or the debtor's dependents to the extent of three thousand dollars in value;

(f) Provisions and fuel on hand for the use or consumption of the debtor or the debtor's dependents to the extent of six hundred dollars in value;

(g) (I) Except as otherwise provided in subparagraph (II) of this paragraph (g), in the case of every debtor engaged in agriculture as the debtor's principal occupation, including but not limited to farming, ranching, dairy production, and the raising of livestock or poultry, all livestock, poultry, or other animals and all tractors, farm implements, trucks used in agricultural operations, harvesting equipment, seed, and agricultural machinery and tools in the aggregate value of fifty thousand dollars.

(II) Only one exemption in the aggregate value of fifty thousand dollars shall be allowed for a debtor and his or her spouse under subparagraph (I) of this paragraph (g). In the event that property is claimed as exempt by a debtor or his or her spouse under subparagraph (I) of this paragraph (g), no exemption shall be allowed for such debtor or his or her spouse under paragraph (i) of this subsection (1).

(h) Except for amounts due under court-ordered support of children or spouse which are subject to the exemption provisions of section 13-54-104, all money received by any



person as a pension, compensation, or allowance for any purpose on account or arising out of the services of such person as a member of the armed forces of the United States in time of war or armed conflict, and whether in the actual possession of the recipient thereof or deposited or loaned by him, and a like exemption to the unremarried widow or widower and the children of such person who receive a pension, compensation, or allowance of any kind from the United States on account or arising out of such service by a deceased member of such armed forces; and when a debtor entitled to exemption under this paragraph (h) dies or leaves his family said exemption shall extend to the dependents of said debtor;

(h.5) The articles of military equipment personally owned by members of the National Guard;

(i) The stock in trade, supplies, fixtures, maps, machines, tools, electronics, equipment, books, and business materials of any debtor used and kept for the purpose of carrying on any gainful occupation in the aggregate value of twenty thousand dollars; except that exempt property described in this paragraph (i) may not also be claimed as exempt pursuant to paragraph (j) of this subsection (1);

(j) (I) One or more motor vehicles or bicycles kept and used by any debtor in the aggregate value of five thousand dollars; or

(II) (A) One or more motor vehicles kept and used by any elderly or disabled debtor, or by any debtor with an elderly or disabled spouse or dependent, in the aggregate value of ten thousand dollars.

(B) (Deleted by amendment, L. 2007, p. 876, § 3, effective May 14, 2007.)

(k) The library of any debtor who is a professional person, including a minister or priest of any faith, kept and used by the debtor in carrying on his or her profession, in the value of three thousand dollars; except that exemptions with respect to any of the property described in this paragraph (k) may not also be claimed under paragraph (i) of this subsection (1);

(l) (I) (A) The cash surrender value of policies or certificates of life insurance to the extent of one hundred thousand dollars for writs of attachment or writs of execution issued against the insured; except that there is no exemption for increases in cash value from moneys contributed to a policy or certificate of life insurance during the forty-eight months prior to the issuance of the writ of attachment or writ of execution; and

(B) The proceeds of policies or certificates of life insurance paid upon the death of the insured to a designated beneficiary, without limitation as to amount, for writs of attachment or writs of execution issued against the insured.

(II) The provisions of this paragraph (l) shall not be interpreted to provide an exemption for attachment or execution of the proceeds of any policy or certificate of life insurance to pay the debts of a beneficiary of such policy or certificate.

(III) The provisions of this paragraph (l) shall not provide an exemption for attachment or execution of the proceeds of any policy or certificate of life insurance if the beneficiary of such policy or certificate is the estate of the insured.

(m) The proceeds of any claim for loss, destruction, or damage and the avails of any fire or casualty insurance payable because of loss, destruction, or damage to any property which would have been exempt under this article to the extent of the exemptions incident to such property;

(n) The proceeds of any claim for damages for personal injuries suffered by any debtor except for obligations incurred for treatment of any kind for such injuries or collection of such damages;

(o) The full amount of any federal or state income tax refund attributed to an earned income tax credit or a child tax credit;

(p) Professionally prescribed health aids for the debtor or a dependent of the debtor;

(q) The debtor's right to receive, or property that is traceable to, an award under a crime victim's reparation law;

(r) For purposes of garnishment proceedings pursuant to the provisions of article 54.5 of this title, any amount held by a third party as a security deposit, as defined in section 38-12-102 (2), C.R.S., or any amount held by a third party as a utility deposit to secure payment for utility goods or services used or consumed by the debtor or his dependents;

(s) Property, including funds, held in or payable from any pension or retirement plan or deferred compensation plan, including those in which the debtor has received benefits or payments, has the present right to receive benefits or payments, or has the right to receive benefits or payments in the future and including pensions or plans which qualify under the federal "Employee Retirement Income Security Act of 1974", as amended, as an employee pension benefit plan, as defined in 29 U.S.C. sec. 1002, any individual retirement account, as defined in 26 U.S.C. sec. 408, any Roth individual retirement account, as defined in 26 U.S.C. sec. 408A, and any plan, as defined in 26 U.S.C. sec. 401, and as these plans may be amended from time to time;

(t) All property which is subject to a judgment against a debtor for failure to pay state income tax to a state for periods when such individual was not a resident of such state on benefits received from a pension or other retirement plan;

(u) Any court-ordered domestic support obligation or payment, including a maintenance obligation or payment or a child support obligation or payment, if the child support obligation or payment meets the requirements of section 13-54-102.5;

(v) Any claim for public or private disability benefits due, or any proceeds thereof, not otherwise provided for under law, up to three thousand dollars per month. Any claim or proceeds in excess of this amount shall be subject to garnishment in accordance with section 13-54-104.

(2) Notwithstanding the provisions of paragraph (h) of subsection (1) of this section and section 13-54-104, military pensions shall be subject to court-ordered support of children or spouse.

(3) Notwithstanding the provisions of paragraph (s) of subsection (1) of this section, any pension or retirement benefit or payment shall be subject to attachment or levy in satisfaction of a judgment taken for arrearages for child support or for child support debt, subject to the limitations contained in section 13-54-104.

(4) Notwithstanding anything to the contrary in this section, all property of a person who has committed a felonious killing, as defined in section 15-11-803 (1) (b), C.R.S., and as determined in the manner described in section 15-11-803 (7), C.R.S., shall be subject to attachment or levy in satisfaction of a judgment awarded pursuant to section 13-21-201 or section 13-21-202 for such felonious killing.

(5) (a) As provided in the exception contained in 11 U.S.C. sec. 522 (f) (3), as amended, a debtor shall not avoid a consensual lien on property otherwise eligible to be claimed as exempt property.

(b) As used in this subsection (5), unless the context otherwise requires, "consensual lien" means a lien on property granted with the consent and approval of the owner.

**Source:** L. 59: p. 530, § 2. CRS 53: § 77-13-2. C.R.S. 1963: § 77-2-2. L. 73: pp. 236, 915, 916, §§ 15, 1, 3. L. 75: (1)(o)(II) amended, p. 1466, § 6, effective July 18. L. 77: (1)(h) amended and (1.1) added, p. 811, § 1, effective July 1. L. 81: Entire section R&RE, p. 893, § 2, effective July 1. L. 84: (1)(r) added, p. 475, § 2, effective January 1, 1985. L. 85: (1)(j) amended, p. 580, § 1, effective April 30. L. 91: (1)(s) and (3) added, p. 383, §§ 1, 2, effective May 1. L. 92: (1)(t) added, p. 2241, § 1, effective June 6. L. 94: (1)(u) added, p. 1210, § 1, effective May 22. L. 95: (1)(l) amended, p. 723, § 1, effective July 1. L. 96: (4) added, p. 50, § 2, effective July 1. L. 2000: (1)(a), (1)(b), (1)(c), (1)(e), (1)(f), (1)(g), (1)(i), (1)(j)(I), (1)(j)(II)(A), (1)(k), and (1)(o) amended, p. 715, § 2, effective May 23. L. 2002: (1)(h.5) added, p. 587, § 11, effective May 24; (1)(s) amended, p. 487, § 1, effective May 24; (1)(g) amended, p. 1862, § 1, effective July 1; (1)(l)(I)(A) amended, p. 641, § 1, effective August 7. L. 2007: (1)(b), (1)(g), (1)(i), (1)(j), (1)(o), and (1)(u) amended and (1)(v) and (5) added, pp. 876, 877, §§ 3, 4, effective May 14; (1)(s) amended, p. 2026, § 27, effective June 1. L. 2010: (1)(l)(I)(A) amended, (SB 10-147), ch. 147, p. 507, § 1, effective September 1.

**Cross references:** (1) For specific exemptions for cemetery company property, see § 7-47-106; for workers' compensation benefits, see § 8-42-124; for employment security benefits, see § 8-80-103; for delinquent insurance company assets, see § 10-3-556; for group life insurance proceeds, see § 10-7-205; for fraternal benefit society insurance benefits, see § 10-14-403; for constitutional state



officers' fees or salaries, see § 13-61-101; for family allowance from estate, see § 15-11-403; for public assistance payments, see § 26-2-131; for homestead exemptions, see part 2 of article 41 of title 38.

(2) For the legislative declaration contained in the 2007 act amending subsections (1)(b), (1)(g), (1)(i), (1)(j), (1)(o), and (1)(u) and enacting subsections (1)(v) and (5), see section 1 of chapter 226, Session Laws of Colorado 2007.

## ANNOTATION

- I. General Consideration.
- II. Exempt Property.
  - A. In General.
  - B. Agriculture.
  - C. Household Goods.
  - D. Stock in Trade.
  - E. Motor Vehicles.
  - F. Pensions and Retirement Plans.
  - G. Life Insurance.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Widow's Allowance", see 6 Dicta 11 (1929). For article, "Some Phases of the Exemption Laws", see 12 Dicta 107 (1935). For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950). For note, "The Landlord's Lien in Colorado", see 27 Dicta 447 (1950). For note, "A Discussion of Garnishment and Its Exemptions", see 27 Dicta 453 (1950). For article, "Commercial Law", see 59 Den. L.J. 227 (1982). For article, "Legislative Update", see 11 Colo. Law. 2142 (1982). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983). For article, "Exempting Retirement Benefits from Bankruptcy in Colorado", see 18 Colo. Law. 17 (1989). For article, "The Nuts and Bolts of Collecting Support", see 19 Colo. Law. 1595 (1990). For article, "Rights of the Debtor and Creditor to Retirement Plan Benefits", see 20 Colo. Law. 199 (1991).

**Annotator's note.** Since § 13-54-102 is similar to repealed CSA, C. 93, § 14, and laws antecedent thereto, relevant cases construing these provisions have been included in the annotations to § 13-54-102.

**Constitutionality.** This section does not violate the uniformity clause of § 8 of art. VIII, U.S. Const., or the supremacy clause, art. VI, cl. 2, U.S. Const. In re Parrish, 19 Bankr. 331 (Bankr. D. Colo. 1982).

**On its face this section clearly applies to all writs of execution, regardless of underlying claim.** Packard v. Packard, 33 Colo. App. 308, 519 P.2d 1221 (1974).

**The only exception is specified in § 13-54-103,** which denies exemptions if the writ of execution issues on a judgment for the purchase price of the property exempted. Packard v. Packard, 33 Colo. App. 308, 519 P.2d 1221 (1974).

**The purpose of exemption is to preserve to the debtor his means of support.** Watson v. Lederer, 11 Colo. 577, 19 P. 602 (1888); Smith v. Pueblo Mercantile & Credit Ass'n, 82 Colo. 364, 260 P. 109 (1927).

**And to preserve the home for the family.** Repeated decisions are to the effect that the purpose of these statutes is to preserve the home for the family, and, to that end, to protect it from alienation by one spouse without the concurrence of the other, and also from execution or attachment arising from any debt, contract, or civil obligation. In re Youngstrom, 153 F. 98 (8th Cir. 1907).

**Exemptions are to be liberally construed.** The exemption laws of the state are for the benefit of residents, and they are to be liberally construed. Sandberg v. Borstadt, 48 Colo. 96, 109 P. 419 (1910).

**As indicated in the constitution.** The liberal policy of this state in regard to exemption laws is indicated by the organic law. Section 1 of art. XVIII, Colo. Const., expressly declares that "the general assembly shall pass liberal homestead and exemption laws". The decisions of the courts should be in harmony with this policy. Martin v. Bond, 14 Colo. 466, 24 P. 326 (1890); Hawkins v. Mosher, 8 Colo. App. 31, 44 P. 763 (1896).

**Exemptions provided by this section for the purposes intended are favored.** A perversion of the statute to admit of fraudulent purposes should be avoided by the courts; however, a construction so strict as to defeat its purpose and design should not prevail. Penrose v. Stevens, 100 Colo. 83, 65 P.2d 697 (1937).

**This section relates solely to civil actions.** Enderman v. Alexander, 68 Colo. 110, 187 P. 729 (1920).

**The statutory right to an exemption is personal and individual,** and must be exercised in relation to the property of the individual claiming it. McCrimmon v. Linton, 4 Colo. App. 420, 36 P. 300 (1894).

**Right cannot be exercised in respect to partnership property.** McCrimmon v. Linton, 4 Colo. App. 420, 36 P. 300 (1894).

**Exemptions apply to the estate of a mental incompetent.** The exemption provisions of this section are applicable to the assets in the estate of a mental incompetent, and insurance proceeds in such an estate are exempt from an approved claim of the Colorado state hospital.

State v. Estate of Butler, 30 Colo. App. 246, 491 P. 2d 102 (1971).

**Benefits received by individuals at state mental hospital from veterans administration and the Colorado old age pension program** may be applied to cover costs of care at the hospital under former § 27-12-104 and therefore are not exempt under this section. In re Estate of Nau, 183 P.3d 626 (Colo. App. 2007).

**While property may be exempt from levy, there is no statute which exempts it from liens.** Noxon v. Glaze, 11 Colo. App. 503, 53 P. 827 (1898).

**Exemption can be claimed only from levy and sale upon execution or attachment.** As the common-law process of distress for rent does not exist in this state, it is only from levy and sale upon execution or attachment that exemption can be claimed. Replevin on the ground of exemption will lie only where property has been seized by execution or attachment. The statute exempting property from levy does not exempt it from a landlord's lien. Noxon v. Glaze, 11 Colo. App. 503, 53 P. 827 (1898).

**Cognovit waiving exemptions is invalid.** Colorado has held that a stipulation in a cognovit note which waived the right of exemption was invalid as against public policy. In re Rade, 205 F. Supp. 336 (D. Colo. 1962).

**General waiver.** A general waiver of "any and all exemptions permitted by law" in a promissory note is invalid as against public policy. Beneficial Finance Co. of Colo. v. Schmuhl, 713 P.2d 1294 (Colo. 1986).

**Implied waiver.** Combined note and security agreement result in an implied waiver of \$6000 residential mobile home exemption. Beneficial Finance Co. of Colo. v. Schmuhl, 713 P.2d 1294 (Colo. 1986).

**An ordinary chattel mortgage given on property which is later claimed as exempt will prevail** over the exemption. In re Rade, 205 F. Supp. 336 (D. Colo. 1962).

**Exemption applicable to judgment for arrearages in child support and alimony.** The exemption from levy under writ of execution set forth in subsection (1)(j) applies to a judgment for arrearages in child support and alimony. Packard v. Packard, 33 Colo. App. 308, 519 P.2d 1221 (1974).

**The exemption would apply only to the debtor's equity.** When mortgaged property is claimed as exempt by a bankrupt, the exemption applies to the equity and not to the specific items of property. In re Cummings, 413 F.2d 1281 (10th Cir. 1969), cert. denied, Sears, Roebuck & Co. v. Horton, 397 U.S. 915, 90 S. Ct. 918, 25 L. Ed.2d 95 (1970); Centennial Savings & Loan Ass'n v. Schmuhl, 690 P.2d 882 (Colo. App. 1984), rev'd on other grounds sub nom. Beneficial Finance Co. of Colo. v. Schmuhl, 713 P.2d 1294 (Colo. 1986); In re Holcomb, 54 Bankr. 59 (Bankr. D. Colo. 1985).

**Vendor's assignee cannot resort to exempt property to satisfy judgment.** If the vendor takes a promissory note for the property sold, and transfers the note to a third party, such voluntary transfer of the note does not carry with it to the assignee the right to resort to exempt property to satisfy a judgment which he as assignee may recover upon the note. Whether the heir or personal representative of a deceased vendor would succeed to the privilege of his decedent under the proviso statute was not involved in the controversy in Weil v. Nevitt, 18 Colo. 10, 31 P. 487 (1892).

**Garnishment of former spouse's pension as indemnification for tax liability is not precluded by subsection (1)(s) exempting pension funds from levy and sale under writ of attachment or execution in "any action" brought after a specified date** where relevant action was dissolution, not motion to compel payment of tax. In re Plank, 881 P.2d 486 (Colo. App. 1994).

**Applied in First Nat'l Bank v. District Court,** 652 P.2d 613 (Colo. 1982).

## II. EXEMPT PROPERTY.

### A. In General.

**The application of the amended Colorado exemption limits set forth in this section to a loan and security agreement that was entered into prior to the enactment of the amended exemption statute does not constitute a "retrospective" application of state law in violation of art. II, § 11, of the Colorado Constitution and § 2-4-202.** In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

**The application also does not constitute an unconstitutional "taking" of the loan collateral under the fifth amendment to the United States Constitution and the Constitution of the state of Colorado.** In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

**The application also does not violate the respective "contracts" clauses of the United States and Colorado Constitutions.** In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

**Notwithstanding the exemption created by subsection (1)(a), public policy prevents the application of an attorney's charging lien against funds owing to a parent as child support.** In re Etcheverry, 921 P.2d 82 (Colo. App. 1996).

**Wife is not a "single person" within meaning of this section** and she is not entitled to any claims for exemption as a "single person". In re Hellman, 474 F. Supp. 348 (D. Colo. 1979).

**Where husband and wife file separately for bankruptcy,** both the husband and the wife are entitled to the exemptions provided in paragraphs (c) and (e) of subsection (1). In re Hellman, 474 F. Supp. 348 (D. Colo. 1979).



**Subsection (1)(f) permits but one claim for exemption** and where the trustee had allowed that claim in the computation of the assets available for the creditors of the husband, the wife's claim for a similar exemption was disallowed. In re Hellman, 474 F. Supp. 348 (D. Colo. 1979).

**Debtor may claim exemptions under subsection (1)(g) and (1)(i) on the same property.** In re Case, 66 Bankr. 44 (Bankr. D. Colo. 1986); In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

And each debtor can claim the full amount of the exemption under both subsection (1)(g) and (1)(i) as these are personal exemptions belonging to each debtor on personalty. In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

**"Implements"** are defined in Anderson's Law Dictionary to be: "Things necessary to any trade, without which the work cannot be performed". Eckman v. Poor, 38 Colo. 200, 87 P. 1088 (1906).

**Damages for personal injuries includes** damages recovered in actions for breach of warranty, fraud, deceit, or false imprisonment as well as damages for loss of consortium. In re Keyworth, 47 Bankr. 966 (D. Colo. 1985).

**But excludes** damages under the "Wrongful Death Act" unless the claim was for damages for personal injury suffered by the debtor and punitive damages since they are awarded not because of personal injury but because of malicious, wanton, and reckless actions. In re Keyworth, 47 Bankr. 966 (D. Colo. 1985).

The exemption for damages for personal injury does not apply to punitive damages that are awarded to punish the wrongdoer and not to compensate the plaintiff for injury. Miller v. Accelerated Bureau of Collections, Inc., 932 P.2d 824 (Colo. App. 1996).

**Subsection (1)(n) does not protect the net proceeds of a personal injury judgment from garnishment for child support obligation.** The plain language of § 13-54-106 clearly permits the garnishment of otherwise exempt property or income for the collection of child support arrearages. Drachmeister v. Brassart, 93 P.3d 566 (Colo. App. 2004).

**Subsection (1)(o)(II) exemption for mobile home.** Under subsection (1)(o)(II), each debtor in a joint case in bankruptcy is entitled to an exemption for a mobile home used as a place of residence and of which each debtor is an owner. In re Janesofsky, 22 Bankr. 973 (Bankr. D. Colo. 1982).

**Moneys from federally guaranteed student loan** in student's bank account are exempt from garnishment for judgment based on antecedent business debt owed by student. Schaerrer v. Westman Comm'n Co., 769 P.2d 1058 (Colo. 1989).

**Funds of defendant were not exempt from garnishment** even though those funds were derived from a federal court order requiring defen-

dant to make restitution as a part of a criminal case. Newburn v. RFB Petroleum, Inc., 775 P.2d 93 (Colo. App. 1989).

**Where a non-custodial parent owes a duty of child support,** such parent may not offset that obligation against a personal judgment that the non-custodial parent may have against the custodial parent. Hall v. Hall-Stradley, 776 P.2d 1166 (Colo. App. 1989).

**Exemption for jewelry was denied where debtor failed to provide court with current market value of specific items.** In re Raymond, 132 Bankr. 53 (Bankr. D. Colo. 1991).

**Debtor's annuity was not a life insurance policy for purposes of exemption under subsection (1)(l).** In re Raymond, 132 Bankr. 53 (Bankr. D. Colo. 1991).

**Because the statute has no restrictive conditions, the term "avails" in subsection (1)(l) includes the cash surrender value of life insurance policies.** In re Griesse, 172 Bankr. 336 (Bankr. D. Colo. 1994) (decided prior to 1995 amendment to subsection (1)(l)).

**An adoption expense credit is not an earned income tax credit and, therefore, does not qualify as exempt property under subsection (1)(o).** Earned income is not an element of eligibility for the adoption expense credit. Subsection (1)(o) refers to the very unique tax credit program that is based upon earned income. It does not create a generic exemption for all tax credits that use income as a qualifying factor. In re Walsh, 298 B.R. 894 (Bankr. D. Colo. 2003).

## B. Agriculture.

**Debtors engaged in agriculture as their principal occupation where they began trucking** to save their farming business, a business that had been a way of life for each of them and for at least three generations for each of their families; they began trucking with reluctance; debtor wife steadfastly resisted driving a truck but finally did so only as a last resort to save the farming business; it is fairly common for farmers and ranchers in the area to take on employment outside of the family farm for at least part of the year in order to supplement farm income and pay bills; most, if not all, of the income from trucking was dedicated to paying the bills related to the family and its farming and ranching business; both debtors expressed a credible and sincere intent to return to working full-time as farmers/ranchers once they were able to get back on their feet financially; and, while they drove trucks approximately 40 hours per week, they and their children also continued to raise cattle and manage the farm in their spare time. The debtors can, therefore, claim exemptions under subsection (1)(g). In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

**Debtors' remaining livestock are in the nature of breeding stock, without which it**

would be virtually impossible for debtors to obtain a fresh start. The stock is therefore exempt from levy as "tools of the trade" under subsection (1)(g). In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

### C. Household Goods.

**Ownership interest required before exemption may be claimed.** Each Colorado debtor in a joint case is entitled to claim up to \$1,500 a piece in household goods or tools of trade; however, the debtor must have an ownership interest in the property before any exemption may be claimed. In re Ferguson, 15 Bankr. 439 (Bankr. D. Colo. 1981); In re Reeder, 60 Bankr. 312 (Bankr. D. Colo. 1986).

**Where husband and wife are two separate debtors in a joint petition** in bankruptcy, under subsection (1)(e), each is entitled to claim a \$1,500 exemption for a total exemption of \$3,000 for household goods. In re Alvarez, 14 Bankr. 940 (Bankr. D. Colo. 1981).

**Where husband and wife file separately for bankruptcy**, both the husband and the wife are entitled to the exemptions provided in paragraphs (c) and (e) of subsection (1). In re Hellman, 474 F. Supp. 348 (D. Colo. 1979).

**Subsection (1)(e) exemption superior to nonpossessory, nonpurchase money security interest.** A nonpossessory, nonpurchase money security interest in debtors' household goods and household furnishings under § 522 (f) of the federal bankruptcy code, is void to the extent that it impairs the exemption to which the debtors would be entitled under subsection (1)(e) if no security interest existed. Redin v. Fidelity Fin. Servs., 14 Bankr. 727 (Bankr. D. Colo. 1981); In re Weiss, 51 Bankr. 224 (Bankr. D. Colo. 1985).

**Guns do not constitute household goods** when primarily used as recreational items. In re Greenlee, 61 Bankr. 257 (Bankr. D. Colo. 1986).

**Tractor qualified as a household good** because it was necessary to the functioning of the household. In re Sarmiento, 363 B.R. 189 (Bankr. D. Colo. 2006).

### D. Stock in Trade.

**Debtor may claim exemptions under subsection (1)(g) and (1)(i) on the same property.** In re Case, 66 Bankr. 44 (Bankr. D. Colo. 1986); In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

And each debtor can claim the full amount of the exemption under both subsection (1)(g) and (1)(i) as these are personal exemptions belonging to each debtor on personality. In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

**The words "stock in trade"**, in subsection (1)(i), apply to the merchant or shopkeeper, as well as to the mechanic, and include the stock of

goods kept on sale by the merchant. Weil v. Nevitt, 18 Colo. 10, 31 P. 487 (1892).

**Therefore it includes liquors of a saloon-keeper.** Weil v. Nevitt, 18 Colo. 10, 31 P. 487 (1892).

**Debtors may claim exemptions under subsection (1)(i) where evidence demonstrated** that equipment was not only used by the debtors in their farming and ranching operations but was an integral part of those operations. In re Larsen, 260 B.R. 174 (Bankr. D. Colo. 2001).

**A debtor may claim a motor vehicle as exempt pursuant to subsection (1)(i) so long as the vehicle qualifies for the exemption.** In re Van Winkle, 265 B.R. 247 (Bankr. D. Colo. 2002); In re Black, 280 B.R. 258 (Bankr. D. Colo. 2002).

**Debtor entitled to claim truck as exempt equipment pursuant to subsection (1)(i) where** debtor used and kept the truck for the specific purpose of carrying on debtor's occupation. In re Van Winkle, 265 B.R. 247 (Bankr. D. Colo. 2002).

**Debtor entitled to claim motor vehicle under subsection (1)(i) where** debtor used the vehicle to carry on a gainful occupation. In re Sackett, 394 B.R. 544 (Bankr. D. Colo. 2008).

**Failure to make selection under this section is waiver of right.** A defendant in attachment, claiming under subsection (1)(i), of "implements or stock in trade used or kept for the purpose of carrying on his trade or business", not specifically exempt by law, is entitled to select such articles as are suitable to his trade or business; and a failure on his part to make such selection, is a waiver of his right thereto. Behymer v. Cook, 5 Colo. 395 (1880).

**Property subject to levy and sale under § 13-54-103 cannot become exempt under subsection (1)(i).** Behymer v. Cook, 5 Colo. 395 (1880).

**Exemption for stock in trade cannot exceed statutory limit.** The supreme court of Colorado has made statements indicating it would not exempt a tool or instrument, or stock in trade, exceeding the value set by the statute. Watson v. Lederer, 11 Colo. 577, 19 P. 602 (1888).

### E. Motor Vehicles.

**Law reviews.** For article, "Exemption of Automobiles from Levy Under Execution or Attachment", see 10 Dicta 143 (1933). For note, "The Status of an Automobile Under the Exemption Laws of Colorado", see 10 Rocky Mt. L. Rev. 269 (1938).

**Subsection (1)(j) provides for an exemption where the debtor uses a motor vehicle for carrying on any gainful occupation.** In re Rade, 205 F. Supp. 336 (D. Colo. 1962).

**Legal title to an automobile is not a requirement of subsection (1)(j)(I).** Subsection (1)(j)(I) allows a debtor to exempt one or more



motor vehicles kept and used by the debtor. Hill v. Koching, 338 B.R. 463 (Bankr. D. Colo. 2005).

**Use of vehicle on public highways is not a requirement of subsection (1)(j)(I).** In re Sarmiento, 363 B.R. 189 (Bankr. D. Colo. 2006).

Debtors entitled to claim tractor as exempt motor vehicle. In re Sarmiento, 363 B.R. 189 (Bankr. D. Colo. 2006).

**The application of subsection (1)(j)(II)(A) is expressly limited to debtors who are themselves elderly or disabled** and not to a debtor who keeps and uses a motor vehicle for the purpose of obtaining medical care for a disabled dependent. In re Coleman, 208 Bankr. 739 (Bankr. D. Colo. 1997).

**Debtor's son's manic-depressive mental condition was not disabling under subsection (1)(j)(II)(A)** where there was no evidence or offer of proof of any inability of the son to maintain gainful employment. In re Coleman, 208 Bankr. 739 (Bankr. D. Colo. 1997).

**For evidence supporting ruling that automobile was not exempt**, see Law v. Simon, 110 Colo. 545, 136 P.2d 520 (1943).

#### F. Pensions and Retirement Plans.

**Subsection (1)(s) applies only to original actions, writs of garnishments, issued by a**

**court on or after May 1, 1991.** Guidry v. Sheet Metal Wkrs. Intern. Ass'n, Local 9, 10 F.3d 700 (10th Cir. 1993).

**And the exemption does not apply in any action for dissolution of marriage in which the petition was filed before May 1, 1991.** In re LeBlanc, 944 P.2d 686 (Colo. App. 1997).

**Plain meaning of "retirement plan"** is not limited to plans that possess attributes of ERISA-qualified or tax-qualified plans. A future retirement obligation by company is therefore exempt from attachment or garnishment under subsection (1)(s). Dillabaugh v. Ellerton, 259 P.3d 550 (Colo. App. 2011).

#### G. Life Insurance.

**Statute exempts from garnishment the "cash surrender value" of a life insurance policy up to \$25,000.** In re Gedgaudas, 978 P.2d 677 (Colo. App. 1999).

**The exclusion from the exemption is the only garnishable or attachable asset**, measured by the incremental increases in "cash value" occasioned by the making of contributions to the policy through payment of premiums. In re Gedgaudas, 978 P.2d 677 (Colo. App. 1999).

### 13-54-102.5. Child support payments - exemption - deposit into custodial account.

(1) Any past or present child support obligation owed by a parent or child support payment made by a parent that is required by a support order is exempt from levy under writ of attachment or writ of execution for any debt owed by either parent. A child support payment is no longer exempt under the provisions of this section if the recipient of the payment intermingles the payment with any other moneys.

(2) A child support payment is only exempt under the provisions of subsection (1) of this section after the payment is deposited in a bank, savings and loan, or credit union account if the account is a custodial account for the benefit of the child designated for child support payments and if no moneys other than child support payments made pursuant to a support order or interest earned on the moneys in the account are deposited into the account.

**Source: L. 94:** Entire section added, p. 1210, § 2, effective May 22.

#### ANNOTATION

**Notwithstanding the exemption created by subsection (1), public policy prevents the application of an attorney's charging lien against funds owing to a parent as child support.** In re Etcheverry, 921 P.2d 82 (Colo. App. 1996).

**Special coordinator appointed to arbitrate during a post-dissolution of marriage proceeding violated this section by requesting**

**that her fees be paid from child support funds deposited in the court registry.** Although the coordinator did not employ writs of attachment or execution to obtain payment, coordinator's behavior was functionally equivalent to extracting payment for a parent's debt from a child support payment. In re Eggert, 53 P.3d 794 (Colo. App. 2002).

**13-54-103. No exemption for purchase price.** None of the property described in section 13-54-102 shall be exempt from levy and sale on writ of attachment or writ of execution for the purchase price of such property.

**Source:** L. 59: p. 532, § 3. CRS 53: § 77-13-3. C.R.S. 1963: § 77-2-3.

### ANNOTATION

**Annotator's note.** Since § 13-54-103 is similar to the repealed second proviso to CSA, C. 13, § 14 and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**This section is for the protection of the vendor** who has parted with his property without getting his pay for it; it is a privilege personal to the vendor. *Weil v. Nevitt*, 18 Colo. 10, 31 P. 487 (1892).

**It is analogous to the vendor's lien for purchase price of real estate.** The privilege which the statute secures to the vendor would seem to bear a close analogy to the vendor's lien for the purchase price of real estate. *Weil v. Nevitt*, 18 Colo. 10, 31 P. 487 (1892).

**No property is exempt from levy to satisfy a claim for the purchase money thereof.** *Behymer v. Cook*, 5 Colo. 395 (1880).

**This section itself does not create a lien on exempt property.** As this section indicates, exempt personal property is subject to levy of attachment for the purchase price thereof. But it has been held that such a statutory provision in itself does not create a lien in exempt property. *In re Rade*, 205 F. Supp. 336 (D. Colo. 1962).

**It has been indicated that a favorable attitude towards equitable liens prevails in Colorado.** *In re Rade*, 205 F. Supp. 336 (D. Colo. 1962).

**Applied in** *Packard v. Packard*, 33 Colo. App. 308, 519 P.2d 1221 (1974); *In re Seguin*, 76 Bankr. 175 (Bankr. D. Colo. 1987).

### **13-54-104. Restrictions on garnishment and levy under execution or attachment.**

(1) As used in this section, unless the context otherwise requires:

(a) "Disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld and after the deduction of the cost of any health insurance provided by the individual pursuant to section 14-14-112, C.R.S. In the case of an order for the support of a spouse, former spouse, or dependent child, "disposable earnings" includes moneys voluntarily deposited in tax-deferred compensation funds.

(b) (I) "Earnings" means:

(A) Compensation paid or payable for personal services, whether denominated as wages, salary, commission, or bonus;

(B) Funds held in or payable from any health, accident, or disability insurance.

(II) For the purposes of writs of garnishment that are the result of a judgment taken for arrearages for child support or for child support debt, for restitution for the theft, embezzlement, misappropriation, or wrongful conversion of public property, or in the event of a judgment for a willful and intentional violation of fiduciary duties to a public pension plan where the offender or a related party received direct financial gain, "earnings" also means:

(A) Workers' compensation benefits;

(B) Any pension or retirement benefits or payments, including but not limited to those paid pursuant to articles 51, 54, 54.5, and 54.6 of title 24, C.R.S., and articles 30.5 and 31 of title 31, C.R.S.;

(C) Payment to an independent contractor for labor or services, dividends, severance pay, royalties, monetary gifts, monetary prizes, excluding lottery winnings not required by the rules of the Colorado lottery commission to be paid only at the lottery office, taxable distributions from general partnerships, limited partnerships, closely held corporations, or limited liability companies, interest, trust income, annuities, capital gains, or rents;

(D) Any funds held in or payable from any health, accident, disability, or casualty insurance to the extent that such insurance replaces wages or provides income in lieu of wages; and

(E) Tips declared by the individual for purposes of reporting to the federal internal revenue service or tips imputed to bring the employee's gross earnings to the minimum wage for the number of hours worked, whichever is greater.

(III) For the purposes of writs of garnishment issued by the state agency responsible for administering the state medical assistance program, which writs are issued as a result of a



judgment for medical support for child support or for medical support debt, “earnings” includes:

(A) Payments received from a third party to cover the health care cost of the child but which payments have not been applied to cover the child’s health care costs;

(A.5) Unemployment insurance benefits; and

(B) State tax refunds.

(IV) For the purposes of writs of garnishment issued by a county department of social services responsible for administering the state public assistance programs, which writs are issued as a result of a judgment for a debt for fraudulently obtained public assistance, fraudulently obtained overpayments of public assistance, or excess public assistance paid for which the recipient was ineligible, “earnings” shall include workers’ compensation benefits.

(V) For the purposes of attachments of earnings or writs of garnishment that are the result of a judgment taken for court assessments including fines, fees, costs, restitution, and surcharges pursuant to section 16-11-101.6 or section 16-18.5-105, C.R.S., “earnings” also means those enumerated under subparagraph (I) of this paragraph (b).

(1.1) Repealed.

(2) (a) Except as provided in subsection (3) of this section, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment or levy under execution or attachment may not exceed:

(I) For debts other than debts under subparagraph (II) of this paragraph (a), the lesser of:

(A) Twenty-five percent of the individual’s disposable earnings for that week; or

(B) The amount by which the individual’s disposable earnings for that week exceed thirty times the federal minimum hourly wage prescribed by section 206 (a) (1) of title 29 of the United States Code in effect at the time the earnings are payable; or

(C) The amount by which the individual’s disposable earnings for that week exceed thirty times the state minimum hourly wage pursuant to section 15 of article XVIII of the state constitution in effect at the time the earnings are payable;

(II) For debts for fraudulently obtained public assistance or fraudulently obtained overpayments collected pursuant to section 26-2-128 (1) (a), C.R.S., the lesser of:

(A) Thirty-five percent of the individual’s disposable earnings for that week; or

(B) The amount by which the individual’s disposable earnings for that week exceed thirty times the federal minimum hourly wage prescribed by section 206 (a) (1) of title 29 of the United States Code in effect at the time the earnings are payable; or

(C) The amount by which the individual’s disposable earnings for that week exceed thirty times the state minimum hourly wage pursuant to section 15 of article XVIII of the state constitution in effect at the time the earnings are payable.

(b) In the case of earnings for any pay period other than a week, a multiple of the federal minimum hourly wage or the state minimum hourly wage, equivalent in effect to that set forth in paragraph (a) of this subsection (2) shall be used.

(3) (a) The restrictions of subsection (2) of this section do not apply in the case of:

(I) Any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure which is established by state law, which affords substantial due process, and which is subject to judicial review;

(II) Any order of any court of the United States having jurisdiction over cases under chapter 13 of title 11 of the United States Code, the federal bankruptcy code of 1978;

(III) Any debt due for any state or federal tax.

(b) (I) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment or levy under execution or attachment to enforce any order for the support of any person shall not exceed:

(A) Where such individual is supporting his spouse or dependent child, other than a spouse or child with respect to whose support such order is used, fifty percent of such individual’s disposable earnings for that week; and

(B) Where such individual is not supporting a spouse or dependent child as described in sub-subparagraph (A) of this subparagraph (I), sixty percent of such individual’s disposable earnings for that week.

(II) With respect to the disposable earnings of any individual for any workweek, the fifty percent specified in sub-subparagraph (A) of subparagraph (I) of this paragraph (b) shall be deemed to be fifty-five percent, and the sixty percent specified in sub-subparagraph (B) of subparagraph (I) of this paragraph (b) shall be deemed to be sixty-five percent if and to the extent that such earnings are subject to garnishment or wage assignment or income assignment or levy under execution or attachment to enforce a support order with respect to a period that is prior to the twelve-week period that ends with the beginning of such workweek.

(III) Notwithstanding the maximum part of the aggregate disposable earnings of an individual which is subject to garnishment as provided in this paragraph (b), a debtor who is totally and permanently disabled and who establishes that at least seventy-five percent of his income is derived from any disability income or benefits may object to the amount of the aggregate disposable earnings subject to garnishment under this paragraph (b). The court, upon consideration of the circumstances of the parties, may provide for garnishment in an amount less than such maximum amounts.

(4) The restrictions established by this section shall be adhered to whether or not the employer of the debtor is subject to garnishee process.

**Source:** L. 59: p. 532, § 4. CRS 53: § 77-13-4. C.R.S. 1963: § 77-2-4. L. 71: p. 853, § 2. L. 79: Entire section R&RE, p. 623, § 1, effective May 31. L. 80: (1)(b) amended, p. 613, § 2, effective April 10; (3)(a)(II) amended, p. 785, § 11, effective June 5. L. 85: (3)(b)(II) amended, p. 590, § 5, effective July 1. L. 87: (1)(b) amended, p. 595, § 22, effective July 10. L. 88: (1.1) added, p. 609, § 1, effective April 14; (3)(b)(III) added, p. 611, § 3, effective July 1. L. 90: (1)(b) amended, p. 564, § 32, effective July 1. L. 91: (1)(b) amended and (1.1) repealed, pp. 383, 384, §§ 3, 4, effective May 1. L. 92: (1)(b) amended, p. 577, § 3, effective July 1; (1)(a) amended, p. 172, § 5, effective August 1. L. 93: (1)(b)(II) amended, p. 1871, § 3, effective June 6. L. 94: (1)(a) and (1)(b)(I)(A) amended, p. 1535, § 2, effective May 31; (1)(b)(II) amended, p. 2048, § 7, effective June 3; (1)(b) amended, p. 1594, § 3, effective July 1; (1)(b)(II) amended, p. 1252, § 4, effective July 1; (2)(a) amended, p. 2061, § 2, effective July 1. L. 96: (1)(b) and (3)(b)(II) amended, p. 590, § 1, effective July 1. L. 98: (1)(b)(II)(B) amended, p. 920 § 5, effective July 1. L. 99: (1)(b)(II)(B) amended, p. 620, § 13, effective August 4. L. 2005: IP(1)(b)(II) and (1)(b)(II)(B) amended, p. 71, § 1, effective August 8. L. 2006: (1)(b)(IV) added, p. 948, § 4, effective August 7. L. 2007: (2) amended, p. 877, § 5, effective July 1. L. 2009: (1)(b)(II)(B) amended, (SB 09-066), ch. 73, p. 259, § 23, effective July 1; (1)(b)(II)(B) amended, (SB 09-282), ch. 288, p. 1396, § 57, effective January 1, 2010. L. 2012: (1)(b)(V) added, (HB 12-1310), ch. 268, p. 1392, § 2, effective June 7.

**Editor's note:** (1) Amendments to subsection (1)(b) by Senate Bill 94-164, Senate Bill 94-088, Senate Bill 94-141, and House Bill 94-1345 were harmonized.

(2) Amendments to subsection (1)(b)(II)(B) by Senate Bill 09-066 and Senate Bill 09-282 were harmonized, effective January 1, 2010.

**Cross references:** For the legislative intent contained in the 2006 act enacting subsection (1)(b)(IV), see section 8(2) of chapter 208, Session Laws of Colorado 2006. For the legislative declaration contained in the 2007 act amending subsection (2), see section 1 of chapter 226, Session Laws of Colorado 2007.

## ANNOTATION

**Law reviews.** For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968). For article, "An Individual's Retirement Benefits Under the Bankruptcy Code", see 16 Colo. Law. 1211 (1987). For article, "Perils of Pre-Bankruptcy Planning: Transfers, Exemptions and Taxes", see 17 Colo. Law. 1513 (1988). For article, "Operating a Personal Ser-

vice Corporation", see 17 Colo. Law. 2011 (1988). For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2108 (1988). For article, "Exempting Retirement Benefits from Bankruptcy in Colorado", see 18 Colo. Law. 17 (1989). For article, "Rights of the Debtor and Creditor to Retirement Plan Benefits", see 20 Colo. Law. 199



(1991). For article, "Overcoming Difficulties in Collecting Child Support and Maintenance", see 24 Colo. Law. 2725 (1995).

**Annottator's note.** Since § 13-54-104 is similar to repealed laws antecedent to CSA, C. 93, § 16, cases construing those provisions have been included in the annotations to this section.

**Earnings received do not lose their character as "wages" and become capital.** It has been argued with much ingenuity that the earnings of the laborer, when received by him, are no longer wages, but capital; that the exemption statute has performed its office when it has enabled the laborer to secure his wages from his employer without let or hindrance; and that thereafter the statute cannot be invoked in his favor. This section cannot be thus reasoned away. Such a construction is narrow and illiberal. It would compel the laborer to leave his earnings in the hands of his employer, or else forego the protection of the statute altogether. It would not only deprive him of the privilege of depositing his earnings with any bank or other depository for safekeeping, but would subject his wages to supplemental proceedings even in his own pocket; for, if earnings once received immediately lose their character as wages, then it is evident that the laborer could never retain his earnings for a single hour without exposing them to the very perils which the statute was designed to avert. Such a construction would practically frustrate the beneficial objects of the statute. *Rutter v. Shumway*, 16 Colo. 95, 26 P. 321 (1891).

**Earnings include money received according to the work done.** The earnings of defendant were according to the work done, and not according to the length of employment. This fact does not preclude them from being "earnings" within the meaning of the statute. *Stranger v. Harris*, 77 Colo. 340, 236 P. 1001 (1925).

**The fact that some capital, and some assistants, enter into the work,** does not prevent the income from the contract from being "earnings" within the meaning of our statute. *Stranger v. Harris*, 77 Colo. 340, 236 P. 1001 (1925).

**Employee's interest in erstwhile retirement plan is not earnings.** Where employee terminated his employment and never did qualify for, any pension or retirement benefits, employee's interest in erstwhile employer's retirement plan cannot be considered "earnings". *Fin. Acceptance Co. v. Breaux*, 160 Colo. 510, 419 P.2d 955 (1966).

**Shares of common stock debtor purchased through an employee stock purchase plan are not exempt earnings pursuant to this section and § 5-5-105.** In re *Kramer*, 339 P.3d 761 (Bankr. D. Colo. 2006).

**Termination payments held earnings for exempt services.** Termination payments which may be paid to the debtor pursuant to an insur-

ance agent's agreement after the filing of his Chapter 7 petition are not payments due him under a covenant not to compete but are earnings for services which are exempt under this section. In re *Marshburn*, 5 Bankr. 711 (Bankr. D. Colo. 1980).

**The whole spirit of acts such as this section is such that it was intended to protect the exempt property from all manner of coercive process of the law, and not merely to protect the earnings of the debtor and other exempt property from seizure by means of the processes technically known as attachment, execution, or garnishment, but to preserve them for the benefit of his family against any appropriation for the payment of his debts not authorized by law to which he does not consent.** *Fin. Acceptance Co. v. Breaux*, 160 Colo. 510, 419 P.2d 955 (1966).

**Attorney's fees not deductible before computing percentage of disposable earnings available for garnishment.** *Rios v. Mireles*, 937 P.2d 840 (Colo. App. 1996).

**A defendant cannot counterclaim for wages that are exempt.** In an action for wages exempt by statute from levy under execution, attachment, or garnishment which are due from a defendant, the defendant cannot counterclaim a debt due from the plaintiff to him. *Fin. Acceptance Co. v. Breaux*, 160 Colo. 510, 419 P.2d 955 (1966).

**Subsection (1.1) held invalid.** Since the federal constitution reserves to Congress the right to legislate bankruptcy exemptions, this attempt by the state to create a separate bankruptcy exemption was impermissible. The exemption provided by this subsection was one which served to protect a judgment debtor in bankruptcy but did not protect him from execution and levy. In re *Mata*, 115 Bankr. 288 (Bankr. D. Colo. 1990) (decided prior to 1991 repeal of subsection (1.1)).

Since this subsection makes specific reference to ERISA plans, it is clear that this provision must be considered to have been preempted by the explicit provisions of ERISA. In re *Starkey*, 116 Bankr. 259 (Bankr. D. Colo. 1990) (decided prior to 1991 repeal of subsection (1.1)).

**Subsection (2), which limits an exemption in pension plan benefits to 75% of the "avails" of any such plan, is preempted by the ERISA provision which mandates a 100% exemption.** In re *Starkey*, 116 Bankr. 259 (Bankr. D. Colo. 1990).

**Deferred compensation plans are "earnings" within the meaning of this section and not a "trust".** In re *Vann*, 113 Bankr. 704 (Bankr. D. Colo. 1990) (decided prior to 1991 amendment to subsection (1)(b)).

**Future commissions based on renewal of insurance policies qualify as "earnings" under subsection (1)(b) because they are "compensation . . . payable for personal services".** Therefore, all renewal commissions are "earn-

ings" that would be entitled to the statutory exemption. In re Fuchs, 189 Bankr. 811 (Bankr. D. Colo. 1995).

**Personal injury settlement proceeds do not constitute "earnings"** as the term is defined in this section. Therefore, the statutory exemptions and methods of computing "disposable earnings" subject to garnishment of earnings do not apply. People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

**Applicability of exemption.** The exemption provided for in this section only applies to that portion of a pension or profit sharing plan that is interest or income and not to the corpus of such plan. In re Toner, 105 Bankr. 978 (Bankr. D. Colo. 1989); In re Alagna, 107 Bankr. 301 (Bankr. D. Colo. 1989).

The exemption in this section does not apply in an action for dissolution of marriage commenced by petition before May 1, 1991. In re LeBlanc, 944 P.2d 686 (Colo. App. 1997).

**Preemption of section.** This section is preempted with respect to ERISA qualified pensions or plans. In re Alagna, 107 Bankr. 301 (Bankr. D. Colo. 1989).

**Debtors are permitted under the Bankruptcy Code and this section to exempt 75% of the entire balance of their IRA's from the**

**bankruptcy estate.** In re Kulp, 949 F.2d 1106 (10th Cir. 1991).

**Wages paid to subcontractor do not lose characterization of "earnings" by virtue of having been deposited in joint marital account.** In re Kobernusz, 160 Bankr. 844 (Bankr. D. Colo. 1993).

**Attorney's lien** is not "required to be withheld" until it is enforced and should not be calculated as part of garnishable "disposable earnings" until that time. Rios v. Mireles, 937 P.2d 840 (Colo. App. 1996).

**Trial court's determination that defendant was not supporting other dependents was supported by record.** Rios v. Mireles, 937 P.2d 840 (Colo. App. 1996).

**Defendant not entitled to more interest than has accrued on the amount due.** Rios v. Mireles, 937 P.2d 840 (Colo. App. 1996).

**Statutory limit on percent of wage that can be garnished is subject to fraud exception.** Where debtor and garnishee colluded to avoid paying employee's wages until garnishment period had ended, court properly held garnishee liable for 100% of wages. Hoyman v. Coffin, 976 P.2d 311 (Colo. App. 1998).

**Applied in** In re McCue, 645 P.2d 854 (Colo. App. 1982); Bernstein v. Richardson, 34 Bankr. 611 (Bankr. D. Colo. 1983).

**13-54-105. No exemption for taxes.** Nothing in this article shall be construed to exempt any property of any debtor from sale for the payment of any taxes legally assessed.

**Source:** L. 59: p. 532, § 5. CRS 53: § 77-13-5. C.R.S. 1963: § 77-2-5.

**13-54-106. Exemptions applicable to all writs - exception for child support.** The exemptions provided by this article shall extend and apply to writs of attachment, execution, and garnishment issued out of any court of record and by municipal courts, except those writs which are the result of a judgment taken for arrearages for child support or for child support debt which are subject to the exemptions set forth in section 13-54-104 (3).

**Source:** L. 59: p. 532, § 6. CRS 53: § 77-13-6. C.R.S. 1963: § 77-2-6. L. 64: p. 287, § 216. L. 86: Entire section amended, p. 728, § 11, effective July 1. L. 87: Entire section amended, p. 586, § 2, effective July 10.

#### ANNOTATION

**The exemption procedure is an integral part of any garnishment proceeding.** Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978).

**Plain language of section clearly permits the garnishment of otherwise exempt prop-**

**erty or income for the collection of child support arrearages.** Drachmeister v. Brassart, 93 P.3d 566 (Colo. App. 2004).

**13-54-107. Exemptions in bankruptcy.** The exemptions provided in section 522 (d) of the federal bankruptcy code of 1978, title 11 of the United States Code, as amended, are denied to residents of this state. Exemptions authorized to be claimed by residents of this state shall be limited to those exemptions expressly provided by the statutes of this state.

**Source:** L. 81: Entire section added, p. 894, § 3, effective July 1.



## ANNOTATION

**Law reviews.** For article, "Legislative Update", see 11 Colo. Law. 2142 (1982). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983). For article, "Over the Hill to the Poor House — The Failure of Section 522 Bankruptcy Exemptions Under the Bankruptcy Reform Act of 1978", see 61 Den. L.J. 705 (1984). For article, "Homestead and Bankruptcy in Colorado and Elsewhere", see 56 U. Colo. L. Rev. 175 (1985). For article, "Bankruptcy Law", which discusses Tenth Circuit decisions dealing with constitutionality of the Colorado bankruptcy exemptions, see 62 Den. U. L. Rev. 53 (1985). For article, "An Individual's Retirement Benefits Under the Bankruptcy Code", see 16 Colo. Law. 1211 (1987). For article, "Perils of Pre-Bankruptcy Planning: Transfers, Exemptions and Taxes", see 17 Colo. Law. 1513 (1988). For a discussion of Tenth Circuit decisions dealing with bankruptcy, see 66 Den. U. L. Rev. 683 (1989). For article, "Rights of the Debtor and Creditor to Retirement Plan Benefits", see 20 Colo. Law. 199 (1991).

**Constitutionality.** This section does not violate the uniformity clause of § 8 of art. VIII, U.S. Const., or the supremacy clause, art. VI, cl. 2, U.S. Const. In re Parrish, 19 Bankr. 331 (Bankr. D. Colo. 1982); In re Robinson, 44 Bankr. 292 (Bankr. D. Colo. 1984).

This section is constitutional, notwithstanding the fact that Colorado does not provide an exemption for alimony and support. Ranes v. Molen, 31 Bankr. 70 (Bankr. D. Colo. 1983).

Debtor's claim that entire section is unconstitutional because second sentence exceeds state authority to deny federal exemptions is not addressed because debtor lacked standing to question the constitutionality of the statute. Hinkson v. Pfeiderer, 729 F.2d 697 (10th Cir. 1984).

**Purpose of revision of exemption schedules.** When Colorado revised its exemption schedules, it sought to meet congressional criticism that most of the state exemption laws are outmoded, designed for more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start for modern urban debtors'. In re Parrish, 19 Bankr. 331 (Bankr. D. Colo. 1982).

**State exemption scheme conforms to federal legislative attempt.** Colorado's scheme of bankruptcy exemptions is in conformity with the federal legislative intent to provide the required "fresh start" to debtors in bankruptcy. In re Parrish, 19 Bankr. 331 (Bankr. D. Colo. 1982).

**Debtor limited to state exemptions.** Because Colorado's bankruptcy exemptions are not inconsistent with the federal scheme of exemptions, a debtor may use only those exemptions provided for in Colorado law. In re Parrish, 19 Bankr. 331 (Bankr. D. Colo. 1982).

Colorado has "opted out" and denied to its residents the right to choose the exemptions in 11 U.S.C. § 522(d), thus confining its debtors to those exemptions enumerated in the Colorado statutes. In re Janesofsky, 22 Bankr. 973 (Bankr. D. Colo. 1982).

**Colorado exemptions are available only to Colorado residents.** Since debtor may not claim Colorado exemptions because she is not a Colorado resident, and since the 730-day domiciliary requirement in the federal bankruptcy code renders her ineligible to claim exemptions under any state's laws, debtor may claim federal exemptions. In re Underwood, 342 B.R. 358 (Bankr. D. Colo. 2006).

**Debtor denied exemptions in 11 U.S.C. § 522 (d)** because Colorado has "opted out" of said exemptions as allowed by federal law. Hinkson v. Pfeiderer, 729 F.2d 697 (10th Cir. 1984).

**Federal nonbankruptcy exemptions available to debtors.** Colorado did not intend to deny the federal nonbankruptcy exemptions to debtors in this state, nor could Colorado deny those exemptions to its citizens. Those exemptions are specifically reserved to all debtors in 11 U.S.C. § 522(b)(2)(A). Thus, the federal nonbankruptcy exemptions are available to Colorado debtors. Ranes v. Molen, 31 Bankr. 70 (Bankr. D. Colo. 1983).

**Recorded encumbrance is secure claim.** Where an encumbrance requiring payment of annual and special assessments is established by a prior recording of which the property owner had constructive notice when she accepted the deed, and where she also had actual notice from the contents of her deed, itself, the lienor holds a secured claim which a bankruptcy debtor must provide for. Lincoln v. Cherry Creek Homeowners Ass'n, 30 Bankr. 905 (Bankr. D. Colo. 1983).

**Judicial liens in bankruptcy.** Judicial liens impair a bankruptcy debtor's equity where they are created subsequent to the establishment of a homestead right and no waiver is obtained from the property owner. Consequently, pursuant to 11 U.S.C. § 522 and §§ 13-54-107, 38-41-201 and 38-41-202, these liens are null and void and judicial liens. Lincoln v. Cherry Creek Homeowners Ass'n, 30 Bankr. 905 (Bankr. D. Colo. 1983).

**Applied in** Redin v. Fidelity Fin. Servs., 14 Bankr. 727 (Bankr. D. Colo. 1981).

**ARTICLE 54.5****Garnishment**

13-54.5-101.	Definitions.		
13-54.5-102.	Continuing garnishment - creation of lien.	13-54.5-108.	Judgment debtor to file written objection or claim of exemption.
13-54.5-103.	Property or earnings subject to garnishment.	13-54.5-108.5.	Garnishee not required to assert exemption.
13-54.5-104.	Priority between multiple garnishments.	13-54.5-109.	Hearing on objection or claim of exemption.
13-54.5-105.	Notice to judgment debtor in continuing garnishment.	13-54.5-110.	No discharge from employment for any garnishment - general prohibition.
13-54.5-106.	Notice to judgment debtor in other garnishment.	13-54.5-111.	Supreme court rules.
13-54.5-107.	Service of notice upon judgment debtor.		

**13-54.5-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Continuing garnishment" means any procedure for withholding the earnings of a judgment debtor for successive pay periods for payment of a judgment debt.

(2) (a) "Earnings" means:

(I) Compensation paid or payable for personal services, whether denominated as wages, salary, commission, or bonus;

(II) Funds held in or payable from any health, accident, or disability insurance.

(b) For the purposes of writs of garnishment that are the result of a judgment taken for arrearages for child support or for child support debt, for restitution for the theft, embezzlement, misappropriation, or wrongful conversion of public property, or in the event of a judgment for a willful and intentional violation of fiduciary duties to a public pension plan where the offender or a related party received direct financial gain, "earnings" also means:

(I) Workers' compensation benefits;

(II) Any pension or retirement benefits or payments, including but not limited to those paid pursuant to articles 51, 54, 54.5, and 54.6 of title 24, C.R.S., and articles 30.5 and 31 of title 31, C.R.S.;

(III) Payment to an independent contractor for labor or services, dividends, severance pay, royalties, monetary gifts, monetary prizes, excluding lottery winnings not required by the rules of the Colorado lottery commission to be paid only at the lottery office, taxable distributions from general partnerships, limited partnerships, closely held corporations, or limited liability companies, interest, trust income, annuities, capital gains, or rents;

(IV) Any funds held in or payable from any health, accident, disability, or casualty insurance to the extent that such insurance replaces wages or provides income in lieu of wages; and

(V) Tips declared by the individual for purposes of reporting to the federal internal revenue service or tips imputed to bring the employee's gross earnings to the minimum wage for the number of hours worked, whichever is greater.

(c) For the purposes of writs of garnishment issued by the state agency responsible for administering the state medical assistance program, which writs are issued as a result of a judgment for medical support for child support or for medical support debt, "earnings" includes:

(I) Payments received from a third party to cover the health care cost of the child but which payments have not been applied to cover the child's health care costs; and

(II) State tax refunds.

(d) For the purposes of writs of garnishment issued by a county department of social services responsible for administering the state public assistance programs, which writs are issued as a result of a judgment for a debt for fraudulently obtained public assistance, fraudulently obtained overpayments of public assistance, or excess public assistance paid for which the recipient was ineligible, "earnings" shall include workers' compensation benefits.



(e) For the purposes of attachments of earnings or writs of garnishment that are the result of a judgment taken for court assessments including fines, fees, costs, restitution, and surcharges pursuant to section 16-11-101.6 or section 16-18.5-105, C.R.S., “earnings” also means those enumerated under paragraph (a) of this subsection (2).

(3) “Garnishee” means a person other than a judgment creditor or judgment debtor who is in possession of earnings or property of the judgment debtor and who is subject to garnishment in accordance with the provisions of this article.

(4) “Garnishment” means any procedure through which the property or earnings of an individual in the possession or control of a garnishee are required to be withheld for payment of a judgment debt.

(5) “Judgment creditor” means any individual, corporation, partnership, or other legal entity that has recovered a money judgment against a judgment debtor in a court of competent jurisdiction.

(6) “Judgment debtor” means any person, including a corporation, partnership, or other legal entity, who has a judgment entered against him in a court of competent jurisdiction.

(7) “Notice of exemption and pending levy” means the document required to be served on the judgment debtor in any garnishment proceeding, except continuing garnishment, as soon as practicable following the service of the writ of garnishment on the garnishee. A “notice of exemption and pending levy” includes a statement that the judgment creditor intends to satisfy the judgment against the judgment debtor out of the judgment debtor’s personal property held by a third party and that the judgment debtor has the right to claim certain property as exempt.

**Source:** **L. 84:** Entire article added, p. 469, § 1, effective January 1, 1985. **L. 85:** (7) amended, p. 582, § 1, effective May 3. **L. 87:** (2) amended, p. 595, § 23, effective July 10. **L. 90:** (2) amended, p. 564, § 33, effective July 1. **L. 91:** (2) amended, p. 384, § 5, effective May 1. **L. 92:** (2) amended, p. 577, § 4, effective July 1. **L. 93:** (2)(b) amended, p. 1871, § 4, effective June 6. **L. 94:** (2)(a)(I) amended, p. 1536, § 3, effective May 31; (2) amended, p. 1595, § 4, effective July 1; (2)(b) amended, p. 1252, § 5, effective July 1. **L. 96:** (2) amended, p. 591, § 2, effective July 1. **L. 98:** (2)(b)(II) amended, p. 920, § 6, effective July 1. **L. 99:** (2)(b)(II) amended, p. 620, § 14, effective August 4. **L. 2005:** IP(2)(b) and (2)(b)(II) amended, p. 71, § 2, effective August 8. **L. 2006:** (2)(d) added, p. 947, § 3, effective August 7. **L. 2009:** (2)(b)(II) amended, (SB 09-282), ch. 288, p. 1397, § 58, effective January 1, 2010. **L. 2010:** (2)(b)(II) amended, (HB 10-1422), ch. 419, p. 2068, § 23, effective August 11. **L. 2012:** (2)(e) added, (HB 12-1310), ch. 268, p. 1392, § 3, effective June 7.

**Editor’s note:** Amendments to subsection (2) by Senate Bill 94-088, Senate Bill 94-164, and House Bill 94-1345 were harmonized.

**Cross references:** For the legislative intent contained in the 2006 act enacting subsection (2)(d), see section 8(2) of chapter 208, Session Laws of Colorado 2006.

## ANNOTATION

**Law reviews.** For article, “Rights of the Debtor and Creditor to Retirement Plan Benefits”, see 20 Colo. Law. 199 (1991).

*Residential Ins. Co. v. Dimmick*, 916 P.2d 638 (Colo. App. 1996).

**The definition of “earnings” before 1991** was broad enough to include tips. *United Guar.*

**13-54.5-102. Continuing garnishment - creation of lien.** (1) In addition to garnishment proceedings otherwise available under the laws of this state in any case in which a money judgment is obtained in a court of competent jurisdiction, the judgment creditor or its assignees shall be entitled, on notice to the judgment debtor required by section 13-54.5-105, to apply to the clerk of such court for garnishment against any garnishee. To the extent that the earnings are not exempt from garnishment, such garnishment shall be a lien and continuing levy upon the earnings due or to become due from the garnishee to the

judgment debtor.

(2) Garnishment pursuant to subsection (1) of this section shall be a lien and continuing levy against said earnings due for one hundred eighty-two days following service of the writ or for one hundred eighty-two days following the expiration of any writs with a priority under section 13-54.5-104, but such lien shall be terminated earlier than one hundred eighty-two days if earnings are no longer due, the underlying judgment is vacated, modified, or satisfied in full, or the writ is dismissed; except that a continuing garnishment may be suspended for a specified period of time by the judgment creditor upon agreement with the judgment debtor, which agreement shall be in writing and filed by the judgment creditor with the clerk of the court in which the judgment was entered and a copy of which shall be delivered by the judgment creditor to the garnishee.

(3) Garnishment pursuant to subsection (1) of this section shall apply only to proceedings against the earnings of a judgment debtor who is a natural person.

**Source:** **L. 84:** Entire article added, p. 470, § 1, effective January 1, 1985. **L. 85:** (1) amended, p. 582, § 2, effective May 3. **L. 88:** (1) and (2) amended, p. 610, § 1, effective July 1. **L. 2001:** (2) amended, p. 35, § 1, effective August 8. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 826, § 14, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**13-54.5-103. Property or earnings subject to garnishment.** (1) Any earnings owed by the garnishee to the judgment debtor at the time of service of the writ of continuing garnishment upon the garnishee and all earnings accruing from the garnishee to the judgment debtor from such date of service up to and including the ninetieth day thereafter shall be subject to the process of continuing garnishment. A garnishee shall not be required to collect, possess, or control the judgment debtor's tips, and any such tips shall not be owed by a garnishee to a judgment debtor.

(2) Any indebtedness, intangible personal property, or tangible personal property capable of manual delivery, other than earnings, owned by the judgment debtor and in the possession and control of the garnishee at the time of service of the writ of garnishment upon the garnishee shall be subject to the process of garnishment.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, the exemptions from garnishment required or allowed by law, including but not limited to exemptions provided by sections 13-54-102 and 13-54-104 and 15 U.S.C. sec. 1671 et seq., shall apply to all garnishments.

**Source:** **L. 84:** Entire article added, p. 470, § 1, effective January 1, 1985. **L. 96:** (1) amended, p. 621, § 30, effective July 1.

#### ANNOTATION

**Not federally guaranteed student loan.** Moneys in student's bank account, which are proceeds of federally guaranteed student loan, are not garnishable pursuant to a judgment based on antecedent business debt of student. *Schaerrer v. Westman Comm'n Co.*, 769 P.2d 1058 (Colo. 1989).

**Judgment debtor's right to annual discretionary disbursement of the corpus of a trust**

**is not a garnishable asset.** The right to annual disbursement of funds from principal is a power of appointment, and a power of appointment is neither property nor a property right. *Univ. Nat'l Bank v. Rhoadarmer*, 827 P.2d 561 (Colo. App. 1991).

**13-54.5-104. Priority between multiple garnishments.** (1) (a) Only one writ of continuing garnishment against earnings due the judgment debtor shall be satisfied at one time. When more than one writ of continuing garnishment has been issued against earnings



due the same judgment debtor, they shall be satisfied in the order of service on the garnishee. Except as provided in this subsection (1), a lien and continuing levy obtained pursuant to this article shall have priority over any subsequent garnishment lien or wage attachment.

(b) Where a continuing garnishment has been suspended for a specific period of time by agreement of the parties pursuant to the provisions of section 13-54.5-102 (2), such suspended continuing garnishment shall have priority over any writ of continuing garnishment served on the garnishee after such suspension has expired.

(c) (I) Notwithstanding any other provision of this subsection (1), a continuing garnishment obtained pursuant to section 14-14-105, C.R.S., for the satisfaction of debts or judgments for child support shall have priority over any other continuing garnishment.

(II) Notwithstanding any other provision of this subsection (1), a continuing garnishment obtained pursuant to section 26-2-128 (1) (a), C.R.S., for the satisfaction of a judgment for fraudulently obtained public assistance or fraudulently obtained overpayments has priority over any other continuing garnishment other than a garnishment for collection of child support under subparagraph (I) of this paragraph (c).

(2) (a) Any writ of continuing garnishment served upon a garnishee while any previous writ is still in effect shall be answered by the garnishee with a statement that he has been served previously with one or more writs of continuing garnishment against earnings due the judgment debtor and specifying the date on which all such liens are expected to terminate.

(b) Upon the termination of a lien and continuing levy obtained pursuant to this article, any other writ of continuing garnishment which has been issued or which is issued subsequently against earnings due the judgment debtor shall have priority in the order of service on the garnishee, and no priority shall be given to any previous continuing lienholder whose lien has terminated. The person who serves a writ of continuing garnishment on a garnishee shall note the date and time of such service.

**Source:** L. 84: Entire article added, p. 471, § 1, effective January 1, 1985. L. 94: (1)(c) amended, p. 2062, § 3, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "The Nuts and Bolts of Collecting Support", see 19 Colo. Law. 1595 (1990).

**13-54.5-105. Notice to judgment debtor in continuing garnishment.** In a case of continuing garnishment, the judgment creditor shall serve two copies of the writ of continuing garnishment upon the garnishee, one copy of which the garnishee shall deliver to the judgment debtor as provided in section 13-54.5-107. Such writ shall include notice to the judgment debtor of the formula used to calculate the amount of exempt earnings owed to the judgment debtor for a single pay period and the amount of nonexempt earnings payable to the judgment creditor for a single pay period, and such writ shall contain notice to the judgment debtor of his right to object to such calculation of exempt and nonexempt earnings and his right to a hearing on such objection.

**Source:** L. 84: Entire article added, p. 471, § 1, effective January 1, 1985.

**13-54.5-106. Notice to judgment debtor in other garnishment.** (1) In a case where personal property of the judgment debtor other than earnings is subject to garnishment, following the service of the writ of garnishment on the garnishee, the person who served said writ shall, as soon as practicable, serve a copy of the writ of garnishment, together with a notice of exemption and pending levy, upon each judgment debtor whose property is subject to garnishment by said writ. The notice of exemption and pending levy shall inform the judgment debtor that the judgment creditor intends to seek satisfaction of any judgment rendered in its favor against the judgment debtor out of the judgment debtor's personal

property in the possession or control of the garnishee and shall inform the judgment debtor of his right to claim exempt property.

(2) The notice of exemption and pending levy in such garnishment proceeding against the personal property of a judgment debtor who is a natural person shall contain the following:

- (a) The judgment creditor's name and business address;
- (b) The original amount of the judgment;
- (c) The amount, if any, paid on the principal of the judgment as of the date of the notice;
- (d) The principal balance due on the judgment;
- (e) The interest, if any, due on the judgment;
- (f) The itemized taxable costs, if any, including the estimated costs of serving the notice;

- (g) The total amount due and owing on the judgment;
- (h) The date of entry of the judgment;
- (i) The name of the court in which the judgment was entered;
- (j) A statement of the judgment debtor's right to claim any property levied upon as exempt, including, but not limited to:

(I) Exempt property under section 13-54-102 and exempt earnings under section 13-54-104;

(II) Workers' compensation benefits under section 8-42-124, C.R.S.;

(III) Unemployment compensation benefits under section 8-80-103, C.R.S.;

(IV) Group life insurance proceeds under section 10-7-205, C.R.S.;

(V) Health insurance benefits under section 10-16-212, C.R.S.;

(VI) Fraternal society benefits under section 10-14-403, C.R.S.;

(VII) Family allowances under section 15-11-404, C.R.S.;

(VIII) Repealed.

(IX) Public employees' retirement benefits pursuant to sections 24-51-212 and 24-54-111, C.R.S., social security benefits pursuant to 42 U.S.C. sec. 407, and railroad employee retirement benefits pursuant to 45 U.S.C. sec. 231m;

(X) Public assistance benefits under section 26-2-131, C.R.S.;

(XI) Police officers' and firefighters' pension fund payments under section 31-30.5-208, C.R.S.;

(XII) Utility and security deposits under section 13-54-102 (1) (r);

(j.5) A statement that, notwithstanding the debtor's right to claim any property levied upon as exempt for the property specified in paragraph (j) of this subsection (2), no exemption other than the exemptions set forth in section 13-54-104 (3) may be claimed for a writ which is the result of a judgment taken for arrearages for child support or for child support debt;

(k) The method of claiming an exemption and the time therefor; and

(l) The right to a hearing on any such claim of exemption and the time within which such hearing must be held.

(3) Any notice to the judgment debtor required in the case of a garnishment proceeding against the assets of a judgment debtor other than a natural person shall be as prescribed by the supreme court pursuant to section 13-54.5-111.

**Source:** **L. 84:** Entire article added, p. 471, § 1, effective January 1, 1985. **L. 87:** (2)(j)(IX) amended, p. 1091, § 6, effective July 1; (2)(j)(IX) amended, p. 1585, § 56, effective July 1; (2)(j.5) added, p. 595, § 24, effective July 10. **L. 88:** (3) amended, p. 611, § 2, effective July 1. **L. 90:** (2)(j)(II) amended, p. 564, § 34, effective July 1. **L. 92:** (2)(j)(V) amended, p. 1726, § 15, effective July 1. **L. 93:** (2)(j)(VI) amended, p. 609, § 2, effective July 1. **L. 94:** (2)(j)(VII) amended, p. 1040, § 18, effective July 1, 1995. **L. 96:** (2)(j)(XI) amended, p. 941, § 3, effective May 23. **L. 2011:** (2)(j)(VIII) repealed, (HB 11-1303), ch. 264, p. 1152, § 20, effective August 10.

**13-54.5-107. Service of notice upon judgment debtor.** (1) In a case of continuing garnishment, the garnishee shall deliver a copy of the writ of garnishment required by



section 13-54.5-105 to the judgment debtor at the time the judgment debtor receives earnings for the first pay period affected by such writ of continuing garnishment.

(2) In cases where the judgment debtor's personal property, other than earnings, is subject to garnishment, service of the notice of exemption and pending levy required by section 13-54.5-106 shall be made by delivering a copy of such notice to the judgment debtor personally or by leaving a copy of such notice at the usual abode of the judgment debtor with some member of his or her family over the age of eighteen years. In the event that personal service cannot be made upon the judgment debtor, upon a showing that due diligence has been used to obtain personal service, the court shall order service of such notice of exemption and pending levy to be made, in accordance with section 24-70-106, C.R.S., by publication thereof for a period of fourteen days in some newspaper of general circulation published in the county in which said property was so levied upon or, if there is no such newspaper published in such county, by publication in a newspaper of general circulation in an adjoining county, and the court shall order the clerk of the court in which the judgment was entered to mail a copy of such notice to the judgment debtor at his or her last-known address, postage prepaid. Such notice, with proof of service thereof, and, in the case of publication, an affidavit of publication and an affidavit of the mailing of notice shall be filed with the clerk of the court in which the judgment was entered.

(3) Compliance with this section and sections 13-54.5-105 and 13-54.5-106 by the judgment creditor shall be deemed to give sufficient notice to the judgment debtor of the garnishment proceedings against him, and no further notice shall be required under this article.

**Source:** L. 84: Entire article added, p. 473, § 1, effective January 1, 1985. L. 2012: (2) amended, (SB 12-175), ch. 208, p. 826, § 15, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

### **13-54.5-108. Judgment debtor to file written objection or claim of exemption.**

(1) (a) In a case of continuing garnishment where the judgment debtor objects to the calculation of the amount of exempt earnings, the judgment debtor shall have seven days from receipt of the copy of the writ of continuing garnishment required by section 13-54.5-105 within which to resolve the issue of such miscalculation, by agreement with the garnishee, during which time the garnishee shall not tender any moneys to the clerk of the court. If such objection is not resolved within seven days and after good faith effort, the judgment debtor may file a written objection with the clerk of the court in which the judgment was entered setting forth with reasonable detail the grounds for such objection. The judgment debtor shall, by certified mail, return receipt requested, deliver immediately a copy of such objection to the judgment creditor or his or her attorney of record.

(b) In a case where a garnishee, pursuant to a writ of garnishment, holds any personal property of the judgment debtor other than earnings which the judgment debtor claims to be exempt, said judgment debtor, within fourteen days after being served with the notice of exemption and pending levy required by section 13-54.5-106, shall make and file with the clerk of the court in which the judgment was entered a written claim of exemption setting forth with reasonable detail a description of the property claimed to be exempt, together with the grounds for such exemption. The judgment debtor shall, by certified mail, return receipt requested, deliver immediately a copy of such claim to the judgment creditor or his or her attorney of record.

(2) Upon the filing of a written objection or claim of exemption, all further proceedings with relation to the sale or other disposition of said property or earnings shall be stayed until the matter of such objection or claim of exemption is determined.

(3) Notwithstanding the provisions of subsection (1) of this section, a judgment debtor failing to make a written objection or claim of exemption may, at any time within one hundred eighty-two days from receipt of a copy of the writ of continuing garnishment required by section 13-54.5-105 or from service of the notice of exemption and pending

levy required by section 13-54.5-106 and for good cause shown, move the court in which the judgment was entered to hear an objection or a claim of exemption as to any earnings or property levied in garnishment, the amount of which the judgment debtor claims to have been miscalculated or which the judgment debtor claims to be exempt. Such hearing may be granted upon a showing of mistake, accident, surprise, irregularity in proceedings, newly discovered evidence, events not in the control of the judgment debtor, or such other grounds as the court may allow.

**Source:** L. 84: Entire article added, p. 473, § 1, effective January 1, 1985. L. 2012: (1) and (3) amended, (SB 12-175), ch. 208, p. 827, § 16, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1) and (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

### ANNOTATION

**There is no provision by statute for oral amendment of a claim of exemption.** In re Nye, 210 Bankr. 857 (Bankr. D. Colo. 1997).

**Court must hold a hearing to determine validity of defendant's claim of exemption**

**prior to allowing garnishment to proceed.** Summarily denying a claim of exemption based on a finding that the defendant was in contempt of another court order is insufficient. *Borrayo v. Lefever*, 159 P.3d 657 (Colo. App. 2006).

**13-54.5-108.5. Garnishee not required to assert exemption.** A garnishee shall not be required to deduct, set up, or plead any exemption for or on behalf of a judgment debtor, except as set forth in the writ.

**Source:** L. 2006: Entire section added, p. 579, § 1, effective July 1.

**13-54.5-109. Hearing on objection or claim of exemption.** (1) (a) Upon the filing of an objection pursuant to section 13-54.5-108 (1) (a) or the filing of a claim of exemption pursuant to section 13-54.5-108 (1) (b), the court in which the judgment was entered shall set a time for the hearing of such objection or claim, which shall be not more than fourteen days after filing. The clerk of the court where such objection or claim is filed shall immediately inform the judgment creditor or his or her attorney of record and the judgment debtor or his or her attorney of record by telephone, by mail, or in person of the date set for such hearing.

(b) The certificate of the clerk of the court that service of notice of such hearing has been made in the manner and form stated in paragraph (a) of this subsection (1), which certificate has been attached to the court file, shall constitute prima facie evidence of such service, and such certificate of service filed with the clerk of the court is sufficient return of such service.

(2) Upon such hearing, the court shall summarily try and determine whether the amount of the judgment debtor's exempt earnings was correctly calculated by the garnishee or whether the property held by the garnishee is exempt and shall enter an order or judgment setting forth the determination of the court. If the amount of exempt earnings is found to have been miscalculated or if said property is found to be exempt, the court shall order the clerk of the court to remit the amount of over-garnished earnings, or the garnishee to remit such exempt property, to the judgment debtor within seven days.

(3) Where the judgment debtor moves the court to hear an objection or claim of exemption within the time provided by section 13-54.5-108 (3) and the judgment giving rise to such claim has been satisfied against property or earnings of the judgment debtor, the court shall hear and summarily try and determine whether the amount of the judgment debtor's earnings paid to the judgment creditor was correctly calculated and whether the judgment debtor's property sold in execution was exempt and shall issue an order setting forth the determination of the court. If such amount of earnings is found to have been miscalculated or if such property is found to be exempt, the court shall order the judgment



creditor to remit the amount of the over-garnished earnings or such exempt property or the value thereof to the judgment debtor within seven days.

(4) Any order or judgment entered by the court as provided for in subsections (2) and (3) of this section is a final judgment or order for the purpose of appellate review.

**Source:** **L. 84:** Entire article added, p. 474, § 1, effective January 1, 1985. **L. 2012:** (1)(a), (2), and (3) amended, (SB 12-175), ch. 208, p. 827, § 17, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1)(a), (2), and (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Failure to comply with a court order does not supersede requirement to set a hearing pursuant to subsection (1)(a).** The court may not sanction a party for his or her failure to comply with a court order by refusing to set a

hearing on an objection or claim of exemption. The setting of a hearing is mandatory, not discretionary. *Borrayo v. Lefever*, 159 P.3d 657 (Colo. App. 2006).

**13-54.5-110. No discharge from employment for any garnishment - general prohibition.** (1) No employer shall discharge an employee for the reason that a creditor of the employee has subjected or attempted to subject unpaid earnings of the employee to any garnishment or like proceeding directed to the employer for the purpose of paying any judgment.

(2) If an employer discharges an employee in violation of the provisions of this section, the employee may, within ninety-one days, bring a civil action for the recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall be lost wages not to exceed six weeks, costs, and reasonable attorney fees.

**Source:** **L. 84:** Entire article added, p. 475, § 1, effective January 1, 1985. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 828, § 18, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**13-54.5-111. Supreme court rules.** The practice and procedure in garnishment actions instituted pursuant to this article, and all forms in connection therewith, shall be in accordance with rules prescribed by the supreme court pursuant to article 2 of this title.

**Source:** **L. 84:** Entire article added, p. 475, § 1, effective January 1, 1985.

## ARTICLE 55

### Method of Claiming Exemption

13-55-101.	Defendant to file written claim.	13-55-106.	Order or judgment is final.
13-55-102.	Service of notice of levy.	13-55-107.	Failure to claim - effect.
13-55-103.	Proceedings for sale stayed.	13-55-108.	Damages.
13-55-104.	Hearing on claim.	13-55-109.	Court may order sale - proceeds.
13-55-105.	Court enters order or judgment.	13-55-110.	Appeals.

**13-55-101. Defendant to file written claim.** Except in cases of garnishment pursuant to article 54.5 of this title, in cases where a sheriff or other officer by virtue of a writ of execution, writ of attachment, or other order of court issued by a court of record or clerk thereof levies upon, seizes, or takes into his possession any property of the defendant debtor, which said property, or part thereof, the defendant claims as exempt under the provisions of the statutes of the state, said defendant debtor, within fourteen days after being served with notice of such levy or seizure, shall make and file with the clerk of the court of record out of which such writ of execution, writ of attachment, or other order was issued a written claim of such exemption setting forth with reasonable detail the description of the property so claimed to be exempt together with the grounds of such claim of exemption.

**Source:** L. 35: p. 244, § 1. CSA: C. 93, § 30. CRS 53: § 77-4-1. C.R.S. 1963: § 77-4-1. L. 64: p. 283, § 205. L. 85: Entire section amended, p. 582, § 3, effective May 3. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 828, § 19, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

#### ANNOTATION

**Law reviews.** For note, "The Status of an Automobile Under the Exemption Laws of Colorado", see 10 Rocky Mt. L. Rev. 269 (1938). For article, "Executions and Levies on Tangible

Property", see 27 Dicta 143 (1950). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den. L.J. 82 (1970).

**13-55-102. Service of notice of levy.** Notice of such levy or seizure of any property under a writ of execution, writ of attachment, or other order of court shall be served upon the defendant debtor by delivering a copy of such notice to the defendant debtor personally or by leaving a copy of such notice at the usual abode of the defendant debtor with some member of his family over the age of fifteen years. In the event the defendant is a nonresident, or absent from the state or conceals himself or herself so personal service cannot be had upon him or her, then service of such notice of levy or seizure shall be made by publication thereof for a period of fourteen days in some newspaper published in the county in which said property was so levied upon or seized, or, if there is no newspaper published in such county, then like publication shall be made in a newspaper in an adjoining county, and the clerk of the court of record shall mail a copy of such notice to the defendant debtor directed to him or her at his or her last-known address, postage prepaid. Such notice, with proof of service thereof and, in case of publication, affidavit of publication and affidavit of mailing of notice shall be filed with the clerk of the court of record from which such writ of execution, writ of attachment, or other order of court was issued.

**Source:** L. 35: p. 245, § 2. CSA: C. 93, § 31. CRS 53: § 77-4-2. C.R.S. 1963: § 77-4-2. L. 64: p. 283, § 206. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 828, § 20, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For requirements of publication of notice, as required by this section, see § 24-70-106.

#### ANNOTATION

**This prescribed procedure must be strictly followed.** The remedy of attachment is in dero-

gation of the common law, and must be strictly followed. Any failure to conform to prescribed



procedures, all being necessary and mandatory, is fatal and the writ is of no validity. *Jayne v Peck*, 155 Colo. 513, 395 P.2d 603 (1964).

**13-55-103. Proceedings for sale stayed.** Upon the filing of a written claim of exemption, all further proceedings with relation to the sale or other disposition of said property shall be stayed until the matter of such claim of exemption is determined.

**Source:** L. 35: p. 245, § 3. CSA: C. 93, § 32. CRS 53: § 77-4-3. C.R.S. 1963: § 77-4-3.

**13-55-104. Hearing on claim.** (1) Upon the filing of such claim of exemption, the court of record shall set a time for the hearing of such claim of exemption, which shall not be less than seven days nor more than fourteen days thereafter. A written notice of the time and place of such hearing shall be given by the defendant or his or her attorney to the officer who made such levy or seizure, and to the plaintiff in said action or his or her attorney of record, by leaving a copy of such notice with said officer or his deputy at his office and by leaving a copy thereof with the plaintiff or his or her attorney of record, or notice may be given to the plaintiff by mailing a copy of such notice of hearing to the attorney of record of the plaintiff at least seven days in advance of date set for the hearing.

(2) The affidavit of the defendant or his attorney that service of notice of such hearing has been made in the manner and form stated, attached to the original notice, shall constitute prima facie evidence of such service, and such affidavit of service filed with the clerk of the court is sufficient return of such service. Such hearing may be continued from time to time in the discretion of the court. In case of the absence of the district judge from the county in which said claim of exemption has been filed with the clerk of the district court or in case of other inability of the district judge to act, the county judge of such county if possessing the qualifications of a district judge in cases of claims for exemption arising therein may set the time of hearing and hear and determine such claims, sitting as a judge of the district court, and his judgment, findings, or orders entered therein shall be of the same force and effect as though made by the district judge.

**Source:** L. 35: p. 246, § 4. CSA: C. 93, § 33. CRS 53: § 77-4-4. C.R.S. 1963: § 77-4-4. L. 64: p. 284, § 207. L. 2012: (1) amended, (SB 12-175), ch. 208, p. 829, § 21, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**13-55-105. Court enters order or judgment.** Upon such hearing, the court shall summarily try and determine the question as to whether or not the property, or any part thereof, so levied upon, seized, and taken into possession by the officer making such levy, as set forth in said written claim of exemption, is exempt and shall enter an order or judgment setting forth the determination of the court. If any of said property is found to be exempt, the court shall order the sheriff or other officer to return such property so found to be exempt to the defendant within forty-eight hours, unless same is ordered sold as provided in section 13-55-109.

**Source:** L. 35: p. 247, § 5. CSA: C. 93, § 34. CRS 53: § 77-4-5. C.R.S. 1963: § 77-4-5. L. 64: p. 284, § 208.

**13-55-106. Order or judgment is final.** Any order or judgment entered by the court as provided for by section 13-55-105 is a final judgment or order for the purpose of appellate review.

**Source:** L. 35: p. 247, § 6. CSA: C. 93, § 35. CRS 53: § 77-4-6. C.R.S. 1963: § 77-4-6. L. 64: p. 284, § 209.

**13-55-107. Failure to claim - effect.** In case the defendant debtor fails to make written claim of exemption as provided in section 13-55-101, he conclusively waives his right of exemption under the statutes of this state and has no right of action against the officer making such levy or seizure or against the plaintiff on account of such levy or seizure on the ground of levying upon exempt property.

**Source:** L. 35: p. 247, § 7. CSA: C. 93, § 36. CRS 53: § 77-4-7. C.R.S. 1963: § 77-4-7.

**13-55-108. Damages.** If, after hearing of claim of exemption, the court determines that the property levied upon and seized, or any part thereof, is exempt and the officer making the levy in all matters obeys and abides by the order or judgment of the court, no right of action for other than actual damages suffered by the defendant shall exist against said officer or the plaintiff on account of such levy or seizure upon the ground of levying upon or seizure of exempt property. If such officer does not return the property seized and so found to be exempt within forty-eight hours, unless same is ordered sold as provided in section 13-55-109, then he is liable in damages for three times the value of the property seized.

**Source:** L. 35: p. 247, § 8. CSA: C. 93, § 37. CRS 53: § 77-4-8. C.R.S. 1963: § 77-4-8. L. 64: p. 285, § 210.

**13-55-109. Court may order sale - proceeds.** In case the court finds that a portion of such property is exempt to such value as is by statute fixed as being exempt but that the property seized is of a greater value and said property so seized cannot be readily divided, the court may order said property to be sold, and out of the first proceeds of said sale the defendant debtor shall be paid the amount, as is provided by statute, of his exemption. The disposal of the balance of the proceeds of said sale shall await the further order of the court. If such property is divisible, the court shall fix the value of each item thereof and shall require the defendant to select therefrom such items as the defendant may choose of an aggregate value not to exceed the amount of his exemptions, and the disposal of the balance of such property shall await the further order of the court. No sale of property seized or levied upon under a writ of attachment shall be ordered sold until after final judgment in said action has been rendered in favor of the plaintiff.

**Source:** L. 35: p. 248, § 9. CSA: C. 93, § 38. CRS 53: § 77-4-9. C.R.S. 1963: § 77-4-9. L. 64: p. 285, § 211.

#### ANNOTATION

**Failure to provide for homestead exemption deprived court of jurisdiction to proceed.** Where, in its order authorizing the trustee to sell the interest of the bankrupt as well as the trustee's interest, the bankruptcy court failed to provide for separation of the proceeds and payment

to bankrupt of the amount of the homestead, the bankruptcy court did not have jurisdiction of the property at the time of sale, and thus the sale by the bankruptcy court was void. *Baker v. Allen*, 34 Colo. App. 363, 528 P.2d 922 (1974).

**13-55-110. Appeals.** Appellate review may be had from the final order or judgment entered in pursuance of this article as in other cases.

**Source:** L. 35: p. 248, § 10. CSA: C. 93, § 39. CRS 53: § 77-4-10. C.R.S. 1963: § 77-4-10.



## ARTICLE 56

## Levy and Sale - Real Estate

**Cross references:** For prohibition against execution and levy, see § 15-12-812.

## PART 1

## CERTIFICATES OF LEVY

13-56-101.	Certificate of levy - notice.
13-56-102.	Writs from other county.
13-56-103.	Lien of six years' duration.
13-56-104.	Recorder to file and record.

## PART 2

## SALE OF LANDS

13-56-201.	Hours - notice - penalty - irregularity.
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## PART 1

## CERTIFICATES OF LEVY

**13-56-101. Certificate of levy - notice.** When in any case a writ of attachment or a writ of execution is issued from any district or county court and a levy thereunder is made upon real estate, it is the duty of the sheriff or officer making the levy to file a certificate of such fact with the recorder of the county where such real estate is situate, and, from and after the filing, such levy shall take effect as to creditors and bona fide purchasers without notice and not before.

**Source:** L. 19: p. 295, § 1. C.L. § 5932. CSA: C. 93, § 40. CRS 53: § 77-5-1. C.R.S. 1963: § 77-5-1.

## ANNOTATION

**Law reviews.** For article, "Foreclosures by the Public Trustee", see 9 Dicta 6 (1931). For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950).

**The purpose of this section is to enable the creditor to seize property,** and hold it for the satisfaction of the judgment to be obtained in the cause, and of course the lien of the attachment cannot be greater than the indebtedness stated in the affidavit and writ. *Tilton v. Cofield*, 2 Colo. 392 (1874) (decided prior to L. 19, p. 295, § 1, the earliest source of § 13-56-101).

**An imperfect statement may constitute notice.** That the plaintiff, by an imperfect statement of his case, may give such notice of his right as will affect purchasers and creditors as well as the defendant in the cause, there is every reason to believe. If, for instance, the creditor should state the facts upon information and belief instead of upon his own knowledge, or if he should claim several distinct sums of money and then state the aggregate amount of them incorrectly, he would probably give to all full notice of his right, although not in the precise manner prescribed by the act. *Tilton v. Cofield*, 2 Colo. 392 (1874).

**Although purchasers, etc., are entitled to rely upon the record as it exists.** Purchaser's

and creditors who acquire an interest in the property during the pendency of the suit are entitled to stand upon the record as it existed at the time such interest was acquired, and, of course, they cannot be supposed to have knowledge of any matter of which the record does not advise them. *Tilton v. Cofield*, 2 Colo. 392 (1874).

**Purchasers are presumed to have knowledge of the filed statement.** Whatever the rule may be as to the defendant, it is clear that purchasers of the attached property take it subject to the lien of the plaintiff for the sum stated in the affidavit and writ, with accruing interest, if he shall obtain judgment in that action for so much. To this extent, the record which is made for that purpose advises them of the incumbrance upon the property, and, therefore, they may be presumed to have knowledge of the fact. *Tilton v. Cofield*, 2 Colo. 392 (1874).

**Until creditors file their transcript or make a levy they have no lien** on the real estate. *Routt County Mining Co. v. Stutheit*, 101 Colo. 254, 72 P.2d 692 (1937).

**Applied** in *Baker v. Allen*, 34 Colo. App. 363, 528 P.2d 922 (1974).

**13-56-102. Writs from other county.** Writs of attachment and writs of execution may issue from any district or county court of any county to the sheriff or other proper officer of such county or any other county, and, when in such cases a levy is made upon real estate in such other county, it is the duty of the sheriff or other officer making such levy to file a certificate of such fact with the recorder of his county, and, from and after the filing of the same, such levy shall take effect as to creditors and bona fide purchasers without notice and not before.

**Source:** L. 19: p. 295, § 2. C.L. § 5933. CSA: C. 93, § 41. CRS 53: § 77-5-2. C.R.S. 1963: § 77-5-2.

**13-56-103. Lien of six years' duration.** The lien of an attachment or execution levied on real estate shall continue for six years from the filing of the certificate thereof, as provided in section 13-56-101, unless the same is sooner released or discharged or unless the judgment in the case is satisfied.

**Source:** L. 19: p. 295, § 3. C.L. § 5934. CSA: C. 93, § 42. CRS 53: § 77-5-3. C.R.S. 1963: § 77-5-3.

**13-56-104. Recorder to file and record.** It is the duty of the recorder of the proper county to file and record the certificates mentioned in this part 1 in a book to be kept for that purpose, for which he shall be entitled to the same fees as for recording other papers, to be paid by the plaintiff in such execution or attachment and taxed and collected by the sheriff as other costs.

**Source:** R.S. p. 378, § 26. G.L. omitted. G.S. § 1885. R.S. 08: § 3639. C.L. § 5937. CSA: C. 93, § 45. CRS 53: § 77-5-4. C.R.S. 1963: § 77-5-4.

## PART 2

### SALE OF LANDS

**13-56-201. Hours - notice - penalty - irregularity.** (1) No lands or tenements shall be sold by virtue of any execution unless such sale is at public venue and between the hours of nine in the morning and the setting of the sun on the same day nor unless the time and place of holding such sale has been previously advertised for the space of twenty days, by publishing notices of the time and place thereof in some daily or weekly newspaper printed and published in the county where such lands and tenements are situate or, if there is no such newspaper printed in the county, by posting such notices, printed or written, or partly printed and partly written, in three of the most public places in the county where the lands may be situated specifying the names of the plaintiff and defendant in the execution. In all such notices, the lands or tenements to be sold shall be described with reasonable certainty by setting forth their number or by some other appropriate description, and such notices shall comply with section 24-70-109, C.R.S.

(2) If any sheriff or other officer sells any lands or tenements by virtue of any such execution, otherwise than in the manner aforesaid, or without such previous notice, the sheriff or other officer so offending shall forfeit and pay the sum of fifty dollars for every offense to be recovered, with costs of suit, in any court of record in this state by the person whose lands were advertised and sold. No such offense nor any irregularity on the part of the sheriff or other officer having the execution shall affect the validity of any sale made under it, unless it appears that the purchaser had notice of such irregularity.

**Source:** R.S. p. 372, § 11. G.L. § 1417. G.S. § 1849. R.S. 08: § 3641. C.L. § 5939. CSA: C. 93, § 47. CRS 53: § 77-6-1. C.R.S. 1963: § 77-6-1. L. 88: (1) amended, p. 977, § 2, effective May 6.



**Cross references:** For sales on execution and lien foreclosures, see article 38 of title 38; for general requirements of publication, see § 24-70-106.

## ANNOTATION

**Law reviews.** For article, "Again — How Many Times?", see 21 Dicta 62 (1944). For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950).

**Generally a successful bid becomes a final and binding purchase.** When a judgment creditor or other party makes a successful bid and purchases property at a sheriff's execution sale, it becomes a final and binding purchase subject to the statutory rights of redemption. If later it is discovered that the amount bid was in excess of the value, the judgment creditor or other party is nevertheless bound by his bid and a court in the exercise of its equity jurisdiction cannot on this ground alone set aside a sheriff's execution sale. If, in addition, however, the excessive bid was made because of the proven fraud and false representations of the judgment debtor, who would benefit by a high bid, then the court may have sufficient grounds to nullify the sheriff's sale. *Cont'l Oil Co. v. Benham*, 163 Colo. 255, 430 P.2d 90 (1967).

**Where no fraud exists, mistaken bid will not nullify sale.** The property was adequately and fully described. Plaintiff mistakenly believed he was bidding on defendants' residence

property, rather than on vacant land. No fraud is shown, and there exists no basis for nullifying the sheriff's execution sale. *Cont'l Oil Co. v. Benham*, 163 Colo. 255, 430 P.2d 90 (1967).

**So ordinarily, inadequacy of price paid is not sufficient cause for setting aside a judicial sale.** Generally in addition, it must appear that there were such irregularities in connection with the sale, or such fraud practiced, as tended to prevent the property levied upon from being sold at a fairly adequate price. *Cont'l Oil Co. v. Benham*, 163 Colo. 255, 430 P.2d 90 (1967).

**The period of 20 days provided in this section applies to sales to enforce a mechanic's lien.** *Keystone Mining Co. v. Gallagher*, 5 Colo. 23 (1879); *San Juan, etc., Smelting Co. v. Finch*, 6 Colo. 214 (1882).

**The law does not recognize fractions of a day,** and a notice published on February 16 was 20 days prior to the sale on March 8; and this section was observed. *Leppel v. Kus*, 38 Colo. 292, 88 P. 448 (1906).

**Applied in First Mtg. Sec. Co. v. Fader**, 100 Colo. 22, 64 P.2d 1278 (1937); *Travelers Ins. Co. v. Janitell Farms, Inc.*, 44 Colo. App. 34, 609 P.2d 1116 (1980).

## ARTICLE 57

### Sale of Chattels

13-57-101. Ten days' notice of sale.  
13-57-102. Future delivery bond - conditions.

13-57-103. Breach of bond - levy on security - sale.

**13-57-101. Ten days' notice of sale.** No goods or chattels shall be sold by virtue of any execution unless previous notice of such sale has been given for at least ten days successively in the same manner as required in the sale of real estate upon execution.

**Source:** R.S. p. 379, § 29. G.L. § 1430. G.S. § 1862. R.S. 08: § 3649. C.L. § 5947. CSA: C. 93, § 57. CRS 53: § 77-7-1. C.R.S. 1963: § 77-7-1.

**Cross references:** For procedure for sale of real estate upon execution, see § 13-56-201.

## ANNOTATION

**Law reviews.** For article, "Again — How Many Times?", see 21 Dicta 62 (1944).

**For nonapplicability of this section to fixtures,** see *Roseville Alta Mining Co. v. Iowa*

*Gulch Mining Co.*, 15 Colo. 29, 24 P. 920 (1890).

**13-57-102. Future delivery bond - conditions.** When a sheriff or other officer has levied an execution, issued out of any court of record, upon the personal property of a defendant, or is about to make such levy and the defendant is desirous of retaining the

property in his possession, such sheriff shall take a bond from the defendant with security that the property shall be forthcoming or delivered at such time and place as is named in the condition and that the property shall not be disposed of nor injured. A bond so taken shall not be considered void as taken by color of office.

**Source:** R.S. p. 379, § 30. G.L. § 1431. G.S. § 1863. R.S. 08: § 3650. C.L. § 5948. CSA: C. 93, § 58. CRS 53: § 77-7-2. C.R.S. 1963: § 77-7-2.

**13-57-103. Breach of bond - levy on security - sale.** Where bonds are taken by a sheriff for the future delivery of property and the defendant or his security does not return the property named in the bond conformably to the condition thereof, the officer having such execution may proceed to execute the same in the same manner as if no levy had been made. In case the defendant's property, or a sufficiency thereof, cannot be found, the officer may proceed to levy on so much of the property of the security in the delivery bond as will make the amount called for in such bond. The property which may be so taken may be sold, by giving notice thereof, as prescribed in section 13-57-101, and no future delivery bond shall be allowed.

**Source:** R.S. p. 379, § 31. G.L. § 1432. G.S. § 1864. R.S. 08: § 3651. C.L. § 5949. CSA: C. 93, § 59. CRS 53: § 77-7-3. C.R.S. 1963: § 77-7-3.

ARTICLE 58

Death of Parties

13-58-101.	Death of debtor - filing claim.	13-58-104.	Lien of judgment not abated
13-58-102.	Execution to issue after one year.		by death.
13-58-103.	Death of plaintiff - substitution.	13-58-105.	Administrator to buy on execution.

**13-58-101. Death of debtor - filing claim.** When a judgment is obtained in any court of record in this state against any person who after the rendition of said judgment dies, a claim based upon such judgment may be filed against the estate of the deceased judgment debtor without first reviving the judgment against his heirs or personal representatives.

**Source:** R.S. p. 381, § 37. G.L. § 1438. G.S. § 1871. R.S. 08: § 3659. C.L. § 5957. CSA: C. 93, § 67. L. 45: p. 423, § 1. CRS 53: § 77-8-1. C.R.S. 1963: § 77-8-1.

ANNOTATION

A judgment lien which attaches to specific property of a party during his lifetime is not dissolved by his death, but survives and is enforceable against the real estate of the decedent, and such lien may be enforced by the

lienholder without filing a claim against the estate and independently of the estate proceeding. Willis v. Neilson, 32 Colo. App. 129, 507 P.2d 1106 (1973).

**13-58-102. Execution to issue after one year.** When any judgment becomes a lien and the defendant dies before execution is issued thereon, the remedy of the person in whose favor the judgment has been rendered shall not be delayed nor suspended by reason of the nonage of any heir of such defendant. No execution shall issue upon such judgment until the expiration of one year after the death of the defendant, nor shall any law of this state which gives no preference to the claims of a creditor of a deceased debtor be so construed as to impair or affect the lien of any judgment.

**Source:** R.S. p. 371, § 2. G.L. § 1410. G.S. § 1842. R.S. 08: § 3660. C.L. § 5958. CSA: C. 93, § 68. CRS 53: § 77-8-2. C.R.S. 1963: § 77-8-2.



**13-58-103. Death of plaintiff - substitution.** The collection of the judgments of courts of record shall not be delayed nor hindered by the death of the plaintiff or person in whose name the judgment exists, but the executor or administrator, as the case may be, may cause the letters testamentary or of administration to be recorded in the court in which the judgment exists, after which execution may issue and proceedings had thereon in the name of the executor or administrator as such, in the same manner that could or might be done, if the judgment exists or remains in the name and in favor of the executor or administrator in his capacity as such executor or administrator.

**Source:** R.S. p. 382, § 40. G.L. § 1441. G.S. § 1872. R.S. 08: § 3661. C.L. § 5959. CSA: C. 93, § 69. CRS 53: § 77-8-3. C.R.S. 1963: § 77-8-3.

ANNOTATION

**The effect of this section is to make the judgment the property of the administrator.** Being property it should be treated like other assets of the estate. Bright v. Schmitt, 76 Colo. 329, 231 P. 159 (1924).  
**Section applies only where the estate has an interest in the judgment.** It is clear that this section only applies where the property in the

judgment remains in the judgment plaintiff. The statute does not reach the case of a judgment plaintiff who has parted with all interest in the judgment by assignment. Christ v. Flannagan, 13 Colo. 140, 46 P. 683 (1896).  
**An assignee's right to execution on a judgment is not impaired by this section.** Christ v. Flannagan, 23 Colo. 140, 46 P. 683 (1896).

**13-58-104. Lien of judgment not abated by death.** The lien created by law on property shall not abate or cease by reason of the death of any plaintiff, but the same shall survive in favor of the executor or administrator of the testator or intestate, whose duty it is to have the judgment enforced in the manner provided in section 13-58-103.

**Source:** R.S. p. 382, § 41. G.L. § 1442. G.S. § 1873. R.S. 08: § 3662. C.L. § 5960. CSA: C. 93, § 70. CRS 53: § 77-8-4. C.R.S. 1963: § 77-8-4.

**13-58-105. Administrator to buy on execution.** When it is necessary in order to secure the collection of any judgment in favor of any executor or administrator, it is the duty of such executor or administrator to bid for and become the purchaser of real estate at a sheriff's sale, which real estate so purchased shall be assets in his hands and may be again sold by him upon the order of the court of probate, and the moneys arising from such sale shall be paid over and accounted for as other moneys in his hands.

**Source:** R.S. p. 382, § 42. G.L. § 1443. G.S. § 1874. R.S. 08: § 3663. C.L. § 5961. CSA: C. 93, § 71. CRS 53: § 77-8-5. C.R.S. 1963: § 77-8-5.

ARTICLE 59

Execution Against the Body

13-59-101.	No imprisonment for debt.	13-59-104.	Finding - term - release. (Repealed)
13-59-102.	Execution against the body.		
13-59-103.	Body execution in tort, when. (Repealed)	13-59-105.	Plaintiff to pay costs, unless. (Repealed)

**13-59-101. No imprisonment for debt.** There shall be no imprisonment or arrest for debt in this state in any case upon any contract, expressed or implied.

**Source:** R.S. p. 358, § 1. G.L. § 1351. G.S. § 1646. R.S. 08: § 3022. C.L. § 5962. CSA: C. 93, § 72. CRS 53: § 77-9-1. C.R.S. 1963: § 77-9-1.

**13-59-102. Execution against the body.** No execution shall issue against the body of any defendant in a civil action.

**Source:** G.L. § 1589. G.S. § 1648. R.S. 08: § 3023. C.L. § 5963. CSA: C. 93, § 73. CRS 53: § 77-9-2. C.R.S. 1963: § 77-9-2. L. 95: Entire section amended, p. 16, § 6, effective March 9.

#### ANNOTATION

**Law reviews.** For note, "Extension of Vicarious Liability to Include Body Judgments", see 2 Rocky Mt. L. Rev. 248 (1930).

#### **13-59-103. Body execution in tort, when. (Repealed)**

**Source:** G.L. § 1590. G.S. § 1649. R.S. 08: § 3024. L. 21: p. 310, § 1. C.L. § 5964. CSA: C. 93, § 74. CRS 53: § 77-9-3. C.R.S. 1963: § 77-9-3. L. 64: p. 286, § 212. L. 95: Entire section repealed, p. 16, § 2, effective March 9.

#### **13-59-104. Finding - term - release. (Repealed)**

**Source:** G.L. § 1591. G.S. § 1650. R.S. 08: § 3025. C.L. § 5965. CSA: C. 93, § 75. CRS 53: § 77-9-4. L. 64: p. 286, § 213. C.R.S. 1963: § 77-9-4. L. 95: Entire section repealed, p. 15, § 3, effective March 9.

#### **13-59-105. Plaintiff to pay costs, unless. (Repealed)**

**Source:** G.L. § 1592. G.S. § 1651. R.S. 08: § 3026. C.L. § 5966. CSA: C. 93, § 76. CRS 53: § 77-9-5. C.R.S. 1963: § 77-9-5. L. 95: Entire section repealed, p. 15, § 4, effective March 9.

### ARTICLE 60

#### Judgments Against Municipal Corporations

13-60-101. Levy to pay judgment against  
municipality - procedure.

**13-60-101. Levy to pay judgment against municipality - procedure.** (1) When a judgment for the payment of money is given and rendered against any municipal or quasi-municipal corporation of the state, or against any officer thereof, in an action prosecuted by or against him in his official capacity or name of office, such judgment being an obligation of such municipality, and when by reason of vacancy in office or for any other cause the duly constituted tax assessing and collecting officers fail or neglect to provide for the payment of such judgment or fail to make a tax levy to pay such judgment, the judgment creditor may file a transcript of such judgment with the board of county commissioners of the county, and counties if more than one, in which such public corporation is situated. Thereupon, the county commissioners shall levy a tax as provided in subsection (2) of this section upon all the taxable property within the limits of such public corporation for the purpose of making provision for the payment of such judgment, which tax shall be collected by the county treasurer, and, when collected by the county treasurer, it shall be paid over, as fast as collected by him, to the judgment creditor, or his assigns, upon the execution and delivery of proper vouchers therefor.

(2) The power conferred to pay such judgment by special levy of such tax is in addition to the taxing power given and granted to such public corporation to levy taxes for other



purposes. The board of county commissioners shall levy under this section on all taxable property within said municipal or quasi-municipal corporation such taxes as are sufficient to discharge such judgment in the next fiscal year; but in no event shall such annual levy pursuant to this section and section 24-10-113, C.R.S., exceed a total of ten mills for one or more judgments, exclusive of mill levies for other purposes of such public corporation. The board of county commissioners shall continue to levy such taxes not to exceed a total of ten mills annually, exclusive of mill levies for other purposes of such public corporation, but in no event less than ten mills if such judgment will not be discharged by a lesser levy, until such judgment is discharged.

(3) Any taxes levied to pay the last payment upon or to pay any such judgment shall be valid, whether or not the sum sought to be raised thereby exceeds the sum due on such judgment, principal, and interest. Such excess of the sum required shall not exceed a sum equal to ten percent of such required sum, and no sale of real estate made to make such taxes shall be invalid by reason of such excess if the same is within said specified limit. All levies to pay judgments shall be made as near as possible to raise a sum equal to that due on the judgment to pay for which the tax is levied. Nevertheless, any excess levied, if such excess does not exceed ten percent of the sum due and desired to be paid, shall not invalidate any tax levy upon or tax sale of real or personal estate made to raise, make, or collect the sum due and excess. Any excess collected by the county treasurer remaining in his hands after paying all judgments in full, transcripts thereof having been filed with the county commissioners, shall be paid by him to the treasurer of such public corporation and become part of the general fund of such public corporation. This section shall not prevent said public corporation from paying any judgment from any other funds it may have in its treasury available for that purpose. The provisions of this section shall not apply to counties.

**Source:** L. 13: p. 388, § 1. C.L. § 5967. CSA: C. 93, § 77. CRS 53: § 77-10-1. C.R.S. 1963: § 77-10-1. L. 71: p. 1213, § 7.

ANNOTATION

**Law reviews.** For article, "Trusts and Estates", see 30 Dicta 435 (1953). (1934); Atchison, T. & S. F. Ry. v. Sch. Dist. No. 2, 100 Colo. 148, 66 P.2d 541 (1937).

**Applied in** Atchison, T. & S. F. Ry. v. Bd. of County Comm'rs, 95 Colo. 435, 37 P.2d 761

ARTICLE 61

Garnishment of Public Servants

13-61-101.	Funds subject to garnishment.	13-61-103.	Summons - how served.
13-61-102.	Other salaries, wages, and fees.	13-61-104.	Garnishee to answer.
		13-61-105.	Order of court.

**13-61-101. Funds subject to garnishment.** The state of Colorado, municipal corporations, quasi-municipal corporations, and any officer, board, or commission thereof, having the control of the disbursing of any fund, whether the same be derived from appropriations, levies, fees, licenses, special taxes, or otherwise within the state of Colorado, shall be subject to garnishment upon writs of attachment and execution in the same manner as private corporations are subject to garnishment under such writs; except that the state of Colorado shall not be subject to garnishment regarding salaries or fees due to any officer designated as such and whose salary or fees are fixed by the provisions of the constitution of the state of Colorado.

**Source:** L. 27: p. 374, § 1. Code 35: § 132A. CRS 53: § 77-12-1. C.R.S. 1963: § 77-12-1.

## ANNOTATION

**Annotator's note.** Since § 13-61-001 is similar to repealed Appendix B, § 4, C.R.C.P., and rules antecedent to Appendix B, § 4, C.R.C.P., cases construing those provisions have been included in the annotations to this section.

**In the absence of a statutory provision a county is not subject to garnishment.** *McFerson v. Bd. of Comm'rs*, 78 Colo. 354, 241 P. 733 (1925).

**Municipal corporations are not counties.** *Stermer v. Bd. of Comm'rs*, 5 Colo. App. 379, 38 P. 839 (1894); *Bd. of Comm'rs v. Brown*, 6 Colo. App. 43, 39 P. 989 (1895); *Gann v. Cribbs*, 6 Colo. App. 484, 41 P. 829 (1895); *McFerson v. Bd. of Comm'rs*, 78 Colo. 354, 241 P. 733 (1925).

**Applied in** *State v. Elkins*, 84 Colo. 409, 270 P. 875 (1928).

**13-61-102. Other salaries, wages, and fees.** It is declared that no provision of this article is contrary to public policy and that the provisions of this article are meant to apply to all salaries, wages, fees, credits, and choses in action other than such as are exempt under the provisions of section 13-61-101, whether collection of the same might be enforced under any action in court, by an action in the nature of mandamus, or in any manner whatsoever.

**Source:** L. 27: p. 375, § 2. **Code 35:** § 132B. **CRS 53:** § 77-12-2. **C.R.S. 1963:** § 77-12-2.

**Cross references:** For an action in the nature of mandamus, see C.R.C.P. 106(a)(2).

**13-61-103. Summons - how served.** Garnishee summons issued upon writs of attachment and execution shall be served upon the officer of such state, municipal corporation, quasi-municipal corporation, or board or commission thereof, whose duty it is to issue warrants, checks, or money for the payment to any officer, employee, or other person whose salary, wages, earnings, or money due him is sought to be held. Service of such garnishee summons on such officer shall be made by leaving a copy thereof with him personally or, in the event of his absence from his office, then by leaving a copy thereof in his office with the chief clerk, deputy, or other employee of the office then in charge thereof.

**Source:** L. 27: p. 375, § 3. **Code 35:** § 132C. **CRS 53:** § 77-12-3. **C.R.S. 1963:** § 77-12-3.

**Cross references:** For personal service in state, see C.R.C.P. 4(e).

**13-61-104. Garnishee to answer.** It is the duty of such officer to answer any garnishee summons served upon him under the provisions of this article in the same manner as is provided by law for the answer of garnishee summons by private corporations. If such answer is accompanied by a certificate of such officer that the same is true, such answer need not be under oath or affirmation, and such officer shall not be required to appear and answer in person, but may file his answer in writing or submit the same by United States mail to the court, or clerk thereof, designated in such summons. The officer need not include as money due the amount of any warrant or check drawn and signed prior to the time of the service of such garnishee summons.

**Source:** L. 27: p. 375, § 4. **Code 35:** § 132D. **CRS 53:** § 77-12-4. **C.R.S. 1963:** § 77-12-4. **L. 64:** p. 287, § 214.

**13-61-105. Order of court.** Such officer shall abide by the order of the court with regard to paying into court any amount ordered, not, however, in excess of the salary, wages, earnings, or money due such officer, employee, or other person whose salary, wages, or money due him is sought to be held to the time of the service of such garnishee summons.

**Source:** L. 27: p. 376, § 5. **Code 35:** § 132E. **CRS 53:** § 77-12-5. **C.R.S. 1963:** § 77-12-5. **L. 64:** p. 287, § 215.



## ARTICLE 62

### Uniform Foreign-country Money Judgments Recognition Act

**Editor's note:** This article was added in 1977 and was not amended prior to 2008. The substantive provisions of this article were repealed and reenacted in 2008, resulting in the addition, relocation, and elimination of sections as well as subject matter. For the text of this article prior to 2008, consult the 2007 Colorado Revised Statutes.

13-62-101.	Short title.		eign-country judgment.
13-62-102.	Definitions.	13-62-108.	Stay of proceedings pending
13-62-103.	Applicability.		appeal of foreign-country
13-62-104.	Standards for recognition of		judgment.
	foreign-country judgment.	13-62-109.	Statute of limitations.
13-62-105.	Personal jurisdiction.	13-62-110.	Uniformity of interpretation.
13-62-106.	Procedure for recognition of	13-62-111.	Saving clause.
	foreign-country judgment.	13-62-112.	Applicability.
13-62-107.	Effect of recognition of for-		

**13-62-101. Short title.** This article may be cited as the "Uniform Foreign-country Money Judgments Recognition Act".

**Source: L. 2008:** Entire article R&RE, p. 99, § 1, effective August 5.

#### OFFICIAL COMMENT

Source: This section is an updated version of Section 9 of the Uniform Foreign Money-Judgments Recognition Act of 1962.

#### ANNOTATION

**Law reviews.** For article, "Jurisdiction and Service of Process Beyond Colorado Boundaries", see 11 Colo. Law. 648 (1982). For article, "Enforcing Foreign Country Judgments in Colorado", see 13 Colo. Law. 381 (1984).

**Applied in** *In re McMahan*, 660 P.2d 515 (Colo. App. 1983) (decided prior to 2008 repeal and reenactment).

**13-62-102. Definitions.** In this article:

- (1) "Foreign-country" means a government other than:
  - (a) The United States;
  - (b) A state, district, commonwealth, territory, or insular possession of the United States;
 or
  - (c) Any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the full faith and credit clause of the United States constitution.
- (2) "Foreign-country judgment" means a judgment of a court of a foreign country.

**Source: L. 2008:** Entire article R&RE, p. 99, § 1, effective August 5.

#### OFFICIAL COMMENT

Source: This section is derived from Section 1 of the Uniform Foreign Money-Judgments Recognition Act of 1962.

1. The defined terms "foreign state" and "foreign judgment" in the 1962 Act have been

changed to "foreign country" and "foreign-country judgment" in order to make it clear that the Act does not apply to recognition of sister-state judgments. Some courts have noted that the "foreign state" and "foreign judgment"

definitions of the 1962 Act have caused confusion as to whether the Act should apply to sister-state judgments because "foreign state" and "foreign judgment" are terms of art generally used in connection with recognition and enforcement of sister-state judgments. *See, e.g., Eagle Leasing v. Amandus*, 476 N.W.2d 35 (S.Ct. Iowa 1991) (reversing lower court's application of UFMJRA to a sister-state judgment, but noting lower court's confusion was understandable as "foreign judgment" is term of art normally applied to sister-state judgments). *See also*, Uniform Enforcement of Foreign Judgments Act § 1 (defining "foreign judgment" as the judgment of a sister state or federal court).

The 1962 Act defines a "foreign state" as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryuku Islands." Rather than simply updating the list in the 1962 Act's definition of "foreign state," the new definition of "foreign country" in this Act combines the "listing" approach of the 1962 Act's "foreign state" definition with a provision that defines "foreign country" in terms of whether the judgments of the particular government's courts are initially subject to the Full Faith and Credit Clause standards for determining whether those judgments will be recognized. Under this new definition, a governmental unit is a "foreign country" if it is (1) not the United States or a state, district, commonwealth, territory or insular possession of the United States; and (2) its judgments are not initially subject to Full Faith and Credit Clause standards.

The Full Faith and Credit Clause, Art. IV, section 1, provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State, and the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Whether the judgments of a governmental unit are subject to the Full Faith and Credit Clause may be determined by judicial interpretation of the Full Faith and Credit Clause or by statute, or by a combination of these two sources. For example, pursuant to the authority granted by the second sentence of the Full Faith and Credit Clause, Congress has passed 28 U.S.C.A. § 1738, which provides *inter alia* that court records from "any State, Territory, or Possession of the United States" are entitled to full faith and credit under the Full Faith and Credit Clause. In *Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938), the United States Supreme Court held that this statute also requires that full faith and credit be given to judgments of federal courts. States also have made determinations as to whether certain types of judgments are subject to the Full Faith and Credit

Clause. *E.g.* *Day v. Montana Dept. Of Social & Rehab. Servs.*, 900 P.2d 296 (Mont. 1995) (tribal court judgment not subject to Full Faith and Credit, and should be treated with same deference shown foreign-country judgments). Under the definition of "foreign country" in this Act, the determination as to whether a governmental unit's judgments are subject to full faith and credit standards should be made by reference to any relevant law, whether statutory or decisional, that is applicable "in this state."

The definition of "foreign country" in terms of those judgments not subject to Full Faith and Credit standards also has the advantage of more effectively coordinating the Act with the Uniform Enforcement of Foreign Judgments Act. That Act, which establishes a registration procedure for the enforcement of sister state and equivalent judgments, defines a "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." Uniform Enforcement of Foreign Judgments Act, § 1 (1964). By defining "foreign country" in the Recognition Act in terms of those judgments not subject to full faith and credit standards, this Act makes it clear that the Enforcement Act and the Recognition Act are mutually exclusive - if a foreign money judgment is subject to full faith and credit standards, then the Enforcement Act's registration procedure is available with regard to its enforcement; if the foreign money judgment is not subject to full faith and credit standards, then the foreign money judgment may not be enforced until recognition of it has been obtained in accordance with the provisions of the Recognition Act.

2. The definition of "foreign-country judgment" in this Act differs significantly from the 1962 Act's definition of "foreign judgment." The 1962 Act's definition served in large part as a scope provision for the Act. The part of the definition defining the scope of the Act has been moved to section 3, which is the scope section.

3. The definition of "foreign-country judgment" in this Act refers to "a judgment" of "a court" of the foreign country. The foreign-country judgment need not take a particular form - any order or decree that meets the requirements of this section and comes within the scope of the Act under Section 3 is subject to the Act. Similarly, any competent government tribunal that issues such a "judgment" comes within the term "court" for purposes of this Act. The judgment, however, must be a judgment of an adjudicative body of the foreign country, and not the result of an alternative dispute mechanism chosen by the parties. Thus, foreign arbitral awards and agreements to arbitrate are not covered by this Act. They are governed instead by federal law, Chapter 2 of the U.S. Arbitration Act, 9 U.S.C. §§ 201-208, implementing the United Nations Convention on the Recognition and Enforce-



ment of Foreign Arbitral Awards and Chapter 3 of the U.S. Arbitration Act, 9 U.S.C. §§ 301-307, implementing the Inter-American Convention on International Commercial Arbitration. A judgment of a foreign court confirming or setting aside an arbitral award, however, would be covered by this Act.

4. The definition of “foreign-country judgment” does not limit foreign-country judgments

to those rendered in litigation between private parties. Judgments in which a governmental entity is a party also are included, and are subject to this Act if they meet the requirements of this section and are within the scope of the Act under Section 3.

### ANNOTATION

**Annotator’s note.** Since § 13-62-102 is similar to § 13-62-102 as it existed prior to the 2008 repeal and reenactment of article 62 of title 13, a relevant case construing that provision has been included in the annotations to this section.

**Definition of “foreign state” requires** that the foreign government has entered into a reciprocity agreement with the United States before

judgments from its courts will be recognized in Colorado. *Milhoux v. Linder*, 902 P.2d 856 (Colo. App. 1995).

**Reciprocity requirement in definition of “foreign state”** does not necessarily render the act meaningless. *Milhoux v. Linder*, 902 P.2d 856 (Colo. App. 1995).

**13-62-103. Applicability.** (1) Except as otherwise provided in subsection (2) of this section, this article applies to a foreign-country judgment to the extent that the judgment:

- (a) Grants or denies recovery of a sum of money; and
- (b) Under the law of the foreign country where rendered, is final, conclusive, and enforceable.

(2) This article does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is:

- (a) A judgment for taxes;
- (b) A fine or other penalty; or
- (c) A judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.

(3) A party seeking recognition of a foreign-country judgment has the burden of establishing that this article applies to the foreign-country judgment.

**Source: L. 2008:** Entire article R&RE, p. 100, § 1, effective August 5.

### OFFICIAL COMMENT

**Source:** This section is based on Section 2 of the 1962 Act. Subsection (b) contains material that was included as part of the definition of “foreign judgment” in Section 1(2) of the 1962 Act. Subsection (c) is new.

1. Like the 1962 Act, this Act sets out in subsection 3(a) two basic requirements that a foreign-country judgment must meet before it comes within the scope of this Act - the foreign-country judgment must (1) grant or deny recovery of a sum of money and (2) be final, conclusive and enforceable under the law of the foreign country where it was rendered. Subsection 3(b) then sets out three types of foreign-country judgments that are excluded from the coverage of this Act, even though they meet the criteria of subsection 3(a) - judgments for taxes, judgments constituting fines and other penalties, and judgments in domestic relations matters. These exclusions are comparable to those contained in Section 1(2) of the 1962 Act.

2. This Act applies to a foreign-country judgment only to the extent the foreign-country judgment grants or denies recovery of a sum of money. If a foreign-country judgment both grants or denies recovery of a sum of money and provides for some other form of relief, this Act would apply to the portion of the judgment that grants or denies monetary relief, but not to the portion that provides for some other form of relief. The U.S. court, however, would be left free to decide to recognize and enforce the non-monetary portion of the judgment under principles of comity or other applicable law. See Section 11.

3. In order to come within the scope of this Act, a foreign-country judgment must be final, conclusive, and enforceable under the law of the foreign country in which it was rendered. This requirement contains three distinct, although inter-related concepts. A judgment is final when it is not subject to additional proceedings in the

rendering court other than execution. A judgment is conclusive when it is given effect between the parties as a determination of their legal rights and obligations. A judgment is enforceable when the legal procedures of the state to ensure that the judgment debtor complies with the judgment are available to the judgment creditor to assist in collection of the judgment.

While the first two of these requirements - finality and conclusiveness - will apply with regard to every foreign-country money judgment, the requirement of enforceability is only relevant when the judgment is one granting recovery of a sum of money. A judgment denying a sum of money obviously is not subject to enforcement procedures, as there is no monetary award to enforce. This Act, however, covers both judgments granting and those denying recovery of a sum of money. Thus, the fact that a foreign-country judgment denying recovery of a sum of money is not enforceable does not mean that such judgments are not within the scope of the Act. Instead, the requirement that the judgment be enforceable should be read to mean that, if the foreign-country judgment grants recovery of a sum of money, it must be enforceable in the foreign country in order to be within the scope of the Act.

Like the 1962 Act, subsection 3(b) requires that the determinations as to finality, conclusiveness and enforceability be made using the law of the foreign country in which the judgment was rendered. Unless the foreign-country judgment is final, conclusive, and (to the extent it grants recovery of a sum of money) enforceable in the foreign country where it was rendered, it will not be within the scope of this Act.

4. Subsection 3(b) follows the 1962 Act by excluding three categories of foreign-country money judgments from the scope of the Act - judgments for taxes, judgments that constitute fines and penalties, and judgments in domestic relations matters. The domestic relations exclusion has been redrafted to make it clear that all judgments in domestic relations matters are excluded from the Act, not just judgments "for support" as provided in the 1962 Act. This is consistent with interpretation of the 1962 Act by the courts, which extended the "support" exclusion in the 1962 Act beyond its literal wording to exclude other money judgments in connection with domestic matters. *E.g.*, *Wolff v. Wolff*, 389 A.2d 413 (My. App. 1978) ("support" includes alimony).

Recognition and enforcement of domestic relations judgments traditionally has been treated differently from recognition and enforcement of other judgments. The considerations with regard to those judgments, particularly with regard to jurisdiction and finality, differ from those with regard to other money judgments. Further, national laws with regard to domestic relations vary widely, and recognition and enforcement of

such judgments thus is more appropriately handled through comity than through use of this uniform Act. Finally, other statutes, such as the Uniform Interstate Family Support Act and the federal International Child Support Enforcement Act, 42 U.S.C. § 659a (1996), address various aspects of the recognition and enforcement of domestic relations awards. Under Section 11 of this Act, courts are free to recognize money judgments in domestic relations matters under principles of comity or otherwise, and U.S. courts routinely enforce money judgments in domestic relations matters under comity principles.

Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts. *See, e.g.*, Restatement Third of the Foreign Relations Law of the United States § 483 (1986). Both the "revenue rule," under which the courts of one country will not enforce the revenue laws of another country, and the prohibition on enforcement of penal judgments seem to be grounded in the idea that one country does not enforce the public laws of another. *See id.* Reporters' Note 2. The exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 11, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

A judgment for taxes is a judgment in favor of a foreign country or one of its subdivisions based on a claim for an assessment of a tax. Thus, a judgment awarding a plaintiff restitution of the purchase price paid for an item would not be considered in any part a judgment for taxes, even though one element of the recovery was the sales tax paid by the plaintiff at the time of purchase. Such a judgment would not be one designed to enforce the revenue laws of the foreign country, but rather one designed to compensate the plaintiff. Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. *E.g.*, *Chase Manhattan Bank, N.A. v. Hoffman*, 665 F.Supp 73 (D. Mass. 1987) (finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium). Thus, a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature and therefore outside the scope of the Act simply



because the action is brought on behalf of the private individuals by a government entity. Cf. U.S.-Australia Free Trade Agreement, art.14.7.2, U.S.-Austl., May 18, 2004 (providing that when government agency obtains a civil monetary judgment for purpose of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, judgment generally should not be denied recognition and enforcement on ground that it is penal or revenue in nature, or based on other foreign public law).

5. Under subsection 3(b), a foreign-country money judgment is not within the scope of this Act "to the extent" that it comes within one of the excluded categories. Therefore, if a foreign-country money judgment is only partially within one of the excluded categories, the non-excluded portion will be subject to this Act.

6. Subsection 3(c) is new. The 1962 Act does not expressly allocate the burden of proof with regard to establishing whether a foreign-country

judgment is within the scope of the Act. Courts applying the 1962 Act generally have held that the burden of proof is on the person seeking recognition to establish that the judgment is final, conclusive and enforceable where rendered. *E.g.*, *Mayekawa Mfg. Co. Ltd. v. Sasaki*, 888 P.2d 183, 189 (Wash. App. 1995) (burden of proof on creditor to establish judgment is final, conclusive, and enforceable where rendered); *Bridgeway Corp. v. Citibank*, 45 F.Supp.2d 276, 285 (S.D.N.Y. 1999) (party seeking recognition must establish that there is a final judgment, conclusive and enforceable where rendered); *S.C.Chimexim S.A. v. Velco Enterprises, Ltd.*, 36 F. Supp.2d 206, 212 (S.D.N.Y. 1999) (Plaintiff has the burden of establishing conclusive effect). Subsection (3)(c) places the burden of proof to establish whether a foreign-country judgment is within the scope of the Act on the party seeking recognition of the foreign-country judgment with regard to both subsection (a) and subsection (b).

**13-62-104. Standards for recognition of foreign-country judgment.** (1) Except as otherwise provided in subsections (2) and (3) of this section, a court of this state shall recognize a foreign-country judgment to which this article applies.

(2) A court of this state may not recognize a foreign-country judgment if:

(a) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(b) The foreign court did not have personal jurisdiction over the defendant; or

(c) The foreign court did not have jurisdiction over the subject matter.

(3) A court of this state need not recognize a foreign-country judgment if:

(a) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(b) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;

(c) The judgment or the claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States;

(d) The judgment conflicts with another final and conclusive judgment;

(e) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(f) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(g) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(h) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(4) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (2) or (3) of this section exists.

**Source:** L. 2008: Entire article R&RE, p. 100, § 1, effective August 5.

#### OFFICIAL COMMENT

**Source:** This section is based on Section 4 of the 1962 Act.

1. This Section provides the standards for recognition of a foreign-country money judgment.

ment. Section 7 sets out the effect of recognition of a foreign-country money judgment under this Act.

2. Recognition of a judgment means that the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country. *See, e.g.* Restatement (Second) of Conflicts of Laws, Ch. 5, Topic 3, Introductory Note (recognition of foreign judgment occurs to the extent the forum court gives the judgment “the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the state where it was rendered.”) Recognition of a foreign-country judgment must be distinguished from enforcement of that judgment. Enforcement of the foreign-country judgment involves the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign-country judgment. Recognition of a foreign-country money judgment often is associated with enforcement of the judgment, as the judgment creditor usually seeks recognition of the foreign-country judgment primarily for the purpose of invoking the enforcement procedures of the forum state to assist the judgment creditor’s collection of the judgment from the judgment debtor. Because the forum court cannot enforce the foreign-country judgment until it has determined that the judgment will be given effect, recognition is a prerequisite to enforcement of the foreign-country judgment. Recognition, however, also has significance outside the enforcement context because a foreign-country judgment also must be recognized before it can be given preclusive effect under *res judicata* and collateral estoppel principles. The issue of whether a foreign-country judgment will be recognized is distinct from both the issue of whether the judgment will be enforced, and the issue of the extent to which it will be given preclusive effect.

3. Subsection 4(a) places an affirmative duty on the forum court to recognize a foreign-country money judgment unless one of the grounds for nonrecognition stated in subsection (b) or (c) applies. Subsection (b) states three mandatory grounds for denying recognition to a foreign-country money judgment. If the forum court finds that one of the grounds listed in subsection (b) exists, then it must deny recognition to the foreign-country money judgment. Subsection (c) states eight nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. Subsection (d) places the burden of proof on the party resisting recognition of the foreign-country judgment to establish that one of the grounds for nonrecognition exists.

4. The mandatory grounds for nonrecognition stated in subsection (b) are identical to the mandatory grounds stated in Section 4 of the

1962 Act. The discretionary grounds stated in subsection 4(c)(1) through (6) are based on subsection 4(b)(1) through (6) of the 1962 Act. The discretionary grounds stated in subsection 4(c)(7) and (8) are new.

5. Under subsection (b)(1), the forum court must deny recognition to the foreign-country money judgment if that judgment was “rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.” The standard for this ground for nonrecognition “has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S.113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved.” Cmt § 4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure. *Kam-Tech Systems, Ltd. v. Yardeni*, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord*, *Society of Lloyd’s v. Ashenden*, 233 F.3d 473 (7<sup>th</sup> Cir. 2000) (procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under subsection (b)(1), so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding. As the U.S. Supreme Court stated in *Hilton*:

Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized. *Hilton*, 159 U.S. at 202.

6. Under section 4(b)(2), the forum court must deny recognition to the foreign-country



judgment if the foreign court did not have personal jurisdiction over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes clear that other grounds for personal jurisdiction may be found sufficient.

7. Subsection 4(c)(2) limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud - conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case - is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the foreign-country judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding. Intrinsic fraud does not provide a basis for denying recognition under subsection 4(c)(2), as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in subsection 4(c)(3) is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether "the [cause of action] [claim for relief] on which the judgment is based" is repugnant to public policy. Based on this "cause of action" language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on something other than repugnancy of the foreign cause of action comes within this exception. *E.g.*, *Southwest Livestock & Trucking Co., Inc. v. Ramon*, 169 F.3d 317, (5<sup>th</sup> Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48 % because cause of action to collect on promissory note does not violate public policy); *Guinness PLC v. Ward*, 955 F.2d 875 (4<sup>th</sup> Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); *The Society of Lloyd's v. Turner*, 303 F.3d 325 (5<sup>th</sup> Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not con-

trary to state public policy); *cf.* *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). Subsection 4(c)(3) rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although subsection 4(c)(3) of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language "or of the United States" in subsection 4(c)(3), which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.*, *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. Subsection 4(c)(5) allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing the foreign-country judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

10. Subsection 4(c)(6) authorizes the forum court to refuse recognition of a foreign-country judgment that was rendered in the foreign country solely on the basis of personal service when the forum court believes the original action should have been dismissed by the court in the

foreign country on grounds of *forum non conveniens*.

11. Subsection 4(c)(7) is new. Under this subsection, the forum court may deny recognition to a foreign-country judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with subsection 4(b)(1), which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, subsection 4(b)(1) focuses on the judicial system of the foreign country as a whole, rather than on whether the particular judicial proceeding leading to the foreign-country judgment was impartial and fair. *See, e.g.,* The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5<sup>th</sup> Cir. 2002) (interpreting the 1962 Act); CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7<sup>th</sup> Cir. 2000) (interpreting the 1962 Act). On the other hand, subsection 4(c)(7) allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the foreign-country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. Subsection 4(c)(8) also is new. It allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness. Like subsection 4(c)(7), it can be contrasted with subsection 4(b)(1), which requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of subsection 4(b)(1) is on the foreign country's judicial system as a whole, the focus of subsection 4(c)(8) is on the particular proceeding that resulted in

the specific foreign-country judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment.

Subsections 4(c)(7) and (8) both are discretionary grounds for denying recognition, while subsection 4(b)(1) is mandatory. Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. Under subsection 4(d), the party opposing recognition of the foreign-country judgment has the burden of establishing that one of the grounds for nonrecognition set out in subsection 4(b) or (c) applies. The 1962 Act was silent as to who had the burden of proof to establish a ground for nonrecognition and courts applying the 1962 Act took different positions on the issue. *Compare* Bridgeway Corp. v. Citibank, 45 F.Supp. 2d 276, 285 (S.D.N.Y. 1999) (plaintiff has burden to show no mandatory basis under 4(a) for nonrecognition exists; defendant has burden regarding discretionary bases) *with* The Courage Co. LLC v. The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition). Because the grounds for nonrecognition in Section 4 are in the nature of defenses to recognition, the burden of proof is most appropriately allocated to the party opposing recognition of the foreign-country judgment.



## ANNOTATION

**Foreign judgments recognized under principles of comity** are entitled to full faith and credit. *Milhoux v. Linder*, 902 P.2d 856 (Colo.

App. 1995) (decided prior to 2008 repeal and reenactment).

**13-62-105. Personal jurisdiction.** (1) A foreign-country judgment may not be refused recognition for lack of personal jurisdiction if:

- (a) The defendant was served with process personally in the foreign country;
- (b) The defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;
- (c) The defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
- (d) The defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;
- (e) The defendant had a business office in the foreign country and the proceeding in the foreign court involved a claim for relief arising out of business done by the defendant through that office in the foreign country; or
- (f) The defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a claim for relief arising out of that operation.

(2) The list of bases for personal jurisdiction in subsection (1) of this section is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subsection (1) of this section as sufficient to support a foreign-country judgment.

**Source:** L. 2008: Entire R&RE, p. 101, § 1, effective August 5.

## OFFICIAL COMMENT

**Source:** This provision is based on Section 5 of the 1962 Act. Its substance is the same as that of Section 5 of the 1962 Act, except as noted in Comment 2 below with regard to subsection 5(a)(4).

1. Under section 4(b)(2), the forum court must deny recognition to the foreign-country judgment if the foreign court did not have personal jurisdiction over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes it clear that these bases of personal jurisdiction are not exclusive. The forum court may find that the foreign court had personal jurisdiction over the defendant on some other basis.

2. Subsection 5(a)(4) of the 1962 Act provides that the foreign court had personal jurisdiction over the defendant if the defendant was

“a body corporate” that “had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state.” Subsection 5(a)(4) of this Act extends that concept to forms of business organization other than corporations.

3. Subsection 5(a)(3) provides that the foreign court has personal jurisdiction over the defendant if the defendant agreed before commencement of the proceeding leading to the foreign-country judgment to submit to the jurisdiction of the foreign court with regard to the subject matter involved. Under this provision, the forum court must find both the existence of a valid agreement to submit to the foreign court’s jurisdiction and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

**13-62-106. Procedure for recognition of foreign-country judgment.** (1) If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment.

(2) If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense.

**Source:** L. 2008: Entire article R&RE, p. 102, § 1, effective August 5.

## OFFICIAL COMMENT

Source: This section is new.

1. Unlike the 1962 Act, which was silent as to the proper procedure for seeking recognition of a foreign-country judgment, Section 6 of this Act expressly sets out the ways in which the issue of recognition may be raised. Under section 6, the issue of recognition always must be raised in a court proceeding. Thus, section 6 rejects decisions under the 1962 Act holding that the registration procedure found in the Uniform Enforcement of Foreign Judgments Act could be utilized with regard to recognition of a foreign-country judgment. *E.g.* *Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7<sup>th</sup> Cir. 2000). The Enforcement Act deals solely with the *enforcement* of sister-state judgments and other judgments entitled to full faith and credit, not with the *recognition* of foreign-country judgments.

More broadly, section 6 rejects the use of any registration procedure in the context of the foreign-country judgments covered by this Act. A registration procedure represents a balance between the interest of the judgment creditor in obtaining quick and efficient recognition and enforcement of a judgment when the judgment debtor has already been provided with an opportunity to litigate the underlying issues, and the interest of the judgment debtor in being provided an adequate opportunity to raise and litigate issues regarding whether the foreign-country judgment should be recognized. In the context of sister-state judgments, this balance favors use of a truncated procedure such as that found in the Enforcement Act. Recognition of sister-state judgments normally is mandated by the Full Faith and Credit Clause. Courts recognize only a very limited number of grounds for denying full faith and credit to a sister-state judgment - that the rendering court lacked jurisdiction, that the judgment was procured by fraud, that the judgment has been satisfied, or that the limitations period has expired. Thus, the judgment debtor with regard to a sister-state judgment normally does not have any grounds for opposing recognition and enforcement of the judgment. The extremely limited grounds for denying full faith and credit to a sister-state judgment reflect the fact such judgments will have been rendered by a court that is subject to the same due process limitations and the same overlap of federal statutory and constitutional law as the forum state's courts, and, to a large extent, the same body of court precedent and socio-economic ideas as those shaping the law of the forum state. Therefore, there is a strong presumption of fairness and competence attached to a sister-state judgment that justifies use of a registration procedure.

The balance between the benefits and costs of a registration procedure is significantly different, however, in the context of recognition and

enforcement of foreign-country judgments. Unlike the limited grounds for denying full faith and credit to a sister-state judgment, this Act provides a number of grounds upon which recognition of a foreign-country judgment may be denied. Determination of whether these grounds apply requires the forum court to look behind the foreign-country judgment to evaluate the law and the judicial system under which the foreign-country judgment was rendered. The existence of these grounds for nonrecognition reflects the fact there is less expectation that foreign-country courts will follow procedures comporting with U.S. notions of fundamental fairness and jurisdiction or that those courts will apply laws viewed as substantively tolerable by U.S. standards than there is with regard to sister-state courts. In some situations, there also may be suspicions of corruption or fraud in the foreign-country proceedings. These differences between sister-state judgments and foreign-country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign-country judgment in all cases in which that issue is raised. Although the threshold for establishing that a foreign-country judgment is not entitled to recognition under Section 4 is high, there is a sufficiently greater likelihood that significant recognition issues will be raised so as to require a judicial proceeding.

2. This Section contemplates that the issue of recognition may be raised either as an original matter or in the context of a pending proceeding. Subsection 6(a) provides that in order to raise the issue of recognition of a foreign-country judgment as an initial matter, the party seeking recognition must file an action for recognition of the foreign-country judgment. Subsection 6(b) provides that when the recognition issue is raised in a pending proceeding, it may be raised by counterclaim, cross-claim or affirmative defense, depending on the context in which it is raised. These rules are consistent with the way the issue of recognition most often was raised in most states under the 1962 Act.

3. An action seeking recognition of a foreign-country judgment under this Section is an action on the foreign-country judgment itself, not an action on the underlying cause of action that gave rise to that judgment. The parties to an action under Section 6 may not relitigate the merits of the underlying dispute that gave rise to the foreign-country judgment.

4. While this Section sets out the ways in which the issue of recognition of a foreign-country judgment may be raised, it is not intended to create any new procedure not currently existing in the state or to otherwise effect existing state procedural requirements. The parties to an action in which recognition of a for-



foreign-country judgment is sought under Section 6 must comply with all state procedural rules with regard to that type of action. Nor does this Act address the question of what constitutes a sufficient basis for jurisdiction to adjudicate with regard to an action under Section 6. Courts have split over the issue of whether the presence of assets of the debtor in a state is a sufficient basis

for jurisdiction in light of footnote 36 of the U.S. Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977). This Act takes no position on that issue.

5. In states that have adopted the Uniform Foreign-Money Claims Act, that Act will apply to the determination of the amount of a money judgment recognized under this Act.

**13-62-107. Effect of recognition of foreign-country judgment.** (1) If the court in a proceeding under section 13-62-106 finds that the foreign-country judgment is entitled to recognition under this article then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is:

(a) Conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

(b) Enforceable in the same manner and to the same extent as a judgment rendered in this state.

**Source:** L. 2008: Entire article R&RE, p. 102, § 1, effective August 5.

#### OFFICIAL COMMENT

**Source:** The substance of subsection 7(1) is based on Section 3 of the 1962 Act. Subsection 7(2) is new.

1. Section 5 of this Act sets out the standards for the recognition of foreign-country judgments within the scope of this Act, and places an affirmative duty on the forum court to recognize any foreign-country judgment that meets those standards. Section 6 of this Act sets out the procedures by which the issue of recognition may be raised. This Section sets out the consequences of the decision by the forum court that the foreign-country judgment is entitled to recognition.

2. Under subsection 7(1), the first consequence of recognition of a foreign-country judgment is that it is treated as conclusive between the parties in the forum state. Section 7(1) does not attempt to establish directly the extent of that conclusiveness. Instead, it provides that the foreign-country judgment is treated as conclusive to the same extent that a judgment of a sister state that had been determined to be entitled to full faith and credit would be conclusive. This means that the foreign-country judgment generally will be given the same effect in the forum state that it has in the foreign country where it was rendered. Subsection 7(1), how-

ever, sets out the minimum effect that must be given to the foreign-country judgment once recognized. The forum court remains free to give the foreign-country judgment a greater preclusive effect in the forum state than the judgment would have in the foreign country where it was rendered. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 481 cmt c (1986).

3. Under subsection 7(2), the second consequence of recognition of a foreign-country judgment is that, to the extent it grants a sum of money, it is enforceable in the forum state in accordance with the procedures for enforcement in the forum state and to the same extent that a judgment of the forum state would be enforceable. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States § 481 (1986) (judgment entitled to recognition is enforceable in accordance with the procedure for enforcement of judgments applicable where enforcement is sought). Thus, under subsection 7(2), once recognized, the foreign-country judgment has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying a judgment of a comparable court in the forum state, and can be enforced or satisfied in the same manner as such a judgment of the forum state.

**13-62-108. Stay of proceedings pending appeal of foreign-country judgment.** If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires, or the appellant has had sufficient time to prosecute the appeal and has failed to do so.

**Source:** L. 2008: Entire article R&RE, p. 102, § 1, effective August 5.

## OFFICIAL COMMENT

Source: This section is the same substantively as section 6 of the 1962 Act, except that it adds as an additional measure for the duration of the stay "the time for appeal expires."

1. Under Section 3 of this Act, a foreign-country judgment is not within the scope of this Act unless it is conclusive and enforceable where rendered. Thus, if the effect of appeal under the law of the foreign country in which the judgment was rendered is to prevent it from being conclusive or enforceable between the parties, the existence of a pending appeal in the foreign country would prevent the application of

this Act. Section 8 addresses a different situation. It deals with the situation in which either (1) the party seeking a stay has demonstrated that it intends to file an appeal in the foreign country, although the appeal has not yet been filed or (2) an appeal has been filed in the foreign country, but under the law of the foreign country filing of an appeal does not affect the conclusiveness or enforceability of the judgment. Section 8 allows the forum court in those situations to determine in its discretion that a stay of proceedings is appropriate.

**13-62-109. Statute of limitations.** An action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or fifteen years from the date that the foreign-country judgment became effective in the foreign country.

Source: L. 2008: Entire article R&RE, p. 102, § 1, effective August 5.

## OFFICIAL COMMENT

Source: This Section is new. The 1962 Act did not contain a statute of limitations. Some courts applying the 1962 Act have used the state's general statute of limitations, *e.g.*, *Vrozos v. Sarantopoulos*, 552 N.E.2d 1053 (Ill. App. 1990) (as Recognition Act contains no statute of limitations, general five-year statute of limitations applies), while others have used the statute of limitations applicable with regard to enforcement of a domestic judgment, *e.g.*, *La Societe Anonyme Goro v. Conveyor Accessories, Inc.*, 677 N.E. 2d 30 (Ill. App. 1997).

1. Under Section 3 of this Act, this Act only applies to foreign-country judgments that are conclusive, and if the judgment grants recovery of a sum of money, enforceable where rendered. Thus, if the period of effectiveness of the foreign-country judgment has expired in the foreign country where the judgment was rendered, the foreign-country judgment would not be subject to this Act. This means that the period of time during which a foreign-country judgment may be recognized under this Act normally is measured by the period of time during which that judgment is effective (that is, conclusive and, if applicable, enforceable) in the foreign

country that rendered the judgment. If, however, the foreign-country judgment remains effective for more than fifteen years after the date on which it became effective in the foreign country, Section 9 places an additional time limit on recognition of a foreign-country judgment. It provides that, if the foreign-country judgment remains effective between the parties for more than fifteen years, then an action to recognize the foreign-country judgment under this Act must be commenced within that fifteen year period.

2. Section 9 does not address the issue of whether a foreign-country judgment that can no longer be the basis of a recognition action under this Act because of the application of the fifteen-year limitations period in Section 9 may be used for other purposes. For example, a common rule with regard to judgments barred by a statute of limitations is that they still may be used defensively for purposes of offset and for their preclusive effect. The extent to which a foreign-country judgment with regard to which a recognition action is barred by Section 9 may be used for these or other purposes is left to the other law of the forum state.

**13-62-110. Uniformity of interpretation.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: L. 2008: Entire article R&RE, p. 102, § 1, effective August 5.



## OFFICIAL COMMENT

Source: This Section is substantively the same as Section 8 of the 1962 Act. The section

has been rewritten to reflect current NCCUSL practice.

**13-62-111. Saving clause.** This article does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this article.

**Source: L. 2008:** Entire article R&RE, p. 103, § 1, effective August 5.

## OFFICIAL COMMENT

Source: This section is based on Section 7 of the 1962 Act.

1. Section 3 of this Act provides that this Act applies only to certain foreign-country judgments that grant or deny recovery of a sum of money. The purpose of this Act is to establish the minimum standards for recognition of those judgments. Section 11 makes clear that no negative implication should be read from the fact

that this Act does not provide for recognition of other foreign-country judgments. Rather, this Act simply does not address the issue of whether foreign-country judgments not within its scope under Section 3 should be recognized. Courts are free to recognize those foreign-country judgments not within the scope of this Act under common law principles of comity or other applicable law.

## ANNOTATION

**Annotator's note.** Since § 13-62-111 is similar to § 13-62-108 as it existed prior to the 2008 repeal and reenactment of article 62 of title 13, a relevant case construing that provision has been included in the annotations to this section.

**A foreign judgment may be recognized under the common law doctrine of comity where** defendants were represented by counsel during foreign proceedings, the foreign court had personal and subject matter jurisdiction, there was

no evidence of fraud, and defendants did not claim that they were denied the opportunity in the foreign proceedings of a full, fair, and impartial trial. *Milhoux v. Linder*, 902 P.2d 856 (Colo. App. 1995).

**Reciprocity is not required** for recognition of foreign judgments in Colorado as a matter of comity. *Milhoux v. Linder*, 902 P.2d 856 (Colo. App. 1995).

**13-62-112. Applicability.** This article applies to all actions commenced on or after August 5, 2008, in which the issue of recognition of a foreign-country judgment is raised.

**Source: L. 2008:** Entire article R&RE, p. 103, § 1, effective August 5.

## ARTICLE 62.1

## Uniform Foreign-Money Claims Act

13-62.1-101.	Definitions.	13-62.1-108.	Conversions of foreign money in distribution proceeding.
13-62.1-102.	Scope.	13-62.1-109.	Pre-judgment and judgment interest.
13-62.1-103.	Variation by agreement.	13-62.1-110.	Enforcement of foreign judgments.
13-62.1-104.	Determining money of the claim.	13-62.1-111.	Determining United States dollar value of foreign-money claims for limited purposes.
13-62.1-105.	Determining amount of the money of certain contract claims.	13-62.1-112.	Effect of currency revalorization.
13-62.1-106.	Asserting and defending foreign-money claim.	13-62.1-113.	Supplementary general principles of law.
13-62.1-107.	Judgments and awards on foreign-money claims; times of money conversion; form of judgment.		

13-62.1-114.	Uniformity of application and construction.	13-62.1-116.	Severability clause.
		13-62.1-117.	Effective date.
13-62.1-115.	Short title.	13-62.1-118.	Transitional provision.

**13-62.1-101. Definitions.** In this article:

- (1) “Action” means a judicial proceeding or arbitration in which a payment in money may be awarded or enforced with respect to a foreign-money claim.
- (2) “Bank-offered spot rate” means the spot rate of exchange at which a bank will sell foreign money at a spot rate.
- (3) “Conversion date” means the banking day next preceding the date on which money, in accordance with this article, is:
  - (a) Paid to a claimant in an action or distribution proceeding;
  - (b) Paid to the official designated by law to enforce a judgment or award on behalf of a claimant; or
  - (c) Used to recoup, set-off, or counterclaim in different moneys in an action or distribution proceeding.
- (4) “Distribution proceeding” means a judicial or nonjudicial proceeding for the distribution of a fund in which one or more foreign-money claims is asserted and includes an accounting, an assignment for the benefit of creditors, a foreclosure, the liquidation or rehabilitation of a corporation or other entity, and the distribution of an estate, trust, or other fund.
- (5) “Foreign money” means money other than money of the United States of America.
- (6) “Foreign-money claim” means a claim upon an obligation to pay, or a claim for recovery of a loss, expressed in or measured by a foreign money.
- (7) “Money” means a medium of exchange for the payment of obligations or a store of value authorized or adopted by a government or by intergovernmental agreement.
- (8) “Money of the claim” means the money determined as proper pursuant to section 13-62.1-104.
- (9) “Person” means an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, joint venture, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.
- (10) “Rate of exchange” means the rate at which money of one country may be converted into money of another country in a free financial market convenient to or reasonably usable by a person obligated to pay or to state a rate of conversion. If separate rates of exchange apply to different kinds of transactions, the term means the rate applicable to the particular transaction giving rise to the foreign-money claim.
- (11) “Spot rate” means the rate of exchange at which foreign money is sold by a bank or other dealer in foreign exchange for immediate or next day availability or for settlement by immediate payment in cash or equivalent, by charge to an account, or by an agreed delayed settlement not exceeding two days.
- (12) “State” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

**Source: L. 90:** Entire article added, p. 877, § 1, effective January 1, 1991.

**13-62.1-102. Scope.** (1) This article applies only to a foreign-money claim in an action or distribution proceeding.

(2) This article applies to foreign-money issues even if other law under the conflict of laws rules of this state applies to other issues in the action or distribution proceeding.

**Source: L. 90:** Entire article added, p. 878, § 1, effective January 1, 1991.

**13-62.1-103. Variation by agreement.** (1) The effect of this article may be varied by agreement of the parties made before or after commencement of an action or distribution proceeding or the entry of judgment.



(2) Parties to a transaction may agree upon the money to be used in a transaction giving rise to a foreign-money claim and may agree to use different moneys for different aspects of the transaction. Stating the price in a foreign money for one aspect of a transaction does not alone require the use of that money for other aspects of the transaction.

**Source: L. 90:** Entire article added, p. 878, § 1, effective January 1, 1991.

**13-62.1-104. Determining money of the claim.** (1) The money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment.

(2) If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is the money:

- (a) Regularly used between the parties as a matter of usage or course of dealing;
- (b) Used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or
- (c) In which the loss was ultimately felt or will be incurred by the party claimant.

**Source: L. 90:** Entire article added, p. 878, § 1, effective January 1, 1991.

**13-62.1-105. Determining amount of the money of certain contract claims.** (1) If an amount contracted to be paid in a foreign money is measured by a specified amount of a different money, the amount to be paid is determined on the conversion date.

(2) If an amount contracted to be paid in a foreign money is to be measured by a different money at the rate of exchange prevailing on a date before default, that rate of exchange applies only to payments made within a reasonable time after default, not exceeding thirty days. Thereafter, conversion is made at the bank-offered spot rate on the conversion date.

(3) A monetary claim is neither usurious nor unconscionable because the agreement on which it is based provides that the amount of the debtor's obligation to be paid in the debtor's money, when received by the creditor, must equal a specified amount of the foreign money of the country of the creditor. If, because of unexcused delay in payment of a judgment or award, the amount received by the creditor does not equal the amount of the foreign money specified in the agreement, the court or arbitrator shall amend the judgment or award accordingly.

**Source: L. 90:** Entire article added, p. 879, § 1, effective January 1, 1991.

**13-62.1-106. Asserting and defending foreign-money claim.** (1) A person may assert a claim in a specified foreign money. If a foreign-money claim is not asserted, the claimant makes the claim in United States dollars.

(2) An opposing party may allege and prove that a claim, in whole or in part, is in a different money than that asserted by the claimant.

(3) A person may assert a defense, set-off, recoupment, or counterclaim in any money without regard to the money of other claims.

(4) The determination of the proper money of the claim is a question of law.

**Source: L. 90:** Entire article added, p. 879, § 1, effective January 1, 1991.

**13-62.1-107. Judgments and awards on foreign-money claims; times of money conversion; form of judgment.** (1) Except as provided in subsection (3) of this section, a judgment or award on a foreign-money claim must be stated in an amount of the money of the claim.

(2) A judgment or award on a foreign-money claim is payable in that foreign money or, at the option of the debtor, in the amount of United States dollars which will purchase that foreign money on the conversion date at a bank-offered spot rate.

(3) Assessed costs must be entered in United States dollars.

(4) Each payment in United States dollars must be accepted and credited on a judgment or award on a foreign-money claim in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date for that payment.

(5) A judgment or award made in an action or distribution proceeding on both (i) a defense, set-off, recoupment, or counterclaim and (ii) the adverse party's claim, must be netted by converting the money of the smaller into the money of the larger, and by subtracting the smaller from the larger, and specify the rates of exchange used.

(6) A judgment substantially in the following form complies with subsection (1) of this section:

[IT IS ADJUDGED AND ORDERED, that Defendant           (insert name)           pay to Plaintiff           (insert name)           the sum of           (insert amount in the foreign money)           plus interest on that sum at the rate of           (insert rate - see Section 9)           percent a year or, at the option of the judgment debtor, the number of United States dollars which will purchase the           (insert name of foreign money)           with interest due, at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with assessed costs of           (insert amount)           United States dollars.]  
[Note: States should insert their customary forms of judgment with appropriate modifications.]

(7) If a contract claim is of the type covered by section 13-62.1-105 (1) or (2), the judgment or award must be entered for the amount of money stated to measure the obligation to be paid in the money specified for payment or, at the option of the debtor, the number of United States dollars which will purchase the computed amount of the money of payment on the conversion date at a bank-offered spot rate.

(8) A judgment must be [filed] [docketed] [recorded] and indexed in foreign money in the same manner, and has the same effect as a lien, as other judgments. It may be discharged by payment.

**Source: L. 90:** Entire article added, p. 879, § 1, effective January 1, 1991.

**Editor's note:** Section 9, which is referenced in the form in subsection (6), is found at § 13-62.1-109.

**13-62.1-108. Conversions of foreign money in distribution proceeding.** The rate of exchange prevailing at or near the close of business on the day the distribution proceeding is initiated governs all exchanges of foreign money in a distribution proceeding. A foreign-money claimant in a distribution proceeding shall assert its claim in the named foreign money and show the amount of United States dollars resulting from a conversion as of the date the proceeding was initiated.

**Source: L. 90:** Entire article added, p. 880, § 1, effective January 1, 1991.

**13-62.1-109. Pre-judgment and judgment interest.** (1) With respect to a foreign-money claim, recovery of pre-judgment or pre-award interest and the rate of interest to be applied in the action or distribution proceeding, except as provided in subsection (2) of this section, are matters of the substantive law governing the right to recovery under the conflict-of-laws rules of this state.

(2) The court or arbitrator shall increase or decrease the amount of pre-judgment or pre-award interest otherwise payable in a judgment or award in foreign-money to the extent required by the law of this state governing a failure to make or accept an offer of settlement or offer of judgment, or conduct by a party or its attorney causing undue delay or expense.

(3) A judgment or award on a foreign-money claim bears interest at the rate applicable to judgments of this state.

**Source: L. 90:** Entire article added, p. 880, § 1, effective January 1, 1991.



**13-62.1-110. Enforcement of foreign judgments.** (1) If an action is brought to enforce a judgment of another jurisdiction expressed in a foreign money and the judgment is recognized in this state as enforceable, the enforcing judgment must be entered as provided in section 13-62.1-107, whether or not the foreign judgment confers an option to pay in an equivalent amount of United States dollars.

(2) A foreign judgment may be [filed] [docketed] [recorded] in accordance with any rule or statute of this state providing a procedure for its recognition and enforcement.

(3) A satisfaction or partial payment made upon the foreign judgment, on proof thereof, must be credited against the amount of foreign money specified in the judgment, notwithstanding the entry of judgment in this state.

(4) A judgment entered on a foreign-money claim only in United States dollars in another state must be enforced in this state in United States dollars only.

**Source: L. 90:** Entire article added, p. 881, § 1, effective January 1, 1991.

**13-62.1-111. Determining United States dollar value of foreign-money claims for limited purposes.** (1) Computations under this section are for the limited purposes of the section and do not affect computation of the United States dollar equivalent of the money of the judgment for the purpose of payment.

(2) For the limited purpose of facilitating the enforcement of provisional remedies in an action, the value in United States dollars of assets to be seized or restrained pursuant to a writ of attachment, garnishment, execution, or other legal process, the amount of United States dollars at issue for assessing costs, or the amount of United States dollars involved for a surety bond or other court-required undertaking, must be ascertained as provided in subsections (3) and (4) of this section.

(3) A party seeking process, costs, bond, or other undertaking under subsection (2) of this section shall compute in United States dollars the amount of the foreign money claimed from a bank-offered spot rate prevailing at or near the close of business on the banking day next preceding the filing of a request or application for the issuance of process or for the determination of costs, or an application for a bond or other court-required undertaking.

(4) A party seeking the process, costs, bond, or other undertaking under subsection (2) of this section shall file with each request or application an affidavit or certificate executed in good faith by its counsel or a bank officer, stating the market quotation used and how it was obtained, and setting forth the calculation. Affected court officials incur no liability, after a filing of the affidavit or certificate, for acting as if the judgment were in the amount of United States dollars stated in the affidavit or certificate.

**Source: L. 90:** Entire article added, p. 881, § 1, effective January 1, 1991.

**13-62.1-112. Effect of currency revalorization.** (1) If, after an obligation is expressed or a loss is incurred in a foreign money, the country issuing or adopting that money substitutes a new money in place of that money, the obligation or the loss is treated as if expressed or incurred in the new money at the rate of conversion the issuing country establishes for the payment of like obligations or losses denominated in the former money.

(2) If substitution under subsection (1) of this section occurs after a judgment or award is entered on a foreign-money claim, the court or arbitrator shall amend the judgment or award by a like conversion of the former money.

**Source: L. 90:** Entire article added, p. 882, § 1, effective January 1, 1991.

**13-62.1-113. Supplementary general principles of law.** Unless displaced by particular provisions of this article, the principles of law and equity, including the law merchant, and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes supplement its provisions.

**Source: L. 90:** Entire article added, p. 882, § 1, effective January 1, 1991.

**13-62.1-114. Uniformity of application and construction.** This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

**Source:** L. 90: Entire article added, p. 882, § 1, effective January 1, 1991.

**13-62.1-115. Short title.** This article may be cited as the “Uniform Foreign-Money Claims Act”.

**Source:** L. 90: Entire article added, p. 882, § 1, effective January 1, 1991.

**13-62.1-116. Severability clause.** If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

**Source:** L. 90: Entire article added, p. 882, § 1, effective January 1, 1991.

**13-62.1-117. Effective date.** This article becomes effective on January 1, 1991.

**Source:** L. 90: Entire article added, p. 882, § 1, effective January 1, 1991.

**13-62.1-118. Transitional provision.** This article applies to actions and distribution proceedings commenced after January 1, 1991.

**Source:** L. 90: Entire article added, p. 882, § 1, effective January 1, 1991.

**ARTICLE 63**

**Default Judgments Based on  
Affidavits**

13-63-101. Default judgments in civil actions - affidavit.

**13-63-101. Default judgments in civil actions - affidavit.** (1) In every civil action in which the default of a party against whom a judgment for affirmative relief is sought has been entered, the court may enter judgment based upon affidavit of the party seeking such affirmative relief.

(2) The court may require such supporting evidence as it may deem helpful to the disposition of the issues in addition to an affidavit and may, upon its own motion, require that a formal hearing be held to determine any and all issues presented by the pleadings.

**Source:** L. 82: Entire article added, p. 296, § 1, effective July 1.

**ARTICLE 64**

**Health Care Availability Act**

**PART 1**

**SHORT TITLE - LEGISLATIVE  
DECLARATION**

13-64-101. Short title.  
13-64-102. Legislative declaration.

**PART 2**

**PERIODIC PAYMENTS OF  
TORT JUDGMENTS**

13-64-201. Legislative declaration.  
13-64-202. Definitions.



13-64-203.	Periodic payments.	13-64-303.	Judgments and settlements - reported.
13-64-204.	Special damages findings required.	13-64-303.5.	Exclusion - mental health care facilities.
13-64-205.	Determination of judgment to be entered.	13-64-304.	Effective date - applicability of part.
13-64-206.	Periodic installment obligations.		
13-64-207.	Form of funding.		
13-64-208.	Funding the obligation.		
13-64-209.	Assignment of periodic payments.		
13-64-210.	Exemption of benefits.		
13-64-211.	Settlement agreements and consent judgments.	13-64-401.	Qualifications as expert witness in medical malpractice actions or proceedings.
13-64-212.	Satisfaction of judgment.	13-64-402.	Collateral source evidence.
13-64-213.	Effective date - applicability of part.	13-64-403.	Agreement for medical services - alternative arbitration procedures - form of agreement - right to rescind.

## PART 3

FINANCIAL LIABILITY  
REQUIREMENTS - LIMITATIONS

13-64-301.	Financial responsibility.
13-64-302.	Limitation of liability - interest on damages.
13-64-302.5.	Exemplary damages - legislative declaration - limitations - distribution of damages collected.

13-64-404.	Effective date - applicability of part.
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## PART 5

## LIMITATION ON ACTIONS BROUGHT

13-64-501.	Definitions.
13-64-502.	Limitation on actions.
13-64-503.	Effective date - applicability of part.

## PART 1

## SHORT TITLE - LEGISLATIVE DECLARATION

**13-64-101. Short title.** This article shall be known and may be cited as the "Health Care Availability Act".

**Source: L. 88:** Entire article added, p. 612, § 1, effective July 1.

**13-64-102. Legislative declaration.** (1) The general assembly determines and declares that it is in the best interests of the citizens of this state to assure the continued availability of adequate health care services to the people of this state by containing the significantly increasing costs of malpractice insurance for medical care institutions and licensed medical care professionals, and that such is rationally related to a legitimate state interest. To attain this goal and in recognition of the exodus of professionals from health care practice or from certain portions or specialties thereof, the general assembly finds it necessary to enact this article limited to the area of medical malpractice to preserve the public peace, health, and welfare.

(2) The general assembly further determines and declares:

(a) The purpose of enacting the "Health Care Availability Act" and amendments thereto is to clearly and unequivocally state the intent of the general assembly that, in order to promote the purposes set forth in subsection (1) of this section, the limitations of liability set forth in section 13-64-302 are hereby reaffirmed; and

(b) All noneconomic damages of any kind whatsoever, whether direct or derivative, including but not limited to grief, loss of companionship, pain and suffering, inconvenience, emotional stress, impairment of quality of life, physical impairment, disfigurement, and damages for any other nonpecuniary harm awarded in a medical malpractice action, shall not exceed the limitations on noneconomic loss or injury specified in section 13-64-302.

**Source:** L. 88: Entire article added, p. 612, § 1, effective July 1. L. 2003: Entire section amended, p. 1788, § 3, effective July 1.

## PART 2

### PERIODIC PAYMENTS OF TORT JUDGMENTS

**Law reviews:** For article, “1988 Update on Colorado Tort Reform Legislation — Part I”, see 17 Colo. Law. 1719 (1988); for article, “1990 Update on Colorado Tort Reform Legislation”, see 19 Colo. Law. 1529 (1990).

**13-64-201. Legislative declaration.** (1) The general assembly declares the purposes of enacting this part 2 are to:

- (a) Alleviate the practical problems incident to the unpredictability of future losses;
- (b) Effectuate more precise awards of damages for actual losses;
- (c) Pay damages as the losses are found to accrue;
- (d) Assure that payments of damages more nearly serve the purposes for which they are awarded;
- (e) Reduce the burden on public assistance costs created by the dissipation of lump-sum payments; and
- (f) Conform to the income tax policies in the federal “Internal Revenue Code of 1986” and the laws of this state with respect to compensation for personal injuries.

**Source:** L. 88: Entire article added, p. 613, § 1, effective July 1.

**13-64-202. Definitions.** As used in this part 2, unless the context otherwise requires:

- (1) “Economic loss” means pecuniary harm for which damages are recoverable under the laws of this state.
- (2) “Future damages” means damages of any kind arising from personal injuries which the trier of fact finds will accrue after the damages findings are made.
- (3) “Health care institution” means any licensed or certified hospital, health care facility, dispensary, other institution for the treatment or care of the sick or injured, or a laboratory certified under the federal “Clinical Laboratories Improvement Act of 1967”, as amended, 42 U.S.C. sec. 263a, to perform high complexity testing.
- (4) (a) “Health care professional” means any person licensed in this state or any other state to practice medicine, chiropractic, nursing, physical therapy, podiatry, dentistry, pharmacy, optometry, or other healing arts. The term includes any professional corporation or other professional entity comprised of such health care providers as permitted by the laws of this state.
- (b) Repealed.
- (c) Nothing in this subsection (4) shall be construed to create an exception to the corporate practice of medicine doctrine.
- (5) “Noneconomic loss” means nonpecuniary harm for which damages are recoverable under the laws of this state, but the term does not include punitive or exemplary damages.
- (6) “Past damages” means damages that have accrued before the damages findings are made, including any punitive or exemplary damages allowed by the laws of this state.
- (7) “Present value” means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the judgment is entered.
- (8) “Qualified insurer” means an insurance company licensed to do business in this state or any self-insurer, assignee, plan, or arrangement approved by the court.

**Source:** L. 88: Entire article added, p. 613, § 1, effective July 1. L. 93: (4) amended, p. 1920, § 4, effective July 1. L. 2003: (4) amended, p. 1600, § 4, effective July 1. L. 2004: (3) amended, p. 966, § 5, effective May 21.



**Editor's note:** Subsection (4)(b) provided for the repeal of subsection (4)(b), effective July 1, 1996. (See L. 93, p. 1920.)

**Cross references:** For the legislative declaration contained in the 2003 act amending subsection (4), see section 1 of chapter 240, Session Laws of Colorado 2003.

#### ANNOTATION

**Physical impairment is a recoverable item of damages under Colorado law as used in subsection (5).** Dupont v. Preston, 9 P.3d 1193 (Colo. App. 2000), aff'd, 35 P.3d 433 (Colo. 2001).

**Noneconomic damages for physical impairment and disfigurement are not included in the definition of noneconomic loss contained in § 13-64-302.** Preston v. Dupont, 35 P.3d 433 (Colo. 2001).

**13-64-203. Periodic payments.** (1) In any civil action for damages in tort brought against a health care professional or a health care institution, the trial judge shall enter a judgment ordering that awards for future damages be paid by periodic payments rather than by a lump-sum payment if the award for future damages exceeds the present value of one hundred fifty thousand dollars, as determined by the court.

(2) In any such action in which the award for future damages is one hundred fifty thousand dollars or less, present value, the trial judge may order that awards for future damages be paid by periodic payments.

**Source: L. 88:** Entire article added, p. 614, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Health Care Litigation in Colorado: A Survey of Recent Decisions", see 30 Colo. Law. 91 (August 2001).

**13-64-204. Special damages findings required.** (1) If liability is found in a trial under this part 2, the trier of fact, in addition to other appropriate findings, shall make separate findings for each claimant specifying the amount of:

- (a) Any past damages for each of the following types:
  - (I) Medical and other costs of health care;
  - (II) Other economic loss except loss of earnings;
  - (III) Loss of earnings; and
  - (IV) Noneconomic loss;
- (b) Any future damages and the period of time over which they will be paid, for each of the following types:
  - (I) Medical and other costs of health care;
  - (II) Other economic loss except loss of future earnings which would be incurred for the life of the claimant or any lesser period;
  - (III) Loss of future earnings which would be incurred for the work life expectancy of the claimant or a lesser period; and
  - (IV) Noneconomic loss which would be incurred for the life of the claimant or any lesser period.

(2) The calculation of all future damages under subparagraphs (I), (II), and (IV) of paragraph (b) of subsection (1) of this section shall reflect the costs and losses during the period of time, including life expectancy, if appropriate, that the claimant will sustain those costs and losses. The calculation of loss under subparagraph (III) of paragraph (b) of subsection (1) of this section shall be based on loss during the period of time the claimant would have earned income but for the injury upon which the claim is based.

(3) The fact that payment of any judgment will be paid by periodic payments shall not be disclosed to a jury.

**Source: L. 88:** Entire article added, p. 614, § 1, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Health Care Litigation in Colorado: A Survey of Recent Decisions", see 30 Colo. Law. 91 (August 2001).

**The Health Care Availability Act limits the total recovery for all noneconomic loss or injury to \$250,000, including any such loss or injury resulting from physical impairment or disfigurement as set forth in § 13-21-102.5.** Plaintiffs may not recover for a separate category of damages for physical impairment and disfigurement in addition to the statutory categories set forth in this section. *Ledstrom by and through Ledstrom v. Keeling*, 10 F. Supp.2d 1195 (D. Colo. 1998).

**This section does not prohibit recovery for physical impairment.** Damages for physical

impairment are recoverable under the laws of this state as either economic or noneconomic loss and court did not err in instructing jury to determine separately the amount of past damages attributable to any physical impairment and any future damages allocable to any physical impairment. *Dupont v. Preston*, 9 P.3d 1193 (Colo. App. 2000), *aff'd*, 35 P.3d 433 (Colo. 2001).

**This section requires determination of present value of future damages but does not require presentation of expert testimony as to the calculation of present value.** *Dupont v. Preston*, 9 P.3d 1193 (Colo. App. 2000), *aff'd* on other grounds, 35 P.3d 433 (Colo. 2001).

**13-64-205. Determination of judgment to be entered.** (1) In order to determine what judgment is to be entered on a verdict requiring findings of special damages under this part 2, the court shall proceed as follows:

(a) The court shall apply to the findings of past and future damages any applicable rules of law, including setoffs, credits, comparative fault, additurs, and remittiturs in calculating the respective amounts of past and future damages each claimant is entitled to recover and each party is obligated to pay. The court shall preserve the rights of any subrogee to be paid in a lump sum.

(b) The court shall specify the payment of attorney fees and litigation expenses in a manner separate from the periodic installments payable to the claimant, either in a lump sum or by periodic installments, pursuant to any agreement entered into between the claimant or beneficiary and his attorney, computed in accordance with the applicable principles of law.

(c) The court shall enter judgment in a lump sum for past damages and for any damages payable in lump sum or otherwise under paragraphs (a) and (b) of this subsection (1).

(d) After hearing relevant expert testimony, the jury shall determine the present value of future damages and, except as provided in paragraphs (e) and (f) of this subsection (1), the court shall enter judgment for the periodic payment of future damages. The court, in considering evidence of the need for one or more future major medical proceedings or services, may enter judgment for lump-sum payment therefor, payable either immediately or at some designated date or dates in the future.

(e) Upon petition of a party before entry of judgment and a finding of incapacity to fund the periodic payments, the court, at the election of the claimant or at the election of the beneficiaries in an action for wrongful death, shall enter a judgment for the present value of the periodic payments.

(f) The plaintiff who meets the criteria set forth in this subsection (1) may elect to receive the immediate payment to the plaintiff of the present value of the future damage award in a lump-sum amount in lieu of periodic payments. In order to exercise this right, the plaintiff must either:

(I) (A) Have reached his or her eighteenth birthday by the time the periodic payment order is entered;

(B) Not be an incapacitated person, as defined in section 15-14-102 (5), C.R.S.; and

(C) Have been provided financial counseling and must be making an informed decision; or

(II) Be a person under disability who has a legal representative authorized to take action on his or her behalf, as described in section 13-81-102.

(2) For purposes of paragraph (f) of subsection (1) of this section, "legal representative", "person under disability", and "take action" shall have the same meanings as provided in section 13-81-101.



**Source: L. 88:** Entire article added, p. 614, § 1, effective July 1. **L. 2000:** (1)(f)(II) amended, p. 1833, § 6, effective January 1, 2001. **L. 2007:** (1)(f) amended and (2) added, p. 172, § 2, effective August 3.

**Cross references:** For the legislative declaration contained in the 2007 act amending subsection (1)(f) and enacting subsection (2), see section 1 of chapter 49, Session Laws of Colorado 2007.

### ANNOTATION

**Law reviews.** For article, "Health Care Litigation in Colorado: A Survey of Recent Decisions", see 30 Colo. Law. 91 (August 2001).

**Subsection (1)(b) does not preclude or affect a prevailing defendant's right to recover costs** and does not imply a repeal of § 13-16-105. *Mullins v. Kessler*, 83 P.3d 1203 (Colo. App. 2003).

**Subsection (1)(f) excludes an "incapacitated person"** from those who may elect to receive a lump-sum payment regardless of whether such person also is a "protected person". *Rodriguez ex rel. Rodriguez v. HealthONE*, 24 P.3d 9 (Colo. App. 2000), rev'd on other grounds, 50 P.3d 879 (Colo. 2002); *Garhart v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004).

**Subsection (1)(f) is rationally related to a legitimate government objective and, therefore, is constitutional and does not violate the respondent's equal protection rights.** Protect-

ing "incapacitated persons represented by conservators" from prematurely exhausting their judgments is a legitimate governmental objective and subsection (1)(f) is rationally related to this legitimate governmental objective. *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879 (Colo. 2002); *Garhart v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004).

**Statute as amended in 2007 is not unconstitutional special legislation.** By covering all minor and incapacitated persons who receive large medical malpractice verdicts, the statute plainly has general future applicability. *Vitetta v. Corrigan*, 240 P.3d 322 (Colo. App. 2009).

**Court construed the Health Care Availability Act in harmony with § 13-16-105 and C.R.C.P. 54(d)** to allow a prevailing defendant to recover costs in a medical negligence action. *Mullins v. Kessler*, 83 P.3d 1203 (Colo. App. 2003).

**13-64-206. Periodic installment obligations.** (1) A judgment for periodic payments under this part 2 shall provide that:

(a) Such periodic payments are fixed and determinable as to amount and time of payment;

(b) Such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments; and

(c) The recipient of such payments shall be a general creditor of the qualified insurer.

(2) Unless the court directs otherwise and the parties otherwise agree, payments shall be scheduled at one-month intervals. Payments for damages accruing during the scheduled intervals are due at the beginning of the intervals. For good cause shown, the court may direct that periodic payments shall continue for an initial term of years notwithstanding the death of the judgment creditor during that term.

(3) Money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor. Any such remaining periodic payments shall be paid to the heirs and devisees of the judgment creditor. Payments for future damages other than loss of future earnings shall cease at the death of the judgment creditor.

**Source: L. 88:** Entire article added, p. 615, § 1, effective July 1.

### ANNOTATION

Although the federal government is not subject to the Colorado Health Care Availability Act (HCAA), under the Federal Tort Claims Act the government is to be treated in

the same manner and to the same extent as a private individual under like circumstances. Therefore the government was entitled to receive a reversionary interest in that part of an

award to a seriously injured child resulting from the government's negligence that would approx-

imate the result contemplated by the HCAA. Hill v. U.S., 81 F.3d 118 (10th Cir. 1996).

**13-64-207. Form of funding.** (1) A judgment for periodic payments entered in accordance with this part 2 shall provide for payments to be funded in one or more of the following forms approved by the court:

(a) Annuity contract issued by a company licensed to do business as an insurance company under the laws of this state;

(b) An obligation or obligations of the United States;

(c) Evidence of applicable and collectible liability insurance from one or more qualified insurers;

(d) An agreement by one or more personal injury liability assignees to assume the obligation of the judgment debtor;

(e) An obligation of the state of Colorado or of a public entity other than the state which is self-insured as provided in section 24-10-115, 24-10-115.5, or 24-10-116, C.R.S.; or

(f) Any other satisfactory form of funding.

(2) The court shall require that the annuity contract or other form of funding permitted by subsection (1) of this section show that portion of each periodic payment which is attributable to loss of future earnings and that portion attributable to all other future damages.

**Source: L. 88:** Entire article added, p. 616, § 1, effective July 1.

#### ANNOTATION

**Section gives discretion to trial court in entering its judgment for periodic payments.**

Trial court not required to approve an order allowing defendant to purchase an annuity at a cost less than the jury's present value award

even if the annuity pays the plaintiff the equivalent of the future value of damages. Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C., 168 P.3d 512 (Colo. App. 2007).

**13-64-208. Funding the obligation.** (1) If the court enters a judgment for periodic payments under this part 2, then each party liable for all or a portion of the judgment, unless found to be incapable of doing so, shall separately or jointly with one or more others provide the funding for the periodic payments in a form prescribed in section 13-64-207, within sixty days after the date the judgment is entered. A liability insurer having a contractual obligation and any other person adjudged to have an obligation to pay all or part of a judgment for periodic payments on behalf of a judgment debtor is obligated to provide such funding to the extent of its contractual or adjudged obligation if the judgment debtor has not done so.

(2) A judgment creditor or successor in interest and any party having rights under subsection (4) of this section may move that the court find that funding has not been provided with regard to a judgment obligation owing to the moving party. Upon so finding, the court shall order that funding complying with this article be provided within thirty days. If funding is not provided within that time and subsection (3) of this section does not apply, then the court shall calculate the present value of the periodic payment obligation and enter a judgment for that amount in favor of the moving party.

(3) If a judgment debtor who is the only person liable for a portion of a judgment for periodic payments fails to provide funding, then the right to present value payment described in subsection (2) of this section applies only against that judgment debtor and the portion of the judgment so owed.

(4) If more than one party is liable for all or a portion of a judgment requiring funding under this part 2 and the required funding is provided by one or more but fewer than all of the parties liable, the funding requirements are satisfied and those providing funding may proceed under subsection (2) of this section to enforce rights for funding or present value payment to satisfy or protect rights of reimbursement from a party not providing funding.

**Source: L. 88:** Entire article added, p. 616, § 1, effective July 1.



**13-64-209. Assignment of periodic payments.** (1) An assignment by a judgment creditor or an agreement by such person to assign any right to receive periodic payments for future damages contained in a judgment entered under this part 2 is enforceable only as to amounts:

- (a) To secure payment of alimony, maintenance, or child support;
- (b) For the costs of products, services, or accommodations provided or to be provided by the assignee for medical or other health care; or
- (c) For attorney fees and other expenses of litigation incurred in securing the judgment.

**Source:** L. 88: Entire article added, p. 617, § 1, effective July 1.

**13-64-210. Exemption of benefits.** Except as provided in section 13-64-209, periodic payments for future damages contained in a judgment entered under this part 2 for loss of earnings are exempt from garnishment, attachment, execution, and any other process or claim to the extent that wages or earnings are exempt.

**Source:** L. 88: Entire article added, p. 617, § 1, effective July 1.

**13-64-211. Settlement agreements and consent judgments.** Nothing in this part 2 is to be construed to limit or affect the settlement of actions triable under this part 2 nor shall it apply to the settlement of actions except as otherwise agreed to by the parties. Parties to an action on a claim for personal injury may, but are not required to, file with the clerk of the court in which the action is pending or, if none is pending, with the clerk of a court of competent jurisdiction over the claim a settlement agreement for future damages payable in periodic payments. The settlement agreement may provide that one or more sections of this part 2 apply to it.

**Source:** L. 88: Entire article added, p. 617, § 1, effective July 1.

**13-64-212. Satisfaction of judgment.** Upon entry of an order by the court that the form of funding complies with section 13-64-207 and that the funding of the obligation complies with section 13-64-208, the court shall order a satisfaction of judgment and discharge of the judgment debtor.

**Source:** L. 88: Entire article added, p. 617, § 1, effective July 1.

**13-64-213. Effective date - applicability of part.** This part 2 shall take effect July 1, 1988, and shall apply to acts or omissions occurring on or after said date.

**Source:** L. 88: Entire article added, p. 617, § 1, effective July 1.

### PART 3

#### FINANCIAL LIABILITY REQUIREMENTS - LIMITATIONS

**Law reviews:** For article, "1988 Update on Colorado Tort Reform Legislation — Part I", see 17 Colo. Law. 1719 (1988); for article, "1990 Update on Colorado Tort Reform Legislation", see 19 Colo. Law. 1529 (1990).

**13-64-301. Financial responsibility.** (1) As a condition of active licensure or authority to practice in this state, every physician or dentist, and every health care institution as defined in section 13-64-202, except as provided in section 13-64-303.5, that provides health care services shall establish financial responsibility, as follows:

- (a) (I) If a dentist, by maintaining commercial professional liability insurance coverage with an insurance company authorized to do business in this state or an eligible nonadmitted

insurer allowed to insure in Colorado pursuant to article 5 of title 10, C.R.S., in a minimum indemnity amount of five hundred thousand dollars per incident and one million five hundred thousand dollars annual aggregate per year; except that this requirement is not applicable to a dentist who is a public employee under the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

(II) The board of dental examiners may, by rule, exempt from or establish lesser financial responsibility standards than those prescribed in this section for classes of dentists who:

- (A) Perform dental services as employees of the United States government;
- (B) Render limited or occasional dental services;
- (C) Perform less than full-time active dental services because of administrative or other nonclinical duties or partial or complete retirement; or
- (D) Provide uncompensated dental care to patients but do not otherwise provide any compensated dental care to patients.

(III) The board of dental examiners may exempt from or establish lesser financial responsibility standards for a dentist for reasons other than those described in subparagraph (II) of this paragraph (a) that render the limits provided in subparagraph (I) of this paragraph (a) unreasonable or unattainable.

(IV) Nothing in this paragraph (a) shall preclude or otherwise prohibit a licensed dentist from rendering appropriate patient care on an occasional basis when the circumstances surrounding the need for care so warrant.

(a.5) (I) If a physician, by maintaining commercial professional liability insurance coverage with an insurance company authorized to do business in this state or an eligible nonadmitted insurer allowed to insure in Colorado pursuant to article 5 of title 10, C.R.S., in a minimum indemnity amount of one million dollars per incident and three million dollars annual aggregate per year; except that this requirement is not applicable to a physician who is a public employee under the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

(II) The Colorado medical board may, by rule, exempt from or establish lesser financial responsibility standards than those prescribed in this paragraph (a.5) for classes of physicians who:

- (A) Perform medical services as employees of the United States government;
- (B) Render limited or occasional medical services;
- (C) Perform less than full-time active medical services because of administrative or other nonclinical duties or partial or complete retirement; or
- (D) Provide uncompensated health care to patients but do not otherwise provide any compensated health care to patients.

(III) The Colorado medical board may exempt from or establish lesser financial responsibility standards for a physician for reasons other than those described in subparagraph (II) of this paragraph (a.5) that render the limits provided in subparagraph (I) of this paragraph (a.5) unreasonable or unattainable.

(IV) Nothing in this paragraph (a.5) shall preclude or otherwise prohibit a licensed physician from rendering appropriate patient care on an occasional basis when the circumstances surrounding the need for care so warrant.

(b) If a health care institution, by maintaining, as a condition of licensure, certification, or other authority to render health care services in this state, commercial professional liability insurance coverage with an insurance company authorized to do business in this state or an eligible nonadmitted insurer allowed to insure in Colorado pursuant to article 5 of title 10, C.R.S., in a minimum indemnity amount of five hundred thousand dollars per incident and three million dollars annual aggregate per year; except that this requirement is not applicable to a certified health care institution that is a public entity under the "Colorado Governmental Immunity Act". In the event a health care institution does not have a commercial professional liability insurance policy in compliance with this paragraph (b), or the limits of professional liability insurance coverage are in excess of any self-insured retention amount, or there is a deductible other than zero dollars, the health care institution shall procure evidence that the commissioner of insurance has accepted and approved an alternative form of establishing financial responsibility in compliance with paragraph (c),



(d), or (e) of this subsection (1), in accordance with applicable rules promulgated by the division of insurance. The health care institution shall furnish evidence of alternative financial responsibility compliance to the department of public health and environment as part of the health care institution's application for an initial or renewal license, certification, or other authority.

(c) In the alternative, by maintaining a surety bond in a form acceptable to the commissioner of insurance in the amounts set forth in paragraph (a), (a.5), or (b) of this subsection (1);

(d) As an alternative, by depositing cash or cash equivalents as security with the commissioner of insurance in such applicable amounts;

(e) As an alternative, any other security acceptable to the commissioner of insurance, which may include approved plans of self-insurance.

(2) Each such physician or dentist, as a condition of receiving and maintaining an active or inactive license or other authority to provide health care services and each health care institution, as a condition of receiving and maintaining an active license, certification, or other authority to provide health care services in this state, shall furnish the appropriate authority which issues and administers such license, certification, or other authority with evidence of compliance with subsection (1) of this section. No such license, certification, or other authority shall be issued or renewed unless such evidence of compliance has been furnished.

(3) Notwithstanding the minimum amount specified in paragraph (a.5) of subsection (1) of this section, if the Colorado medical board receives two or more reports pursuant to section 13-64-303 during any twelve-month period regarding a physician, the minimum amount of financial responsibility for that physician shall be twice the amount specified in paragraph (a.5) of subsection (1) of this section. The Colorado medical board may reduce the additional amount if the physician, upon motion, presents sufficient evidence to the Colorado medical board that one or more of the reports involved an action or claim that did not represent any substantial failure to adhere to accepted professional standards of care. The board may reduce the additional amount to an amount that would be fair and conscionable.

(4) (Deleted by amendment, L. 2010, (HB 10-1260), ch. 403, p. 1963, § 33, effective July 1, 2010.)

**Source:** **L. 88:** Entire article added, p. 617, § 1, effective July 1. **L. 89:** IP(1) and (1)(b) amended, p. 762, § 1, effective July 1. **L. 90:** IP(1), (1)(a), and (2) amended, p. 816, § 5, effective May 8. **L. 91:** (1)(a) amended, p. 973, § 2, effective May 6. **L. 2010:** (1)(a) and (1)(b) amended, (HB 10-1227), ch. 130, p. 428, § 1, effective April 15; IP(1), (1)(a), (1)(c), (3), and (4) amended and (1)(a.5) added, (HB 10-1260), ch. 403, p. 1963, § 33, effective July 1; (1)(a.5)(I) amended, (HB 10-1227), ch. 130, p. 429, § 2, effective July 1. **L. 2012:** (1)(a)(I), (1)(a.5)(I), and (1)(b) amended, (HB 12-1215), ch. 104, p. 356, § 11, effective August 8.

**Editor's note:** Amendments to subsection (1)(a) by House Bill 10-1227 and House Bill 10-1260 were harmonized.

**Cross references:** For the "Colorado Governmental Immunity Act", see article 10 of title 24.

#### ANNOTATION

**Law reviews.** For article, "Physical Impairment and Disfigurement Under the Health Care Availability Act", see 28 Colo. Law. 65 (May 1999).

**13-64-302. Limitation of liability - interest on damages.** (1) (a) As used in this section:

(I) "Derivative noneconomic loss or injury" means noneconomic loss or injury to persons other than the person suffering the direct or primary loss or injury. "Derivative noneconomic loss or injury" does not include punitive or exemplary damages.

(II) (A) “Direct noneconomic loss or injury” means nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, physical impairment or disfigurement, and impairment of the quality of life. “Direct noneconomic loss or injury” does not include punitive or exemplary damages.

(B) Nothing in this section shall be construed to prohibit a recovery for economic damages, whether past or future, resulting from physical impairment or disfigurement.

(b) The total amount recoverable for all damages for a course of care for all defendants in any civil action for damages in tort brought against a health care professional, as defined in section 13-64-202, or a health care institution, as defined in section 13-64-202, or as a result of binding arbitration, whether past damages, future damages, or a combination of both, shall not exceed one million dollars, present value per patient, including any claim for derivative noneconomic loss or injury, of which not more than two hundred fifty thousand dollars, present value per patient, including any derivative claim, shall be attributable to direct or derivative noneconomic loss or injury; except that, if, upon good cause shown, the court determines that the present value of past and future economic damages would exceed such limitation and that the application of such limitation would be unfair, the court may award in excess of the limitation the present value of additional past and future economic damages only. The limitations of this section are not applicable to a health care professional who is a public employee under the “Colorado Governmental Immunity Act” and are not applicable to a certified health care institution which is a public entity under the “Colorado Governmental Immunity Act”. For purposes of this section, “present value” has the same meaning as that set forth in section 13-64-202 (7). The existence of the limitations and exceptions thereto provided in this section shall not be disclosed to a jury.

(c) Effective July 1, 2003, the damages limitation of two hundred fifty thousand dollars described in paragraph (b) of this subsection (1) shall be increased to three hundred thousand dollars, which increased amount shall apply to acts or omissions occurring on or after said date. It is the intent of the general assembly that the increase reflect an adjustment for inflation to the damages limitation.

(2) In any civil action described in subsection (1) of this section, prejudgment interest awarded pursuant to section 13-21-101 that accrues during the time period beginning on the date the action accrued and ending on the date of filing of the civil action is deemed to be a part of the damages awarded in the action for the purposes of this section and is included within each of the limitations on liability that are established pursuant to subsection (1) of this section.

**Source:** **L. 88:** Entire article added, p. 619, § 1, effective July 1. **L. 95:** Entire section amended, p. 317, § 1, effective July 1. **L. 2003:** (1) amended, p. 1788, § 4, effective July 1. **L. 2004:** (1)(a)(I), (1)(a)(II)(A), and (1)(b) amended, p. 501, § 2, effective January 1, 2005.

**Cross references:** (1) For the “Colorado Governmental Immunity Act”, see article 10 of title 24.

(2) For the legislative declaration contained in the 2004 act amending subsections (1)(a)(I), (1)(a)(II)(A), and (1)(b), see section 1 of chapter 165, Session Laws of Colorado 2004.

## ANNOTATION

**Law reviews.** For article, “Health Care Litigation in Colorado: A Survey of Recent Decisions”, see 30 Colo. Law. 91 (August 2001).

**Constitutional.** The provisions of this act and the damage limitations of this section do not violate the equal protection clause. *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993).

**Since there is no constitutional right to a civil jury trial, the Health Care Availability Act (HCAA) damage cap does not impermis-**

**sibly infringe on the right to a jury trial.** *Garhart v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004).

**The HCAA damage cap does not violate separation of powers.** The cap does not interfere with the remittur authority of the courts. The court still has the authority to reduce the award by remittur. The HCAA damage cap does not infringe on the court’s rule-making authority. Since the damage cap involves a substantive exercise of the general assembly’s power to



define and limit a cause of action, there is no infringement on court rules that relate to damages and jury awards. *Garhart v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004).

**The limitations of this section apply to any professional corporation or entity** regardless of whether the injury was caused by a licensed health care professional or an unlicensed member of the staff. *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993).

**Liability limitation can be applied to employer of licensed pharmacist who committed negligence that led to injury.** Although employer was not a licensed health care professional within the literal language of the statute, as it was neither a licensed person nor a professional corporation or professional entity comprised of licensed persons, had the licensed pharmacist who worked for employer been named as defendant, she or he would have come within the definition of a health care professional, and the liability limitation would have applied to that individual. In the context of this case, liability arose strictly from defendant's capacity as the employer of a licensed professional who committed a negligent act. Accordingly, the limitations of this section apply. *Price v. Walgreen Co.*, 322 F. Supp. 2d 1179 (D. Colo. 2004).

**Prejudgment interest is not included** in the damage cap provided in this section. *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (decided prior to 1995 amendment).

**Prejudgment interest is subject to statutory damages cap.** *Dupont v. Preston*, 9 P.3d 1193 (Colo. App. 2000), *aff'd* on other grounds, 35 P.3d 433 (Colo. 2001).

**Under § 13-21-101, prejudgment interest** must be calculated based on the amount awarded by the final judgment, regardless of the jury's determination. *Ochoa v. Vered*, 212 P.3d 963 (Colo. App. 2009).

**The HCAA creates a limited exception to the interest formula** regarding the accumulation of prefilng and prejudgment interest, which formula is created in § 13-21-101. *Ochoa v. Vered*, 212 P.3d 963 (Colo. App. 2009).

**Subsection (2) includes prefilng interest, which begins when the action has accrued and ends when the action is filed, but not prejudgment interest within the \$250,000 cap** on noneconomic damages. *Ochoa v. Vered*, 212 P.3d 963 (Colo. App. 2009).

**Noneconomic damages for physical impairment and disfigurement are not included in the definition of noneconomic loss contained in this section.** *Preston v. Dupont*, 35 P.3d 433 (Colo. 2001).

**Provisions of the act unambiguously limit recovery for noneconomic damages** against

health care professionals to \$250,000 for a course of care of one patient regardless of the number of plaintiffs or the number of defendants. *Evans v. Colo. Permanente Med. Group, P.C.*, 902 P.2d 867 (Colo. App. 1995), *aff'd*, 926 P.2d 1218 (Colo. 1996).

**Limitations of damages for all defendants are governed by this act** rather than the general damages statute because of the particular type of action, medical malpractice claims, and the particular class of defendants, health care professionals, involved. *Evans v. Colo. Permanente Med. Group, P.C.*, 902 P.2d 867 (Colo. App. 1995), *aff'd*, 926 P.2d 1218 (Colo. 1996).

**Plaintiffs were unable to establish they were treated any differently from other persons** whose cause of action accrued at the same time and, therefore, could not establish disparate treatment for an equal protection claim. *Garhart v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004).

**A damage cap should be applied to the jury award before apportionment of the award pursuant to the jury's allocation of fault.** *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004).

**No challenge for cause for juror with specific knowledge of damages caps under HCAA** notwithstanding requirement in subsection (1) that prevents disclosure of such damage limitations to the jury. Trial court did not err in rejecting defendant's challenge for cause for prospective juror with special knowledge of the caps because this is not a ground set forth in C.R.C.P. 47 (e) for dismissal of a potential juror. *Dupont v. Preston*, 9 P.3d 1193 (Colo. App. 2000), *aff'd* on other grounds, 35 P.3d 433 (Colo. 2001).

**The \$250,000 cap on noneconomic damages in this section does not limit damages for physical impairment or disfigurement in a medical malpractice case, and, therefore, it is proper for the court to instruct a jury to award a separate category of damages for physical impairment and disfigurement.** *Preston v. Dupont*, 35 P.3d 433 (Colo. 2001).

**However, damages for physical impairment and disfigurement are subject to the HCAA's one million dollar damages limitation.** *Wallbank v. Rothenberg*, 74 P.3d 413 (Colo. App. 2003).

**Applicable standard of review of a trial court determination of good cause and unfairness for purposes of the exception to the total damages cap is whether the trial court abused its discretion.** *Wallbank v. Rothenberg*, 140 P.3d 177 (Colo. App. 2006).

**Moving party bears burden of proving good cause and unfairness in order to exceed the cap on total damages.** *Wallbank v. Rothenberg*, 140 P.3d 177 (Colo. App. 2006).

**13-64-302.5. Exemplary damages - legislative declaration - limitations - distribution of damages collected.** (1) The general assembly hereby finds, determines, and declares that it is in the public interest to establish a consistent and uniformly applicable standard for the determination, amount, imposition, and distribution of exemplary monetary damages arising from civil actions and arbitration proceedings alleging professional negligence in the practice of medicine. It is the intent of the general assembly that any such exemplary damages serve the public purposes of deterring negligent acts and where appropriate provide a form of punishment that is in addition to the disciplinary and licensing sanctions available to the Colorado medical board.

(2) Notwithstanding any other provision of law to the contrary, the exemplary damages provided for in this section and authorized to be imposed upon a health care professional shall be the only such damages imposed as a result of the negligence claim.

(3) In any civil action or arbitration proceeding alleging negligence against a health care professional, exemplary damages may not be included in any initial claim for relief. A claim for such exemplary damages may be asserted by amendment to the pleadings only after the substantial completion of discovery and only after the plaintiff establishes prima facie proof of a triable issue. If the court or arbitrator allows such an amendment to the complaint under this subsection (3), it may also, in its discretion, permit additional discovery on the question of exemplary damages.

(4) In any civil action or arbitration proceeding in which compensatory damages are assessed against a health care professional, the judge or arbitrator, in his discretion, and only if it is shown at the trial or proceeding that the action complained of was attended by circumstances of fraud, malice, or willful and wanton conduct, may allow the trier of fact to impose reasonable exemplary damages, as provided in this subsection (4). The degree of proof shall be as provided in section 13-25-127 (2).

(b) The standards for awarding and the amount of exemplary damages, if imposed upon such health care professional, shall be as provided in sections 13-21-102 and 13-25-127 (2).

(5) (a) No exemplary damages shall be imposed under subsection (4) of this section which were the result of the use of any drug or product approved for use by any state or federal regulatory agency and used within the approved standards therefor, or used in accordance with standards of prudent health care professionals.

(b) No exemplary damages shall be imposed under subsection (4) of this section which were the result of the use of any drug or product subject to the provisions of paragraph (a) of this subsection (5) when the clinically justified use of such drug or product is beyond the regulatory approvals or standards therefor and is in accordance with standards of prudent health care professionals, and when such use has been agreed to pursuant to the written informed consent of the recipient.

(6) No exemplary damages shall be assessed against a health care professional as a result of the acts of others unless he specifically directed the act to be done or ratified the same.

(7) For the purposes of this section, unless the context otherwise requires, "health care professional" has the same meaning set forth in section 13-64-202 (4).

**Source:** L. 90: Entire section added, p. 883, § 1, effective July 1. L. 91: (5) amended, p. 376, § 1, effective July 1. L. 2010: (1) amended, (HB 10-1260), ch. 403, p. 1985, § 71, effective July 1.

#### ANNOTATION

**Trial court's failure to dismiss plaintiffs' claim for exemplary damages from plaintiffs' initial pleading was not reversible error** where claim was found to be sufficiently supported to allow its presentation in plaintiffs' case-in-chief. *Evans v. Colo. Permanente Medical Group, P.C.*, 902 P.2d 867 (Colo. App. 1995), *aff'd in part and rev'd in part on other grounds*, 926 P.2d 1218 (Colo. 1996).

**This section plainly limits recovery only against a health care professional or a health care institution.** Because the nonparty at fault was neither of those, the court correctly refused to reduce the noneconomic damages award to the statutory limit prior to apportioning fault. *Chavez v. Parkview Episcopal Med. Ctr.*, 32 P.3d 609 (Colo. App. 2001).

**Trial court did not err in denying plaintiff's**



**request to amend complaint to seek exemplary damages** when materials presented amounted to a prima facie showing of negligence only. *Sheron v. Lutheran Med. Ctr.*, 18 P.3d 796 (Colo. App. 2000).

**While this section allows the court, in its discretion, to permit additional discovery on**

**the question of exemplary damages**, it does not require the court to permit such discovery or to continue the trial at defendant's request. *Reigel v. SavaSeniorCare L.L.C.*, \_\_ P.3d \_\_ (Colo. App. 2011).

**13-64-303. Judgments and settlements - reported.** Any final judgment, settlement, or arbitration award against any health care professional or health care institution for medical malpractice shall be reported within fourteen days by such professional's or institution's medical malpractice insurance carrier in accordance with section 10-1-120, 10-1-121, 10-1-124, or 10-1-125, C.R.S., or by such professional or institution if there is no commercial medical malpractice insurance coverage to the licensing agency of the health care professional or health care institution for review, investigation, and, where appropriate, disciplinary or other action. Any health care professional, health care institution, or insurance carrier that knowingly fails to report as required by this section shall be subject to a civil penalty of not more than two thousand five hundred dollars. Such penalty shall be determined and collected by the district court in the city and county of Denver. All penalties collected pursuant to this section shall be transmitted to the state treasurer, who shall credit the same to the general fund.

**Source: L. 88:** Entire article added, p. 619, § 1, effective July 1. **L. 2003:** Entire section amended, p. 623, § 38, effective July 1.

**13-64-303.5. Exclusion - mental health care facilities.** The provisions of section 13-64-301 do not apply to any outpatient mental health care facility, including but not limited to a community mental health center or clinic, and to any extended care facility or hospice with sixteen or fewer inpatient beds, including but not limited to nursing homes or rehabilitation facilities. The department of public health and environment shall by rule establish financial responsibility standards which are less than those prescribed in this section for classes of health care institutions which have less risk of exposure to medical malpractice claims or for other reasons that render the limits provided in section 13-64-301 (1) (b) unreasonable or unattainable.

**Source: L. 89:** Entire section added, p. 762, § 2, effective July 1. **L. 94:** Entire section amended, p. 2730, § 346, effective July 1.

**Cross references:** For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994.

**13-64-304. Effective date - applicability of part.** This part 3 shall take effect January 1, 1989, and shall apply to acts or omissions occurring on or after said date and to licenses, certification, or other authority granted on or after said date.

**Source: L. 88:** Entire article added, p. 620, § 1, effective July 1.

## PART 4

### PROCEDURES AND EVIDENCE IN MEDICAL MALPRACTICE ACTIONS

**Law reviews:** For article, "1988 Update on Colorado Tort Reform Legislation — Part I", see 17 Colo. Law. 1719 (1988); for article, "1990 Update on Colorado Tort Reform Legislation", see 19 Colo. Law. 1529 (1990).

**13-64-401. Qualifications as expert witness in medical malpractice actions or proceedings.** No person shall be qualified to testify as an expert witness concerning issues

of negligence in any medical malpractice action or proceeding against a physician unless he not only is a licensed physician but can demonstrate by competent evidence that, as a result of training, education, knowledge, and experience in the evaluation, diagnosis, and treatment of the disease or injury which is the subject matter of the action or proceeding against the physician defendant, he was substantially familiar with applicable standards of care and practice as they relate to the act or omission which is the subject of the claim on the date of the incident. The court shall not permit an expert in one medical subspecialty to testify against a physician in another medical subspecialty unless, in addition to such a showing of substantial familiarity, there is a showing that the standards of care and practice in the two fields are similar. The limitations in this section shall not apply to expert witnesses testifying as to the degree or permanency of medical or physical impairment.

**Source:** L. 88: Entire article added, p. 620, § 1, effective July 1.

#### ANNOTATION

**Doctrine of res ipsa loquitur cannot be used to avoid the requirements of this section,** at least when there is no evidence or inference

that the defendant had any control over the instrumentality causing the injury. *Bilawsky v. Faseehudin*, 916 P.2d 586 (Colo. App. 1995).

**13-64-402. Collateral source evidence.** (1) In any action in a court or arbitration proceeding for personal injury against a health care provider for professional negligence, the plaintiff shall, within sixty days after the commencement thereof, serve written notice thereof to the third party payor or provider of any amount paid or payable as a medical benefit pursuant to any health, sickness, or accident insurance or plan, which provides health benefits, or any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services, and shall file a copy thereof with the court or arbitrator. Such service shall be made pursuant to section 10-3-107 (1) or (1.5), C.R.S., or pursuant to the Colorado rules of civil procedure.

(2) If such third party payor or provider of such benefits has a right of subrogation for such payments, it shall file with the court or arbitrator written notice of such subrogated claim, without specifying a definite amount, within ninety days after receipt of the notice required in subsection (1) of this section, and transmit a copy thereof to the party plaintiff. Failure to file such written notice shall constitute a waiver of such right of subrogation as to such action.

(3) Before entering final judgment, the court shall determine the amount, if any, due the third party payor or provider and enter its judgment in accordance with such finding.

(4) The provisions of this section shall not apply to section 25.5-4-301, C.R.S.

**Source:** L. 88: Entire article added, p. 620, § 1, effective July 1. L. 92: Entire section amended, p. 269, § 1, effective April 16. L. 2006: (4) amended, p. 2001, § 47, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Recovery of Medical Expenses by Insured Medical Malpractice Victims", see 33 Colo. Law. 113 (July 2004).

**There is no indication that the provision in this section creating a mechanism for insurers to assert their subrogation rights for medical benefits paid to a plaintiff is meant to supplant a prevailing party's right to recover**

**costs.** *Mullins v. Kessler*, 83 P.3d 1203 (Colo. App. 2003).

**Court construed the Health Care Availability Act in harmony with § 13-16-105 and C.R.C.P. 54(d) to allow a prevailing defendant to recover costs in a medical negligence action.** *Mullins v. Kessler*, 83 P.3d 1203 (Colo. App. 2003).

**13-64-403. Agreement for medical services - alternative arbitration procedures - form of agreement - right to rescind.** (1) It is the intent of the general assembly that an



arbitration agreement be a voluntary agreement between a patient and a health care provider and no medical malpractice insurer shall require a health care provider to utilize arbitration agreements as a condition of providing medical malpractice insurance to such health care provider. Making the use of arbitration agreements a condition to the provision of medical malpractice insurance shall constitute an unfair insurance practice and shall be subject to the provisions, remedies, and penalties prescribed in part 11 of article 3 of title 10, C.R.S.

(1.5) Exemplary damages may be awarded in any arbitration proceeding held pursuant to this section in accordance with section 13-21-102 (1) to (3) and (6). Any award of exemplary damages in a proceeding held pursuant to this section may be modified by the district court upon petition to the district court alleging that the award of such damages was either excessive or inadequate.

(2) Any agreement for the provision of medical services which contains a provision for binding arbitration of any dispute as to professional negligence of a health care provider that conforms to the provisions of this section shall not be deemed contrary to the public policy of this state, except as provided in subsection (10) of this section.

(3) Any such agreement shall have the following statement set forth as part of the agreement: "It is understood that any claim of medical malpractice, including any claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered or omitted, will be determined by submission to binding arbitration in accordance with the provisions of part 2 of article 22 of this title, and not by a lawsuit or resort to court process except as Colorado law provides for judicial review of arbitration proceedings. The patient has the right to seek legal counsel concerning this agreement, and has the right to rescind this agreement by written notice to the physician within ninety days after the agreement has been signed and executed by both parties unless said agreement was signed in contemplation of the patient being hospitalized, in which case the agreement may be rescinded by written notice to the physician within ninety days after release or discharge from the hospital or other health care institution. Both parties to this agreement, by entering into it, have agreed to the use of binding arbitration in lieu of having any such dispute decided in a court of law before a jury."

(4) Immediately preceding the signature lines for such an agreement, the following notice shall be printed in at least ten-point, bold-faced type:

**NOTE: BY SIGNING THIS AGREEMENT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL BINDING ARBITRATION RATHER THAN BY A JURY OR COURT TRIAL.**

**YOU HAVE THE RIGHT TO SEEK LEGAL COUNSEL AND YOU HAVE THE RIGHT TO RESCIND THIS AGREEMENT WITHIN NINETY DAYS FROM THE DATE OF SIGNATURE BY BOTH PARTIES UNLESS THE AGREEMENT WAS SIGNED IN CONTEMPLATION OF HOSPITALIZATION IN WHICH CASE YOU HAVE NINETY DAYS AFTER DISCHARGE OR RELEASE FROM THE HOSPITAL TO RESCIND THE AGREEMENT.**

**NO HEALTH CARE PROVIDER SHALL WITHHOLD THE PROVISION OF EMERGENCY MEDICAL SERVICES TO ANY PERSON BECAUSE OF THAT PERSON'S FAILURE OR REFUSAL TO SIGN AN AGREEMENT CONTAINING A PROVISION FOR BINDING ARBITRATION OF ANY DISPUTE ARISING AS TO PROFESSIONAL NEGLIGENCE OF THE PROVIDER.**

**NO HEALTH CARE PROVIDER SHALL REFUSE TO PROVIDE MEDICAL CARE SERVICES TO ANY PATIENT SOLELY BECAUSE SUCH PATIENT REFUSED TO SIGN SUCH AN AGREEMENT OR EXERCISED THE NINETY-DAY RIGHT OF RESCISSION.**

(5) Once signed, the agreement shall govern all subsequent provision of medical services for which the agreement was signed until or unless rescinded by written notice.

Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor. Where the agreement is one for medical services to a minor, it shall not be subject to disaffirmation by the minor if signed by the minor's parent or legal guardian.

(6) The patient shall be provided with a written copy of any agreement subject to the provisions of this section at the time that it is signed by the parties.

(7) No health care provider shall refuse to provide medical care services to any patient solely because such patient refused to sign such an agreement or exercised the ninety-day right of rescission.

(8) No health care provider shall withhold the provision of emergency medical services to any person because of that person's failure or refusal to sign an agreement containing a provision for binding arbitration of any dispute arising as to professional negligence of the provider.

(9) If a health care provider refuses to provide medical care services to any patient in violation of subsection (7) of this section or withholds the provision of emergency medical services to any person in violation of subsection (8) of this section or fails to comply with the requirements of subsection (3) or (4) or both of this section, such refusal or withholding of services shall constitute unprofessional conduct as such term is used under the relevant licensing statute governing that particular care provider, and the appropriate authority which conducts disciplinary proceedings relating to such health care provider shall consider and take appropriate disciplinary action against such health care provider as provided under the relevant licensing statute.

(10) Even where it complies with the provisions of this section, such an agreement may nevertheless be declared invalid by a court if it is shown by clear and convincing evidence that:

(a) The agreement failed to meet the standards for such agreements as specified in this section; or

(b) The execution of the agreement was induced by fraud; or

(c) The patient executed the agreement as a direct result of the willful or negligent disregard of the patient's right to refrain from such execution; or

(d) The patient executing the agreement was not able to communicate effectively in spoken and written English, unless the agreement is written in his native language.

(11) No such agreement may be submitted to a patient for approval when the patient's condition prevents the patient from making a rational decision whether or not to execute such an agreement.

(12) For the purposes of this section:

(a) (I) "Health care provider" means any person licensed or certified by the state of Colorado to deliver health care and any clinic, health dispensary, or health facility licensed by the state of Colorado. The term includes any professional corporation or other professional entity comprised of such health care providers as permitted by the laws of this state.

(II) (A) Nothing in this paragraph (a) shall be construed to permit a professional service corporation, as described in section 12-36-134, C.R.S., to practice medicine.

(B) Nothing in this paragraph (a) shall be construed to otherwise create an exception to the corporate practice of medicine doctrine.

(b) "Professional negligence" means a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of personal injury or wrongful death, as long as such services are within the scope of services for which the provider is licensed.

**Source:** L. 88: Entire article added, p. 620, § 1, effective July 1. L. 89: (1.5) added, p. 763, § 3, effective July 1. L. 95: (1.5) amended, p. 16, § 7, effective March 9. L. 2003: (12)(a) amended, p. 1600, § 5, effective July 1. L. 2004: (3) amended, p. 1731, § 2, effective August 4.

**Cross references:** For the legislative declaration contained in the 2003 act amending subsection (12)(a), see section 1 of chapter 240, Session Laws of Colorado 2003.



## ANNOTATION

**Law reviews.** For article, "Arbitration of Medical Malpractice Disputes", see 18 Colo. Law. 897 (1989). For article, "Mandatory Arbitration and the Medical Malpractice Plaintiff", see 27 Colo. Law. 77 (May 1998).

**When an arbitration provision does not comply with subsections (3) and (4), these subsections govern the arbitration provision and are not preempted by the Federal Arbitration Act.** Although the arbitration provision in the HMO contract does extend to wrongful death actions filed by a member's non-party spouse, the respondent is not bound by the arbitration provision because it does not comply with subsections (3) and (4). The Colorado Health Care Availability Act governs the arbitration provision because the McCarran-Ferguson Act exempts this provision from federal preemption by the Federal Arbitration Act. *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003) (disagreeing with the reasoning of the federal district court in *Morrison v. Colo. Permanente Med. Group*, annotated below).

**Subsections (3) and (4) are inconsonant with, and therefore preempted by, the Federal Arbitration Act.** The Colorado Uniform Arbitration Act, § 13-22-210 et seq., places no text or form limitations on arbitration agreements. Thus, the effect of the provisions in subsection (3) and (4) is to place arbitration clauses in medical services agreements in a class apart not only from any contract but also from all other arbitration agreements. By doing so, the Health Care Availability Act singularly limits their validity. *Morrison v. Colo. Permanente Med. Group*, 983 F. Supp. 937 (D. Colo. 1997).

**If dispute resolution procedures include arbitration of professional negligence claims against health care providers who provide med-**

ical services, the patient must be notified of this fact in a manner consistent with the Health Care Availability Act requirements. *Evans v. Colo. Permanente Med. Group, P.C.*, 902 P.2d 867 (Colo. App. 1995), *aff'd*, 926 P.2d 1218 (Colo. 1996).

**Fact that agreement to arbitrate was obtained by a health maintenance organization on behalf of a doctor and nurses does not create a conflict with the Colorado Health Maintenance Organization Act; the Health Care Availability Act applies to any agreement for the provision of medical services by a health care provider.** *Evans v. Colo. Permanente Med. Group, P.C.*, 902 P.2d 867 (Colo. App. 1995), *aff'd*, 926 P.2d 1218 (Colo. 1996).

**A doctor, nurses, and a professional entity comprised of physicians are each a "health care provider" within the meaning of subsection (12).** *Evans v. Colo. Permanente Med. Group, P.C.*, 902 P.2d 867 (Colo. App. 1995), *aff'd in part and rev'd in part on other grounds*, 926 P.2d 1218 (Colo. 1996).

**Providing a copy of the agreement to the attorney-in-fact who signed the agreement on behalf of the patient satisfies subsection (6)'s requirement that the patient receive a copy of the agreement.** *Moffett v. Life Care Ctrs. of Am.*, 187 P.3d 1140 (Colo. App. 2008), *aff'd on other grounds*, 219 P.3d 1068 (Colo. 2009).

**A person who holds a medical durable power of attorney, in selecting a long-term health care facility, has the power to execute applicable admissions forms, including arbitration agreements, unless that power is restricted by the principal.** Subsection (11) may not be construed in isolation from statutes governing powers of attorney. *Moffett v. Life Care Ctrs. of Am.*, 187 P.3d 1140 (Colo. App. 2008), *aff'd*, 219 P.3d 1068 (Colo. 2009).

**13-64-404. Effective date - applicability of part.** This part 4 shall take effect July 1, 1988, and shall apply to acts or omissions occurring on or after said date and shall apply to agreements for medical services containing a binding arbitration provision on or after said date.

**Source: L. 88:** Entire article added, p. 623, § 1, effective July 1.

## PART 5

### LIMITATION ON ACTIONS BROUGHT

**Law reviews:** For article, "1988 Update on Colorado Tort Reform Legislation — Part I", see 17 Colo. Law. 1719 (1988); for article, "1990 Update on Colorado Tort Reform Legislation", see 19 Colo. Law. 1529 (1990).

**13-64-501. Definitions.** As used in this part 5, unless the context otherwise requires:

(1) "Health care institution" means any licensed or certified hospital, health care facility, dispensary, or other institution for the treatment or care of the sick or injured.

(2) "Health care professional" means any person licensed in this state or any other state to practice medicine, chiropractic, or nursing.

**Source:** L. 88: Entire article added, p. 623, § 1, effective July 1.

**13-64-502. Limitation on actions.** (1) No claimant, including an infant or his personal representative, parents, or next of kin, may recover for any damage or injury arising from genetic counseling and screening and prenatal care, or arising from or during the course of labor, delivery, or the period of postnatal care in a health care institution, where such damage or injury was the result of genetic disease or disorder or other natural causes, unless the claimant can establish by a preponderance of the evidence that the damage or injury could have been prevented or avoided by ordinary standard of care of the physician or other health care professional or health care institution.

(2) (a) Medical records of or any other medical information concerning a person whose alleged death or injury is the subject matter of a civil action under subsection (1) of this section shall be discoverable by a party defendant under the provisions of the Colorado rules of civil procedure and shall not be inadmissible in evidence because of the provisions of section 13-90-107 (1) (d).

(b) Medical records and information concerning such person's genetic siblings, parents, and grandparents may be discoverable as provided in paragraph (a) of this subsection (2) if the defendant, after reasonable efforts, is unable to obtain appropriate releases and makes a showing to the court of the possible relevancy of such records or information. In such case, the court may order the production of such records. If deemed necessary, the court may hold an in camera proceeding on the relevancy of such records. No liability shall attach to any physician, health care professional, or health care institution as a result of the release of such medical records or information.

**Source:** L. 88: Entire article added, p. 623, § 1, effective July 1. L. 89: Entire section R&RE, p. 763, § 4, effective July 1.

**13-64-503. Effective date - applicability of part.** This part 5 shall take effect July 1, 1988, and shall apply to acts or omissions occurring on or after said date.

**Source:** L. 88: Entire article added, p. 623, § 1, effective July 1.

## **JURIES AND JURORS**

### **ARTICLE 70**

#### **Juries and Jurors - General Provisions and Fees**

#### **13-70-101 to 13-70-106. (Repealed)**

**Source:** L. 89: Entire article repealed, p. 776, § 9, effective January 1, 1990.

**Editor's note:** This article was numbered as article 7 of chapter 78 in C.R.S. 1963. For amendments to this article prior to its repeal in 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

### **ARTICLE 71**

#### **Colorado Uniform Jury Selection and Service Act**

**Editor's note:** This article was numbered as articles 1 to 5 of chapter 78, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1989, resulting in the addition,



relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1989, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated.

**Cross references:** For jury trials, see C.R.C.P. 38, 39, and 47 to 51.1 and Crim. P. 23, 24, and 31.

13-71-101.	Short title.		jurors during first three days of service.
13-71-102.	Definitions.		
13-71-103.	Number of trial jurors.	13-71-127.	Financial hardship of employer or self-employed juror.
13-71-104.	Eligibility for juror service - prohibition of discrimination.	13-71-128.	Reimbursement of unemployed jurors during first three days of service.
13-71-105.	Qualifications for juror service.	13-71-129.	Compensation of jurors after first three days of service.
13-71-106.	Jury commissioners.	13-71-129.5.	Public transportation for jurors.
13-71-107.	Master juror list.	13-71-130.	Limitations on juror compensation.
13-71-108.	Master juror wheel.	13-71-131.	Special awards of compensation and reimbursement.
13-71-109.	Random selection from master juror list.	13-71-132.	Juror service acknowledgment information - requests - payment.
13-71-110.	Juror selection and summoning.	13-71-133.	Enforcement of employer's duty to compensate jurors.
13-71-111.	Contents of juror summons.	13-71-134.	Penalties and enforcement remedies for harassment by employer.
13-71-112.	Emergency summonses.	13-71-135.	Juror orientation program.
13-71-113.	Modification of juror service.	13-71-136.	Availability of juror list.
13-71-114.	Cancellation of juror service.	13-71-137.	Duties and responsibilities of interpreters for jurors who are deaf or hard of hearing.
13-71-115.	Juror questionnaires.	13-71-138.	Preservation of juror records.
13-71-116.	Trial juror's right to one postponement.	13-71-139.	Challenge of juror pool.
13-71-116.5.	Postponement related to co-employee jury service.	13-71-140.	Irregularity in selecting, summoning, and managing jurors.
13-71-117.	Assignment of courthouse location.	13-71-141.	Authority to contract and accept gifts.
13-71-118.	Telephone notice.	13-71-142.	Alternate jurors.
13-71-119.	Deferments and excuses - limitations.	13-71-143.	Grand jurors - vacancies.
13-71-119.5.	Persons entitled to be excused from jury service.	13-71-144.	Jury fees to be assessed in civil cases - repeal.
13-71-120.	Length of juror service.	13-71-145.	Expense of meals and provisions to be taxed.
13-71-121.	Extended trials.		
13-71-122.	Failure to appear - delinquency notice.		
13-71-123.	Enforcement of juror duties.		
13-71-124.	Delegation of authority to jury commissioner.		
13-71-125.	Compensation and reimbursement.		
13-71-126.	Compensation of employed		

**13-71-101. Short title.** This article shall be known and may be cited as the "Colorado Uniform Jury Selection and Service Act".

**Source:** L. 89: Entire article R&RE, p. 765, § 1, effective January 1, 1990.

**Editor's note:** This section is similar to former § 13-71-101 as it existed prior to 1989.

#### ANNOTATION

**Applied in** *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (1978).

**13-71-102. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Clerk" and "clerk of the court" include any deputy clerk or the jury commissioner.
- (2) "Court" means a district or county court of this state and includes any judge of the court.

(2.5) "Juror service" means the period of time during which a person is committed to serving upon a jury, from the time the person reports and checks in on his or her designated reporting date through and until he or she is released by the court or by the jury commissioner. "Juror service" includes any time that a person spends in the jury selection process and any time that a person spends in a trial.

(3) "Juror wheel" means any electronic automated system for the storage of the names or identifying numbers of prospective jurors.

(4) "Master juror list" means the voter registration lists for the county, which shall be supplemented with names from other sources prescribed pursuant to section 13-71-107 in order to foster the policy and protect the rights secured by this article.

(5) "Master juror wheel" means the juror wheel in which are placed names or identifying numbers of prospective jurors taken from the master list.

(6) "Voter registration lists" means the official records of persons registered to vote in the most recent general election.

**Source:** L. 89: Entire article R&RE, p. 765, § 1, effective January 1, 1990. L. 2011: (2.5) added, (HB 11-1153), ch. 70, p. 189, § 1, effective August 10.

**Editor's note:** This section is similar to former § 13-71-104 as it existed prior to 1989.

**13-71-103. Number of trial jurors.** A jury in civil cases shall consist of six persons, unless the parties agree to a smaller number, which shall be not less than three.

**Source:** L. 89: Entire article R&RE, p. 766, § 1, effective January 1, 1990.

**Editor's note:** This section is similar to former § 13-70-102 as it existed prior to 1989.

**13-71-104. Eligibility for juror service - prohibition of discrimination.** (1) Juror service is a duty that every qualified person has an obligation to perform when selected.

(2) All trial and grand jurors shall be selected at random from a fair cross section of the population of the area served by the court. All selected and summoned jurors shall serve, except as otherwise provided in this article or by court rule.

(3) (a) No person shall be exempted or excluded from serving as a trial or grand juror because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, economic status, or occupation.

(b) A person with a disability shall serve except:

(I) As otherwise provided in section 13-71-105 or 13-71-119.5; or

(II) Where the court finds that such person's disability prevents the person from performing the duties and responsibilities of a juror.

(c) Before dismissing a person with a disability pursuant to paragraph (b) of this subsection (3), the court shall interview the person to determine the reasonable accommodations, if any, consistent with federal and state law, that the court may make available to permit the person to perform the duties of a juror.

(4) The court shall strictly enforce the provisions of this article; except that the supreme court may provide by rule for the exclusion in a criminal trial of a juror who is employed by a public law enforcement agency or public defender's office.

**Source:** L. 89: Entire article R&RE, p. 766, § 1, effective January 1, 1990. L. 96: Entire section amended, p. 737, § 8, effective July 1. L. 98: Entire section amended, p. 304, §1, effective April 17; entire section amended, p. 464, § 1, effective January 1, 1999. L. 2000: (2) amended, p. 32, § 1, effective August 2. L. 2004: (1) and (3) amended, p. 276, § 1, effective August 4. L. 2008: (3)(a) amended, p. 1600, § 20, effective May 29.



**Editor's note:** (1) This section is similar to former § 13-71-103 as it existed prior to 1989.

(2) Amendments to this section by Senate Bill 98-136 and Senate Bill 98-066 were harmonized.

**Cross references:** For the legislative declaration contained in the 2008 act amending subsection (3)(a), see section 1 of chapter 341, Session Laws of Colorado 2008.

## ANNOTATION

**Annotator's note.** Since § 13-71-104 is similar to § 13-71-103 as it existed prior to the 1989 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Trial court has discretion** concerning a prospective juror's ability to render satisfactory jury service when questions of the juror's ability to serve are raised because of a physical disability, and absent an abuse of discretion, the trial court's decision will not be disturbed on appeal. *State v. Janes*, 942 P.2d 1331 (Colo. App. 1997); *People v. Coughlin*, \_\_ P.3d \_\_ (Colo. App. 2011).

**Although the better practice is for the trial court to interview the prospective juror and enter findings pursuant to this section**, trial court did not abuse its discretion by excusing the prospective juror for cause without entering such findings when juror had reported an attention deficit disorder and potential difficulty understanding testimony without taking notes. In light of the trial court's ban on note taking, the court properly determined that the potential juror's condition prevented her from performing the duties and responsibilities of a juror as required under this section. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

**Elements of fair cross-section requirement.** To establish a prima facie violation of the fair cross-section requirement, defendant must show that: (1) The group alleged to be excluded is a distinct group in the community; (2) the representation of this group in venires is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *State v. Janes*, 942 P.2d 1331 (Colo. App. 1997).

**Defendant had no standing** to assert rights of excluded juror under federal Americans with Disabilities Act where juror herself had asked to be excused due to physical disability. *State v. Janes*, 942 P.2d 1331 (Colo. App. 1997).

**Defendant failed to prove racial discrimination despite fact that no persons with Span-**

**ish surnames were on grand jury.** Prosecution succeeded in offering race-neutral explanation for jury selection process. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993), *aff'd*, 900 P.2d 45 (Colo. 1995).

**Prosecution's failure to voir dire juror and use of peremptory challenge to exclude juror from service can demonstrate intent to discriminate because of race.** The use of peremptory challenges to exclude jurors because of race violates the equal protection clause. To establish discriminatory use of peremptory challenges, the defendant must make a prima facie showing the challenges were used to discriminate against a juror because of race. The party using the peremptory challenge must have a non-racial reason for using the challenge. However, failure to voir dire can demonstrate intent to exclude jurors on the basis of race. Applying non-racial criteria for peremptory challenge differently to different jurors can also indicate a peremptory challenge used to discriminate because of race. *People v. Gabler*, 958 P.2d 505 (Colo. App. 1997).

**The state's actions were inherently discriminatory in excluding an economic class from the opportunity to participate in grand jury service based on generalized assumptions concerning hourly wage earners.** Although the state's actions were discriminatory and violated the requirements of this section, they did not prejudice the defendants who, following indictment by the grand jury, were afforded full procedural protections in their trials before petit juries. *Cerrone v. People*, 900 P.2d 45 (Colo. 1995).

**Statute does not "eliminate" § 16-10-103.** This statute was enacted after the passage of § 16-10-103 and general assembly is assumed to have been aware of that statute at that time, both statutes should be read together so as to give effect to each, particular statutes prevail over general and statutory repeal by implication is not favored, and § 16-10-103 applies only in criminal trials while this statute applies generally to all jury trials. *People v. Veloz*, 946 P.2d 525 (Colo. App. 1997).

**13-71-105. Qualifications for juror service.** (1) Any person who is a United States citizen and resides in a county or lives in such county more than fifty percent of the time, whether or not registered to vote, shall be qualified to serve as a trial or grand juror in such county. Citizenship and residency status on the date that the jury service is to be performed shall control.

(2) A prospective trial or grand juror shall be disqualified, based on the following grounds:

(a) Being under the age of eighteen;

(b) Inability to read, speak, and understand the English language;

(c) Inability, by reason of a physical or mental disability, to render satisfactory juror service. Any person claiming this disqualification shall submit a letter, if the jury commissioner requests it, from a licensed physician, licensed advanced practice nurse, or authorized Christian science practitioner, stating the nature of the disability and an opinion that such disability prevents the person from rendering satisfactory juror service. The physician, licensed advanced practice nurse, or authorized Christian science practitioner shall apply the following guideline: A person shall be capable of rendering satisfactory juror service if the person is able to perform a sedentary job requiring close attention for three consecutive business days for six hours per day, with short breaks in the morning and afternoon sessions.

(d) Sole responsibility for the daily care of a permanently disabled person living in the same household to the extent that the performance of juror service would cause a substantial risk of injury to the health of the disabled person. Jurors who are regularly employed at a location other than their households may not be disqualified for this reason. Any person claiming this disqualification shall, if the jury commissioner requests it, submit a letter from a licensed physician, licensed advanced practice nurse, or authorized Christian science practitioner stating the name, address, and age of the disabled person, the nature of care provided by the prospective juror, and an opinion that the performance of juror service would cause a substantial risk of injury to the disabled person.

(e) Residence outside of the county with no intention of returning to the county at any time during the succeeding twelve months;

(f) Selection and service as an impaneled trial or grand juror in any municipal, tribal, military, state, or federal court within the preceding twelve months or being scheduled for juror service within the next twelve months. Any person claiming this disqualification must submit a letter or other formal acknowledgment from the appropriate authority verifying his or her prior or pending juror service.

(g) Appearance as a prospective juror in state court in accordance with the provisions of section 13-71-120 within the current calendar year. Any person claiming this disqualification shall submit a letter or other formal acknowledgment from the appropriate authority verifying such prior juror appearance. This exemption, however, does not apply in emergency circumstances as provided for in section 13-71-112.

(h) (Deleted by amendment, L. 2000, p. 32, § 2, effective August 2, 2000.)

(3) A prospective grand juror shall be disqualified if he or she has previously been convicted of a felony in this state, any other state, the United States, or any territory under the jurisdiction of the United States.

**Source:** L. 89: Entire article R&RE, p. 766, § 1, effective January 1, 1990. L. 98: (2)(g) and (2)(h) added, p. 464, § 2, effective January 1, 1999. L. 2000: (2)(f), (2)(g), and (2)(h) amended, p. 32, § 2, effective August 2. L. 2002: (3) added, p. 761, § 12, effective July 1. L. 2004: (2)(f) amended, p. 277, § 2, effective August 4. L. 2008: (2)(c) and (2)(d) amended, p. 124, § 4, effective January 1, 2009. L. 2011: (2)(f) and (2)(g) amended, (HB 11-1153), ch. 70, p. 189, § 2, effective August 10.

**Editor's note:** This section is similar to former § 13-71-109 as it existed prior to 1989.

#### ANNOTATION

The U.S. Constitution does not forbid states to prescribe relevant qualifications for their jurors. The states remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intel-

ligence, sound judgment, and fair character. *People v. Lee*, 93 P.3d 544 (Colo. App. 2003).

The fourteenth amendment of the federal constitution and the equal protection clause do not apply to preemptory challenges to persons with disabilities. The fourteenth



amendment of the federal constitution and the equal protection clause prohibit the use of peremptory challenges to discriminate against potential jurors based on race or gender. However, excluding jurors on the basis of a physical disability, even if it is assumed such physical disability is within the meaning of the Americans with Disabilities Act, is not prohibited. *Donelson v. Fritz*, 70 P.3d 539 (Colo. App. 2002).

**Section applicable to municipal courts of record.** The statutory disqualifications for jury service in this section should be applied since there are no other references in the statutes to jury qualifications or disqualifications. *City of Aurora v. Rhodes*, 689 P.2d 603 (Colo. 1984).

With respect to the requirement that the juror be a "resident of the county", a juror summoned to a municipal court qualifies as long as he resides in that part of the county located within the territorial limits of the municipality. *City of Aurora v. Rhodes*, 689 P.2d 603 (Colo. 1984).

**Trial court has discretion** concerning a prospective juror's ability to render satisfactory jury service when questions of the juror's ability to serve are raised because of a physical disability, and absent an abuse of discretion, the trial court's decision will not be disturbed on appeal. *State v. Janes*, 942 P.2d 1331 (Colo. App. 1997).

**Failure of juror to meet qualification is not absolute prohibition.** The failure of a prospective juror to meet a qualification for jury service operates as a basis of a challenge for cause rather than as an absolute prohibition to service. Accordingly, that challenge is waived if counsel does not use reasonable diligence on voir dire to determine if a challenge for cause exists. *People v. Crespin*, 635 P.2d 918 (Colo. App. 1981).

Failure of prospective juror to meet a qualification for jury service operates as a basis of a challenge for cause rather than as an absolute prohibition to service. *People v. Orozco*, 49 P.3d 1212 (Colo. App. 2002).

**Inability to understand English grounds for disqualification.** If a juror is, in fact, unable to read, speak, and understand the English language, then she will be disqualified by this section. However, whether the juror was so impaired is a fact question for the trial court. *People v. Rodriguez*, 638 P.2d 802 (Colo. App. 1981); *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001); *People v. Lee*, 93 P.3d 544 (Colo. App. 2003).

**Findings on juror's ability to understand English binding on appeal.** Where the trial court finds that a juror is able to understand, speak and read the English language adequately and where such findings are not refuted in the record, they are binding on appeal. *People v. Rodriguez*, 638 P.2d 802 (Colo. App. 1981); *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001).

**Trial court abused its discretion by requiring a qualification to be satisfied by reliance upon the abilities of other jurors.** Requiring one juror to depend on other jurors in order to understand the proceedings diminishes the role of the dependent juror and undermines the defendant's right to have the charges decided by 12 independent jurors. *People v. Orozco*, 49 P.3d 1212 (Colo. App. 2002).

**Presumptions regarding judge's findings.** Where there is sufficient evidence to support the trial judge's findings as to the English language skills of a juror without regard to the judge's personal knowledge of the juror, it is presumed that the trial judge disregarded any incompetent evidence in making his determination. *People v. Rodriguez*, 638 P.2d 802 (Colo. App. 1981).

**Tests for competency set forth in this section operate as basis for challenging juror for cause.** *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973).

**Defendant waives objection to juror when he has knowledge but does not challenge.** Where defense counsel does not on voir dire ask questions dealing with previous criminal record of jurors and defendant possesses information of juror's felony record before jury renders verdict, but does not move for new trial until after guilty verdict, defendant waives objections to competency of juror. *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973).

Knowing that a juror was in the Air Force, counsel should, at the very least, have taken the opportunity on voir dire to inquire further into why he considered himself a resident. His failure to exercise this opportunity constitutes a waiver of the residency requirement. *People v. Crespin*, 635 P.2d 918 (Colo. App. 1981).

**Statute no longer disqualifies convicted felons** whose voting rights have not been restored from serving on a jury. *People v. Ellis*, 148 P.3d 205 (Colo. App. 2006).

**Defendant had no standing to assert rights of excluded juror** under federal Americans with Disabilities Act where juror herself had asked to be excused due to physical disability. *State v. Janes*, 942 P.2d 1331 (Colo. App. 1997).

**Juror opposed to capital punishment may be excluded.** It is not error to exclude from the jury those persons who state that they would not be able to consider and impose the death penalty under any circumstances because of religious, ethical, or moral scruples against the death penalty. *People v. Craig*, 179 Colo. 115, 498 P.2d 942, cert. denied, 409 U.S. 1077, 93 S. Ct. 690, 34 L. Ed.2d 666 (1972).

**Juror's religious reservation on judging another cannot be a ground for challenge** under C.R.C.P. 47(e)(1). *Action Realty v. Brethouwer*, 633 P.2d 522 (Colo. App. 1981).

**A person is domiciled in a given county if the home or place in which his or her habitation is fixed and to which he or she has the**

**present intention of returning after a departure or absence is situated there, regardless of the duration of the absence.** *People v. White*, 242 P.3d 1121 (Colo. 2010).

**Juror was qualified under this section to serve as a trial juror** since juror had lived in the county more than fifty percent of the time for the

preceding four years, although juror paid Ohio income tax and voted in Ohio, juror had lived in the county for four and one-half years, had his car registered in Colorado, was employed by the United States Air Force, and was awaiting relocation at the time of his jury service. *People v. Williams*, 827 P.2d 612 (Colo. App. 1992).

**13-71-106. Jury commissioners.** The chief judge of each judicial district shall appoint a jury commissioner for each county within that judicial district. Each jury commissioner shall be compensated as determined by the supreme court pursuant to section 13-3-105, but no court employee who serves as a jury commissioner shall receive any compensation in addition to a regular salary.

**Source:** L. 89: Entire article R&RE, p. 767, § 1, effective January 1, 1990.

**Editor's note:** This section is similar to former § 13-71-105 as it existed prior to 1989.

**13-71-107. Master juror list.** (1) Each year, the state court administrator shall obtain from the secretary of state a voter registration list for each county in the state. The state court administrator shall also obtain licensed driver lists from the department of revenue, and, where available, the department of revenue shall match said drivers license records with the most recent address of the individual used for income tax purposes and supply any additional income tax address to the court administrator. The state court administrator may obtain other lists of residents of the state as necessary and desirable. The voter registration lists, as supplemented and modified by other lists, may be used to compile the master juror list for the following year. A copy of the master juror list that does not contain addresses of the jurors shall be open to the public for examination as a public record.

(2) Any person who has custody, possession, or control of any list to be used in compiling the master juror list shall furnish, upon request, a copy of that list to the state court administrator.

**Source:** L. 89: Entire article R&RE, p. 767, § 1, effective January 1, 1990. L. 98: (1) amended, p. 465, § 3, effective January 1, 1999. L. 2002: (1) amended, p. 986, § 1, effective June 1.

**Editor's note:** This section is similar to former § 13-71-106 as it existed prior to 1989.

#### ANNOTATION

**Use of voter registration lists as sole source of names for jury duty is constitutionally permissible.** *Craig v. Wyse*, 373 F. Supp. 1008 (D. Colo. 1974).

**Unless use of voter registration lists results in systematic exclusion of cognizable group or class of qualified citizens**, in which case they are not constitutionally permissible as sole source of names for jury duty. *Craig v. Wyse*, 373 F. Supp. 1008 (D. Colo. 1974).

**Persons constitutionally excluded from jury selection process.** Persons under the age of 21, who had not lived in Colorado for one year, who had not lived in their precinct for at least 32 days, and who had not registered to vote or had not voted in the last election, can be excluded from the jury selection process without rendering the process unconstitutional. *Craig v. Wyse*, 373 F. Supp. 1008 (D. Colo. 1974).

**13-71-108. Master juror wheel.** (1) The state court administrator shall use an electronic automated system to compile and maintain a master juror wheel. The wheel shall consist of names, addresses, dates of birth, identifying numbers, and jury histories for prospective jurors taken from the master juror list. Each year, the master juror wheel shall be emptied and refilled in compliance with the provisions of this article. Jurors receiving cancellations or postponements of juror appearance and service may be replaced on the master juror wheel for the succeeding year and shall receive new summonses for their new



dates in the succeeding year.

(2) In order to more equitably distribute the responsibility for juror appearance and service throughout the qualified population of each county and to avoid repeatedly summoning the same individuals for jury appearance and service, the state court administrator shall implement reasonable procedures to match prior year records of juror selection, appearance, and service in the state courts with the prospective juror names included in the master juror wheel. To the extent practical, the prior juror selection and service records shall be used to prioritize the juror names in the master juror wheel. To the extent practical, individuals with the least amount of jury appearances or service in the most recent years shall be summoned prior to individuals who have appeared or served more recently.

**Source:** L. 89: Entire article R&RE, p. 767, § 1, effective January 1, 1990. L. 98: Entire section amended, p. 465, § 4, effective January 1, 1999. L. 2000: Entire section amended, p. 33, § 3, effective August 2.

**Editor's note:** This section is similar to former § 13-71-107 as it existed prior to 1989.

**13-71-109. Random selection from master juror list.** If all prospective jurors on the master juror list are not needed, selection of the names or identifying numbers of prospective jurors to be placed on the master juror wheel shall be by a random selection method which ensures equal probability of selection.

**Source:** L. 89: Entire article R&RE, p. 767, § 1, effective January 1, 1990.

**Editor's note:** This section is similar to former § 13-71-108 as it existed prior to 1989.

**13-71-110. Juror selection and summoning.** A jury commissioner shall specify the number of trial jurors needed for each day's juror pool or for selection of a grand jury within that commissioner's county. The state court administrator shall then randomly select the specified number of jurors required from the master juror wheel and shall issue a summons to each selected prospective juror, either personally or by mail addressed to the usual residence or post-office address of the prospective juror.

**Source:** L. 89: Entire article R&RE, p. 767, § 1, effective January 1, 1990.

**Editor's note:** This section is similar to former § 13-71-110 as it existed prior to 1989.

**13-71-111. Contents of juror summons.** (1) The juror summons shall state: Whether the anticipated service is that of a trial or grand juror; the beginning date of the juror service; the name, address, hour, and room number, if any, of the courthouse or office to which the juror shall report on the first day of service; the fact that a knowing failure to obey the summons without justifiable excuse is a violation of section 18-8-612, C.R.S., and a class 3 misdemeanor punishable as provided in section 18-1.3-501, C.R.S.; and such other information and instructions as are deemed appropriate by the state court administrator or the jury commissioner.

(2) Every prospective juror shall also receive with the summons:

(a) Notice of the qualifications for juror service; and

(b) Instructions to jurors for retrieving juror service acknowledgment information, as described in section 13-71-132.

**Source:** L. 89: Entire article R&RE, p. 768, § 1, effective January 1, 1990. L. 2002: Entire section amended, p. 1488, § 124, effective October 1. L. 2004: Entire section amended, p. 277, § 3, effective August 4. L. 2011: Entire section amended, (HB 11-1153), ch. 70, p. 190, § 3, effective August 10.

**Editor's note:** This section is similar to former § 13-71-110 (3) as it existed prior to 1989.

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**13-71-112. Emergency summonses.** In order to meet emergency needs of the court, the state court administrator or a jury commissioner, by any means of notice including notice by telephone, may summon additional trial or grand jurors to appear for juror service at a time certain and shall inform the juror at which courthouse to appear.

**Source: L. 89:** Entire article R&RE, p. 768, § 1, effective January 1, 1990.

**Editor's note:** This section is similar to former § 13-71-110 (4) as it existed prior to 1989.

**13-71-113. Modification of juror service.** In order to meet the urgent needs of the court, a jury commissioner may modify the date, location, or other condition of trial or grand juror service and may notify the prospective juror of the modification by telephone or other appropriate means.

**Source: L. 89:** Entire article R&RE, p. 768, § 1, effective January 1, 1990.

**13-71-114. Cancellation of juror service.** Whenever it appears that the number of jurors scheduled to appear is in excess of the number needed, a jury commissioner may cancel the trial or grand juror service of a prospective juror and may notify the juror by telephone or other appropriate means. Any juror whose service has been cancelled is not considered disqualified under section 13-71-105 (2) (f) but may be randomly reselected for further service within the succeeding twelve months.

**Source: L. 89:** Entire article R&RE, p. 768, § 1, effective January 1, 1990.

**13-71-115. Juror questionnaires.** (1) On or before the first day of the term of trial or grand juror service, each juror shall be given a juror questionnaire requesting the following information about the juror: Name, sex, date of birth, age, residence, and marital status; the number and ages of children; educational level and occupation; whether the juror is regularly employed, self-employed, or unemployed; spouse's occupation; previous juror service; present or past involvement as a party or witness in a civil or criminal proceeding; and such other information as the jury commissioner deems appropriate after consulting with the judges in the judicial district. The questionnaire shall contain a declaration by the juror that the information supplied is, to the best of the juror's knowledge, true and an acknowledgment that a willful misrepresentation of a material fact is a class 3 misdemeanor punishable as provided in section 18-1.3-501, C.R.S. Immediately below the declaration, the questionnaire shall contain a place for the signature of the juror. A notice that the completed questionnaire is not a public record shall appear prominently on its face.

(2) Unless the court orders otherwise, the jury commissioner shall provide copies of the appropriate completed questionnaires to the trial judge and counsel for use during jury selection. With the exception of the names of qualified jurors and disclosures made during jury selection, information on the questionnaires shall be held in confidence by the court, the parties, trial counsel, and their agents. Upon the completion of jury selection, the parties and their counsel shall return all copies of the completed questionnaires to the court for immediate destruction. The original completed questionnaires for all prospective jurors shall be sealed in an envelope and retained in the court's file but shall not constitute a public record.

(3) If a person's answers to a questionnaire indicate that the person is disqualified or disabled from performing jury service pursuant to section 13-71-104 (3), 13-71-105, or 13-71-119.5 or, in the opinion of the court, state grounds sufficient to be excused from jury



service pursuant to section 13-71-119.5, the person's name shall not be included in the juror pool and the court shall notify the person that he or she is excused from jury service.

**Source:** L. 89: Entire article R&RE, p. 768, § 1, effective January 1, 1990. L. 93: (1) amended, p. 515, § 2, effective July 1. L. 2002: (1) amended, p. 1488, § 125, effective October 1. L. 2004: (3) added, p. 278, § 5, effective August 4.

**Editor's note:** This section is similar to former § 13-71-108 as it existed prior to 1989.

**Cross references:** For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

### ANNOTATION

Although the general rule of this section requires certain information to be made available to defense counsel, the defendant was not prejudiced by the trial court's refusal to supply defense counsel with the addresses of the jurors. *People v. Vigil*, 718 P.2d 496 (Colo. 1986).

**Erroneous destruction of juror questionnaires is not per se prejudice.** The defendant must establish some sort of prejudice in conjunction with the destruction of the juror questionnaires to show prejudice to the appeal. *People v. Blankenship*, 30 P.3d 698 (Colo. App. 2000).

**13-71-116. Trial juror's right to one postponement.** A trial juror shall have the right to one postponement of the term of juror service. Such postponement shall not last more than six months, but may extend into the next calendar year. To exercise this right, the juror shall notify the jury commissioner by telephone or in writing requesting an alternate date to which juror service may be postponed. A jury commissioner, in his or her discretion, may set the date to which the juror's service is postponed. A jury commissioner shall notify the juror by telephone or in writing of the new date.

**Source:** L. 89: Entire article R&RE, p. 769, § 1, effective January 1, 1990. L. 2000: Entire section amended, p. 33, § 4, effective August 2. L. 2011: Entire section amended, (HB 11-1153), ch. 70, p. 190, § 4, effective August 10.

**Editor's note:** This section is similar to former § 13-71-112 as it existed prior to 1989.

**13-71-116.5. Postponement related to co-employee jury service.** Upon notice by an employee, a jury commissioner shall postpone and reschedule the service of a summoned juror who is regularly employed by an employer with five or fewer full-time employees or their equivalent if, during the same period, another employee of the employer has been summoned for jury service. A postponement issued pursuant to this section shall not affect a person's right to a postponement of jury service pursuant to section 13-71-116.

**Source:** L. 2004: Entire section added, p. 277, § 4, effective August 4.

**13-71-117. Assignment of courthouse location.** Every trial and grand juror shall be notified on the summons, or otherwise, to perform juror service at a designated court location within each county. The jury commissioner or the court may permit a juror to serve at a different courthouse location within the county upon a finding that service at the original location would be a hardship.

**Source:** L. 89: Entire article R&RE, p. 769, § 1, effective January 1, 1990.

**Editor's note:** This section is similar to former § 13-71-110 (3) as it existed prior to 1989.

**13-71-118. Telephone notice.** The jury commissioner or the court may permit a trial or grand juror to be available for juror service or continued juror service upon telephone

notice. Such a juror shall provide the court with a telephone number at which the juror may be reached, with certainty, and shall agree to resume juror service, if necessary, not more than one hour after receiving telephone notice.

**Source:** L. 89: Entire article R&RE, p. 769, § 1, effective January 1, 1990.

**13-71-119. Deferments and excuses - limitations.** (1) It shall be the policy of this article that every trial juror shall be prepared to serve three trial days except as otherwise provided in this section or in section 13-71-104, 13-71-105, or 13-71-119.5.

(2) The court or the jury commissioner may defer or advance the term of service of the trial or grand juror upon a finding as provided in section 13-71-104, 13-71-105, or 13-71-119.5. The court may excuse a juror from grand juror service upon a finding of hardship or inconvenience, taking into consideration the length of grand juror service. The court may excuse a juror from trial juror service upon a finding of extreme hardship. The court may dismiss a trial or grand juror at any time in the best interest of justice.

(3) The court, after a hearing, may excuse and discharge an impaneled juror prior to jury deliberation upon a finding of extreme hardship, and such discharge shall not be grounds for objection or a mistrial as long as the statutorily or constitutionally required number of jurors remain able to proceed with the trial and deliberation. The court, after a hearing, may excuse and discharge a juror participating in jury deliberation only upon a finding of an emergency or for any other compelling reason. If the statutorily or constitutionally required number of jurors does not remain to hear evidence or to participate in jury deliberation after the discharge of a juror, the trial may continue with the lesser number of jurors only upon agreement of all parties on the record. The court may discharge an impaneled juror who has not appeared for juror service upon a finding that there is a strong likelihood that an unreasonable delay in the trial would occur if the court were to await the appearance of the juror. The court may exercise any authority granted in this section at any time before or during a juror's term of service.

**Source:** L. 89: Entire article R&RE, p. 769, § 1, effective January 1, 1990. L. 2004: Entire section amended, p. 278, § 6, effective August 4.

**Editor's note:** This section is similar to former § 13-71-111 as it existed prior to 1989.

#### ANNOTATION

**Annotator's note.** Since § 13-71-119 is similar to § 13-71-112 as it existed prior to the 1989 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Jurors excused only for statutory reasons.** Jury service being an obligation of citizenship, the court should not excuse a person otherwise qualified for jury service for any reason short of

the statutory criteria. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

**"Undue hardship" may include undue financial burden.** What constitutes "undue hardship" sufficient to excuse a juror lies within the discretion of the trial court, and includes one for whom jury service would impose an undue financial burden. *People v. Reese*, 670 P.2d 11 (Colo. App. 1983).

**13-71-119.5. Persons entitled to be excused from jury service.** (1) The general assembly finds and declares that it is the policy of this state that all qualified citizens have an obligation to serve on juries when summoned by the courts of this state unless excused in accordance with the provisions of this article.

(2) (a) (I) A person shall be excused temporarily from service as a juror if his or her jury service would cause undue or extreme physical hardship to him or her or to another person under his or her direct care or supervision.

(II) The provisions of this subsection (2) shall apply notwithstanding the fact that the person does not have sole responsibility for the care of another person as described in section 13-71-105 (2) (d).

(b) A judge or jury commissioner of the court for which a person was summoned for



jury service shall determine whether jury service would cause the prospective juror or another person under his or her direct care undue or extreme physical hardship.

(c) A person who requests to be excused under this subsection (2) shall take all actions necessary to obtain a determination on the request before the date on which the person is scheduled to appear for jury duty.

(d) For purposes of this subsection (2), undue or extreme physical hardship shall be limited to circumstances in which a person:

(I) Would be required to abandon a person under his or her direct care or supervision because of the inability to obtain an appropriate substitute care provider during the period of jury service; or

(II) Would suffer physical hardship possibly resulting in illness or disease.

(e) A person who requests to be excused under the provisions of this subsection (2) may provide the judge or jury commissioner documentation that supports the request to be excused, including but not limited to medical statements from licensed physicians, proof of dependency or guardianship, or other similar documents. The judge or jury commissioner may excuse a person if the documentation clearly supports the request to be excused. The documents comprising the documentation described in this subsection (2) shall not be deemed public records and shall not be disclosed to the public.

(3) A person who is temporarily excused pursuant to this section shall become eligible for qualification as a juror when the temporary excuse expires, as determined by the court. A person may be permanently excused only if the judge or jury commissioner determines that the grounds for being excused from jury service are permanent in nature.

(4) The provisions of this section shall not apply to impaneled jurors or to deliberating jurors described in section 13-71-119.

**Source:** L. 2004: Entire section added, p. 277, § 4, effective August 4. L. 2008: (2)(e) amended, p. 1883, § 19, effective August 5.

**13-71-120. Length of juror service.** Trial juror service shall be for a one-day term unless a juror is assigned to or impaneled on an incompleated trial when the one-day term ends, or unless the court orders otherwise. Nothing shall prevent a trial juror from serving on more than one jury or participating in more than one trial during the term; except that a trial juror whose deliberation ended with a verdict shall not be required to participate in a second trial even though the juror may not have completed the first day of juror service at the time of the commencement of the second trial. Jurors awaiting assignment to a trial shall be discharged as early as possible after it has been determined that their services will not be needed. Grand juror service shall be for a term of twelve months unless the court discharges the jurors earlier or enlarges such term upon a finding that the efficient administration of justice so requires; except that in no event shall a grand jury serve for longer than eighteen months.

**Source:** L. 89: Entire article R&RE, p. 769, § 1, effective January 1, 1990. L. 99: Entire section amended, p. 54, § 1, effective March 15.

**Editor's note:** This section is similar to former § 13-71-116 as it existed prior to 1989.

**13-71-121. Extended trials.** Before a jury is impaneled, the court shall inform the jurors if a trial is expected to last more than three trial days and may excuse a juror from performing juror service in that trial upon a finding of hardship or inconvenience, taking into account the expected length of the trial. Any juror so excused shall otherwise complete the term of juror service.

**Source:** L. 89: Entire article R&RE, p. 770, § 1, effective January 1, 1990. L. 2000: Entire section amended, p. 33, § 5, effective August 2.

**Editor's note:** This section is similar to former § 13-71-116 as it existed prior to 1989.

**13-71-122. Failure to appear - delinquency notice.** The jury commissioner may send a delinquency notice by certified or first-class mail to any trial or grand juror who has failed to appear for juror service. The purposes of delinquency notices shall be only to notify the jurors of their delinquent status and to rectify the problem by appropriate means. The jury commissioner shall have discretionary authority to resolve delinquent juror problems.

**Source:** L. 89: Entire article R&RE, p. 770, § 1, effective January 1, 1990.

**Editor's note:** This section is similar to former § 13-71-117 as it existed prior to 1989.

**13-71-123. Enforcement of juror duties.** The court shall take whatever action may be appropriate to enforce the provisions of this article. Upon a finding that a juror will not appear to perform or complete juror service or in response to the court's order, the court may take such action as is likely to compel the juror to appear.

**Source:** L. 89: Entire article R&RE, p. 770, § 1, effective January 1, 1990.

**13-71-124. Delegation of authority to jury commissioner.** The state court administrator or the court may delegate to jury commissioners such authority as is appropriate for the efficient administration of this article.

**Source:** L. 89: Entire article R&RE, p. 770, § 1, effective January 1, 1990.

**13-71-125. Compensation and reimbursement.** The compensation and reimbursement policy of this article shall be to prevent, insofar as possible, financial hardship for any juror because of the performance of juror service. Where financial hardship exists, the court shall attempt to place the juror in the same financial position as such juror would have been were it not for the performance of juror service.

**Source:** L. 89: Entire article R&RE, p. 770, § 1, effective January 1, 1990.

**13-71-126. Compensation of employed jurors during first three days of service.** All regularly employed trial or grand jurors shall be paid regular wages, but not to exceed fifty dollars per day unless by mutual agreement between the employee and employer, by their employers for the first three days of juror service or any part thereof. Regular employment shall include part-time, temporary, and casual employment if the employment hours may be determined by a schedule, custom, or practice established during the three-month period preceding the juror's term of service.

**Source:** L. 89: Entire article R&RE, p. 770, § 1, effective January 1, 1990.

**13-71-127. Financial hardship of employer or self-employed juror.** The court shall excuse an employer or a self-employed juror from the duty of compensation for trial or grand juror service upon a finding that it would cause financial hardship. When such a finding is made, a juror shall receive reasonable compensation in lieu of wages from the state for the first three days of juror service or any part thereof. Such award shall not exceed fifty dollars per day of juror service. A court hearing on an employer's extreme financial hardship shall occur no later than thirty days after the tender of the juror service acknowledgment information to the employer. The request for a court hearing shall be made in writing to the jury commissioner.

**Source:** L. 89: Entire article R&RE, p. 770, § 1, effective January 1, 1990. L. 2011: Entire section amended, (HB 11-1153), ch. 70, p. 190, § 5, effective August 10.

**13-71-128. Reimbursement of unemployed jurors during first three days of service.** Each trial or grand juror who is unemployed may apply to the jury commissioner on



the first day of juror service and shall be reimbursed by the state for reasonable travel, child care, and other necessary out-of-pocket expenses, except food, for the first three days of juror service or any part thereof. The state court administrator shall establish guidelines for the reimbursement of unemployed trial and grand jurors. No award for an unemployed juror shall exceed fifty dollars per day of juror service, and the court shall approve, prior to reimbursement, any award which is outside the guidelines. Any juror who is not regularly employed, including, but not limited to, retired persons, homemakers, students, unemployed persons, and persons receiving unemployment benefits, shall be entitled to reimbursement under this section. Juror service shall not cause a person to lose unemployment benefits.

**Source: L. 89:** Entire article R&RE, p. 771, § 1, effective January 1, 1990.

**13-71-129. Compensation of jurors after first three days of service.** The state shall pay each trial or grand juror who serves more than three days for the fourth day of service and each day thereafter at the rate of fifty dollars per day. A trial or grand juror receiving payment under this section shall not be entitled to additional reimbursement for travel or other out-of-pocket expenses.

**Source: L. 89:** Entire article R&RE, p. 771, § 1, effective January 1, 1990.

**13-71-129.5. Public transportation for jurors.** In all judicial districts with one or more publicly owned or operated systems of public transportation, the office of the state court administrator shall work with officials of the public transportation system or systems to create and implement a plan whereby each juror may obtain transportation at no cost to the juror to the vicinity of the courthouse or other place of juror service, and return, using the regular routes and schedules of the public transportation system.

**Source: L. 97:** Entire section added, p. 1057, § 1, effective May 27.

**13-71-130. Limitations on juror compensation.** The state shall compensate and credit each juror for only those days on which the juror appeared as directed to perform juror service. Holidays and business days on which a trial has been recessed are excluded.

**Source: L. 89:** Entire article R&RE, p. 771, § 1, effective January 1, 1990.

**13-71-131. Special awards of compensation and reimbursement.** Notwithstanding any other provisions of this article, the court is authorized to make special awards of compensation and reimbursement to any juror based upon unusual circumstances or to effect the purposes of this article. By appropriate order, the court may make special arrangements for physically impaired and elderly jurors and may provide for the other needs of jurors. The court shall provide for reasonable costs of jury sequestration.

**Source: L. 89:** Entire article R&RE, p. 771, § 1, effective January 1, 1990.

**13-71-132. Juror service acknowledgment information - requests - payment.**  
(1) The juror service acknowledgment shall contain the following information: The name of the juror; the jury commissioner contact information and the number of days of juror service performed; a declaration of the duty of the employer to compensate an employed juror for the first three days, or any part thereof, of juror service; the right of an employer to be excused from such duty by the court upon a showing of extreme financial hardship; and any other information deemed appropriate by the jury commissioner. The jury commissioner shall retain juror service acknowledgment information for each juror and make it available electronically via the internet for twelve months after the juror completes his or her service.

(2) If a juror requests juror service acknowledgment information relating to his or her juror service at any time during the twelve-month period described in subsection (1) of this section, the jury commissioner shall provide the information within sixty days after the request.

(3) Trial juror payments for each juror's service shall be processed by the state by check or electronic funds transfer within ten days after the conclusion of the juror's service. The state shall process grand juror payments at least on a monthly basis. Each payment shall include all compensation for juror service and reimbursement for authorized expenses incurred by the juror during the previous time period. The state court administrator shall prepare and disburse these payments based upon information received from jury commissioners.

**Source: L. 89:** Entire article R&RE, p. 771, § 1, effective January 1, 1990. **L. 2011:** Entire section amended, (HB 11-1153), ch. 70, p. 191, § 6, effective August 10.

**13-71-133. Enforcement of employer's duty to compensate jurors.** Any employer who fails to compensate an employed juror under the applicable provisions of this article and who has not been excused from such duty of compensation shall be liable to the employed juror. If the employer fails to compensate a juror within thirty days after tender of the juror service acknowledgment information, the juror may commence a civil action in any court having jurisdiction over the parties. Extreme financial hardship on the part of the employer shall not be a defense to such an action. The court may award treble damages and reasonable attorney fees to the juror upon a finding of willful misconduct by the employer.

**Source: L. 89:** Entire article R&RE, p. 772, § 1, effective January 1, 1990. **L. 2011:** Entire section amended, (HB 11-1153), ch. 70, p. 191, § 7, effective August 10.

**13-71-134. Penalties and enforcement remedies for harassment by employer.**  
(1) An employer shall not deprive an employed juror of employment or any incidents or benefits thereof, nor shall an employer harass, threaten, or coerce an employee because the employee receives a juror summons, responds thereto, performs any obligation or election of juror service as a trial or grand juror, or exercises any right under any section of this article. An employer shall make no demands upon any employed juror which will substantially interfere with the effective performance of juror service. The employed juror may commence a civil action for such damages or injunctive relief or both, as may be appropriate, for a violation of this section. The court may award treble damages and reasonable attorney fees to the juror upon a finding of willful misconduct by the employer. Any trial of such an action shall be to the court without a jury.

(2) Any employer who willfully violates this section commits willful harassment of a juror by an employer, as defined in section 18-8-614, C.R.S., which is a class 2 misdemeanor punishable as provided in section 18-1.3-501, C.R.S.

**Source: L. 89:** Entire article R&RE, p. 772, § 1, effective January 1, 1990. **L. 2002:** (2) amended, p. 1489, § 126, effective October 1.

**Cross references:** For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

#### ANNOTATION

**Defendant waived the right to the defense that a corporation, and not the individual defendant, was the employer.** The defendant failed to assert that she was not an "employer"

until after the conclusion of the trial. *Levy-Wegrzyn v. Ediger*, 899 P.2d 230 (Colo. App. 1994).

**Plaintiff is entitled to reasonable attorney**



**fees for defending the judgment on appeal.** The fundamental purpose of awarding attorney fees is to make the plaintiff whole and this purpose would be frustrated by a requirement

that plaintiff pay attorney fees to defend the employer's appeal. *Levy-Wegrzyn v. Ediger*, 899 P.2d 230 (Colo. App. 1994).

**13-71-135. Juror orientation program.** The office of the state court administrator shall establish guidelines for the orientation of prospective jurors.

**Source:** L. 89: Entire article R&RE, p. 772, § 1, effective January 1, 1990.

**13-71-136. Availability of juror list.** (1) Absent a court order to the contrary, upon request, the jury commissioner shall make available for inspection by parties, counsel, or their agents a list of prospective jurors containing the jurors' names. The jury commissioner shall assure that the juror resides in the proper county.

(2) Absent a court order to the contrary, upon request, the jury commissioner shall make available for inspection by counsel or pro se parties a list of prospective jurors containing the jurors' names and addresses.

(3) Upon request, the jury commissioner shall make available for inspection by members of the public a list of prospective jurors containing only the jurors' name and juror number.

**Source:** L. 89: Entire article R&RE, p. 773, § 1, effective January 1, 1990. L. 98: Entire section amended, p. 465, § 5, effective January 1, 1999.

#### ANNOTATION

**Although the general rule of this section requires certain information to be made available to defense counsel,** the defendant was not prejudiced by the trial court's refusal to

supply defense counsel with the addresses of the jurors. *People v. Vigil*, 718 P.2d 496 (Colo. 1986).

**13-71-137. Duties and responsibilities of interpreters for jurors who are deaf or hard of hearing.** The court may provide, through the list of available resources coordinated through the Colorado commission for the deaf and hard of hearing pursuant to section 26-21-106 (4), C.R.S., a qualified interpreter, as defined in section 13-90-202 (8), to assist during a trial a juror who is deaf or hard of hearing. In the presence of the jury, the court shall instruct the qualified interpreter to make true and complete translations of all court proceedings to the juror who is deaf or hard of hearing to the best of the qualified interpreter's ability. The qualified interpreter shall be subject to the same orders and admonitions given to the jurors. The court shall permit a qualified interpreter to be present and assist a juror who is deaf or hard of hearing during the deliberations of the jury. In the presence of the jury, the court shall instruct the qualified interpreter to refrain from participating in any manner in the deliberation of the jury and to refrain from having any communications with any member of the jury regarding deliberation, except for true and complete translations of jurors' remarks made during deliberation. A jury verdict reached in the presence of a qualified interpreter, during deliberation, shall be valid.

**Source:** L. 89: Entire article R&RE, p. 773, § 1, effective January 1, 1990. L. 2006: Entire section amended, p. 1091, § 12, effective May 25. L. 2007: Entire section amended, p. 2026, § 28, effective June 1.

**13-71-138. Preservation of juror records.** All official records and papers compiled and maintained by the state court administrator concerning jurors shall be preserved for three years after the calendar year to which they apply. Official records shall include records in automated form on magnetic tapes and disks.

**Source:** L. 89: Entire article R&RE, p. 773, § 1, effective January 1, 1990.

**13-71-139. Challenge of juror pool.** (1) Any party to a civil or criminal action may challenge by written motion the composition of the juror pool for substantial failure to comply with the requirements of this article. The written motion shall be filed prior to the swearing in of the jury selected to try the case and shall be accompanied by one or more affidavits specifying the supporting facts and demographic data. If the court finds that the affidavit or affidavits, if true, demonstrate such a substantial failure, the moving party shall be entitled to present testimony by any person responsible for the implementation of this article, any records used in the selection and summoning of jurors, and any other relevant evidence. If the court determines, by a preponderance of the evidence, that in selecting the jury there has been a substantial failure to comply with this article, the court shall discharge the jury panel and stay proceedings pending the summoning of a new juror pool.

(2) The procedures described in this section shall be the exclusive means by which a party may challenge a jury on the ground that the juror pool was not selected in conformity with this article.

**Source:** L. 89: Entire article R&RE, p. 773, § 1, effective January 1, 1990. L. 90: (1) amended, p. 983, § 2, effective April 24.

#### ANNOTATION

**Annotator's note.** Since § 13-17-139 is similar to § 13-71-113 as it existed prior to the 1989 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**This section is the exclusive means of challenging a jury panel** not selected in conformity

with this article. *People v. Green*, 759 P.2d 814 (Colo. App. 1988).

**Applied** in *People v. Cornelius*, 41 Colo. App. 182, 585 P.2d 295 (1978); *People v. Moody*, 630 P.2d 74 (Colo. 1981).

**13-71-140. Irregularity in selecting, summoning, and managing jurors.** The court shall not declare a mistrial or set aside a verdict based upon allegations of any irregularity in selecting, summoning, and managing jurors, or in limiting the length of any term of juror service, or based upon any other defect in any procedure performed under this article unless the moving party objects to such irregularity or defect as soon as possible after its discovery and demonstrates specific injury or prejudice.

**Source:** L. 89: Entire article R&RE, p. 773, § 1, effective January 1, 1990.

**13-71-141. Authority to contract and accept gifts.** The state court administrator, and district administrators with the approval of the state court administrator, may enter into contracts and agreements with, and accept gifts, grants, contributions, and bequests of funds from, any department, agency, or political subdivision of the federal, state, county, or municipal government or from any individual, foundation, corporation, association, or public authority to implement the provisions of this article or to improve the jury system.

**Source:** L. 89: Entire article R&RE, p. 774, § 1, effective January 1, 1990.

**13-71-142. Alternate jurors.** In all civil and criminal trials, the court may call and impanel alternate jurors to replace jurors who are disqualified or who the court may determine are unable to perform their duties prior to deliberation. Alternate jurors shall be summoned in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, and privileges as regular jurors. An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict, unless otherwise provided by law, by agreement of the parties, or by order of the court. The seating of an alternate juror entitles each party to an additional peremptory challenge, which may be exercised as to any prospective jurors.



**Source:** **L. 89:** Entire article R&RE, p. 774, § 1, effective January 1, 1990. **L. 90:** Entire section amended, p. 923, § 1, effective March 27. **L. 91:** Entire section amended, p. 428, § 2, effective May 24.

### ANNOTATION

**The purpose of seating an alternate juror** is to have available another juror when, through unforeseen circumstances, a juror is unable to continue to serve. *People v. Abbott*, 690 P.2d 1263 (Colo. 1984); *Hardesty v. Pino*, 222 P.3d 336 (Colo. App. 2009).

**A trial court is in the best position to evaluate whether a juror is unable to serve**, and its decision to excuse a juror will not be disturbed absent a gross abuse of discretion. *People v. Abbott*, 690 P.2d 1263 (Colo. 1984); *Hardesty v. Pino*, 222 P.3d 336 (Colo. App. 2009).

**A trial court is not required to conduct a more thorough investigation** to make a factual determination regarding an absent juror's physical

inability to continue. *Hardesty v. Pino*, 222 P.3d 336 (Colo. App. 2009).

**Where some unforeseen circumstance unrelated to the merits of a case hampers a juror's continued ability to sit**, replacing a juror with an alternate is in the nature of an administrative task. *People v. Anderson*, 183 P.3d 649 (Colo. App. 2007); *Hardesty v. Pino*, 222 P.3d 336 (Colo. App. 2009).

**No error when court did not specifically instruct reconstituted jury** that it must restart jury deliberation, completely disregarding the deliberations involving the replaced juror. *Springs v. Perry*, 8 P.3d 517 (Colo. App. 2000).

**13-71-143. Grand jurors - vacancies.** Vacancies which exist on a grand jury panel shall be filled in accordance with section 13-72-106.

**Source:** **L. 89:** Entire article R&RE, p. 774, § 1, effective January 1, 1990.

**13-71-144. Jury fees to be assessed in civil cases - repeal.** (1) (a) On and after July 1, 2008, any party demanding a trial by jury as provided by statute shall pay to the clerk of the court a fee of one hundred ninety dollars in district court cases at the time the demand is made pursuant to the Colorado rules of civil procedure.

(b) On and after July 1, 2008, any party demanding a trial by jury as provided by statute shall pay to the clerk of the court a fee of ninety-eight dollars in county court cases at the time the demand is made pursuant to the Colorado rules of civil procedure.

(c) Each party to an action who does not affirmatively waive, in writing, the right to a trial by jury on all issues which are so triable shall pay the jury fee. Failure to pay the jury fee at the time of filing the demand, and no later than ten days after the service of the last pleading directed to any issue triable by a jury, shall constitute a waiver of a jury trial by the demanding, nonpaying party.

(2) (a) Each fee collected pursuant to paragraph (a) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, one hundred sixty-five dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and twenty dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(b) Each fee collected pursuant to paragraph (b) of subsection (1) of this section shall be transmitted to the state treasurer and divided as follows:

(I) Repealed.

(II) On and after July 1, 2009, eighty-four dollars shall be deposited in the judicial stabilization cash fund created in section 13-32-101 (6), five dollars shall be deposited in the court security cash fund established pursuant to section 13-1-204, and nine dollars shall be deposited in the justice center cash fund created in section 13-32-101 (7) (a).

(3) (Deleted by amendment, L. 2008, p. 2142, § 12, effective June 4, 2008.)

**Source:** **L. 89:** Entire article R&RE, p. 774, § 1, effective January 1, 1990. **L. 2003:** Entire section amended, p. 574, § 6, effective March 18. **L. 2007:** Entire section amended,

p. 1269, § 6, effective May 25; entire section amended, p. 1537, § 27, effective May 31.  
**L. 2008:** Entire section amended, p. 2142, § 12, effective June 4.

**Editor's note:** (1) Amendments to this section by House Bill 07-1054 and Senate Bill 07-118 were harmonized, resulting in the renumbering of subsection (2) in House Bill 07-1054 to subsection (3).

(2) Subsection (2)(a)(I)(B) provided for the repeal of subsection (2)(a)(I), effective July 1, 2010, and subsection (2)(b)(I)(B) provided for the repeal of subsection (2)(b)(I), effective July 1, 2010. (See L. 2008, p. 2142.)

**Cross references:** For the legislative declaration contained in the 2008 act amending this section, see section 1 of chapter 417, Session Laws of Colorado 2008.

**13-71-145. Expense of meals and provisions to be taxed.** In all civil cases if any expenses are incurred in furnishing meals or provisions to jurors impaneled to try such causes, such expenses shall be taxed as costs in the suit against the unsuccessful party. When collected, the same shall be paid to the clerk of the court for deposit in the state general fund or to reimburse an employer in an amount not to exceed fifty dollars per day for the first three days served by the employee. In the first instance the same shall be paid by the court pursuant to the provisions of section 13-3-106.

**Source:** L. 89: Entire article R&RE, p. 774, § 1, effective January 1, 1990.

## ARTICLE 72

### Grand Jurors

**Editor's note:** This article was numbered as article 6 of chapter 78, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1970, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1970, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**Cross references:** For immunity of witnesses in grand jury proceedings, see § 13-90-118.

**Law reviews:** For article, "State Grand Juries in Colorado: Understanding the Process and Attacking Indictments", see 34 Colo. Law. 63 (April 2005).

13-72-101.	Grand jurors - term - additional juries.	13-72-107.	charged - prospective jurors. Juror giving information - oath.
13-72-102.	Number of jurors.	13-72-108.	Sealing of indictment.
13-72-103.	Selection of jury panel.	13-72-109.	Impanelling of judicial district grand jury - county grand jury unnecessary.
13-72-104.	Foreman appointed - duties.		
13-72-105.	Oath of foreman - jurors.		
13-72-106.	Attendance excused - dis-		

**13-72-101. Grand jurors - term - additional juries.** (1) Grand juries shall not be drawn, summoned, or required to attend the sitting of any court in any county in this state unless specially ordered by the court having jurisdiction to make such an order and except as provided in subsection (2) of this section. The length of term served by a grand jury shall be as provided in section 13-71-120.

(2) In counties with a population of one hundred thousand persons or more, according to the latest federal census, a grand jury shall be drawn and summoned by the court to attend the sitting of said court at the first term of such court in each year.

(3) In all other counties, the grand jury shall be called and shall sit at such times and for such periods as the court may order on its own motion or upon motion by the district attorney of the judicial district in which the county is located.

(4) Upon motion of the district attorney and for good cause shown, the court may cause to be drawn and summoned an additional grand jury.

(5) A grand jury shall be impaneled, sworn and charged in, and report to such court, as the judges of the judicial district among themselves agree or as they may by rule provide.



**Source:** L. 70: R&RE, p. 244, § 1. C.R.S. 1963: § 78-6-1. L. 84: (5) added, p. 476, § 2, effective February 6. L. 89: (1) amended, p. 774, § 2, effective January 1, 1990. L. 99: (1) amended, p. 54, § 2, effective March 15.

## ANNOTATION

**Annotator's note.** Since § 13-72-101 is similar to repealed § 78-6-1, C.R.S. 1963, a relevant case construing that provision has been included in the annotations to this section.

**This section provides for the statutory grand jury.** *Buchler v. District Court*, 158 Colo. 205, 405 P.2d 950 (1965).

**Grand jury is an adjunct of the court.** *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**This section fixes the time when such grand jury shall be impaneled.** *Buchler v. District Court*, 158 Colo. 205, 405 P.2d 950 (1965).

**Service for full 18 months legislative intent.** By enacting this section, the general assembly intended to allow a grand jury to serve for a full 18 months. *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Indictment against a defendant is not void** merely because the grand jury returned the same at a term of court subsequent to the term in which it was organized. *Buchler v. District Court*, 158 Colo. 205, 405 P.2d 950 (1965).

Where a lawfully impaneled grand jury holds over into a term of court subsequent to the one in which it was organized, and at such succeeding term of court is still recognized by the court as a lawful body, it is a good and sufficient grand jury *de facto* and indictments returned by it are not void, but valid; and such is especially true where a *de jure* grand jury has not in the meantime been impaneled. *Buchler v. District Court*, 158 Colo. 205, 405 P.2d 950 (1965).

**Court has authority to ensure that grand jury's function is reasonably facilitated.** *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Court's power relative to grand jury includes**, among other things, authority to protect the grand jury from working unreasonable hours, meeting in unreasonable places, or from service under otherwise unreasonable conditions. *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Power of court to discharge grand jury does not justify judicial interference with the**

internal affairs and investigations of a legally constituted grand jury. *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Court may not dictate nor inquire into areas which are being investigated by grand jury**, for to authorize such an endeavor would contravene the very purpose for which the system was devised. *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Grand jury mandatory in counties of at least 100,000.** The court must convene a grand jury if the county in which the grand jury is to conduct an investigation is populated by at least 100,000 inhabitants. *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Additional grand jury at court's discretion.** The court may exercise its discretion in ruling on a district attorney's motion to summon an additional grand jury and should not grant the request unless good cause has been shown. *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Grand jury should not be utilized as handmaiden to district attorney.** *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Denial of petition to impanel is not abuse of discretion.** *Ross v. Ogburn*, 646 P.2d 390 (Colo. 1982).

**Motion when one grand jury inadequate to handle volume and burden of investigations.** If a district attorney feels that one grand jury is inadequate to handle the volume and the burden of investigations which he has ordered, he may make a motion to the court to summon an additional grand jury. *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Grand jury should not be used in routine cases or for political or other improper purposes.** *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**Information rather than grand jury in ordinary criminal cases.** Criminal justice system in Colorado is not geared to the use of the grand jury in every criminal case, as the district attorney should utilize the information as the charging document in the ordinary case. *Losavio v. Kikel*, 187 Colo. 148, 529 P.2d 306 (1974).

**13-72-102. Number of jurors.** A grand jury shall consist of twelve persons, and the assent of nine jurors shall be necessary for the returning of a true bill; but, upon motion of the district attorney and for good cause shown, the court may cause to be convened, impaneled, and sworn a grand jury consisting of twenty-three members, and the assent of twelve members shall be necessary for the returning of a true bill when said grand jury consists of twenty-three members. At any meeting of the grand jury at least nine grand jurors shall constitute a quorum.

**Source:** L. 70: R&RE, p. 244, § 1. C.R.S. 1963: § 78-6-2. L. 89: Entire section amended, p. 778, § 1, effective July 1.

**13-72-103. Selection of jury panel.** In drawing the list of jurors, the court shall select from no less than seventy-five names thereon and from such additional lists of names as the court may order, or from such lesser number as may be called to serve as jurors, the names of either twelve or twenty-three persons who shall constitute a grand jury and four alternate grand jurors. The members of the county grand jury shall be selected by the chief judge with the advice of the district attorney. The court may close to the public part or all of the selection process when reasonably necessary to protect the grand jury process or the security of the grand jurors. The length of term served by a county grand jury shall be as provided in section 13-71-120. The court, upon its own motion or at the request of the district attorney, shall enter an order to preserve the confidentiality of all information that might identify grand jurors when reasonably necessary to protect the grand jury process or the security of the grand jurors. In the absence of such an order, upon request, the jury commissioner shall make available for inspection by members of the public a list of grand jurors containing only the grand jurors' names and juror numbers. The court may strike the name of any juror who appears to the court to be incompetent or unqualified to serve.

**Source:** L. 70: R&RE, p. 245, § 1. C.R.S. 1963: § 78-6-3. L. 79: Entire section amended, p. 628, § 1, effective May 25. L. 89: Entire section amended, p. 778, § 2, effective July 1. L. 91: Entire section amended, p. 429, § 3, effective May 24. L. 99: Entire section amended, p. 55, § 3, effective March 15.

#### ANNOTATION

**Law reviews.** For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a

case relating to exclusion of persons from a grand jury on the basis of race, see 15 Colo. Law. 1611 (1986).

**13-72-104. Foreman appointed - duties.** Before a grand jury at any term of court is sworn or affirmed, the court shall appoint a foreman of such jury and an alternate foreman to act in the absence of the foreman, and such foreman or alternate foreman has power to administer an oath or affirmation to any and all witnesses who may be required to testify before such jury. He shall also endorse upon every bill that may be presented to a grand jury the finding of such jury that the same is "a true bill" or "not a true bill", as the case may be, and sign his name thereto before the same is returned into court.

**Source:** L. 70: R&RE, p. 245, § 1. C.R.S. 1963: § 78-6-4. L. 89: Entire section amended, p. 778, § 3, effective July 1.

#### ANNOTATION

**Under this section until the bill is indorsed "a true bill", and signed and presented, it is not an indictment.** Bd. of County Comm'rs v.

Graham, 4 Colo. 201 (1878) (decided under repealed laws antecedent to CSA, C. 95, § 61).

**13-72-105. Oath of foreman - jurors.** (1) Before a grand jury enters upon its duties, an oath or affirmation shall be administered to the foreman, as follows:

"You, as foreman of this inquest, do solemnly swear or affirm that you will diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge, or shall otherwise come to your knowledge touching the present service; you will present no person through malice, hatred, or ill will, and that you will leave no one unrepresented through fear, favor, or affection, or for any fee or reward or the hope or promise thereof; that you will keep secret your own counsel and that of your fellows touching the present service, and that in all your presentments, you will present the truth, the whole truth,



and nothing but the truth, according to the best of your skill and understanding, so help you God.”

(2) An oath or affirmation shall be administered to the other grand jurors as follows: “You and each of you do solemnly swear or affirm that you will well and truly keep and observe the oath that” A.B., “your foreman, has just taken before you, so help you God.”

**Source:** L. 70: R&RE, p. 245, § 1. C.R.S. 1963: § 78-6-5.

#### ANNOTATION

**Annotator’s note.** Since § 13-72-105 is similar to repealed laws antecedent to CSA, C. 95, § 62, a relevant case construing those provisions has been included in the annotations to this section.

**Generally mere juror prejudice will not invalidate an indictment.** The general rule is that neither the bias nor prejudice of a grand juror, nor his interest in a prosecution, other than a direct pecuniary interest, nor the fact that he has formed, or expressed an opinion will so disqualify him as to render invalid indictments

returned by the grand jury. But this would not be true where jurors had determined, through malice or bribery, to violate their oaths. *Joslyn v. People*, 67 Colo. 297, 184 P. 375 (1919).

**If juror enters into agreement to violate oath, he is in contempt.** Under this section if, before taking oath, a juror has entered into an agreement or conspiracy to violate it, and as a grand juror he is engaged in consummating that agreement or conspiracy, he is clearly in contempt and may be punished. *Joslyn v. People*, 67 Colo. 297, 184 P. 375 (1919).

**13-72-106. Attendance excused - discharged - prospective jurors.** At any time for cause shown, the court may excuse a grand juror permanently and, if so excused, the court shall select a replacement grand juror from one of the four alternate grand jurors chosen pursuant to section 13-72-103. The excuse or discharge of a grand juror shall be in accordance with the procedures specified in the “Colorado Uniform Jury Selection and Service Act”, article 71 of this title. The discharge of any such grand juror shall in no way or manner affect any indictment found by the grand jury as it was composed either before or after such charge.

**Source:** L. 70: R&RE, p. 245, § 1. C.R.S. 1963: § 78-6-6. L. 89: Entire section amended, p. 779, § 4, effective July 1; entire section amended, p. 775, § 3, effective January 1, 1990.

**Editor’s note:** Amendments to this section by House Bill 89-1252 and Senate Bill 89-041 were harmonized.

**13-72-107. Juror giving information - oath.** When any member of a grand jury gives information touching any matter pending before such jury, he shall take an oath or affirmation in the same manner as other witnesses.

**Source:** L. 70: R&RE, p. 245, § 1. C.R.S. 1963: § 78-6-7.

**13-72-108. Sealing of indictment.** The court, upon motion of the district attorney, shall order the indictment to be sealed and no person may disclose the existence of the indictment until the defendant is in custody or has been admitted to bail except when necessary for the issuance or execution of a warrant or summons.

**Source:** L. 93: Entire section added, p. 516, § 3, effective July 1.

**13-72-109. Impaneling of judicial district grand jury - county grand jury unnecessary.** If a judicial district grand jury is impaneled pursuant to article 74 of this title, there is no need to impanel a county grand jury pursuant to this article.

**Source:** L. 93: Entire section added, p. 516, § 3, effective July 1.

## ARTICLE 73

## Statewide Grand Juries

**Cross references:** For immunity of witnesses in grand jury proceedings, see § 13-90-118.

**Law reviews:** For article, "Grand Jury Abuse: The Remedy after Mechanik and Kilpatrick", see 17 Colo. Law. 647 (1988); for article, "State Grand Juries in Colorado: Understanding the Process and Attacking Indictments", see 34 Colo. Law. 63 (April 2005).

13-73-101.	Petition for impaneling - determination by chief judge.	13-73-105.	Judicial supervision.
13-73-102.	Powers and duties - applicable law - rules and regulations.	13-73-106.	Presentation of evidence.
13-73-103.	List of prospective jurors - selection - membership - term.	13-73-107.	Return of indictment or presentment - designation of venue - consolidation of indictments - sealing of indictment.
13-73-104.	Summoning of jurors.	13-73-108.	Costs and expenses.

**13-73-101. Petition for impaneling - determination by chief judge.** (1) The general assembly finds that the state grand jury exists because of the need to investigate and prosecute crime without regard to county or judicial district boundaries in cases involving organized crime, criminal activity in more than one judicial district, or unusual difficulties in the investigation or adjudication of a matter or cases in which the attorney general has authority to prosecute. The state grand jury is intended, therefore, to be a law enforcement tool with statewide jurisdiction.

(2) When the attorney general deems it to be in the public interest to convene a grand jury that has jurisdiction extending beyond the boundaries of any single county, the attorney general may petition the chief judge of any district court for an order in accordance with the provisions of this article. Said chief judge may, for good cause shown, order the impaneling of a state grand jury that shall have statewide jurisdiction. In making a determination as to the need for impaneling a state grand jury, the judge shall require a showing that the matter cannot be effectively handled by a grand jury impaneled pursuant to article 72 or 74 of this title, such grand juries being referred to in this article as a "county grand jury" or a "judicial district grand jury", respectively.

**Source:** L. 71: p. 880, § 1. C.R.S. 1963: § 78-8-1. L. 96: Entire section amended, p. 738, § 12, effective July 1. L. 97: (1) amended, p. 1552, § 4, effective July 1.

## ANNOTATION

**Denial of petition to impanel is not abuse of discretion.** *Ross v. Ogburn*, 646 P.2d 390 (Colo. 1982).

**Grand jury may return indictment based on facts inquired into.** A properly impaneled grand jury may return an indictment based on facts discovered by it during investigation of matters it is authorized to inquire into when the facts supporting the indictment show the commission of offenses beyond its authorization. *People v. Hower*, 626 P.2d 734 (Colo. App. 1981).

**The statutory powers granted to the attorney general under § 24-31-101 are not enlarged by this article.** *People ex rel. Tooley v. District Court*, 190 Colo. 486, 549 P.2d 774 (1976).

Neither by express provision nor by implication did the general assembly grant the attorney general the right to prosecute all indictments returned by a state grand jury. *People ex rel. Tooley v. District Court*, 190 Colo. 486, 549 P.2d 774 (1976).

**This section expressly gives the attorney general the power to petition the chief judge of a district court for the impanelment of a state grand jury**, and no executive order by the governor is required. *People v. Valdez*, 928 P.2d 1387 (Colo. App. 1996).

**Impaneling of statewide grand jury was proper** where district court chief judge found that attorney general had made a showing of good cause, matter could not be effectively handled by county grand jury, and it was in the



public interest to convene statewide grand jury. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993), *aff'd* on other grounds, 900 P.2d 45 (Colo. 1995).

**Applied** in *In re P.R. v. District Court*, 637 P.2d 346 (Colo. 1981).

**13-73-102. Powers and duties - applicable law - rules and regulations.** A state grand jury shall have the same powers and duties and shall function in the same manner as a county grand jury, except that its jurisdiction shall extend throughout the state. The law applicable to county grand juries shall apply to state grand juries except when such law is inconsistent with the provisions of this article. The supreme court may promulgate such procedural rules as it deems necessary to govern the procedures of state grand juries.

**Source:** L. 71: p. 880, § 1. C.R.S. 1963: § 78-8-2.

**13-73-103. List of prospective jurors - selection - membership - term.** The state court administrator, upon receipt of an order of a chief judge of the district court granting a petition to impanel a state grand jury, shall prepare a list of prospective state grand jurors drawn from existing jury lists of the several counties. In preparing the list of prospective state grand jurors, the state court administrator need not include names of jurors from every county within the state, but the state court administrator may select jurors from counties near the county in which the chief judge requesting the list presides. The chief judge granting the order shall impanel the state grand jury from the list compiled by the state court administrator. A state grand jury shall be composed of twelve or twenty-three members, as provided in section 13-72-102, but not more than one-fourth of the members of the state grand jury shall be residents of any one county. The members of the state grand jury shall be selected by the chief judge with the advice of the attorney general. The chief judge may close to the public part or all of the selection process when reasonably necessary to protect the grand jury process or the security of the grand jurors. The length of term served by a state grand jury shall be as provided in section 13-71-120. The court, upon its own motion or at the request of the attorney general, shall enter an order to preserve the confidentiality of all information that might identify state grand jurors when reasonably necessary to protect the state grand jury process or the security of the state grand jurors. In the absence of such an order, upon request, the state court administrator shall make available for inspection by members of the public a list of state grand jurors containing only the state grand jurors' names and juror numbers.

**Source:** L. 71: p. 880, § 1. C.R.S. 1963: § 78-8-3. L. 99: Entire section amended, p. 55, § 4, effective March 15.

**13-73-104. Summoning of jurors.** The jury commissioner of the court in which the petition for impaneling the state grand jury is filed shall cause said prospective jurors to be summoned for service in the manner provided in section 13-71-110.

**Source:** L. 71: p. 881, § 1. C.R.S. 1963: § 78-8-4. L. 89: Entire section amended, p. 775, § 4, effective January 1, 1990.

**13-73-105. Judicial supervision.** Judicial supervision of the state grand jury shall be maintained by the chief judge who issued the order impaneling such grand jury, and all indictments, reports, and other formal returns of any kind made by such grand jury shall be returned to that judge.

**Source:** L. 71: p. 881, § 1. C.R.S. 1963: § 78-8-5.

**13-73-106. Presentation of evidence.** The presentation of the evidence shall be made to the state grand jury by the attorney general or his designee.

**Source:** L. 71: p. 881, § 1. C.R.S. 1963: § 78-8-6.

ANNOTATION

No authority of attorney general or designee to confer full grand jury subpoena power on police officers. Responsibility to present evidence to statewide grand jury pursuant to this section combined with authority to appoint deputies pursuant to § 24-31-103 does not give the

attorney general or his designee authority to confer full grand jury subpoena power on police officers by naming them as strike force investigators. *People v. Corr*, 682 P.2d 20 (Colo. 1984), cert. denied, 469 U.S. 855, 105 S. Ct. 181, 83 L. Ed.2d 115 (1984).

**13-73-107. Return of indictment or presentment - designation of venue - consolidation of indictments - sealing of indictment.** (1) Any indictment by a state grand jury shall be returned to the chief judge who is supervising the statewide grand jury without any designation of venue. Thereupon, the chief judge shall, by order, designate any county in the state as the county of venue for the purpose of trial. Once venue is designated by the chief judge, a change of venue may be granted only as provided by article 6 of title 16, C.R.S. The chief judge may, by order, direct the consolidation of an indictment returned by a county grand jury with an indictment returned by a state grand jury and fix venue for trial. (2) The court, upon motion of the attorney general, shall order the indictment to be sealed and no person may disclose the existence of the indictment until the defendant is in custody or has been admitted to bail except when necessary for the issuance or execution of a warrant or summons.

**Source:** L. 71: p. 881, § 1. C.R.S. 1963: § 78-8-7. L. 93: Entire section amended, p. 516, § 4, effective July 1. L. 96: (1) amended, p. 739, § 13, effective July 1.

**13-73-108. Costs and expenses.** The costs and expenses incurred in impaneling a state grand jury and in the performance of its functions and duties shall be paid by the state out of funds appropriated to the judicial department.

**Source:** L. 71: p. 881, § 1. C.R.S. 1963: § 78-8-8.

ARTICLE 74

Judicial District Grand Juries

**Cross references:** For immunity of witnesses in grand jury proceedings, see § 13-90-118.  
**Law reviews:** For article, "Grand Jury Abuse: The Remedy after Mechanik and Kilpatrick", see 17 Colo. Law. 647 (1988).

13-74-101.	Petition for impaneling - determination by chief judge.	13-74-105.	Judicial supervision.
13-74-102.	Powers and duties - applicable law - rules and regulations.	13-74-106.	Presentation of evidence.
13-74-103.	List of prospective jurors - selection - membership - term.	13-74-107.	Return of indictment - designation of venue - consolidation of indictments - sealing of indictments.
13-74-104.	Summoning of jurors.	13-74-108.	Costs and expenses.
		13-74-109.	Applicability.
		13-74-110.	Procedural matters.

**13-74-101. Petition for impaneling - determination by chief judge.** When the district attorney deems it to be in the public interest to convene a grand jury which has jurisdiction extending beyond the boundaries of any single county, he may petition the chief judge of any district court for an order in accordance with the provisions of this article. Said chief judge shall, for good cause shown, order the impaneling of a judicial district grand jury which shall have judicial districtwide jurisdiction. If a judicial district grand jury is impaneled pursuant to this article, there is no need to impanel a county grand jury pursuant to article 72 of this title.



**Source:** **L. 83:** Entire article added, p. 633, § 1, effective July 1. **L. 89:** Entire section amended, p. 779, § 5, effective July 1. **L. 93:** Entire section amended, p. 516, § 5, effective July 1.

**13-74-102. Powers and duties - applicable law - rules and regulations.** A judicial district grand jury shall have the same powers and duties and shall function in the same manner as a county grand jury; except that its jurisdiction shall extend throughout the judicial district. The law applicable to county grand juries shall apply to judicial district grand juries except when such law is inconsistent with the provisions of this article. The supreme court may promulgate such procedural rules as it deems necessary to govern the procedures of judicial district grand juries.

**Source:** **L. 83:** Entire article added, p. 633, § 1, effective July 1.

**13-74-103. List of prospective jurors - selection - membership - term.** The state court administrator, upon receipt of an order of a chief judge of the district court granting a petition to impanel a judicial district grand jury, shall prepare a list of prospective judicial district grand jurors drawn from existing jury lists of the several counties within the district. In preparing the list of prospective judicial district grand jurors, the state court administrator need not include names of jurors from every county within the district, but the state court administrator may select jurors from counties near the county in which the chief judge requesting the list presides. The chief judge granting the order shall impanel the judicial district grand jury from the list compiled by the state court administrator. A judicial district grand jury shall be composed of twelve or twenty-three members, as provided in section 13-72-102. The members of the judicial district grand jury shall be selected by the chief judge with the advice of the district attorney. The chief judge may close to the public part or all of the selection process when reasonably necessary to protect the grand jury process or the security of the grand jurors. The length of term served by a judicial district grand jury shall be as provided in section 13-71-120. The court, upon its own motion or at the request of the district attorney, shall enter an order to preserve the confidentiality of all information that might identify judicial district grand jurors when reasonably necessary to protect the judicial district grand jury process or the security of the judicial district grand jurors. In the absence of such an order, upon request, the state court administrator shall make available for inspection by members of the public a list of judicial district grand jurors containing only the judicial district grand jurors' names and juror numbers.

**Source:** **L. 83:** Entire article added, p. 634, § 1, effective July 1. **L. 99:** Entire section amended, p. 56, § 5, effective March 15.

#### ANNOTATION

Although the chief judge, instead of issuing an order each year to provide names to the district grand jury venire, gave a standing order to the state court administrator, the steps taken substantially satisfied the required

procedures, therefore the appellant suffered no prejudice. In re 2000-2001 Dist. Grand Jury, 77 P.3d 779 (Colo. App. 2003), aff'd on other grounds, 97 P.3d 921 (Colo. 2004).

**13-74-104. Summoning of jurors.** The jury commissioner of the court in which the petition for impaneling the judicial district grand jury is filed shall cause said prospective jurors to be summoned for service in the manner provided in section 13-71-110.

**Source:** **L. 83:** Entire article added, p. 634, § 1, effective July 1. **L. 89:** Entire section amended, p. 775, § 5, effective January 1, 1990.

**13-74-105. Judicial supervision.** Judicial supervision of the judicial district grand jury shall be maintained by the chief judge who issued the order impaneling such grand jury, and all indictments, reports, and other formal returns of any kind made by such grand jury shall be returned to that judge.

**Source:** L. 83: Entire article added, p. 634, § 1, effective July 1.

**13-74-106. Presentation of evidence.** The presentation of the evidence shall be made to the judicial district grand jury by the district attorney or his designee.

**Source:** L. 83: Entire article added, p. 634, § 1, effective July 1.

**13-74-107. Return of indictment - designation of venue - consolidation of indictments - sealing of indictments.** (1) Any indictment by a judicial district grand jury shall be returned to the chief judge without any designation of venue. Thereupon, the judge shall, by order, designate the county of venue for the purpose of trial. The judge may, by order, direct the consolidation of an indictment returned by a county grand jury with an indictment returned by a judicial district grand jury and fix venue for trial.

(2) The court, upon motion of the district attorney, shall order the indictment to be sealed and no person may disclose the existence of the indictment until the defendant is in custody or has been admitted to bail except when necessary for the issuance or execution of a warrant or summons.

**Source:** L. 83: Entire article added, p. 634, § 1, effective July 1. L. 93: Entire section amended, p. 517, § 6, effective July 1.

**13-74-108. Costs and expenses.** The costs and expenses incurred in impaneling a judicial district grand jury and in the performance of its functions and duties shall be paid by the state out of funds appropriated to the judicial department.

**Source:** L. 83: Entire article added, p. 634, § 1, effective July 1.

**13-74-109. Applicability.** The provisions of this article shall apply to all judicial districts.

**Source:** L. 83: Entire article added, p. 634, § 1, effective July 1. L. 91: Entire section amended, p. 429, § 4, effective May 24.

**13-74-110. Procedural matters.** Procedural matters not specifically addressed by the provisions of this article shall be governed by the provisions of article 72 of this title and other applicable Colorado statutes and by the Colorado rules of criminal procedure relating to grand juries.

**Source:** L. 89: Entire section added, p. 779, § 6, effective July 1.

## LIMITATION OF ACTIONS

### ARTICLE 80

#### Limitations - Personal Actions

**Editor's note:** This article was numbered as article 1 of chapter 87, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1986, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1986, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and



supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

**Cross references:** (1) For the general rule that a statute of limitations, although barring the use of a claim for affirmative relief after the limitations period has run, is not a bar to asserting that claim as a defense, see *Ackmann v. Merchants Mortg. & Trust Corp.*, 645 P.2d 7 (Colo. 1982) and *Dawe v. Merchants Mortg. & Trust Corp.*, 683 P.2d 796 (Colo. 1984).

(2) For the holding by the Tenth Circuit Court of Appeals that for purposes of the statute of limitations in 42 U.S.C. § 1983 actions, all civil rights claims are to be generally and uniformly characterized, regardless of discrete facts involved, as actions for injury to personal rights, see *Wilson v. Garcia*, 731 F.2d 640 (10th Cir. 1984), *aff'd*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed.2d 254 (1985). For previous cases dealing with the statute of limitations in actions brought under 42 U.S.C. § 1983, see *Mucci v. Falcon School Dist. No. 49*, 655 P.2d 422 (Colo. App. 1982) and *McKay v. Hammond*, 730 F.2d 1367 (10th Cir. 1984). For article, "Civil Rights", which discusses Tenth Circuit decisions dealing with the applicable statute of limitations for actions brought under 42 U.S.C. § 1983, see 62 Den. U. L. Rev. 67 (1985).

(3) For the general rule that it is the nature of the right sued upon and not the form of the action or the relief requested which determines the applicable statute of limitation, see *Richards Engineers, Inc. v. Spanel*, 745 P.2d 1031 (Colo. App. 1987).

(4) For the statute of limitations on the misappropriation of trade secrets, see § 7-74-107; for limitation of actions concerning real property, see part 1 of article 41 of title 38.

**Law reviews:** For article, "United States Supreme Court Review of Tenth Circuit Decisions", which discusses a Tenth Circuit decision dealing with the applicable statute of limitations for actions brought under 42 U.S.C. § 1983, see 63 Den. U.L. Rev. 473 (1986); for article, "Legal Aspects of Health and Fitness Clubs: A Healthy and Dangerous Industry", see 15 Colo. Law. 1787 (1986); for article, "1986 Colorado Tort Reform Legislation", see 15 Colo. Law. 1363 (1986); for article, "1988 Update on Colorado Tort Reform Legislation — Part II", see 17 Colo. Law. 1949 (1988); for article, "Civil Procedure" which discusses Tenth Circuit decisions dealing with the statute of limitations applicable in section 1983 actions, see 65 Den. U. L. Rev. 429 (1988); for article, "Finding the Right Limitations Period for "New" Intentional Torts", see 19 Colo. Law. 875 (1990); for article, "Fifteen Years of Colorado Legislative Tort Reform: Where Are We Now?", see 30 Colo. Law. 5 (February 2001).

13-80-101.	General limitation of actions - three years.	13-80-105.	Limitation of actions against land surveyors.
13-80-102.	General limitation of actions - two years.	13-80-106.	Limitation of actions against manufacturers or sellers of products.
13-80-102.5.	Limitation of actions - medical or health care.	13-80-107.	Limitation of actions against manufacturers, sellers, or lessors of new manufacturing equipment.
13-80-103.	General limitation of actions - one year.	13-80-107.5.	Limitation of actions for uninsured or underinsured motorist insurance.
13-80-103.5.	General limitation of actions - six years.	13-80-108.	When a cause of action accrues.
13-80-103.7.	General limitation of actions - sexual assault or sexual offense against a child - six years.	13-80-109.	Limitations apply to noncompulsory counterclaims and setoffs.
13-80-103.8.	Limitation of civil forfeiture actions related to criminal acts.	13-80-110.	Causes barred in state of origin.
13-80-103.9.	Limitation of actions - failure to perform a background check by a public entity - injury to a child.	13-80-111.	Commencement of new action upon involuntary dismissal.
13-80-104.	Limitation of actions against architects, contractors, builders or builder vendors, engineers, inspectors, and others.	13-80-112.	When action survives death.
		13-80-113.	New promise - effect of payment.

13-80-114.	Promise by one of parties in joint interest.	13-80-118.	Absence or concealment of a party subject to suit.
13-80-115.	Endorsement by payee - effect.	13-80-119.	Damages sustained during commission of a felonious act or in flight from the commission of a felonious act.
13-80-116.	Action against joint debtors or obligors.		
13-80-117.	No dismissal for nonjoinder.		

**13-80-101. General limitation of actions - three years.** (1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within three years after the cause of action accrues, and not thereafter:

(a) All contract actions, including personal contracts and actions under the “Uniform Commercial Code”, except as otherwise provided in section 13-80-103.5;

(b) Repealed.

(c) All actions for fraud, misrepresentation, concealment, or deceit except those in section 13-80-102 (1) (j) or section 13-80-103 (1) (g);

(d) and (e) Repealed.

(f) All actions for breach of trust or breach of fiduciary duty;

(g) All claims under the “Uniform Consumer Credit Code”, except section 5-5-201 (5), C.R.S.;

(h) All actions of replevin or for taking, detaining, or converting goods or chattels, except as otherwise provided in section 13-80-103.5;

(i) All actions under the “Motor Vehicle Financial Responsibility Act”, article 7 of title 42, C.R.S.;

(j) All actions under part 6 of article 4 of title 10, C.R.S.;

(k) All actions accruing outside this state if the limitation of actions of the place where the cause of action accrued is greater than that of this state;

(l) All actions of debt under section 40-30-102, C.R.S.;

(m) All actions for recovery of erroneous or excessive refunds of any tax under section 39-21-102, C.R.S.;

(n) (I) All tort actions for bodily injury or property damage arising out of the use or operation of a motor vehicle including all actions pursuant to paragraph (j) of this subsection (1).

(II) The provisions of this paragraph (n) do not apply to any action for strict liability, absolute liability, or failure to instruct or warn governed by the provisions of section 13-80-102 (1) (b) or section 13-80-106.

(o) (I) Repealed.

(II) For purposes of this paragraph (o):

(A) “Business” shall have the same meaning as set forth in section 13-21-603 (1).

(B) “Electronic computing device” shall have the same meaning as set forth in section 13-21-603 (2).

(C) Repealed.

(p) Repealed.

**Source:** L. 86: Entire article R&RE, p. 695, § 1, effective July 1; (1)(b) repealed and (1)(c) amended, pp. 708, 707, §§ 4, 1, effective July 1. L. 87: (1)(a) and (1)(c) amended and (1)(l) and (1)(m) added, p. 567, § 1, effective July 1; (1)(c) amended, p. 538, § 10, effective July 1; (1)(e) repealed, p. 600, § 38, effective July 10. L. 91: (1)(a) amended, p. 270, § 7, effective July 1. L. 92: (1)(d) repealed, p. 244, § 3, effective July 1. L. 94: (1)(n) added, p. 2824, § 1, effective July 1. L. 99: (1)(o) added, p. 215, § 3, effective July 1; (1)(p) added, p. 593, § 2, effective July 1. L. 2000: (1)(g) amended, p. 1872, § 108, effective August 2; (1)(c) amended, p. 3, § 4, effective July 1, 2001. L. 2003: (1)(j) amended, p. 1572, § 8, effective July 1. L. 2011: (1)(o)(I), (1)(o)(II)(C), and (1)(p) repealed, (HB 11-1303), ch. 264, p. 1153, § 21, effective August 10.



**Editor's note:** The provisions of this section are similar to provisions of several former sections as they existed prior to 1986. For a detailed comparison, see the comparative tables located in the back of the index.

**Cross references:** For the "Uniform Commercial Code", see title 4.

## ANNOTATION

- I. General Consideration.
- II. Paragraph (a).
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  - B. Nonapplicability.
- III. Paragraph (c).
  - A. In General.
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- VII. Paragraph (j).
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- IX. Paragraph (n).

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Federal Practice and Procedure", see 56 Den. L.J. 491 (1979). For article, "Securities", see 59 Den. L.J. 367 (1982). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "Tort Reform's Impact on Contract Law", see 15 Colo. Law. 2206 (1986).

**Annotator's note.** For cases concerning when a cause of action accrues under this section, see the annotations to § 13-80-108.

**Purpose of statute of limitations** is to promote justice, discourage unnecessary delay and forestall the prosecution of stale claims. *Colo. State Bd. of Med. Exam'rs v. Jorgensen*, 198 Colo. 275, 599 P.2d 869 (1979).

**Uncertainty as to the precise extent of damage neither precludes the filing of a suit nor delays the accrual of a claim for purposes of the statute of limitations.** *Palisades Nat'l Bank v. Williams*, 816 P.2d 961 (Colo. App. 1991); *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860 (Colo. App. 1998); *Grant v. Pharmacia & Upjohn Co.*, 314 F.3d 488 (10th Cir. 2002).

**Uninsured driver's cause of action for reimbursement of medical expenses paid to such uninsured driver's passenger against insurer of vehicle which caused accident pursuant to § 10-4-713 does not accrue until actual payment of medical expenses.** *Sakala v. Safeco Ins. Co.*, 833 P.2d 879 (Colo. App. 1992).

**Coverage for underinsured motorist benefits accrues** under the terms of the policy when settlement under the tortfeasor's liability policy is obtained, not on the date of the accident. *State Farm Mut. Auto Ins. v. Springle*, 870 P.2d 578 (Colo. App. 1993).

**The statute of limitations does not run against the state unless the law expressly states otherwise.** *Grogan v. Taylor*, 877 P.2d 1374 (Colo. App. 1993), rev'd on other grounds, 900 P.2d 60 (Colo. 1995).

**Applied in** *Kanarado Mining & Dev. Co. v. Sutton*, 36 Colo. App. 375, 539 P.2d 1325 (1975); *D'Amico v. Smith*, 42 Colo. App. 369, 600 P.2d 84 (1979); *Lucas v. Abbott*, 198 Colo. 477, 601 P.2d 1376 (1979); *Soehner v. Soehner*, 642 P.2d 27 (Colo. App. 1981); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152 (10th Cir. 1981), cert. denied, 464 U.S. 824, 104 S. Ct. 92, 78 L.Ed.2d 99 (1983); *Barker v. Jeremiasen*, 676 P.2d 1259 (Colo. App. 1984); *Brown v. Am. Family Ins. Group*, 989 P.2d 196 (Colo. App. 1999).

### II. PARAGRAPH (a).

#### A. Applicability.

**Law reviews.** For article, "State Statutes of Limitation Contrasted and Compared", see 3 *Rocky Mt. L. Rev.* 106 (1931).

**Annotator's note.** Since § 13-80-101 (1)(a) is similar to former § 13-80-107 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this paragraph (a).

**This provision applies only to personal actions.** *Folda Real Estate Co. v. Jacobsen*, 75 Colo. 16, 223 P. 748 (1924).

**This provision applies only to actions on contract.** *Bonfils v. Pub. Utils. Comm'n*, 67 Colo. 563, 189 P. 775 (1920); *People ex rel. Fed. Land Bank v. Ginn*, 106 Colo. 417, 106 P.2d 479 (1940).

**Such as where a breach of the covenant of seisin**, if any, occurred at the time of the giving of the deed in 1921, and action thereon was not commenced until 1926, the right of action was barred by this section. *Stone v. Rozich*, 88 Colo. 399, 297 P. 999 (1931).

**Covenant of seisin is broken, if at all, when made.** The general rule is that a covenant of seisin is broken, if at all, when it is made, hence a counterclaim for breach of the covenant of seisin asserted in a foreclosure action more than three years after delivery of the conveyance in which the alleged breach occurred is barred by this section. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).

**Mandamus to enforce a private right is barred by lapse of time only where an ordinary**

action upon such right is barred by statute. *Berkey v. Bd. of County Comm'rs*, 48 Colo. 104, 110 P. 197 (1910).

**It bars action three years after it accrues.** Since a covenant is a personal action, it seems, therefore, to come within the class of actions described in this provision and is barred in three years from the date the cause of action accrues. *Hayden v. Patterson*, 39 Colo. 15, 88 P. 437 (1906).

**Infringing contractual rights covered by former § 13-80-110.** Statutory claim alleging a tortious discriminatory wrong, infringing contractual rights, was covered by the provisions of former § 13-80-110 (now § 13-80-102 (1)(a)). *Zuniga v. AMFAC Foods, Inc.*, 580 F.2d 380 (10th Cir. 1978).

**A purchase and sale contract for corporate stock is governed by this provision.** An action against executors of a deceased stockholder on alleged contract for the purchase and transfer of corporate stock, brought more than eight years after right of transfer accrued, was barred by this provision. *Goeddel v. Aircraft Fin., Inc.*, 152 Colo. 419, 382 P.2d 812 (1963).

**As is a claim based on a contract filed in an estate more than seven years after the breach thereof, was barred by the statute of limitations.** *Koon v. Barmettler*, 134 Colo. 221, 301 P.2d 713 (1956).

**Promissory estoppel claims arising from the failure of a retiree's health insurance policy to cover a heart transplant were contract claims** and, accordingly, were barred by the three-year statute of limitations. *Berg v. State Bd. of Agric.*, 919 P.2d 254 (Colo. 1996).

**Contractor's claims for breach of contract, quantum meruit, rescission, and restitution for mistake are governed by the provisions of this section** rather than the two-year limitation provision for tort claims in § 13-80-102. *CAMAS Colo., Inc. v. Bd. of County Comm'rs*, 36 P.3d 135 (Colo. App. 2001).

**This provision is sufficiently broad to encompass an action on an implied warranty of fitness of a house.** *F & S Constr. Co. v. Berube*, 322 F.2d 782 (10th Cir. 1963); *Miehle Co. v. Smith-Brooks Printing Co.*, 303 F. Supp. 501 (D. Colo. 1969).

**The implied warranty must arise from an express contract.** Where admission document mentions only general duty nursing and does not refer to conditions of hospital or fitness of premises for plaintiff, there may be implied warranty that hospital is fit for intended use by patient, but no implied warranty arises from terms of admission document. Therefore, general statute of limitations relating to express contracts is inapplicable. *Adams v. Poudre Valley Hosp. Dist.*, 31 Colo. App. 252, 502 P.2d 1127 (1972).

**A suit for specific performance based on contract is governed by this provision.** Notwithstanding plaintiff's use of the term specific

performance, when the action, from the facts as pled, is on a breach of contract wherein the plaintiff seeks a liquidated, determinable amount of money due him from the defendant, this action is governed by the statute permitting an action to be commenced within six years for actions of debt founded upon any contract and is not governed by the three-year statute of limitations. *Uhl v. Fox*, 31 Colo. App. 13, 498 P.2d 1177 (1972).

**If the contractual shortening of a statute of limitations is prohibited, the contractual and statutory limitations periods are incompatible and, therefore, in conflict.** *Grant Family Farms, Inc. v. Colo. Farm Bureau Mut. Ins. Co.*, 155 P.3d 537 (Colo. App. 2006).

**Subsection (1)(a) contains no language prohibiting the contractual shortening of the three-year limitations period;** therefore, a contractual period shorter than the three-year period is not in conflict with subsection (1)(a). *Grant Family Farms, Inc. v. Colo. Farm Bureau Mut. Ins. Co.*, 155 P.3d 537 (Colo. App. 2006).

**Under statute of limitations applicable to actions for trespass, cause of action in seepage cases accrues when damaged land is first visibly affected.** *Hickman v. N. Sterling Irrig. Dist.*, 748 P.2d 1349 (Colo. App. 1987).

**It was not until a judgment was rendered against insured** that the insured or its assignee could have brought a failure to indemnify action against the insurer since that assignee had not sustained any damage until it had obtained a judgment against the insured from whom it was unable to collect. *Flatiron Paving v. Great Sw. Fire*, 812 P.2d 668 (Colo. App. 1990).

**Action was within the three-year period following the accrual of claims** where judgment against insured was dated November 19, 1984, and insured's assignee's action against insurer was commenced May 14, 1987. *Flatiron Paving v. Great Sw. Fire*, 812 P.2d 668 (Colo. App. 1990).

**This provision applies to a claim for breach of express warranty to repair or replace** even if the party against whom the claim is asserted is protected by the "contractor's statute", § 18-80-104. *Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221 (Colo. 2001).

**Statute of limitations under this section for action in breach of warranty** did not start to run until plaintiffs knew, or should have known, of the government's adverse possession of the property. *Upton v. Griffiths*, 831 P.2d 504 (Colo. App. 1992).

**"Liquidated debt" and "unliquidated, determinable amount" construed.** For purposes of determining whether this section or § 13-80-103.5 applies, a debt is deemed "liquidated" if the amount due is capable of ascertainment by reference to an agreement or by simple computation. A debtor's dispute of or defenses against such claim, or any setoff or counterclaim inter-



posed, does not affect this result. Similarly, if a contract fixes a price per unit of performance, a claim based thereon is "determinable" even though the number of units performed must be proven and is subject to dispute. *Rotenberg v. Richards*, 899 P.2d 365 (Colo. App. 1995).

**A claim based on quantum meruit is not liquidated or determinable**, because it seeks only reasonable compensation for services rendered, in an amount to be determined by the fact-finder. *Rotenberg v. Richards*, 899 P.2d 365 (Colo. App. 1995).

**Where a statute requires presentment of a claim to a county and prohibits suit until the claim has been rejected, the statute of limitations is tolled** between the time the claim is filed and the time it is acted upon by the county where there is no suggestion that contractor failed to prosecute its claims in good faith and with diligence. *CAMAS Colo., Inc. v. Bd. of County Comm'rs*, 36 P.3d 135 (Colo. App. 2001).

#### B. Nonapplicability.

**This provision does not apply to an action against a stockholder for an assessment upon his stock.** *Sweet v. Barnard*, 66 Colo. 526, 182 P. 22 (1919).

**Nor to a proceeding before the utilities commission to recover excessive charges.** This provision has no application to a proceeding before the utilities commission demanding reparation for an excessive charge by a common carrier. The proceeding is not an action within the meaning of the statute. *Bonfils v. Pub. Utils. Comm'n*, 67 Colo. 563, 189 P. 775 (1920).

**A claim of divorced wife for support money for minor child held not barred** under this provision. *Burke v. Burke*, 127 Colo. 257, 255 P.2d 740 (1953).

**This provision is not applicable to action on debt founded upon a contract.** Notwithstanding plaintiff's use of the term specific performance, when the action, from the facts as pled, is on a breach of contract wherein the plaintiff seeks a liquidated, determinable amount of money due him from the defendant, this action is governed by the statute permitting an action to be commenced within six years for actions of debt founded upon any contract and is not governed by the three-year statute of limitations. *Uhl v. Fox*, 31 Colo. App. 13, 498 P.2d 1177 (1972).

**Nor an action alleging negligence and implied warranty.** Under Colorado law, actions alleging negligence and implied warranty were subject to six-year statute of limitations, rather than three-year statute. *Miehle Co. v. Smith-Brooks Printing Co.*, 303 F. Supp. 501 (D. Colo. 1969).

**This provision nonapplicable to an action on the official bond of a county clerk and**

recorder founded upon his alleged negligence in erroneously transcribing the legal description of real property contained in a deed of trust on the records in his office was an *ex delicto* action, hence this section did not apply. *People ex rel. Fed. Land Bank v. Ginn*, 106 Colo. 417, 106 P.2d 479 (1940).

**Nor any action where the state is a party or considerably interested.** The statute may not be invoked against the state, and even though the state as such was not a party to this action, it is unquestionably true that a considerable part of the money stolen belonged to the state. *Massachusetts Bonding & Ins. Co. v. Bd. of County Comm'rs*, 100 Colo. 398, 68 P.2d 555 (1937).

**The specific statute of limitations provision in § 38-26-105 controls over the general civil action provision in this section**, because the provisions of § 38-26-105 specifically apply to the construction project that is the subject of the plaintiff's action. *Pat's Constr. Serv., Inc. v. Ins. Co. of the W.*, 141 P.3d 885 (Colo. App. 2005).

**The statute of limitations does not apply to an action to quiet title brought by a person in possession of real property.** *Martinez v. Archuleta-Padia*, 143 P.3d 1112 (Colo. App. 2006).

### III. PARAGRAPH (c).

#### A. In General.

**Annotator's note.** Since § 13-80-101 (1)(c) is similar to former §§ 13-80-108 (1)(a) and 13-80-109 as said sections existed prior to the 1986 repeal and reenactment of this article, relevant cases construing those provisions have been included with the annotations to this paragraph (c).

**Within limit of this provision doctrine of laches applies.** This provision fixes a limitation beyond which the courts cannot extend the time, but within this limit the peculiar doctrine of courts of equity should prevail as to laches. *Great W. Mining Co. v. Woodmas*, 14 Colo. 90, 23 P. 908 (1890).

**Federal courts apply doctrine in analogy to statutes of limitations.** The federal courts, sitting in equity, are not bound by the statutes of limitations of the states, but they apply the doctrine of laches in analogy to them. If a suit discloses no extraordinary facts or circumstances, they apply the bar of laches at the expiration of the time prescribed by the statute of the state for the limitation of an action at law of like character, but if unusual conditions of extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. *Redd v. Brun*, 157 F.

190 (8th Cir. 1907); *Martin v. Brown*, 294 F. 436 (8th Cir. 1923).

**In federal diversity suits this provision applies at law and equity.** When jurisdiction of the federal court is based solely on the diversity of citizenship of the parties, this provision is applicable to equitable as well as to legal actions. Under such circumstances recovery cannot be had in the federal court if the law of the forum would bar recovery had the action been brought in the state court. *Cont'l Bank & Trust Co. v. Tri-State Gen. Agency, Inc.*, 185 F. Supp. 208 (D. Colo. 1960).

**This section in no way bars the admission of evidence.** The rule in Colorado is that parties who rely upon fraud and upon failure to discover it in order to avoid the bar must allege and prove not only when the fraud was discovered, but the facts and circumstances under which it was obtained. Defendant could not be liable for fraudulent acts discovered over three years from the date on which the action was begun. The statute of limitations goes to the cause of action and not to the evidence in support of it. The statute does not bar the admission of evidence of continuing representations as in this case. *J. F. White Eng'r Corp. v. Gen. Ins. Co. of Am.*, 351 F.2d 231 (10th Cir. 1965).

**It was the intent of the general assembly in enacting this section to control all actions brought by a patient arising out of the patient-physician relationship.** *Koch v. Sadler*, 759 P.2d 792 (Colo. App. 1988).

**The statute of limitations for a lawsuit brought under § 38-10-117 is three years.** In *re Walden*, 207 Bankr. 1 (Bankr. D. Colo. 1997).

#### B. Applicability.

**This provision applies only to personal actions.** *Folda Real Estate Co. v. Jacobsen*, 75 Colo. 16, 223 P. 748 (1924).

**This section applies to actions under section 10(b) of the federal Securities Exchange Act.** An action under section 10(b) of the Securities Exchange Act of 1934 arising from alleged violation of rule 10b-5(1) and (3) might, on certain facts, more accurately be deemed similar to an action "based upon implied or constructive fraud", for which subsection (1) provides a three-year statute of limitations. *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757 (D. Colo. 1964).

**Either because violation is constructive fraud.** Most acts violative of section 10(b) of the Securities Exchange Act would be readily cognizable in Colorado as "constructive fraud", or indeed, as traditional common-law fraud. *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757 (D. Colo. 1964).

**Or is subject to the residuary clause.** Subsequent to this enactment the three-year residuary statute of limitations might arguably have

applied to an action under section 10(b) of the Securities Exchange Act of 1934. *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757 (D. Colo. 1964).

**This provision applies to private suits under section 10 (b) of the federal Securities Exchange Act.** There is no federal statute of limitations applicable to actions brought under section 10(b) of the Securities Exchange Act of 1934. The limitations statute of the forum state in which the alleged prohibited acts occurred applies to a private suit for damages under section 10(b), the Colorado statute of limitation for fraud, which requires that suit be brought within three years after discovery of fraud by the aggrieved party, applies. *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970).

**Former § 13-80-108 applied to actions under section 10(b) of the federal Securities Exchange Act** since there is no federal statute of limitations on these actions. *Laymon v. McComb*, 524 F. Supp. 1091 (D. Colo. 1981).

**There is no federal statute of limitations applicable to provisions of sections 10(b) and 10b-5 of the Securities Exchange Act of 1934 and section 17 of the Securities Act of 1933.** *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036 (10th Cir. 1980).

**Federal law may control tolling of limitations when state statute applicable.** Though the limitations period for an action brought in federal district court based on claims arising under section 17 of the Securities Act of 1933 and sections 10(b) and 20 of the Securities Exchange Act of 1934 is supplied by the law of Colorado, the circumstances which will toll the running of the statute are matters of federal law. *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. 402 (D. Colo. 1979), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895, 102 S. Ct. 392, 70 L. Ed.2d 209 (1981).

**Federal law governs tolling of the statute.** Although the limitation period is supplied by the forum state of Colorado, it is a matter of federal law as to the circumstances that will toll a state statute applied to private actions under the securities laws. Under the federal doctrine of tolling as applied to fraud actions where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970).

**Former § 13-80-108 applied to civil claims under the federal Racketeer Influenced and Corrupt Organizations Act.** *Victoria Oil Co. v. Lancaster Corp.*, 587 F. Supp. 429 (D. Colo. 1984).



**Statute of limitations questions may be appropriately resolved by a F.R.C.P. 12 (b) motion.** *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036 (10th Cir. 1980).

**This provision is applicable to transfers of land obtained by undue influence.** If a grantee obtains transfers of land by exerting undue influence over the grantor, and the transfers were due to no other cause, this section of the statute of limitations would apply. *James v. James*, 75 Colo. 164, 225 P. 208 (1924); *Blizzard v. Penley*, 186 F. Supp. 746 (D. Colo. 1960).

**Action for damages for fraudulent conspiracy** is barred after three years by this section. *Pipe v. Smith*, 5 Colo. 146 (1879); *Farncomb v. City & County of Denver*, 64 Colo. 13, 171 P. 66 (1917); *Littlejohn v. Grand Int'l Bhd. of Locomotive Eng'rs*, 92 Colo. 275, 20 P.2d 311 (1933).

**An action to set aside a decree obtained without notice**, which to the prejudice of the plaintiff substantially modifies and changes the rights of the parties as set forth in a former decree entered in an adjudication of priorities to the use of water, is not brought for the purpose of determining the priority of appropriation to water but is purely one for relief on the ground of fraud, and if any statute of limitation is applicable it is this provision. *Peck Lateral Ditch Co. v. Pella Irrigating Ditch Co.*, 19 Colo. 222, 34 P. 988 (1893).

**An action upon a promissory note to recover a personal judgment**, and, incidentally, to foreclose a lien on shares of stock, although involving the sufficiency of the assignment of such stock, is not an action for relief on the ground of fraud and so barred by this section. *Murto v. Lemon*, 19 Colo. App. 314, 75 P. 160 (1904); *Equitable Sec. Co. v. Johnson*, 36 Colo. 377, 85 P. 840 (1906).

**This provision applies to frauds perpetrated by those not bearing a fiduciary relation to the party defrauded.** *Morgan v. King*, 27 Colo. 539, 63 P. 416 (1900).

**This provision does not apply to an action to have the foreclosure of a trust deed set aside for fraud.** *Barlow v. Hitzler*, 40 Colo. 109, 90 P. 90 (1907).

**Real estate statutes of limitations are elsewhere.** The subsequent passage of specific limitation statutes to real estate actions contained in § 38-41-101 et seq. seems conclusive that these sections do not, and never were intended to, apply as limitations upon actions of that kind. *Munson v. Marks*, 52 Colo. 553, 124 P. 187 (1912).

**Thus where a plaintiff asked for a money judgment for damages resulting from fraud in a real estate transaction**, it is held that this provision did not apply. *Ahart v. Sutton*, 79 Colo. 145, 244 P. 306 (1926).

**This provision has no application to a bill to remove a cloud upon title.** *Elder v. Rich-*

*mond Gold & Silver Mining Co.*, 58 F. 536 (8th Cir. 1893); *Morgan v. King*, 27 Colo. 539, 63 P. 416 (1900); *Ballard v. Golob*, 34 Colo. 417, 83 P. 376 (1905); *Munson v. Marks*, 52 Colo. 553, 124 P. 187 (1912); *Munson v. Keim*, 53 Colo. 576, 127 P. 1026 (1912).

**Section possibly applicable to § 11-51-123.** It is apparent that, under one or another of three statutes, a three-year statute of limitations was provided by Colorado law for civil actions arising out of § 11-51-123. *Ohio v. Peterson*, *Lowry, Rall, Barber & Ross*, 472 F. Supp. 402 (D. Colo. 1979), aff'd, 651 F.2d 687 (10th Cir.), cert. denied, 454 U.S. 895, 102 S. Ct. 392, 70 L. Ed.2d 209 (1981).

**Former § 13-80-108 inapplicable to breach of fiduciary duties.** Former § 13-80-108 was not applicable to claims premised on breach of fiduciary duties, or constructive trust, or negligence. *Morgan v. Dain Bosworth*, 545 F. Supp. 953 (D. Colo. 1982); *Elk River Assocs. v. Huskin*, 691 P.2d 1148 (Colo. App. 1984).

**Paragraph (c) applies to cases brought under the federal Commodity Exchange Act.** *Ebrahimi v. E.F. Hutton & Co., Inc.*, 852 F.2d 516 (10th Cir. 1988).

**Neither § 13-80-102 (a) nor § 13-80-102 (g) applies to a claim brought under § 43 (a) of the federal Lanham Act.** Instead, Colorado's three-year statute of limitations for fraud, misrepresentation, concealment, and deceit, paragraph (c) of this section, governs such claims. *Full Draw Prods. v. Easton Sports, Inc.*, 85 F. Supp.2d 1001 (D. Colo. 2000).

**Paragraph (c) applies to fraudulent conveyance actions**, and the action accrues on the date that such fraud is discovered or should have been discovered by the exercise of reasonable diligence. In re *Munoz*, 111 Bankr. 928 (Bankr. D. Colo. 1990).

**Paragraph (c) does not apply to motions for relief from judgment on grounds of fraud under C.R.C.P. 60(b)(2).** In re *Adoption of P.H.A.*, 899 P.2d 345 (Colo. App. 1995).

**Mere knowledge that product was defective is not knowledge which would enable plaintiff to discover fraud in connection with transaction.** *Balistreri Greenhouses v. Roper Corp.*, 767 P.2d 736 (Colo. App. 1988), cert. dismissed, 773 P.2d 1074 (Colo. 1989).

**Whether a claim is barred by the statute of limitations is normally a jury fact question**, but if the complaint shows the action was brought after the statute of limitations period and the defendant has pled the statute of limitations, the plaintiff has the burden to show tolling of the statute of limitations. *First Interstate Bank v. Berenbaum*, 872 P.2d 1297 (Colo. App. 1993).

#### IV. PARAGRAPH (d).

**Discovery rule is applicable to wrongful death actions.** *Rauschenberger v. Radetsky*, 745 P.2d 640 (Colo. 1987).

**This section, and not the California statute of limitations for tort actions, through operation of the borrowing statute, § 13-80-110, applies to action filed by Colorado resident against a Colorado resident that resulted from an accident that took place in California, if the action is within the scope of the Colorado No Fault Act. Grulke v. Erickson, 920 P.2d 845 (Colo. App. 1995).**

## V. PARAGRAPH (f).

**Law reviews.** For article, "Conclusiveness of United States Oil Shale Placer Mining Claim Patents", see 43 Den. L. Ctr. J. 24 (1966).

**Annotator's note.** Since § 13-80-101 (1)(f) is similar to former § 13-80-114 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this paragraph (f).

**This provision applies only to personal actions.** Folda Real Estate Co. v. Jacobsen, 75 Colo. 16, 223 P. 748 (1924).

**This provision is applicable in a suit to enforce a trust, constructive or otherwise.** Morgan v. King, 27 Colo. 539, 63 P. 416 (1900); James v. James, 75 Colo. 164, 225 P. 208 (1924); Vandewiele v. Vandewiele, 110 Colo. 556, 136 P.2d 523 (1943).

**To suit against purchaser from trustee who conveyed in contravention of trust.** One who purchases property from a trustee who conveys in contravention of his trust is a trustee by construction of law, and in no sense the trustee of an express trust. He holds in hostility to all the world, and whoever would assert the fiduciary character of his holding must bring his action within the limitation prescribed by this provision. Harding v. Burris, 52 Colo. 132, 119 P. 1063 (1911).

**In suit to compel specific performance by trustees, this provision is applicable.** Farris v. Wirt, 16 Colo. App. 1, 63 P. 946 (1901).

**When the action is leased on an existing trust, this provision applies.** Indemnity Ins. Co. of N. Am. v. Smith, 101 Colo. 61, 70 P.2d 109 (1930).

**For applicability to guardian's handling of a minor's estate, see Parsons v. Shackleford, 117 Colo. 545, 188 P.2d 437 (1948).**

**The existence of a fiduciary relationship between directors and stockholders makes this provision applicable.** Hall v. Swan, 117 Colo. 349, 188 P.2d 437 (1947); Polk v. Hergert Land & Cattle Co., 5 P.3d 402 (Colo. App. 2000).

**This provision applies to an action to foreclose a deed of trust.** See Rowe v. Mulvane, 25 Colo. App. 502, 139 P. 1041 (1914).

**Daughter's claim for breach of fiduciary duty alleging that she was rightful owner of winning lottery ticket taken by mother was**

**proper under this provision but time-barred due to three-year statute of limitations.** Curtis v. Counce, 32 P.3d 585 (Colo. App. 2001).

**This provision does not apply to action to remove cloud of title.** Manson v. Marks, 52 Colo. 553, 124 P. 187 (1912); Empire Ranch & Cattle Co. v. Zehr, 54 Colo. 185, 129 P. 828 (1913).

**Not to an action against a stockholder for an assessment.** Sweet v. Barnard, 66 Colo. 526, 182 P. 22 (1919).

**This section does not apply in a case where partnership property is held in trust, the trust being partly discharged and never denied.** Heuschkel v. Wagner, 78 Colo. 61, 239 P. 873 (1925).

**The existence of a fiduciary relationship of a financial planner or investment adviser is a material fact that must be determined before the limitation on a breach of fiduciary duty can be determined.** Johnston v. Cigna Corp., 916 P.2d 643 (Colo. App. 1996).

**A claim for relief under (f) accrues when the breach is discovered or should have been discovered by the exercise of reasonable diligence.** Anderson v. Somatogen, Inc., 940 P.2d 1079 (Colo. App. 1996).

**Because record established that plaintiff knew or should have known of the existence of the alleged breach of fiduciary duty by defendant over three years prior to filing her claim for breach of fiduciary duty, the trial court did not err in granting defendant's motion for summary judgment and dismissing plaintiff's claims.** Colburn v. Kopit, 59 P.3d 295 (Colo. App. 2002).

## VI. PARAGRAPH (h).

**Under paragraph (h), actions for replevin or for taking, detaining, or converting goods or chattels must be commenced within three years after the cause of action accrues. A cause of action for wrongful possession of personal property, goods, or chattels accrues at the time the wrongful possession is discovered or should have been discovered through reasonable diligence.** In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

**Trial court found that, by the exercise of reasonable diligence, claimant should have discovered alleged wrongful possession of rugs in 1992 when they were not returned with paintings. Because claimant did not file return of the rugs until 1997, two years after the statute of limitations had run, no error by trial court in granting partial summary judgment for estate as to that part of claim.** In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

**Reference in paragraph (h) to § 13-80-103.5 does not pertain to the phrase "all actions to recover a liquidated debt or an unliquidated, determinable amount of money**



due to the person bringing the action"; such language pertains to actions for breach of contract. *Curtis v. Counce*, 32 P.3d 585 (Colo. App. 2001).

## VII. PARAGRAPH (j).

Paragraph (j) applies to tort action brought by automobile accident victim against driver of another vehicle under the Colorado Auto Accident Reparations Act. Applicability of paragraph (j) is not limited to actions brought by insured against insurer and the more specific language of paragraph (j) controls over the more general two-year statute of limitations. *Cox v. Jones*, 802 P.2d 1125 (Colo. App. 1990), *aff'd*, 828 P.2d 218 (Colo. 1992).

Plaintiff's claim was intertwined with the no fault act and subject to the three-year statute of limitations in subsection (1)(j), rather than the general two-year limitation, where plaintiff was obligated to pay and did pay benefits required under the act, the plaintiff's action was specifically authorized by the act, and the action was brought because the vehicle driven by the defendant was not insured as required under the act. *Amco Ins. Co. v. Rockwell*, 940 P.2d 1096 (Colo. App. 1997).

Statute of limitations for personal injury action arising under the Colorado Auto Accident Reparations Act begins to run on the date that both the physical injury and its cause are known or should have been known by exercise of reasonable diligence, even though action may not be filed until it is reasonably expected that medical expenses will exceed \$2,500. *Jones v. Cox*, 828 P.2d 218 (Colo. 1992).

Three-year statute of limitation applies to personal injury actions filed by an insured motorist against an insured motorist involved in an automobile accident and such statute of limitation begins to run from the date the plaintiff knows or should know of the physical injury and its cause. *Lee v. Bettale*, 829 P.2d 1301 (Colo. 1992).

Where actual payment was an element of plaintiff's claim under § 10-4-713 (2)(a), the plaintiff's right to bring a direct action for reimbursement did not accrue until the benefits were actually paid. The statute of limitations began to run on the date of payment and not on the date of the accident. *Sakala v. Safeco Ins. Co.*, 833 P.2d 879 (Colo. App. 1992).

Paragraph (j) applies to tort actions brought against a sheriff's department arising from an alleged automobile accident involving a departmental vehicle. Because statutes of limitation are in derogation of a valid claim, the longer period of limitations in paragraph (j) should prevail over the shorter period in § 13-80-103 (1)(c) which could arguably be applicable in this situation. *Reider v. Dawson*,

856 P.2d 31 (Colo. App. 1992), *aff'd*, 872 P.2d 212 (Colo. 1994).

When a claim under the Colorado Auto Accident Reparations Act involves a public entity the time limit for filing an action is governed by this section rather than § 13-80-102, the governmental immunity section. *Reg'l Transp. Dist. v. Voss*, 890 P.2d 663 (Colo. 1995).

## VIII. PARAGRAPH (k).

**Law reviews.** For article, "Statutes of Limitation in the Conflict of Laws Borrowing Statutes", see 32 *Rocky Mt. L. Rev.* 287 (1960).

**Annotator's note.** Since § 13-80-101 (1)(k) is similar to former § 13-80-119 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this paragraph (k).

**This provision does not violate full faith and credit clause of constitution.** The constitutional provision requiring full faith and credit to be given the judgments of other states is not violated by a statute imposing a reasonable period of limitation upon the bringing of suits on such judgments. A six-year period of limitation is not unreasonable. *Kelly v. Heller*, 74 Colo. 470, 222 P. 648 (1924).

**This provision does not bar a cause of action which accrued without the state more than six years before the commencement of the action, but only that it shall be lawful to plead the same in bar of the action.** *Smith v. Kent Oil Co.*, 128 Colo. 80, 261 P.2d 149 (1953).

**This provision and former § 13-80-118 (now § 13-80-110) should be construed together as an entirety.** *Simon v. Wilnes*, 97 Colo. 78, 47 P.2d 406 (1935).

**The statute of limitation in former § 13-80-119 was not applicable to filings under the uniform enforcement of foreign judgments act, § 13-53-101 et seq.** *Hunter Tech., Inc. v. Scott*, 701 P.2d 645 (Colo. App. 1985).

## IX. PARAGRAPH (n).

**Motorcycle is a motor vehicle for purposes of the phrase "arises out of the use or operation of a motor vehicle" in subsection (1)(n).** *Gonzales v. City & County of Denver*, 998 P.2d 51 (Colo. App. 1999), *aff'd*, 17 P.3d 137 (Colo. 2001).

Where injury to plaintiff arose out of his own operation of motorcycle, plaintiff's tort action arose out of the use or operation of a motor vehicle and three-year statute of limitation under subsection (1)(n) applies rather than two-year limit under § 13-80-102 (1)(a). Court declined to read a limitation into the statute that subsection (1)(n) of this section only applied to injuries arising out of the alleged tortfeasor's use or operation of a motor vehicle.

Gonzales v. City & County of Denver, 998 P.2d 51 (Colo. App. 1999), *aff'd*, 17 P.3d 137 (Colo. 2001).

**13-80-102. General limitation of actions - two years.** (1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within two years after the cause of action accrues, and not thereafter:

(a) Tort actions, including but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships, and tortious breach of contract; except that this paragraph (a) does not apply to any tort action arising out of the use or operation of a motor vehicle as set forth in section 13-80-101 (1) (n);

(b) All actions for strict liability, absolute liability, or failure to instruct or warn;

(c) All actions, regardless of the theory asserted, against any veterinarian;

(d) All actions for wrongful death;

(e) Repealed.

(f) All actions against any public or governmental entity or any employee of a public or governmental entity for which insurance coverage is provided pursuant to article 14 of title 24, C.R.S.;

(g) All actions upon liability created by a federal statute where no period of limitation is provided in said federal statute;

(h) All actions against any public or governmental entity or any employee of a public or governmental entity, except as otherwise provided in this section or section 13-80-103;

(i) All other actions of every kind for which no other period of limitation is provided;

(j) All actions brought under section 42-6-204, C.R.S.;

(k) All actions brought under section 13-21-109 (2).

**Source:** **L. 86:** Entire article R&RE, p. 696, § 1, effective July 1; (1)(j) added, p. 707, § 2, effective July 1. **L. 87:** (1)(b) amended and (1)(e) repealed, pp. 567, 569, §§ 2, 8, effective July 1. **L. 88:** (1)(c) amended, p. 627, § 2, effective July 1. **L. 89:** (1)(k) added, p. 757, § 4, effective July 1. **L. 94:** (1)(a) amended, p. 2824, § 2, effective July 1; (1)(j) amended, p. 2549, § 33, effective January 1, 1995.

**Editor's note:** The provisions of this section are similar to provisions of several former sections as they existed prior to 1986. For a detailed comparison, see the comparative tables located in the back of the index.

## ANNOTATION

I. General Consideration.

II. Paragraph (a).

III. Paragraph (c).

IV. Paragraph (d).

V. Paragraph (g).

VI. Paragraph (h).

VII. Paragraph (i).

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Medical Products and Services Liability: Public Policy Requires Legislative Innovation and Judicial Restraint", see 53 Den. L. J. 387 (1976). For article, "Federal Practice and Procedure", see 56 Den. L.J. 491 (1979). For article, "Federal Practice and Procedure", see 58 Den. L.J. 371 (1981).

**Annotator's note.** For cases concerning when a cause of action accrues under this section, see the annotations to § 13-80-108.

**Applicability of amendment.** In order to determine whether an amendment, which required discovery of negligence and the seriousness and character of injuries, applied to a case, it was necessary to determine whether a cause of action had accrued prior to the effective date of the amendment. Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974).

**Cause of action barred by effect of amendment.** Where a plaintiff did not file her action within one year of the effective date of an amendment, her cause of action was barred, even though under the statute in effect at the time of the incident would have allowed her to bring the action until 1985. Licano v. Krausnick, 663 P.2d 1066 (Colo. App. 1983).

**Statute of limitations not violative of due process unless time fixed amounts to denial of justice.** The general rule is that a statute of limitations, including a statute which is to be



applied retroactively, does not violate due process unless the time fixed by the statute is manifestly so limited as to amount to a denial of justice. *Mishek v. Stanton*, 200 Colo. 514, 616 P.2d 135 (1980).

**The statute of limitations was not tolled** by the pendency of a prior action commenced in another state which was dismissed and transferred to Colorado. *Cook v. G.D. Searle & Co., Inc.*, 759 F.2d 800 (10th Cir. 1985).

**Existence of statute which prohibited filing of claim did not toll statute of limitations** under doctrine of equitable tolling although statute was eventually held unconstitutional. *Overheiser v. Safeway Stores, Inc.*, 814 P.2d 12 (Colo. App. 1991).

**Where plaintiffs' affidavits demonstrated that some, although not all, of defendants' acts complained of occurred within limitation period**, but complaint did not identify them, trial court should have permitted filing of amended complaint because original complaint put defendant sufficiently on notice of ongoing nature of claims. *Cassidy v. Smith*, 817 P.2d 555 (Colo. App. 1991).

**Because statutes of limitation are in derogation of a presumptively valid claim**, a longer period of limitations should prevail if two statutes are arguably applicable. *Amco Ins. Co. v. Rockwell*, 940 P.2d 1096 (Colo. App. 1997).

**A claim that is accompanied by an insufficient funds check for payment of fees is not considered filed for purposes of this statute.** The claim is not considered filed for purposes of the statute of limitations until the filing fee is actually paid. *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860 (Colo. App. 1998).

**Applied** in *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816 (10th Cir. 1981); *Weedin v. United States*, 509 F. Supp. 1052 (D. Colo. 1981); *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822 (Colo. 1982); *Banks v. St. Mary's Hosp. & Med. Center*, 558 F. Supp. 1334 (D. Colo. 1983); *State v. Young*, 665 P.2d 108 (Colo. 1983); *Marriott v. Goldstein*, 662 P.2d 496 (Colo. App. 1983); *Jones v. Consol. Freightways Corp.*, 776 F.2d 1458 (1985).

## II. PARAGRAPH (a).

**Law reviews.** For article, "New Role for Nonparties in Tort Actions — The Empty Chair", see 15 Colo. Law. 1650 (1986). For article, "Tort Reform's Impact on Contract Law", see 15 Colo. Law. 2206 (1986).

**Annotator's note.** Since § 13-80-102 (1)(a) is similar to former § 13-80-110 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this paragraph (a).

**Two-year limitation period is not unconstitutional.** As applied to automobile accident

case, period is not unreasonably short and does not deny litigants access to courts; nor did reduction from former six-year limitation period violate equal protection guarantees. *Dove v. Delgado*, 808 P.2d 1270 (Colo. 1991).

**The state cannot claim exemption from the statute of limitations by relying on the doctrine of nullum tempus occurrit regi (time does not run against the king).** *Shootman v. Dept. of Transp.*, 926 P.2d 1200 (Colo. 1996).

**Injuries caused by defendant's reckless disregard of plaintiff's safety.** If the evidence establishes that the injuries were the result of acts of the defendant which were in reckless disregard of plaintiff's safety, it can be said that plaintiff has established a claim which is subject to the statute of limitations. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir.), cert. denied, 444 U.S. 931, 100 S. Ct. 275, 62 L. Ed.2d 188 (1979).

**Infringing contractual rights covered by former § 13-80-110.** Statutory claim alleging a tortious discriminatory wrong, infringing contractual rights, was covered by the provisions of former § 13-80-110. *Zuniga v. AMFAC Foods, Inc.*, 580 F.2d 380 (10th Cir. 1978).

**Claim for bad-faith breach of an insurance contract is subject to two-year limitation period set forth in this section.** *Harmon v. Fred S. James & Co.*, 899 P.2d 258 (Colo. App. 1994).

**No tolling under course-of-treatment exception or "continuing violation" doctrine in a bad-faith breach of workers' compensation insurance case**, because insurer's failure to pay benefits when due puts claimant on notice of the fact of injury and its cause even if there is only a single episode of unreasonable behavior. *Harmon v. Fred S. James & Co.*, 899 P.2d 258 (Colo. App. 1994).

**Irrigation pipeline constituted a continuing trespass.** Accordingly, plaintiff's trespass claim was not barred by the statute of limitations. *Sanderson v. Heath Mesa Homeowners Ass'n*, 183 P.3d 679 (Colo. App. 2008).

**Day of the act or event from which period runs not to be included in computation.** In computing any period of time prescribed or allowed by statute, the day of the act or event from which the designated period of time begins to run is not to be included, but the last day of the period is to be included. *Cade v. Regensberger*, 804 P.2d 238 (Colo. App. 1990).

**Claims arising before July 1, 1986, covered by former § 13-80-110.** *Cassidy v. Smith*, 817 P.2d 555 (Colo. App. 1991).

**"Discovery rule" did not apply** to claims for negligence and outrageous conduct arising from alleged sexual assault on minors. Despite therapists' and plaintiffs' statements that plaintiffs did not realize the full import of defendant's actions until plaintiffs sought counseling years after the assaults, plaintiffs' admissions of emotional upset at time of assaults and knowledge

that defendant's actions were improper and illegal indicated that plaintiffs were on adequate notice of the essential elements of the tort. Therefore, cause of action accrued when plaintiffs reached the age of majority and statutory limitation would apply to their claims. *Cassidy v. Smith*, 817 P.2d 555 (Colo. App. 1991).

**If a plaintiff files a motion to amend accompanied by an amended complaint pursuant to C.R.C.P. 15(a), and if the motion, amended complaint, and summons are served on a defendant before expiration of the statute of limitations, then the statute of limitations is tolled until the trial court rules on plaintiff's motions.** *Moore v. Grossman*, 824 P.2d 7 (Colo. App. 1991) (decided under law in effect prior to amendment of this subsection (3)(c)).

**Claim against title company did not arise when conduct occurred but when plaintiffs discovered injury and could tie the actions by the title company to the injury.** Plaintiffs were not entitled to six-year statute of limitations pursuant to former § 13-80-110, but were limited to two years by this section. *Callahan v. First Am. Title Ins. Co.*, 837 P.2d 769 (Colo. App. 1992).

**Plaintiff knew, or should have known by the exercise of reasonable diligence, of the injury to his reputation and the cause of that injury; consequently, because the complaint was filed more than two years after plaintiff learned of the statements, the trial court properly dismissed plaintiff's claims for libel, slander, and outrageous conduct as barred by subsection (1)(a) of this section and § 13-80-103 (1)(a).** *Taylor v. Goldsmith*, 870 P.2d 1264 (Colo. App. 1994).

**Because record established that plaintiff knew or should have known of the existence of the alleged negligence and outrageous conduct by defendant over three years prior to filing her claim for negligence and outrageous conduct, the trial court did not err in granting defendant's motion for summary judgment and dismissing plaintiff's claims.** *Colburn v. Kopit*, 59 P.3d 295 (Colo. App. 2002).

**The statute of limitations for an action against an attorney for legal malpractice begins to run at the time the client discovers, or through reasonable diligence should have discovered, the negligent act of the attorney.** Once a client becomes aware of her attorney's negligence, and damages in the form of legal fees are incurred to ameliorate the impact of that negligence, she has suffered injury for purposes of the accrual of a legal claim. Client need not await the outcome of her appeal before being charged with knowledge of attorney's negligence. *Jacobson v. Shine*, 859 P.2d 911 (Colo. App. 1993).

**A pending appeal in the underlying litigation that is the basis for a legal malpractice**

**claim does not toll the statute of limitations.** Thus, where plaintiff's attorney admitted, during a pretrial hearing held in the underlying litigation, that he may have committed malpractice, the statute of limitations began to run even though the plaintiff's attorney filed a subsequent appeal in the underlying litigation. *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860 (Colo. App. 1998).

**Statute of limitations not equitably tolled.** Malpractice claim against an accountant was not equitably tolled when the accountant was a witness in a case before the internal revenue service. *Noel v. Hoover*, 12 P.3d 328 (Colo. App. 2000).

**Statute of limitation not tolled on a legal malpractice claim while a criminal defendant either pursues a direct appeal or seeks post-conviction relief.** Defendant must file and preserve his claim within the limitations period, but may seek a stay in the civil action until the criminal case is resolved. *Morrison v. Goff*, 74 P.3d 409 (Colo. App. 2003), *aff'd*, 91 P.3d 1050 (Colo. 2004).

Holding is consistent with the doctrine of equitable tolling which permits tolling of statute of limitations only where the defendant's wrongful conduct prevented the plaintiff from asserting the claim in a timely manner or truly exceptional circumstances prevented the plaintiff from filing the claim despite diligent efforts. *Morrison v. Goff*, 74 P.3d 409 (Colo. App. 2003), *aff'd*, 91 P.3d 1050 (Colo. 2004).

Approach furthers the statute of limitations' goals of promoting justice, preventing unnecessary delay, and avoiding the litigation of stale claims. Approach also protects attorneys from being forced to defend stale malpractice claims and furthers judicial economy by expediting the litigation of claims. *Morrison v. Goff*, 91 P.3d 1050 (Colo. 2004).

**Wife's legal malpractice claim that attorney negligently stipulated to a modification of a temporary order to allow a trustee in liquidation to take possession and sell stock held as marital property to satisfy a judgment against husband arose when federal bankruptcy court denied wife's claim to interest in the stock proceeds and not when the federal district court affirmed the denial on appeal.** *Jacobson v. Shine*, 859 P.2d 911 (Colo. App. 1993).

**Actions against home inspectors must be brought within two years after the buyer discovers or should have discovered a problem arising from a faulty inspection.** *Gleason v. Becker-Johnson Assocs., Inc.*, 916 P.2d 662 (Colo. App. 1996).

**Outrageous conduct is a separate tort, even though it may be premised on conduct amounting to a battery.** Therefore, the applicable statute of limitations under this section is two years from the date of accrual for outrageous conduct, rather than the one year limit



under § 13-80-103 for battery. *Winkler v. Rocky Mtn. Conference*, 923 P.2d 152 (Colo. App. 1995).

Further, where a claim may be pursued on two theories having different limitations, the longer limitation applies. *Winkler v. Rocky Mtn. Conference*, 923 P.2d 152 (Colo. App. 1995).

The statute of limitations in this section, and not that in § 16-5-401 (1)(a) applies to a theft claim brought under § 18-4-405. *Michaelson v. Michaelson*, 923 P.2d 237 (Colo. App. 1995).

Neither subsection (1)(a) nor subsection (1)(g) applies to a claim under § 43 (a) of the federal Lanham Act. Instead, Colorado's three-year statute of limitations for fraud, misrepresentation, concealment, and deceit, § 13-80-101 (1)(c), governs such claims. *Full Draw Prods. v. Easton Sports, Inc.*, 85 F. Supp.2d 1001 (D. Colo. 2000).

Plaintiff's claim was intertwined with the no fault act and subject to the three-year statute of limitations in § 13-80-101 (1)(j), rather than the general two-year limitation under subsection (1)(a), where plaintiff was obligated to pay and did pay benefits required under the act, the plaintiff's action was specifically authorized by the act, and the action was brought because the vehicle driven by the defendant was not insured as required under the act. *Amco Ins. Co. v. Rockwell*, 940 P.2d 1096 (Colo. App. 1997).

Where injury to plaintiff arose out of his own operation of motorcycle, plaintiff's tort action arose out of the use or operation of a motor vehicle and three-year statute of limitation under § 13-80-101 (1)(n) applies rather than two-year limit under subsection (1)(a). *Gonzales v. City & County of Denver*, 998 P.2d 51 (Colo. App. 1999), *aff'd*, 17 P.3d 137 (Colo. 2001).

### III. PARAGRAPH (c).

**Law reviews.** For note, "Pleading a Claim Barred by Statute of Limitations by Way of Recoupment", see 7 *Rocky Mt. L. Rev.* 204 (1935). For article, "Torts", see 31 *Dicta* 456 (1954). For article, "Medical Malpractice in Colorado", see 36 *Dicta* 339 (1959). For article, "One Year Review of Civil Procedure and Appeals", see 38 *Dicta* 133 (1961). For comment on *McCarty v. Goldstein*, appearing below, see 35 *U. Colo. L. Rev.* 606 (1963).

**Annotator's note.** Since § 13-80-102 (1)(c) is similar to former § 13-80-105 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this paragraph (c).

This provision is not "special legislation" prohibited by § 25 of art. V, Colo. Const. *McCarty v. Goldstein*, 151 Colo. 154, 376 P.2d

691 (1962).

It is general and uniform in operation. This section providing that no action shall be maintained to recover damages from persons licensed to practice certain of the healing professions, including dentistry, unless such action be instituted within two years after the action accrued, is not special legislation prohibited by § 25 of art. V, Colo. Const., it being general and uniform in its operation upon all in like situation. *McCarty v. Goldstein*, 151 Colo. 154, 376 P.2d 691 (1962).

It is not discriminatory and does not deny equal protection of the law to attorneys, scientists, engineers, nurses, x-ray technicians, and other professional persons who should be entitled to equal protection of the law. *McCarty v. Goldstein*, 151 Colo. 154, 376 P.2d 691 (1962).

This statute is enacted for the purpose of promoting justice, discouraging unnecessary delay, and forestalling the prosecution of stale claims, not for the benefit of the negligent. It should not be construed to defeat justice. The negligence is equally damaging and the victim equally helpless regardless of the motive for concealment. *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944).

This statute has exactly the same effect as would a contract of employment which provided that no action could be maintained against the doctors unless brought within two years from the date of the performance of the operation. Any excuse which would defeat such express contract is equally effective to toll the statute and impossible to give notice as such. *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944).

An action for malpractice is neither a purely tortious nor a contractual action, but a hybrid, for which a specific limitation has been prescribed by this section. *Maercklein v. Smith*, 129 Colo. 72, 266 P.2d 1095 (1954).

Limitation statutes relating to assault, assault and battery, malicious injury, and fraud have no application to actions for malpractice based on negligence of a physician or surgeon. *Maercklein v. Smith*, 129 Colo. 72, 266 P.2d 1095 (1954).

Where express contract exists between plaintiff and defendant, plaintiff's action thereon is not barred by two-year statute of limitations, but six-year statute dealing with express contracts is applicable. *Adams v. Poudre Valley Hosp. Dist.*, 31 Colo. App. 252, 502 P.2d 1127 (1972).

If there is an express contract, patient must prove it. In an action against physicians and surgeons for damages for alleged malpractice, if the patient made a contract with the physician and a surgeon, the terms of the contract must be disclosed and proven. The burden of proof hereof rests upon plaintiff. *Maercklein v. Smith*, 129 Colo. 72, 266 P.2d 1095 (1954).

**A hospital's general duty of nursing is not an express contract.** Where admission document mentions only general duty nursing and does not refer to conditions of hospital or fitness of premises for plaintiff, there may be implied warranty that hospital is fit for intended use by patient, but no implied warranty arises from terms of admission document. Therefore, general statute of limitation relating to express contracts is inapplicable. *Adams v. Poudre Valley Hosp. Dist.*, 31 Colo. App. 252, 502 P.2d 1127 (1972).

**This section is aimed solely at the maintaining of an action.** *Wyatt v. Burnett*, 95 Colo. 414, 36 P.2d 768 (1934).

**Patient may use claim as a defense against doctor's suit.** The defense of reduction of recoupment, which arises out of the same transaction as the claim, survives as long as the cause of action upon the claim exists, although an affirmative action on the subject of it may be barred by the statute of limitations. A counterclaim, if barred by the statute, is available only for recoupment although for that purpose it may be used as long as plaintiff's cause of action exists. *Wyatt v. Burnett*, 95 Colo. 414, 36 P.2d 768 (1934).

#### IV. PARAGRAPH (d).

**Discovery rule is applicable to wrongful death actions.** *Rauschenberger v. Radetsky*, 745 P.2d 640 (Colo. 1987).

**Applied in** *Aberkals v. Blake*, 633 F. Supp. 2d 1231 (D. Colo. 2009).

#### V. PARAGRAPH (g).

**Law reviews.** For article, "Civil Rights", which discusses Tenth Circuit decisions dealing with the applicable statute of limitations for actions brought under 42 U.S.C. § 1983, see 62 Den. U. L. Rev. 67 (1985).

**Annotator's note.** Since § 13-80-102 (1)(g) is similar to former § 13-80-106 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this paragraph (g).

**Applicability to actions under 42 U.S.C. § 1983.** All civil rights claims are to be generally, uniformly characterized, regardless of discrete facts involved, as actions for injury to personal rights. *Wilson v. Garcia*, 731 F.2d 640 (10th Cir. 1984), *aff'd*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed.2d 254 (1985). (For previous cases dealing with the statute of limitations in actions brought under 42 U.S.C. § 1983, see *Mucci v. Falcon Sch. Dist. No. 49*, 655 P.2d 422 (Colo. App. 1982) and *McKay v. Hammond*, 730 F.2d 1367 (10th Cir. 1984).)

**Former section unconstitutionally discriminatory.** The special two-year statute of limita-

tions made applicable to actions upon a liability created by a federal statute for which actions no period of limitations is provided in such statute would seem to be, on its face, an unconstitutional discrimination against a multitude of federal claims to which a shorter statute of limitations was purportedly applied for no other reason than that they were federal claims, leaving a three-year statute of limitations for residuary state claims. *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F. Supp. 506 (D. Colo. 1952); *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757 (D. Colo. 1964).

**Residuary statute should be used.** The residuary three-year statute of limitations in former § 13-80-108(1)(b) (now subsection (1)(i)) must take precedence over the two-year statute of limitations in former § 13-80-106. *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757 (D. Colo. 1964).

**Nothing in the Occupational Safety and Health Act suggests congressional intention to adopt state statutes of limitations.** *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260 (10th Cir. 1980).

**Absence of public interest may involve state statutes.** An action which, although brought in the name of the United States, involves no public rights or interests may be subject to a state statute of limitations. *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260 (10th Cir. 1980).

**Where action is brought by government to enforce private as well as public rights,** state statutes of limitations do not apply to bar the action even though no federal period of limitations is provided. However, unlike the rule relating to actions brought exclusively for the benefit of the federal government, the doctrine of laches may be applied in these hybrid cases to limit relief. *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260 (10th Cir. 1980).

**Federal law may control tolling of limitations when state statute applicable.** Though the limitations period for an action brought in federal district court based on claims arising under section 17 of the Securities Act of 1933 and §§ 10(b) and 20 of the Securities Exchange Act of 1934 is supplied by the law of Colorado, the circumstances which will toll the running of the statute are matters of federal law. *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. 402 (D. Colo. 1979), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895, 102 S. Ct. 392, 70 L. Ed.2d 209 (1981).

**Action based on federal gasoline controls.** This section applies to an action based on violations of federal regulation of gasoline prices and allocation control. *Siegel Oil Co. v. Gulf Oil Corp.*, 556 F. Supp. 302 (D. Colo. 1982), *aff'd*, 701 F.2d 149 (Temp. Em. Ct. App. 1983).

**Former § 13-80-106 held to apply to federal discrimination action.** *McKinney v.*



Armco Recreational Prods., Inc., 419 F. Supp. 464 (D. Colo. 1976).

**In an action based on federal civil rights law, court applied period of limitations of this section.** *Salazar v. Dowd*, 256 F. Supp. 220 (D. Colo. 1966); *Merrigan v. Affiliated Bankshares of Colo., Inc.*, 775 F. Supp. 1408 (D. Colo. 1991), *aff'd*, 956 F.2d 278 (10th Cir. 1992), *cert. denied*, 506 U.S. 823, 113 S. Ct. 76, 121 L.Ed.2d 40 (1992); *Workman v. Jordan*, 32 F.3d 475 (10th Cir. 1994).

The applicable statute of limitations for a §1983 action, even one asserted against a law enforcement officer, is the two-year limitation period established under subsection (1)(g). *Nieto v. State*, 952 P.2d 834 (Colo. App. 1997), *aff'd in part and rev'd in part on other grounds*, 993 P.2d 493 (Colo. 2000).

**Two-year statute of limitations applies to actions arising under title II of the federal Americans with Disabilities Act.** *Hughes v. Colo. Dept. of Corr.*, 594 F. Supp. 2d 1226 (D. Colo. 2009).

**Former § 13-80-108 applied to actions under section 10(b) of the federal Securities Exchange Act** since there is no federal statute of limitations on these actions. *Laymon v. McComb*, 524 F. Supp. 1091 (D. Colo. 1981).

**There is no federal statute of limitations applicable to provisions of sections 10(b) and 10b-5 of the Securities Exchange Act of 1934** and section 17 of the Securities Act of 1933. *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036 (10th Cir. 1980).

**Former § 13-80-108 applied to civil claims under the federal Racketeer Influenced and Corrupt Organizations Act.** *Victoria Oil Co. v. Lancaster Corp.*, 587 F. Supp. 429 (D. Colo. 1984).

**Statute of limitations questions may be appropriately resolved on rule 12 (b), F.R.C.P. motion.** *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036 (10th Cir. 1980).

**Continuing violation of civil rights statute not barred.** Alleged discrimination in writing physical damage insurance, a violation of the civil rights statute, was a continuing violation when the policy was renewed in 1971 and 1972, and the statute of limitations contained in this section did not bar the claim based on such discrimination. *Ben v. Gen. Motors Acceptance Corp.*, 374 F. Supp. 1199 (D. Colo. 1974).

**Neither subsection (1)(a) nor subsection (1)(g) applies to a claim under § 43 (a) of the federal Lanham Act.** Instead, Colorado's three-year statute of limitations for fraud, misrepresentation, concealment, and deceit, § 13-80-101 (1)(c), governs such claims. *Full Draw Prods. v. Easton Sports, Inc.*, 85 F. Supp.2d 1001 (D. Colo. 2000).

## VI. PARAGRAPH (h).

**Subsection (1)(h) applies to all actions against governmental entities, regardless of**

**the theory upon which suit is brought.** *Bad Boys of Cripple Creek Mining Co. v. City of Cripple Creek*, 996 P.2d 792 (Colo. App. 2000).

A claim for inverse condemnation against a city is a civil action against a governmental entity and is governed by subsection (1)(h). *Bad Boys of Cripple Creek Mining Co. v. City of Cripple Creek*, 996 P.2d 792 (Colo. App. 2000).

**The two-year limitation period of subsection (1)(h) for claims to be brought against a governmental entity is not applicable to the contract claims brought by employees and former employees against a city.** To do so would allow a governmental entity to bring a contract claim against a nongovernmental entity within a three-year or longer period while a nongovernmental entity would be required to bring a similar claim against a governmental entity within a two-year period. *Fishburn v. City of Colo. Springs*, 919 P.2d 847 (Colo. App. 1995).

**The six-year limitation period of § 13-80-103.5 (1)(a) applies even against a governmental entity to recover a liquidated debt or an unliquidated, determinable amount of money due.** *Fishburn v. City of Colo. Springs*, 919 P.2d 847 (Colo. App. 1995).

**Negligence action against a city based on respondeat superior is not barred under subsection (1)(h) even though the underlying negligence action against the city's employee is barred under § 13-80-103 (1)(c).** *Gallegos v. City of Monte Vista*, 976 P.2d 299 (Colo. App. 1998).

## VII. PARAGRAPH (i).

**Annotator's note.** Since § 13-80-102 (1)(i) is similar to § 13-80-108 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this paragraph (i).

**This section is the general statute of limitations applying to all actions or proceedings for which a special period is not provided.** *Bd. of Trustees of Policemen's Pension Fund v. Koman*, 133 Colo. 598, 298 P.2d 737 (1956).

**When damages being apportioned under the Workers' Compensation Act** arise from settlement of a tort case, and the apportionment case is a separate cause of action, the act does not govern the time frame and conditions under which the offset must be determined. Accordingly, the two-year catch-all statute of limitations, pursuant to subsection (1)(i), applies. *Harrison v. Pinnacol Assurance*, 107 P.3d 969 (Colo. App. 2004).

**Claims for disability retirement benefits.** The statute of limitations in former § 13-80-108 (1)(b) (now this paragraph (i)) governed cases involving claims for disability retirement benefits from the public employees' retirement as-

sociation in the absence of a special statute of limitations in the act which provided for such claims. *Flanigan v. Pub. Employees' Retirement Ass'n*, 191 Colo. 198, 551 P.2d 702 (1976), appeal dismissed, 429 U.S. 1068, 97 S. Ct. 799, 50 L. Ed.2d 786 (1977).

**This section governs time period in which to file for pensions.** The general assembly has not enacted a special limitation on the time for filing pension claims, hence, this section governs. *Bd. of Trustees of Policemen's Pension Fund v. Koman*, 133 Colo. 598, 298 P.2d 737 (1956).

**The right to receive a pension may be barred by this section.** The right to receive a pension is a very different right from the right to receive payment once the basic right to receive the pension itself has been determined. Once the right to receive a pension has been determined, then the receipt of the pension is a continuing one. The basic or primary right (to receive the pension) is not a continuing one and may be barred by laches or by a statute of limitations. *Bd. of Trustees of Policemen's Pension Fund v. Koman*, 133 Colo. 598, 298 P.2d 737 (1956).

**This paragraph governs 42 U.S.C. § 1983 actions.** The two-year residual statute is best suited to govern actions that confer a general remedy for injuries to personal rights, and,

therefore, this paragraph applies to civil rights actions under § 1983. *Arvia v. Black*, 722 F. Supp. 644 (D. Colo. 1989); *Blake v. Dickason*, 997 F.2d 749 (10th Cir. 1993); *Workman v. Jordan*, 32 F.3d 475 (10th Cir. 1994).

**This section applies to personal actions brought under 42 U.S.C. § 1983** as such claims are subject to this state's residual statute of limitation. *Dillingham v. Univ. of Colo. Bd. of Regents*, 790 P.2d 851 (Colo. App. 1989); *Riel v. Reed*, 760 F. Supp. 852 (D. Colo. 1990); *Stump v. Gates*, 777 F. Supp. 808 (D. Colo. 1991); *Blake v. Dickason*, 997 F.2d 749 (10th Cir. 1993).

**The two-year statute of limitations applies to claims brought under 42 U.S.C. § 1983.** *Siblerud v. Colo. State Bd. of Agric.*, 896 F. Supp. 1506 (D. Colo. 1995).

**Malicious prosecution claims under § 1983 do not accrue** until the underlying criminal convictions are terminated in the plaintiff's favor because a plaintiff neither knows nor has reason to know of an injury that constitutes the basis of a claim until such termination. *Allen v. City of Aurora*, 892 P.2d 333 (Colo. App. 1994).

**Action for partnership accounting falls under two-year period of limitations.** No statute of limitations specifically addresses an action for partnership accounting. *Tafoya v. Perkins*, 932 P.2d 836 (Colo. App. 1996).

**13-80-102.5. Limitation of actions - medical or health care.** (1) Except as otherwise provided in this section, no action alleging negligence, breach of contract, lack of informed consent, or other action arising in tort or contract to recover damages from any health care institution, as defined in paragraph (a) of subsection (2) of this section, or any health care professional, as defined in paragraph (b) of subsection (2) of this section, shall be maintained unless such action is instituted within two years after the date that such action accrues pursuant to section 13-80-108 (1), but in no event shall an action be brought more than three years after the act or omission which gave rise to the action.

(2) For the purposes of this section:

(a) "Health care institution" means any hospital, health care facility, dispensary, clinic, or other institution which is licensed or certified as such under the laws of this state.

(b) "Health care professional" means any physician, nurse, dentist, chiropractor, pharmacist, optometrist, psychologist, podiatrist, physical therapist, or other health care practitioner who is licensed to perform such profession under the laws of this state.

(3) The limitation of actions provided in subsection (1) of this section shall not apply under the following circumstances:

(a) If the act or omission which gave rise to the cause of action was knowingly concealed by the person committing such act or omission, in which case the action may be maintained if instituted within two years after the person bringing the action discovered, or in the exercise of reasonable diligence and concern should have discovered, the act or omission; or

(b) If the act or omission consisted of leaving an unauthorized foreign object in the body of the patient, in which case the action may be maintained if instituted within two years after the person bringing the action discovered, or in the exercise of reasonable diligence and concern should have discovered, the act or omission; or

(c) If both the physical injury and its cause are not known or could not have been known by the exercise of reasonable diligence; or

(d) If the action is brought by or on behalf of:

(I) A minor under eight years of age who was under six years of age on the date of the



occurrence of the act or omission for which the action is brought, in which case the action may be maintained at any time prior to his attaining eight years of age; or

(II) A person otherwise under disability as defined in section 13-81-101, in which case the action may be maintained within the time period as provided in section 13-81-103.

**Source:** L. 88: Entire section added, p. 626, § 1, effective July 1.

### ANNOTATION

**Law reviews.** For article, "1988 Update on Colorado Tort Reform Legislation — Part I", see 17 Colo. Law. 1790 (1988).

**Annotator's note.** For annotations relating to the statute of repose, formerly found in § 13-80-105 prior to the 1986 repeal and reenactment of this article and now found in this section, see the annotations for § 13-80-108 under the headings "VII. Injuries." and "IX. Former Statute of Repose."

**Given the express language of the knowing concealment exception**, it is necessary for a patient to demonstrate only that a negligent act or omission has been committed by the physician and then knowingly concealed, but not necessary to show that the patient also suspected or discovered that concealment. *Boyett v. Smith*, 888 P.2d 294 (Colo. App. 1994), *aff'd*, 908 P.2d 508 (Colo. 1995) (decided under former § 13-80-105 as it existed prior to the 1986 repeal and reenactment of this article).

**Applicability to minors.** Subsection (3)(d)(I) applies only if the child is represented by a legal

guardian at the time the alleged negligence occurs. Otherwise, the child may file suit at any time before age 18 or within two years after a legal guardian is appointed. This result is required to harmonize this section with the disability statutes, § 13-81-101, *et seq.*, and applies to both the two-year limitation period and the three-year period of repose set forth in subsection (1). *Hane by and through Jabalera v. Tubman*, 899 P.2d 332 (Colo. App. 1995).

**There is no exception to the statute of limitations under this section for actions derivative of those brought by a person under disability.** *Bartlett v. Elgin*, 973 P.2d 694 (Colo. App. 1998), *aff'd*, 994 P.2d 411 (Colo. 1999).

**The language of this section is unambiguous**, thus because defendant was not a "health care professional", the general limitations for tort actions under §§ 13-80-101 and 13-80-102 applied. *Colburn v. Kopit*, 59 P.3d 295 (Colo. App. 2002).

**13-80-103. General limitation of actions - one year.** (1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within one year after the cause of action accrues, and not thereafter:

(a) The following tort actions: Assault, battery, false imprisonment, false arrest, libel, and slander;

(b) All actions for escape of prisoners;

(c) All actions against sheriffs, coroners, police officers, firefighters, national guardsmen, or any other law enforcement authority;

(d) All actions for any penalty or forfeiture of any penal statutes;

(e) All actions under the "Motor Vehicle Repair Act of 1977", article 9 of title 42, C.R.S.;

(f) Repealed.

(g) All actions for negligence, fraud, willful misrepresentation, deceit, or conversion of trust funds brought under section 12-61-303, C.R.S.;

(h) All actions against a person alleging liability for a penalty for commission of a class A or a class B traffic infraction, as defined in section 42-4-1701, C.R.S.

**Source:** L. 86: Entire article R&RE, p. 696, § 1, effective July 1; (1)(f) added, p. 707, § 3, effective July 1. **L. 87:** (1)(f) amended and (1)(g) added, p. 538, § 11, effective July 1; (1)(f) amended and (1)(g) added, p. 567, § 3, effective July 1; (1)(h) added, p. 1495, § 2, effective July 1. **L. 94:** (1)(e) and (1)(h) amended, p. 2550, § 34, effective January 1, 1995. **L. 2000:** (1)(f) repealed, p. 3, § 5, effective July 1, 2001.

**Editor's note:** The provisions of this section are similar to provisions of several former sections as they existed prior to 1986. For a detailed comparison, see the comparative tables located in the back of the index.

## ANNOTATION

- I. General Consideration.
- II. Paragraph (a).
  - A. Assault and Battery.
  - B. False Arrest.
  - C. Libel.
- III. Paragraph (c).
- IV. Paragraph (d).

## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "One Year Review of Civil Procedure and Appeals", see 38 *Dicta* 133 (1961).

**Annotator's note.** For cases concerning when a cause of action accrues under this section, see the annotations to § 13-80-108.

**Held constitutional.** This section does not violate due process and is not unconstitutionally vague because of its failure to include or incorporate a definition of the term "any other law enforcement authority." *Delta Sales Yard v. Patten*, 870 P.2d 554 (Colo. App. 1993).

**A statute of limitations is enacted for the purpose of promoting justice**, discouraging unnecessary delay, and forestalling the prosecution of stale claims. *Klamm Shell v. Berg*, 165 Colo. 540, 441 P.2d 10 (1968).

**Assertion of defense held timely filed.** Where plaintiffs file an amended complaint and defendants interpose the affirmative defense of statute of limitations for the first time in their amended answer to the amended complaint, the defense is timely filed. *Griffen v. Pate*, 644 P.2d 51 (Colo. App. 1981).

**CRS 53, § 135-4-2 (now § 2-5-124), had the effect of reenacting former §§ 13-80-102, 13-80-116, and 13-81-103(1)(c)** despite repealing clause of 1939 act originally enacting § 13-81-103. *Kuckler v. Whisler*, 191 Colo. 260, 552 P.2d 18 (1976).

**Filing of an EEOC action does not operate to toll the one-year limit** of former section. *Bennett v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887 (D. Colo. 1982).

**For inapplicability of this section when gist of cause of action is conspiracy**, see *Clark v. Machette*, 92 Colo. 365, 21 P.2d 182 (1933).

**Applied in** *Williams v. Burns*, 463 F. Supp. 1278 (D. Colo. 1979); *Ellis v. Rocky Mt. Empire Sports, Inc.*, 43 Colo. App. 166, 602 P.2d 895 (1979); *Griffin v. Pate*, 644 P.2d 51 (Colo. App. 1981); *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982); *Berry v. Colo. Dept. of Rev.*, 656 P.2d 721 (Colo. App. 1982); *Marlandis v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152 (10th Cir. 1981), cert. denied, 464 U.S. 824, 104 S. Ct. 92, 78 L. Ed.2d 99 (1983); *Russell v. McMillen*, 685 P.2d 255 (Colo. App. 1984).

## II. PARAGRAPH (a).

**Annotator's note.** Since § 13-80-103 (1)(a) is similar to former § 13-80-102 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this paragraph (a).

## A. Assault and Battery.

**Where evidence shows no negligence, action must be for assault and subject to this section.** Where plaintiff brings action to recover for injuries received as result of being beaten by defendant, and where complaint alleges negligence on part of defendant, but evidence indicates that beating was intentional and that no element of negligence was involved, action is founded on assault and is subject to one-year statute of limitations. *Maes v. Tuttoilmondo*, 31 Colo. App. 248, 502 P.2d 427 (1972).

**Statute will not apply when defendant's assault causes delay.** To apply the one-year statute of limitations rigidly to a situation where a plaintiff is rendered insane as a result of an assault and battery which condition prevents a timely filing of an action against the intentional tortfeasor would result in callous injustice. Rather than promoting justice, the statute of limitations would then become an effective instrument for injustice. When this situation occurs, trial courts properly may turn to estoppel or fashion an equitable exception to the statutory limitation period. *Klamm Shell v. Berg*, 165 Colo. 540, 441 P.2d 10 (1968).

**One-year limitation period did not apply** to complaint alleging negligent supervision arising out of a fight at a company-sponsored Christmas party. *Bradley v. Guess*, 797 P.2d 749 (Colo. App. 1989).

**Statute not tolled.** The fact that a professional team did not permit service of process on a team member at the team facility during the season or the preseason training camp did not toll the statute of limitations for an alleged assault and battery. *MacMillan v. Bruce*, 900 P.2d 131 (Colo. 1995).

**Outrageous conduct is a separate tort, even though it may be premised on conduct amounting to a battery.** Therefore, the applicable statute of limitations under § 13-80-102 is two years from the date of accrual for outrageous conduct, rather than the one year limit under this section for battery. *Winkler v. Rocky Mtn. Conference*, 923 P.2d 152 (Colo. App. 1995).

**Further, where a claim may be pursued on two theories having different limitations**, the longer limitation applies. *Winkler v. Rocky Mtn. Conference*, 923 P.2d 152 (Colo. App. 1995).



## B. False Arrest.

**An action for damages for malicious prosecution** is not an action for false arrest and barred by the one-year statute of this section. *Lowen v. Hilton*, 142 Colo. 200, 351 P.2d 881 (1960).

## C. Libel.

**By this section actions for slander and libel must be commenced within one year** after the cause of action accrues or they are barred. *Bush v. McMann*, 12 Colo. App. 504, 55 P. 956 (1899).

Even "new" claims must be asserted within the one year. In action for libel, where counts one and two in amended complaint constitute "new" claims, and are not asserted against defendant within one year after the cause of action accrued, the courts are now barred by the provision of this section. *Walker v. Associated Press*, 160 Colo. 361, 417 P.2d 486 (1966).

**Libel claim barred if filed after statute has run.** The relation back doctrine, in C.R.C.P. 15(c) does not permit a party to maintain a claim for libel filed after the statute of limitations in this section has run. *Even v. Longmont United Hosp. Ass'n*, 629 P.2d 1100 (Colo. App. 1981).

**Each publication of a defamatory statement must be pled as a separate claim** for limitations purposes under this section. *Corporon v. Safeway Stores, Inc.*, 708 P.2d 1385 (Colo. App. 1985).

**Plaintiff knew, or should have known by the exercise of reasonable diligence**, of the injury to his reputation and the cause of that injury; consequently, because the complaint was filed more than two years after plaintiff learned of the statements, the trial court properly dismissed plaintiff's claims for libel, slander, and outrageous conduct as barred by subsection (1)(a) and § 13-80-102 (1)(a). *Taylor v. Goldsmith*, 870 P.2d 1264 (Colo. App. 1994).

**Trial court erred in determining that plaintiff's complaint is barred by the statute of limitations** when complaint alleges facts that show complaint was filed within the statutory time limitations. *Burke v. Greene*, 963 P.2d 1119 (Colo. App. 1998).

## III. PARAGRAPH (c).

**Annotator's note.** Since § 13-80-103 (1)(c) is similar to former § 13-80-103 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this paragraph (c).

**This section is framed in the interest of the official named and his bondsmen.** *People ex rel. Tritch v. Cramer*, 15 Colo. 155, 25 P. 302 (1890).

**The purpose of this section is to prevent annoyance and injustice through the prosecution against the officers** mentioned of stale demands predicated upon official neglect or other misconduct. *People ex rel. Tritch v. Cramer*, 15 Colo. 155, 25 P. 302 (1890).

**If possible, it should be so construed as also to protect litigants from remediless wrongs.** *People ex rel. Tritch v. Cramer*, 15 Colo. 155, 25 P. 302 (1890).

**When the wrong committed by the sheriff furnishes the real and substantial foundation** of the cause of action this section is applicable. *People v. Putnam*, 52 Colo. 517, 122 P. 796 (1912).

**A cause of action only accrues when a sheriff's negligence or misconduct prevents or retards** the vindication of a private right. *People ex rel. Tritch v. Cramer*, 15 Colo. 155, 25 P. 302 (1890).

**The term "sheriff" is used in its generic sense** and includes the whole class of officers performing the duties of the office of sheriff and includes deputy sheriff. *Bailey v. Clausen*, 192 Colo. 297, 557 P.2d 1207 (1976).

**"Any other law enforcement authority"** encompasses all peace officers included in the compilation of state-recognized law enforcement authorities contained in § 18-1-901, C.R.S. *Delta Sales Yard v. Patten*, 870 P.2d 554 (Colo. App. 1993), *aff'd*, 892 P.2d 297 (Colo. 1995).

**Paragraph applicable to sheriff's actions regardless of whether they are secured by bond.** *Cain v. Guzman*, 761 P.2d 295 (Colo. App. 1988).

**Receipt of investigative report is not the time at which cause of action accrues** where party alleging injury filed notice stating injury occurred on a different, earlier date and complaint substantiated the earlier date. *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo. App. 1991).

**Internal investigation by city would not have resulted in any civil relief to plaintiff and exhaustion of those procedures was not required as a necessary condition precedent to the institution of a legal action against the defendants.** *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo. App. 1991).

**One-year statute of limitation did apply to claims against police officer whose police dog attacked neighbor.** Even though officer was off-duty at time, he was still acting in his official capacity because he was required by departmental policy to keep the police dog at his home. *Kliwer by and through Kliwer v. Sopata*, 797 F. Supp. 1569 (D. Colo. 1992).

**Section 13-80-101 (1)(j) applies to tort actions brought against a sheriff's department arising from an alleged automobile accident involving a departmental vehicle.** Because statutes of limitation are in derogation of a valid

claim, the longer period of limitations in § 13-80-103 (1)(j) should prevail over the shorter period in paragraph (c) which could arguably be applicable in this situation. *Reider v. Dawson*, 856 P.2d 31 (Colo. App. 1992), *aff'd*, 872 P.2d 212 (Colo. 1994).

**Even though an underlying negligence action against a city's employee is barred under subsection (1)(c), a negligence action against the city based on respondeat superior is not barred under § 13-80-102 (1)(h).** *Gallegos v. City of Monte Vista*, 976 P.2d 299 (Colo. App. 1998).

**Trial court erred in applying the one-year statute of limitations to a § 1983 action asserted against a corrections employee.** The appropriate period is the 2-year limitation period of § 13-80-102. *Nieto v. State*, 952 P.2d 834 (Colo. App. 1997), *aff'd in part and rev'd in part* on other grounds, 993 P.2d 493 (Colo. 2000).

#### IV. PARAGRAPH (d).

**Annotator's note.** Since § 13-80-103 (1)(d) is similar to former § 13-80-104 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this paragraph (d).

**Action must be brought within one year after commission of offense.** Where an action was not brought until the expiration of one year after the offense was committed, plaintiff had no cause of action for the "penalty". *Atchison, T. & S. F. R. R. v. Tanner*, 19 Colo. 559, 36 P. 541 (1894); *Morris v. Bd. of County Comm'rs*, 25 Colo. App. 416, 139 P. 582 (1914).

**Statute of limitations is jurisdictional.** The statute authorizing forfeiture for a public nuisance is penal in nature. In an action premised on a penal statute as opposed to a civil claim, the statute of limitations is jurisdictional in nature, in that it specifies the time period during which a cause of action exists. Since the statute of limitations is jurisdictional, it may be raised at any stage of the proceeding, including a motion to dismiss. *People v. Steinberg*, 672 P.2d 543 (Colo. App. 1983).

**In order for this section to apply,** the action must have been brought to enforce a "penalty" provided for by statute. *Sherwood v. Graco, Inc.*, 427 F. Supp. 155 (D. Colo. 1977); *Dorney v. Harris*, 482 F. Supp. 323 (D. Colo. 1980).

**This section held not to apply to a forfeiture of workers' compensation benefits under § 8-42-402** because such forfeiture applied automatically upon conviction. *Wolford v. Pinnacle Assurance*, 81 P.3d 1079 (Colo. App. 2003), *rev'd* on other grounds, 107 P.3d 947 (Colo. 2005).

**Exemplary damages in this state constitute a penalty** provided for by statute. *Sherwood v. Graco, Inc.*, 427 F. Supp. 155 (D. Colo. 1977).

**The one-year limitation of this section applies to prayers for punitive damages.** *Sherwood v. Graco, Inc.*, 427 F. Supp. 155 (D. Colo. 1977); *Dorney v. Harris*, 482 F. Supp. 323 (D. Colo. 1980).

**Special one-year limitation in section applies to actions created by penal statutes,** not prayers for damages arising out of claims for relief not based on penal statutes. *Wise v. Olan Mills, Inc.*, 495 F. Supp. 257 (D. Colo. 1980).

**Prayer for punitive or exemplary damages is not "claim" at all,** in the sense of a claim for relief or cause of action to which a statute of limitations is directed. *Wise v. Olan Mills, Inc.*, 495 F. Supp. 257 (D. Colo. 1980).

A claim for punitive damages is not barred by this section where the claim is based on an underlying tort claim, and is not just a suit for a penalty. *Alley v. Gubser Dev. Co.*, 569 F. Supp. 36 (D. Colo. 1983).

Claim for exemplary damages premised on § 13-21-102 is not an action for a penalty or forfeiture within the meaning of this section and is thus not barred. *Adams v. Paine, Webber, Jackson & Curtis, Inc.*, 686 P.2d 797 (Colo. App. 1983).

This section does not apply to exemplary damage claims. *Moon v. Platte Valley Bank*, 634 P.2d 1036 (Colo. App. 1981).

Claim for punitive damages under § 13-21-102, being ancillary to an independent civil claim for actual damages, is not an action for the recovery of a penalty of a penal statute within the intentment of the one year limitation period of this section. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).

**Claim must sustain cause independent of tort action.** Where plaintiff's claim for exemplary damages was incapable of sustaining an independent cause of action but instead was dependent upon the underlying tort claim, plaintiff's claim for punitive damages was not a suit or action for a penalty or forfeiture. *Dorney v. Harris*, 482 F. Supp. 323 (D. Colo. 1980).

**Claim alleging violation of fiduciary duties not action for penalty or forfeiture.** Plaintiff's claim for relief alleging violation of fiduciary duties by the defendant, and seeking punitive damages for actions allegedly attended by circumstances of fraud, insult, and wanton and reckless disregard of the plaintiff's rights was not an action for a penalty or forfeiture within the meaning of this section. *Res. Exploration & Mining, Inc. v. Itel Corp.*, 492 F. Supp. 515 (D. Colo. 1980).

**Nor claim based upon § 13-21-102.** This section does not apply to exemplary damage claims. *Moon v. Platte Valley Bank*, 634 P.2d 1036 (Colo. App. 1981).

**Punitive damages.** Claims for punitive damages under § 13-21-102, being ancillary to an independent civil claim for actual damages, is not an action for the recovery of a penalty of a



penal statute within the intentment of the limitation period of this section. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).

**Penalty may be provided for in separate statute.** Where the general assembly has selected a one-year limitation period for statutes providing for penalties, it is inconsequential whether the penalty is provided for within the statute establishing the underlying cause of action, or in a separate statute which is parasitic to the existence of the underlying cause of action. The legislative intent to penalize and the legislative intent to limit the time within which such penalty actions may be brought remain the same. *Sherwood v. Graco, Inc.*, 427 F. Supp. 155 (D. Colo. 1977).

While this section has been applied to statutes which contain both a substantive cause of action and a penalty provision for noncompliance, there is no indication that it is limited to such applications. *Sherwood v. Graco, Inc.*, 427 F. Supp. 155 (D. Colo. 1977).

**This section applies to recovery of penalty for unjust discrimination in freight charges.** Section 40-31-102 providing for the recovery of a penalty for unjust discrimination in the matter of freight charges was held subject to this section. *Goodridge v. Union Pac. Ry.*, 35 F. 35 (8th Cir. 1888).

**This section applies to a claim pursuant to § 1132(c) of the federal Employee Retirement Income Security Act of 1974**, since the most analogous state law claim is a claim for civil penalties pursuant to a penal statute. *Adams v. Cyprus Amax Mineral Co.*, 44 F. Supp.2d 1126 (D. Colo. 1999).

**For inapplicability of this section to a private treble damage suit under federal anti-trust laws**, see *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F. Supp. 506 (D. Colo. 1952).

**This section does not apply to proceeding before public utilities commission seeking reparation for excessive charges for service.** *Bonfils v. Pub. Utils. Comm'n*, 67 Colo. 563, 189 P. 775 (1920).

**This section does not apply to penalties for nonpayment of taxes.** Penalties that are added to taxes as damages or interest on account of nonpayment are not such penalties as are con-

templated by this section. *Pinnacle Gold Mining Co. v. People*, 58 Colo. 86, 143 P. 837 (1914).

**Statute is not suspended by institution of suit by foreign corporation which failed to pay privilege tax.** The attempted institution of an action in the courts of Colorado by a corporation organized under the laws of another state, which has not paid the privilege fee imposed by the statute, has not the effect to stay the course of the statute of limitations. When the statutory period has elapsed the action is barred even though during the whole of that period the action appeared upon the docket of the court as a pending action, and the corporation afterwards paid the tax. *W. Elec. Co. v. Pickett*, 51 Colo. 415, 118 P. 988 (1911).

**A general denial presents the defense of the limitation prescribed by this section.** *W. Elec. Co. v. Pickett*, 51 Colo. 415, 118 P. 988 (1911).

**Rule that statute is deemed waived if not pleaded does not apply.** The general rule in civil actions that the statute of limitations is a special privilege, and must be pleaded in apt time, or is deemed waived, does not apply to penal actions. *Atchison, T. & S. F. R. R. v. Tanner*, 19 Colo. 559, 36 P. 541 (1894).

**If plaintiff fails to bring suit in a year, he has no cause of action.** When a penal statute gives plaintiff the right to recover a penalty by suing for it, this section makes his cause of action dependent upon his bringing suit within a certain period; so that if he fails to bring his suit within such period he has no cause of action remaining. *Atchison, T. & S. F. R. R. v. Tanner*, 19 Colo. 559, 36 P. 541 (1894).

**The treble damages provision of § 38-12-103**, being penal in nature, is governed by the one-year statute of limitations; however, the recovery of the actual security deposit and the award of attorney's fees, being remedial in nature, are limited by the six-year statute of limitations. *Carlson v. McCoy*, 193 Colo. 391, 566 P.2d 1073 (1977).

**The limitation period for actions for a penalty or forfeiture under penal statutes does not run against the state**, in accordance with the general rule that statutes of limitation do not run against the state unless the statute specifically or by necessary implication so provides. *Gibbs v. Colo. Mined Land Reclamation Bd.*, 883 P.2d 592 (Colo. App. 1994).

**13-80-103.5. General limitation of actions - six years.** (1) The following actions shall be commenced within six years after the cause of action accrues and not thereafter:

(a) All actions to recover a liquidated debt or an unliquidated, determinable amount of money due to the person bringing the action, all actions for the enforcement of rights set forth in any instrument securing the payment of or evidencing any debt, and all actions of replevin to recover the possession of personal property encumbered under any instrument securing any debt; except that actions to recover pursuant to section 38-35-124.5 (3), C.R.S., shall be commenced within one year;

(b) All actions for arrears of rent;

(c) All actions brought under section 13-21-109, except actions brought under section 13-21-109 (2);

(d) All actions by the public employees' retirement association to collect unpaid contributions from employers for persons who are not members or inactive members at the time the association first notifies an employer of its claim for unpaid contributions. This paragraph (d) shall apply to causes of action as provided in section 24-51-402 (2), C.R.S.

(e) All actions brought for restitution and civil penalties pursuant to section 25.5-4-306, C.R.S.

**Source:** **L. 86:** Entire article R&RE, p. 697, § 1, effective July 1. **L. 87:** (1)(a) amended, p. 568, § 4, effective July 1. **L. 89:** (1)(c) added, p. 757, § 5, effective July 1. **L. 95:** (1)(d) added, p. 562, § 20, effective May 22. **L. 2001:** (1)(e) added, p. 326, § 2, effective July 1. **L. 2002:** (1)(a) amended, p. 1331, § 1, effective July 1. **L. 2006:** (1)(e) amended, p. 2001, § 48, effective July 1.

**Editor's note:** This section is similar to former § 13-80-110 as it existed prior to 1986.

## ANNOTATION

I. General Consideration.

II. Applicable Actions.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "State Statutes of Limitation Contrasted and Compared", see 3 Rocky Mt. L. Rev. 106 (1931). For note, "Necessity for Filing Secured Claims in Bankruptcy Proceedings", see 3 Rocky Mt. L. Rev. 209 (1931). For article, "One Year Review of Agency, Partnerships, Corporations, and Municipal Corporations", see 41 Den. L. Ctr. J. 61 (1964). For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den. L.J. 82 (1970). For article, "Inverse Condemnation — A Viable Alternative", see 51 Den. L.J. 529 (1974). For article, "Federal Practice and Procedure", see 56 Den. L.J. 491 (1979). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

**Annotator's notes.** (1) Since § 13-80-103.5 is similar to former § 13-80-110 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations of this section.

(2) For cases concerning when a cause of action accrues under this section, see the annotations to § 13-80-108.

**The statute of limitations is intended to make parties more vigilant in asserting their supposed rights, and to deter them from bringing actions on state claims when witnesses may have died or moved away, or their recollection become impaired, or when other evidences may have disappeared, so that the truth of matters in controversy might be difficult of ascertainment.** Toothaker v. City of Boulder, 13 Colo. 219, 22 P. 468 (1889).

**It is to be construed liberally.** It is the settled law in Colorado that courts look with favor upon statutes of limitation and construe them liber-

ally. Chuchuru v. Chutchurru, 185 F.2d 62 (10th Cir. 1950).

**The statute of limitations is regarded as a statute of repose,** having regard to the peace and welfare of society, "not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill-founded, which may have been discharged, but the evidence of discharge lost". Hittson v. Davenport, 3 Colo. 597 (1877); Patterson v. Fort Lyon Canal Co., 36 Colo. 175, 84 P. 807 (1906).

**It is a bar to the remedy and not to the right.** Brereton v. Benedict, 41 Colo. 16, 92 P. 238 (1907); Holmquist v. Gilbert, 41 Colo. 113, 92 P. 232 (1907); Foot v. Burr, 41 Colo. 192, 92 P. 236 (1907); Brown v. Bell, 46 Colo. 163, 103 P. 380 (1909); Cooley v. Rowan, 71 Colo. 17, 203 P. 669 (1922); Wyatt v. Burnett, 95 Colo. 414, 36 P.2d 768 (1934); Rogers v. Rogers, 96 Colo. 473, 44 P.2d 909 (1935); Kiles v. Trinchera Irrigation Dist., 136 F.2d 894 (10th Cir. 1943).

**Running of statute does not extinguish debt.** While the statute of limitations may cause the remedy on a debt to be lost, it does not extinguish the debt. Estate of Ramsey v. State, Dept. of Rev., 42 Colo. App. 163, 591 P.2d 591 (1979).

**A statute of limitations drafted to relate to special cases controls over a general statute of limitations.** Mohawk Green Apartments v. Kramer, 709 P.2d 955 (Colo. App. 1985).

**Statute of limitations is personal bar** which may be raised or waived by the defendant. Estate of Ramsey v. State, Dept. of Rev., 42 Colo. App. 163, 591 P.2d 591 (1979).

**Statute of limitations may be waived.** The statute of limitations is a personal defense of which a defendant may or may not avail himself at his pleasure. Williams v. Carr, 4 Colo. App. 368, 36 P. 646 (1894); Owers v. Olathe Silver Mining Co., 6 Colo. App. 1, 39 P. 980 (1895); Foot v. Burr, 41 Colo. 192, 92 P. 236 (1907).

**And is deemed waived if not pleaded.** The statute of limitations may be waived, and where



not pleaded in the first instance, it is presumed to have been waived. *Owers v. Olathe Silver Mining Co.*, 6 Colo. App. 1, 39 P. 980 (1895); *Chivington v. Colo. Springs Co.*, 9 Colo. 597, 14 P. 212 (1886); *Atchinson T. & S. F. R. R. v. Tanner*, 19 Colo. 559, 36 P. 541 (1894); *Brown v. Bell*, 46 Colo. 163, 103 P. 380 (1909).

**Waiver for indefinite time permanently removing bar of statute is void.** Agreement in a promissory note, that "we, the makers hereby waive all benefits of the statute of limitations", being a waiver for an indefinite time, and permanently removing the statute of limitations from operation, is void, and does not preclude the maker from interposing the statute of limitations as a defense. *First Nat'l Bank v. Mock*, 70 Colo. 517, 203 P. 272 (1921).

**Attorney may not waive.** The maker of a promissory note barred by the statute of limitations directs an attorney to attend a sale of land under a trust deed given to secure the note, and "protect his interest". He has no authority to waive the statute of limitations for his client. *Ferris v. Curtis*, 53 Colo. 340, 127 P. 236 (1912); *First Nat'l Bank v. Mock*, 70 Colo. 517, 203 P. 272 (1921).

**Statutes of limitations are not retroactive unless expressly so providing.** Since statutes of limitations are remedial only, it is competent for the general assembly to make them operate retroactively, but it must do so by expressly so providing. *Edelstein v. Carlile*, 33 Colo. 54, 78 P. 680 (1904); *Bonfils v. Pub. Utils. Comm'n*, 67 Colo. 563, 189 P. 775 (1920); *Jones v. O'Connell*, 87 Colo. 103, 285 P. 762 (1930).

**Action cannot be revived by general assembly after bar has attached.** When the bar of a statute of limitations has once attached, the action cannot be revived by an act of the general assembly. *Massachusetts Mut. Life Ins. Co. v. Colo. Loan & Trust Co.*, 20 Colo. 1, 36 P. 793 (1894).

**Twenty-year period prescribed for execution upon judgments in § 13-52-102 and not the six-year period in this section is the applicable statute of limitations for child support arrearages.** *In re Aragon*, 773 P.2d 1110 (Colo. App. 1989).

**Statute of limitations runs against a city acting in its proprietary capacity** in an action to recover unpaid utilities charges due to an error in billing procedure. *Colo. Springs v. Timberlane Assoc.*, 807 P.2d 1177 (Colo. App. 1990), *aff'd* on other grounds, 824 P.2d 776 (Colo. 1992).

**Function in which government is acting is not dispositive of whether limited sovereign immunity attaches.** City is not immune from statute of limitations in action upon contract claim. *Colo. Springs v. Timberlane Assoc.*, 824 P.2d 776 (Colo. 1992).

**The six-year limitation period of subsection (1)(a) applies even against a governmental**

entity to recover a liquidated debt or an unliquidated, determinable amount of money due. *Fishburn v. City of Colo. Springs*, 919 P.2d 847 (Colo. App. 1995).

**The two-year limitation period of § 13-80-102 (1)(h) for claims to be brought against a governmental entity is not applicable to the contract claims brought by employees and former employees against the city.** Because to do so would allow a governmental entity to bring a contract claim against a nongovernmental entity within a three-year or longer period while a nongovernmental entity would be required to bring a similar claim against a governmental entity within a two-year period. *Fishburn v. City of Colo. Springs*, 919 P.2d 847 (Colo. App. 1995).

**State statute of limitation rather than federal statute of limitation governs** an action filed by a private party who is the assignee of a promissory note held by the Federal Deposit Insurance Corporation as receiver. *Tivoli Ventures, Inc. v. Tallman*, 852 P.2d 1310 (Colo. App. 1992).

**An equitable tolling of a statute of limitations is limited** to situations in which either the defendant has wrongfully impeded the plaintiff's ability to bring the claim or truly extraordinary circumstances prevented the plaintiff from filing his or her claim despite diligent efforts. Neither the actions of the defendants nor the lawsuit against the third party in this case in any way impeded the litigant's right to file suit. *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094 (Colo. 1996).

**When a creditor on multiple debts applies an undesignated partial payment by the debtor to a debt on which the statute of limitations has not yet run, the payment tolls the statute of limitations on that debt.** *Drake v. Tyner*, 914 P.2d 519 (Colo. App. 1996).

**Applied in Kanarado Mining & Dev. Co. v. Sutton**, 36 Colo. App. 375, 539 P.2d 1325 (1975); *Carpenters & Millwrights Health Benefit Trust Fund v. Gardiner Dry Walling Co.*, 573 F.2d 1172 (10th Cir. 1978); *Duncan v. Schuster-Graham Homes, Inc.*, 194 Colo. 441, 578 P.2d 637 (1978); *Tamblyn v. Mickey & Fox, Inc.*, 195 Colo. 354, 578 P.2d 641 (1978); *Hayden v. Bd. of County Comm'rs*, 41 Colo. App. 102, 580 P.2d 830 (1978); *McClanahan v. Am. Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo. 1980); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152 (10th Cir. 1981), cert. denied, 464 U.S. 824, 104 S. Ct. 92, 78 L. Ed.2d 99 (1983); *Republic Nat'l Bank v. Meridian Props., Inc.*, 530 F. Supp. 169 (D. Colo. 1982); *Siegel Oil Co. v. Gulf Oil Corp.*, 556 F. Supp. 302 (D. Colo. 1982); *B.C. Inv. Co. v. Throm*, 650 P.2d 1333 (Colo. App. 1982); *Whatley v. Skaggs Cos.*, 707 F.2d 1129 (10th Cir. 1983); *William B. Tanner Co. v. Mesa Broad. Co.*, 571 F. Supp. 28 (D. Colo. 1983); *United Bank of*

Denver Nat'l Ass'n v. Wright, 660 P.2d 510 (Colo. App. 1983); Smith v. Union Supply Co., 675 P.2d 333 (Colo. App. 1983); Simpson v. Milne, 677 P.2d 365 (Colo. App. 1983); Magna Associates v. Torgrove, 585 F. Supp. 585 (D. Colo. 1984); Martinez v. Cont'l Enter., 697 P.2d 789 (Colo. App. 1984); Martinez v. Cont'l Enter., 730 P.2d 308 (Colo. 1986), affirming in part and reversing in part on other grounds, 697 P.2d 789 (Colo. App. 1984).

## II. APPLICABLE ACTIONS.

**A statute of limitations is applied only to cases clearly within its provisions.** Glenn v. Mitchell, 71 Colo. 394, 207 P. 84 (1922); Wyatt v. Burnett, 95 Colo. 414, 36 P.2d 768 (1934).

**This section is a general statute of limitations on the enforcement of debts**, including debts evidenced by a promissory note secured by a deed of trust. After a party reduces a promissory note to judgment, the more specific six- and 15-year limitations periods established by §§ 13-52-102 and 38-29-205 apply to the resulting judgment lien and original deed of trust respectively. The merger of the promissory note into the judgment does not discharge the debt or extinguish the lien of the deed of trust. Mortgage Invs. Corp. v. Battle Mountain Corp., 70 P.3d 1176 (Colo. 2003).

**Application to foreign corporation.** Former § 13-80-110 could not be applied to subject a foreign corporation to greater liabilities than were imposed upon a similarly situated domestic corporation. Casselman v. Denver Tramway Corp., 39 Colo. App. 306, 568 P.2d 84 (1977), rev'd on other grounds, 195 Colo. 241, 577 P.2d 293 (1978).

Since this state has by § 7-8-122 (1) adopted a two-year statute of limitations applicable to dissolved domestic corporations, it would be both illogical and unconstitutional to apply to a foreign corporation, which has been dissolved pursuant to the laws under which it is governed by its state of incorporation, and which has received a certificate of withdrawal from this state, a statute of limitations which would subject it to liability for a period longer than that which this state would apply to a dissolved domestic corporation. Casselman v. Denver Tramway Corp., 39 Colo. App. 306, 568 P.2d 84 (1977), rev'd on other grounds, 195 Colo. 241, 577 P.2d 293 (1978).

**This statute is a meritorious defense to an action on a promissory note.** First Nat'l Bank v. Mock, 70 Colo. 517, 203 P. 272 (1921).

**This statutory section only applies when there is a contract between the parties.** Pound v. Fletter, 39 P.3d 1241 (Colo. App. 2001).

**Action for money loaned may be brought within six years from last interest payment.** The statute of limitations is not a bar to an action for money loaned when brought within six years

from the date of the last payment of interest. Purdy v. Deprez, 39 Colo. 68, 88 P. 972 (1907).

**It applies to action to recover usurious interest.** The applicable statute of limitations for the common-law remedy of money had and received to recover usurious interest paid then is six years. Dennis v. Bradbury, 236 F. Supp. 683 (D. Colo. 1964), aff'd and reh'g denied, 368 F.2d 905 (10th Cir. 1966).

**Reimbursement under lease.** Where a long-term lease agreement is executed, and where the lessor subsequently pays the applicable sales taxes and invoices the amount paid to the lessee, but the lessee refuses to make reimbursement, this section is the applicable statutory section. Columbine Beverage Co. v. Cont'l Can Co., 662 P.2d 1094 (Colo. App. 1982).

**In an action by a builder against the owners for damages for breach of contract prior to completion of construction**, where the builder sought a liquidated determinable amount of money due it from the owners, i.e., 10 percent of the estimated cost of the house, it was an action of debt founded upon a contract included within the meaning of this section. Comfort Homes, Inc. v. Peterson, 37 Colo. App. 516, 549 P.2d 1087 (1976).

**Statute inapplicable to claims for replevin, conversion, theft, and breach of bailment brought by daughter against mother with respect to mother's taking of winning lottery ticket;** this section applicable only to claims based in contract. Curtis v. Counce, 32 P.3d 585 (Colo. App. 2001).

**"Liquidated debt" and "unliquidated, determinable amount" construed.** A debt is deemed "liquidated" if the amount due is capable of ascertainment by reference to an agreement or by simple computation. A debtor's dispute of or defenses against such claim, or any setoff or counterclaim interposed, does not affect this result. Similarly, if a contract fixes a price per unit of performance, a claim based thereon is "determinable" even though the number of units performed must be proven and is subject to dispute. Rotenberg v. Richards, 899 P.2d 365 (Colo. App. 1995); applied in Interbank Inv. v. Vail Valley Consol. Water, 12 P.3d 1224 (Colo. App. 2000); Portercare Adventist Health Sys. v. Lego, \_\_ P.3d \_\_ (Colo. App. 2010).

**A claim based on quantum meruit is not liquidated or determinable**, because it seeks only reasonable compensation for services rendered, in an amount to be determined by the fact-finder. Rotenberg v. Richards, 899 P.2d 365 (Colo. App. 1995); Portercare Adventist Health Sys. v. Lego, \_\_ P.3d \_\_ (Colo. App. 2010).

**Statute does not apply to amount owed from partnership accounting.** Because the amount due from the partnership accounting was not capable of ascertainment by reference to the partnership agreement or by a simple com-



putation derived from the agreement, the statute does not apply. *Tafoya v. Perkins*, 932 P.2d 836 (Colo. App. 1996).

**A hospital bill is not an agreement between parties, but rather a statement of charges,** and so is not a "liquidated" or "determinable" sum. As such, it is governed by the three-year statute of limitations for recovery under § 13-80-101, not the six-year statute of limitations prescribed by this section. *Portercare Adventist Health Sys. v. Lego*, \_\_ P.3d \_\_ (Colo. App. 2010).

**Action under § 10-4-708 of Colorado Auto Accident Reparations Act covered by this section as an action in debt or in assumpsit.** *Winstead v. Criterion Ins. Co.*, 781 P.2d 170 (Colo. App. 1989).

**An action for negligent misrepresentation** is based upon simple negligence, and thus such an action was governed by the former six-year statute of limitations rather than the three-year statute of limitations generally applicable for fraud. *Ebrahimi v. E.F. Hutton & Co., Inc.*, 794 P.2d 1015 (Colo. App. 1989).

**Claim for breach of contract against construction contractor is not governed by two-year statute of limitations for actions against contractors and builders** (now § 13-80-104) but by six-year statute of limitations for contract actions in this section, but claim against contractor for damages caused by delays in construction is covered by two-year statute. *Frisco Motel P'ship v. H.S.M. Corp.*, 791 P.2d 1195 (Colo. App. 1989).

**ERISA action to recover pension and benefit contributions is analogous to state breach of contract action** and subject to the six year statute of limitations under this section. *Trustees of Health Ben. Trust v. Lillard and Clark*, 780 F. Supp. 738 (D. Colo. 1990); *Aull v. Cavalcade Pension Plan*, 988 F. Supp. 1360 (D. Colo. 1997).

**The Colorado statute of limitations for the enforcement of rights which are set forth in an instrument securing the payment of a debt** is six years after the claim for relief accrues and a claim for relief on a promissory note accrues the day after the note matures. *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994).

**13-80-103.7. General limitation of actions - sexual assault or sexual offense against a child - six years.** (1) Notwithstanding any other statute of limitations specified in this article, or any other provision of law that can be construed to reduce the statutory period set forth in this section, any civil action based on a sexual assault or a sexual offense against a child shall be commenced within six years after a disability has been removed for a person under disability, as such term is defined in subsection (3.5) of this section, or within six years after a cause of action accrues, whichever occurs later, and not thereafter. Nothing in this section shall be construed to extend the statutory period with respect to vicarious liability.

(2) For the purpose of this section, "sexual assault" means subjecting another person of any age to sexual contact, as defined in section 18-3-401 (4), C.R.S.; sexual intrusion, as

**The statute of limitations applies to each installment due on a note separately and does not begin to run on any one installment until that installment is due.** Right to foreclose on note is not extinguished because certain payments are more than six years overdue and foreclosure proceedings are just begun. *Application of Church*, 833 P.2d 813 (Colo. App. 1992).

**If a money obligation is payable in installments, a separate cause of action arises on each installment** and the statute of limitations begins to run against each installment when it becomes due, regardless of whether the holder possesses the option to declare all installments payable in the event of default on a single payment. *Application of Church*, 833 P.2d 813 (Colo. App. 1992).

**In the case of a default on installment payments,** the statute of limitations must be deemed to commence running on the date of the cure as to any installment payments due prior to that date. *Parker v. Luttrell*, 926 P.2d 179 (Colo. App. 1996).

**Because the statute of limitations under this section had not run as of the date when the FDIC's claim for relief on promissory note accrued,** the federal statute of limitations preempted this section as a result of the FDIC's receivership. *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994).

**Assignment of a promissory note by the FDIC to private party** allows the assignee to seek recovery pursuant to the federal statute of limitations, facilitates expunging the federal system of failed bank assets, and is consistent with the intent and language of the federal statute as well as the requirements of the common law. *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994).

**This section does not apply to a contract action for insurance coverage** in which no third party was damaged. *Union Pac. R.R. Co. v. Certain Underwriters at Lloyd's, London*, 37 P.3d 524 (Colo. App. 2001).

**The statute of limitations does not apply to an action to quiet title brought by a person in possession of real property.** *Martinez v. Archuleta-Padia*, 143 P.3d 1112 (Colo. App. 2006).

defined in section 18-3-401 (5), C.R.S.; or sexual penetration, as defined in section 18-3-401 (6), C.R.S.

(3) For the purposes of this section, "sexual offense against a child" shall include all offenses listed in section 18-3-411; C.R.S.

(3.5) (a) For the purpose of this section, "person under disability" means any person who is a minor under eighteen years of age, a mental incompetent, or a person under other legal disability and who does not have a legal guardian. "Person under disability" also includes a victim of a sexual assault when the victim is in a special relationship with the perpetrator of the assault or is a victim of a sexual offense against a child or is a victim who is residing in an institutional facility, such as a nursing home, regional center, or residential facility for the treatment and care of persons with mental illness or for the care of persons with developmental disabilities and where the victim is psychologically or emotionally unable to acknowledge the assault or offense and the harm resulting therefrom. For the purpose of this subsection (3.5), "special relationship" means a relationship between the victim and the perpetrator of the sexual assault which is a confidential, trust-based relationship, such as attorney-client, doctor-patient, psychotherapist-patient, minister-parishioner, teacher-student, or familial relationship. It is the intent of the general assembly to leave in place the six-year limitation for adults subjected to a sexual assault except in the situations described in this paragraph (a) in which the victim is in a special relationship with the perpetrator of the assault. In the circumstances in which a victim is in a special relationship with the perpetrator of the assault or is a victim of a sexual offense against a child or a victim who is residing in an institutional facility, such as a nursing home, regional center, or residential facility for the treatment and care of persons with mental illness or for the care of persons with developmental disabilities and where the victim is psychologically or emotionally unable to acknowledge the assault or offense and the harm resulting therefrom, the six-year limitation shall be tolled until the disability is removed. For the purpose of this section, where the plaintiff is a victim of a series of sexual assaults or sexual offenses against a child, the plaintiff need not establish which act of a series of acts caused the plaintiff's injury, and the statute of limitations set forth in this section shall commence with the last in the series of acts, subject to the provisions of this section regarding disability. However, as elements of the cause of action, a person under disability who is psychologically or emotionally unable to acknowledge the assault or offense and the harm resulting therefrom shall have the burden of proving that the assault or offense occurred and that such person was actually psychologically or emotionally unable to acknowledge the assault or offense and the harm resulting therefrom.

(b) Notwithstanding the provisions of section 13-90-107, the filing of a claim pursuant to this subsection (3.5) is deemed to be a limited waiver of the doctor-patient privilege or the psychologist-patient privilege to persons who are necessary to resolve the claim, and a doctor or psychologist who provided medical care and treatment or counseling and treatment to the plaintiff for injuries upon which an action under this subsection (3.5) is based may be examined as a witness. All medical records pertaining to any relevant medical care and treatment or counseling and treatment of the plaintiff are admissible into evidence in an action brought pursuant to this subsection (3.5) and shall be available for inspection upon request by the parties to the action.

(c) If the plaintiff brings a civil action under this subsection (3.5) fifteen years or more after the plaintiff attains the age of eighteen, the plaintiff may only recover damages for medical and counseling treatment and expenses, plus costs and attorney fees.

(d) It is the intent of the general assembly in enacting this subsection (3.5) to extend the statute of limitations as to civil actions based on offenses described in subsection (1) of this section as amended on July 1, 1993, for which the applicable statute of limitations in effect prior to July 1, 1993, has not yet run on July 1, 1993.

(3.7) An action may not be brought pursuant to subsection (3.5) of this section if the defendant is deceased or is incapacitated to the extent that the defendant is incapable of rendering a defense to the action.

(4) It is the intent of the general assembly in enacting this section to extend the statute of limitations as to civil actions based on offenses described in subsection (1) of this section



for which the applicable statute of limitations in effect prior to July 1, 1990, has not yet run on July 1, 1990.

(5) The provisions of this section shall not be construed to extend or suspend the statute of limitations or statute of repose applicable to a claim alleging negligence in the course of providing professional services in the practice of medicine. This subsection (5) shall not be construed to preclude pursuing a civil action pursuant to this section alleging a sexual offense based on a legal theory other than negligence in the course of providing professional services in the practice of medicine, unless the sexual assault forms the basis for a claim of such negligence.

**Source:** **L. 90:** Entire section added, p. 885, § 1, effective April 16. **L. 93:** Entire section amended, p. 1908, § 1, effective July 1.

#### ANNOTATION

This section does not purport to define when an action for sexual assault on a child "accrues", but rather establishes the six-year limitation period and provides that the period runs from accrual or from the date of removal of disability. *Sailsbery v. Parks*, 983 P.2d 137 (Colo. App. 1999).

Statute of limitations set forth in this section is restricted to claims brought against a perpetrator and does not encompass claims

against parties other than a perpetrator of a sexual offense. *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. App. 2000).

Claims of intentional sexual assault or battery committed during the provision of medical services are subject to the six-year statute of limitation of this section, unless the sexual touching occurred in a negligent manner. *Hurtado v. Brady*, 165 P.3d 871 (Colo. App. 2007).

**13-80-103.8. Limitation of civil forfeiture actions related to criminal acts.** (1) The following actions shall be commenced within five years after the cause of action accrues, and not thereafter:

- (a) All actions brought pursuant to section 12-55.5-110 (2), C.R.S.;
- (b) All actions brought pursuant to part 3 of article 13 of title 16, C.R.S.;
- (c) All actions brought pursuant to part 5 of article 13 of title 16, C.R.S.;
- (d) All civil actions brought pursuant to article 17 of title 18, C.R.S.;
- (e) All civil actions brought pursuant to section 42-5-107, C.R.S.

(2) A cause of action shall be deemed to have accrued pursuant to subsection (1) of this section at such time as the alleged offense or conduct giving rise to the claim was discovered. If, when a cause of action accrues against a person pursuant to subsection (1) of this section, such person is out of this state and not subject to service of process or has concealed himself, or the property which is the subject of such a cause of action is concealed or absent from this state, the period limited for the commencement of the action by the statute of limitations pursuant to this section shall not begin to run until such person comes into this state or such property is no longer out of this state or concealed. If, after the cause of action accrues, such person departs from this state and is not subject to service of process or conceals himself, the time of his absence while not subject to service of process or the time of his concealment while not subject to service of process, or any period of time the property which is the subject of such cause of action is removed from this state, shall not be computed as a part of the period within which the action must be brought.

(3) For purposes of computing time pursuant to this section, possession or control of the following forms of property by any person subject to a cause of action pursuant to subsection (1) of this section shall be deemed to be a continuing offense or continuing conduct:

- (a) All currency, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for any alleged offense or conduct giving rise to a cause of action;
- (b) All proceeds of any alleged offense or conduct giving rise to a cause of action;
- (c) All currency, negotiable instruments, or securities intended to be used to facilitate any alleged offense or conduct giving rise to a cause of action;

(d) All property derived from or realized through any alleged offense or conduct giving rise to a cause of action.

**Source: L. 90:** Entire section added, p. 984, § 3, effective April 24.

**13-80-103.9. Limitation of actions - failure to perform a background check by a public entity - injury to a child.** (1) As used in this section, unless the context otherwise requires:

(a) "Child" means a person under eighteen years of age.

(b) "Education employment required background check" means complying with sections 22-2-119 and 22-32-109.7, C.R.S.

(c) "Sexual offense against a child" shall include all offenses listed in section 18-3-411 (1), C.R.S.

(2) Notwithstanding any other statute of limitations specified in this article or any other provision of law, a civil action, as described in subsection (3) of this section, against a school district or charter school for failure to perform an education employment required background check may be brought at any time within two years after the age of majority of the plaintiff.

(3) In bringing a civil action for failure to perform an education employment required background check pursuant to this section, a plaintiff shall make a prima facie showing of the following facts and circumstances:

(a) The school district or charter school, in hiring an individual to work with children or in a setting with children, or the department of education did not perform an education employment required background check of the individual, and the failure to conduct the required background check was the result of the school district's or charter school's deliberate indifference or reckless disregard of its obligations to conduct the background check as provided by law; ordinary negligence or unintentional oversight is not sufficient.

(b) The individual, at the time of hiring, had a criminal record that included one or more convictions for the offense of sexual assault as described in section 18-3-402, C.R.S., for a sexual offense against a child, or for child abuse as described in section 18-6-401, C.R.S., or the individual had been dismissed or had resigned from a school district under the circumstances described in section 22-32-109.7 (1) (b), C.R.S.; and

(c) The individual committed one of the following offenses against a child with whom the individual came in contact in the course of his or her employment with the school district or charter school:

(I) Sexual assault as described in section 18-3-402, C.R.S.;

(II) Sexual offense against a child; or

(III) Child abuse as described in section 18-6-401, C.R.S.

(4) An action may not be brought pursuant to subsection (3) of this section if the defendant is deceased or is incapacitated to the extent that the school district or charter school is incapable of rendering a defense to the action.

**Source: L. 2008:** Entire section added, p. 2225, § 3, effective June 5.

**13-80-104. Limitation of actions against architects, contractors, builders or builder vendors, engineers, inspectors, and others.** (1) (a) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within the time provided in section 13-80-102 after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property, except as provided in subsection (2) of this section.

(b) (I) Except as otherwise provided in subparagraph (II) of this paragraph (b), a claim for relief arises under this section at the time the claimant or the claimant's predecessor in



interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury.

(II) Notwithstanding the provisions of paragraph (a) of this subsection (1), all claims, including, but not limited to indemnity or contribution, by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person:

(A) Arise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first; and

(B) Shall be brought within ninety days after the claims arise, and not thereafter.

(c) Such actions shall include any and all actions in tort, contract, indemnity, or contribution, or other actions for the recovery of damages for:

(I) Any deficiency in the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property; or

(II) Injury to real or personal property caused by any such deficiency; or

(III) Injury to or wrongful death of a person caused by any such deficiency.

(2) In case any such cause of action arises during the fifth or sixth year after substantial completion of the improvement to real property, said action shall be brought within two years after the date upon which said cause of action arises.

(3) The limitations provided by this section shall not be asserted as a defense by any person in actual possession or control, as owner or tenant or in any other capacity, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or damage for which it is proposed to bring an action.

**Source:** L. 86: Entire article R&RE, p. 697, § 1, effective July 1. L. 2001: (1)(b) amended, p. 390, § 2, effective August 8.

**Editor's note:** This section is similar to former § 13-80-127 as it existed prior to 1986.

## ANNOTATION

**Law reviews.** For article, "The Two-Year Construction Statute of Limitations", see 15 Colo. Law. 402 (1986). For article, "Let the Builder-Vender Beware: Defenses and Damages in Home Builder Litigation — Part II", see 16 Colo. Law. 629 (1987). For article, "Defining 'Substantial Completion' in Construction Defect Actions", see 27 Colo. Law. 73 (October 1998). For article, "Statutes of Limitations and Repose in Construction Defect Cases Part I", see 33 Colo. Law. 73 (May 2004). For article, "Statutes of Limitations and Repose in Construction Defect Cases Part II", see 33 Colo. Law. 67 (June 2004).

**Annotator's note.** Since § 13-80-104 is similar to former § 13-80-127 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this section.

**Former § 13-80-127 deemed unconstitutional.** Former section was unconstitutional because it granted immunity from suit to certain classes of defendants without any reasonable basis for the classification. *McClanahan v. Am. Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo. 1980).

**Statutory distinctions neither discriminatory nor arbitrary.** In view of the differences

between construction professionals and materialmen, the legislative judgment to grant one group immunity from suit after a reasonable period of time while denying it to the other is neither invidiously discriminatory nor wholly arbitrary. *Cudahy Co. v. Ragnar Benson, Inc.*, 514 F. Supp. 1212 (D. Colo. 1981).

**Former § 13-80-127 constitutional.** Requiring claims against builder-vendors to be filed within two years after the claim for relief arises did not violate federal or state constitutional equal protection guarantees. *Criswell v. M.J. Brock and Sons, Inc.*, 681 P.2d 495 (Colo. 1984).

**Not retroactive.** Former § 13-80-127 was not enacted until 1969, and there is nothing in it which indicates that it was to be given retroactive application. *Greene v. Green Acres Constr. Co.*, 36 Colo. App. 439, 543 P.2d 108 (1975).

**Period for suit against architect reasonable.** It is not unreasonable for the general assembly to limit to 10 years (now 6 years) the period in which suits may be commenced against architects for design defects, in view of the legislative intent to avoid stale claims and the likelihood that most types of defects would reasonably be discovered within 10 years (now 6 years) of substantial completion. Since this section is rationally related to a permissible state

objective, it does not violate due process. *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822 (Colo. 1982).

**Applicability of section.** The plain language of this section reflects a legislative intent to apply a shorter limitations period only to claims for personal injury or damage to property other than the defective improvement itself; in cases where the claim relates to the defective improvement itself, the general statutes of limitations appropriate to contract, negligence, warranty, etc., are applicable. *Tamblyn v. Mickey & Fox, Inc.*, 195 Colo. 354, 578 P.2d 641 (1978); *Duncan v. Schuster-Graham Homes, Inc.*, 194 Colo. 441, 578 P.2d 637 (1978).

Statute of limitations specifically drafted to relate to special cases controls over a general statute of limitations and, therefore, this section and not the general statute of limitations controls the time limits for filing. *Stanske v. Wazee Elec. Co.*, 690 P.2d 1291 (Colo. App. 1984), *aff'd*, 722 P.2d 402 (Colo. 1986); *Mohawk Green Apartments v. Kramer*, 709 P.2d 955 (Colo. App. 1985).

For purposes of deciding applicability of former § 13-80-127, the principal factor to be considered in determining whether something constitutes an improvement to real property is intention of owner. *Enright v. City of Colo. Springs*, 716 P.2d 148 (Colo. App. 1985).

In the absence of a formal complaint, arbitration proceeding, or settlement of a dispute where a homeowner has bargained for repair work in exchange for a release of a homebuilder's liability, a homebuilder's repair of damages to a home is not resolution of a "claim" for purposes of triggering the 90-day statute of limitations set forth in subsection (1)(b)(II), and that statute of limitations therefore does not apply to such a homebuilder's related claims against subcontractors. *Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC*, 187 P.3d 1199 (Colo. App. 2008).

**This section does not deprive a court of jurisdiction to hear a time-barred claim**, and reliance on the limitation period must be pleaded and proven as an affirmative defense. *Dunton v. Whitewater West Recreation, Ltd.*, 942 P.2d 1348 (Colo. App. 1997).

**Since structure causing injuries to plaintiff was not a product but an improvement to real property**, neither city nor contractor could be held liable on a theory of strict liability. *Enright v. City of Colo. Springs*, 716 P.2d 148 (Colo. App. 1985).

**Former statute of repose barred claim.** Installation of electrical system to grain elevator is integral part of improvement to real property and is kind of activity intended to be protected under former statute of repose. *Stanske v. Wazee Elec. Co.*, 722 P.2d 402 (Colo. 1986).

**Architect may be covered by section even though unlicensed when services first ren-**

**dered.** An architect still comes within the protections of this section even though he is not licensed to practice architecture in Colorado at the time design services are first rendered, but becomes licensed in Colorado before the substantial completion of the structure. *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822 (Colo. 1982).

**Section extends to those involved in the actual process of construction, and a designation alone does not determine whether a defendant is protected.** A court must examine the defendant's activities using an "activities analysis", which includes an examination of the label placed on a party involved in the building process and whether that party's actions fall within the statute's protected class of activities. *Two Denver Highlands v. Stanley Structures*, 12 P.3d 819 (Colo. App. 2000).

**Claims not limited to deficiencies in structure.** This section does not limit claims for deficiencies in the structure itself, as opposed to consequential property damage; thus, a factory owner could sue the designer of a refrigeration unit four years after an accident for the cost of repair of the deficiencies in the system itself. *Cudahy Co. v. Ragnar Benson, Inc.*, 514 F. Supp. 1212 (D. Colo. 1981).

**Claim relating to defective improvements not barred by two-year statute of limitations** where claim was filed within proper time period under former statute of limitations and where claim was filed within time allowed in applicability clause for amendments to two-year statute of limitations. *Johnson v. Graham*, 679 P.2d 1090 (Colo. App. 1983).

Action on breach of warranty claim for defects in workmanship is controlled by two-year statute of limitations since defect was discovered more than two years prior to commencement of action, even though warranty was valid for ten years. *Mohawk Green Apartments v. Kramer*, 709 P.2d 955 (Colo. App. 1985).

**Grading of lot** is essential and integral to the construction and completion of a house and is part of the improvements to the real property. Therefore, the builder's alleged improper grading of the lot is a "deficiency in an improvement to real property", and buyer's claims are within the scope of this section. *Embree v. Am. Continental Corp.*, 684 P.2d 951 (Colo. App. 1984).

**Since phrase "improvement to real property" is not defined**, assumption is that general assembly intended to give it its usual and ordinary meaning and, therefore, indicator light installed as part of overall electrical system is an improvement to property within this section. *Stanske v. Wazee Elec. Co.*, 690 P.2d 1291 (Colo. App. 1984), *aff'd*, 722 P.2d 402 (Colo. 1986); *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637 (Colo. 1988); *Two Denver Highlands v. Dillingham*, 932 P.2d 827 (Colo. App. 1996).

**The determination whether the construction was an improvement to real property is a**



**matter of law.** Two Denver Highlands v. Dillingham, 932 P.2d 827 (Colo. App. 1996).

**The principal factor in determining whether an activity constitutes an improvement to real property is the intention of the owner.** Two Denver Highlands v. Dillingham, 932 P.2d 827 (Colo. App. 1996).

**Concrete used to build garage is an improvement to real property.** The owner intended to improve the real property by building a parking garage. The concrete was an essential and predominant part of the garage. Two Denver Highlands v. Dillingham, 932 P.2d 827 (Colo. App. 1996).

**Section inapplicable to damage claims to defective improvements.** The two-year statute of limitations for actions concerning the construction of improvements to real property does not apply to claims for damage to improvements which are themselves defective. Olson Plumbing & Heating, Inc. v. Douglas Jardine, Inc., 626 P.2d 750 (Colo. App. 1981).

**Section 13-21-204 applies to all wrongful death actions absent exception.** The language of § 13-21-204 is plainly all-inclusive, and must be construed to apply to all wrongful death actions in the absence of an express exception in this section. McClanahan v. Am. Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980).

**Relation back doctrine of rule 15(c), Fed. R. App. P. does not apply in wrongful death action unless the added party was given notice within the period provided by this section.** McClanahan v. Am. Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980).

**Strict construction.** This section is in derogation of prior common law; therefore the terms must be considered to be exclusive and must be construed strictly. Ciancio v. Serafini, 40 Colo. App. 168, 574 P.2d 876 (1977).

**Subsection (1)(a) must be strictly construed because it is in derogation of the common law.** Prior to the enactment of statutes of limitations relating to construction, builders and contractors were subject to potentially indefinite liability. Gleason v. Becker-Johnson Assocs., Inc., 916 P.2d 662 (Colo. App. 1996).

This section therefore applies only to the actual process of construction and not to an unrelated activity such as a "pre-buy" inspection. Gleason v. Becker-Johnson Assocs., Inc., 916 P.2d 662 (Colo. App. 1996).

**A survey which is not part of an improvement or building project does not constitute an "improvement to real property" and actions accruing because of negligence in performing such surveys are not within the purview of this section.** Ciancio v. Serafini, 40 Colo. App. 168, 574 P.2d 876 (1977).

**Plaintiffs' lack of knowledge of the identity of the engineering defendants at the time they were first aware that there was damage to the house does not toll the statute.** Tamblyn v.

Mickey & Fox, Inc., 39 Colo. App. 319, 568 P.2d 491 (1977), rev'd on other grounds, 195 Colo. 354, 578 P.2d 641 (1978).

**Action by subsequent home owner.** A subsequent home owner may maintain an action against a builder for negligence resulting in latent defects which the subsequent purchaser was unable to discover prior to purchase, if the action is filed within the statute of limitations set out in this section. Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983).

**For implied warranty of fitness and habitability for purchasers of new homes,** see Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983).

**Time for discovery of defect is applied in** Criswell v. M.J. Brock and Sons, Inc., 681 P.2d 495 (Colo. 1984); Hipco v. Varco-Pruden, 687 P.2d 540 (Colo. App. 1984).

**The issue of whether plaintiff, in the exercise of reasonable diligence, should have discovered a defect is generally a question of fact,** and summary judgment therefore is inappropriate. Wildridge Venture v. Ranco Roofing, Inc., 971 P.2d 282 (Colo. App. 1998).

**"Substantial completion" is construed to require no greater state of "completion" of an improvement, at the most, than is required by § 38-22-109 (4).** May Dept. Stores v. Univ. Hills, 789 P.2d 434 (Colo. App. 1989).

**A claim for relief does not arise until the damaged party possesses reasonable notice or knowledge of not only the existence but also the substantial nature of a defective improvement, both of which factors are issues of material fact which preclude summary judgment.** Weiss v. Am. Continental Corp., 765 P.2d 595 (Colo. App. 1988) (decided under former § 13-80-127 prior to the deletion of the reference to the substantial or significant nature of a defect).

**Claim for relief arises at time claimant discovers, or should have discovered the physical manifestations of a defect in the improvement that ultimately causes the injury.** Two Denver Highlands v. Stanley Structures, 12 P.3d 819 (Colo. App. 2000).

**Under this section, claim for relief arises, not on the date of injury, but when the physical manifestation of the defect "which ultimately causes the injury" is discovered.** Smith v. Executive Custom Homes, Inc., 209 P.3d 1175 (Colo. App. 2009), aff'd, 230 P.3d 1186 (Colo. 2010).

**This section's notice of claim and tolling provisions preclude equitable tolling under the "repair doctrine".** Smith v. Executive Custom Homes, Inc., 230 P.3d 1186 (Colo. 2010).

**Real estate developer not included under classes of persons listed in section.** Calvaresi v. Nat'l Development Co., 772 P.2d 640 (Colo. App. 1988).

**This section begins to run at the same time for all claims of injury caused by defects in design and construction of improvements to**

**real property**, including claims based upon theories of indemnity and contribution. The general assembly intended to abolish the distinction, established by the Supreme Court in *Duncan v. Shuster-Graham Homes, Inc.* (578 P.2d 637 (Colo. 1978)) between the time of accrual for underlying claims involving construction defects, and claims for indemnification arising therefrom. *Nelson, Haley, et al. v. Garney Companies*, 781 P.2d 153 (Colo. App. 1989).

**Subsection (1)(b)(II) is a statute of limitations tolling provision, not a ripeness provision**, that does not bar cross-claims and third-party claims for indemnity or contribution in construction defect lawsuits. Thus, a defendant in a construction defect lawsuit may utilize C.R.C.P. 13 and 14 to bring an indemnity or contribution claim against a party or add a party allegedly responsible for the defect no later than 90 days after termination of the construction defect lawsuit. *CLPF-Parkridge v. Harwell Invs.,* 105 P.3d 658 (Colo. 2005).

**The 90-day limitation in subsection (1)(b)(II) applies to a construction professional who is a defendant in the underlying lawsuit and sets forth the time period following a settlement or judgment in which the construction professional may file a separate lawsuit seeking indemnification or contribution.** *Fire Ins. Exch. v. Monty's Heating & Air Conditioning*, 179 P.3d 43 (Colo. App. 2007).

**Because the phrase "all claims" in subsection (1)(b)(II) does not include a subrogation claim against a construction professional, the 90-day limitation does not apply.** Rather, the two-year statute of limitations governs such claims. *Fire Ins. Exch. v. Monty's Heating & Air Conditioning*, 179 P.3d 43 (Colo. App. 2007).

**The 90-day period set forth in subsection (1)(b)(II)(B) does not toll the six-year statute of repose.** Although developer brought action against defendants seeking contribution and indemnity within 90 days after settlement of suit against developer, developer's suit was time-barred by the six-year statute of repose set forth in subsection (2). *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166 (Colo. App. 2008).

The 90-day period set forth in subsection (1)(b)(II)(B) affects only when a claim "arises", and must be brought, for purposes of the two-year statute of limitations and does not relate to the six-year statute of repose. *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166 (Colo. App. 2008).

A statute of limitations takes effect when a claim arises, while a statute of repose bars the bringing of a suit after a set period of time, regardless whether an injury has occurred or a claim has arisen. *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166 (Colo. App. 2008).

The reference in subsection (1)(b)(II) to subsection (1)(a) pertains only to the two-year statute of limitations set forth in § 13-80-102, not to the six-year statute of repose. *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166 (Colo. App. 2008).

**This section does not apply to claims** based on injuries to real property allegedly caused by negligent acts that occurred during construction activities, but which did not result in a defect in the improvement itself. This section, read and considered as a whole, was intended to apply only to negligence in planning, design, construction, supervision, or inspection that results in a defect in an improvement created by a building professional and not to all injuries stemming from such professional's negligent conduct. *Irwin v. Elam Const., Inc.*, 793 P.2d 609 (Colo. App. 1990); *Two Denver Highlands v. Dillingham*, 932 P.2d 827 (Colo. App. 1996).

**This section did not apply to movers** since it does not specifically refer to movers, and the movers' efforts in moving a monument does not constitute an improvement to real property. *Flatiron Paving v. Great Southwest Fire*, 812 P.2d 668 (Colo. App. 1990).

**It may be arguable that discovery of the damage resulting from a construction defect caused a claim for relief to arise** under this section prior to its 1979 amendment, while knowledge of the nature of the defect itself was required after the amendment. Nevertheless, absent actual knowledge, it was, in either case, the "reasonable person" standard that was to be applied in determining the existence of the requisite constructive knowledge. *Villa Sierra Condominium v. Field Corp.*, 787 P.2d 661 (Colo. App. 1990).

**This section limits actions against a contractor arising from defects in an improvement** due to negligence in planning, design, construction, supervision, or inspection. *Irwin v. Elam Const., Inc.*, 793 P.2d 609 (Colo. App. 1990).

This section does not apply to all injuries caused by a contractor's negligent conduct. *Irwin v. Elam Const., Inc.*, 793 P.2d 609 (Colo. App. 1990); *Oliver v. Homestake Enterprises, Inc.*, 800 P.2d 1331 (Colo. App. 1990), rev'd on other grounds, 817 P.2d 979 (Colo. 1991).

**Subcontractors are included within the statute.** Defendant is a subcontractor whose activities in preparing and installing concrete related to the process of building a structure. The activities of the defendant fall within those protected by the statute. *Two Denver Highlands v. Dillingham*, 932 P.2d 827 (Colo. App. 1996).

**Application of former § 13-80-127 is fact-specific**, requiring an examination of the nature of the claim to determine whether it alleges misconduct arising out of an activity the statute was designed to protect. *Stanske v. Wazee Elec. Co.*, 722 P.2d 402 (Colo. 1986); *Homestake*



Enterprises, Inc. v. Oliver, 817 P.2d 979 (Colo. 1991).

**Claim for breach of contract against construction contractor is not governed by two-year statute of limitations for actions against contractors and builders** in this section but by six-year statute of limitations for contract actions (now § 13-80-103.5), but claim against contractor for damages caused by delays in construction is covered by two-year statute. Frisco Motel P'ship v. H.S.M. Corp., 791 P.2d 1195 (Colo. App. 1989).

**Relying on the plain language of this section, salon's fire was a "physical manifestation of a defect".** The damage caused by salon's fire, the "injury" in this case, served as the initial discovery of the defect. It was not necessary to know that the defect caused the fire for the fire to be the defect's physical manifestation. United Fire Group v. Powers Elec., Inc., 240 P.3d 569 (Colo. App. 2010).

**The existence of a subrogation claim does not alter this section's statute of limitations for construction defects.** United Fire Group v. Powers Elec., Inc., 240 P.3d 569 (Colo. App. 2010).

**Any claim that salon had against electrician arose on the day of the fire because the salon discovered the fire on that day.** Therefore, under subsection (1)(b)(I), the insurer's claim arose on the same day that the salon's claim arose. United Fire Group v. Powers Elec., Inc., 240 P.3d 569 (Colo. App. 2010).

**Claim for negligence in installing and operating sprinkler system alleged a "defect" or "deficiency" within the meaning of former § 13-80-127,** where system was turned on during freezing weather while construction was still in progress and plaintiff, walking on adjoining sidewalk, was injured by fall on ice which formed as a result. Therefore, two-year limitation period applied to bar plaintiff's claim against contractor. Homestake Enterprises, Inc. v. Oliver, 817 P.2d 979 (Colo. 1991).

**Under this section, the limitations period on an indemnification claim begins to run at the same time as that for the underlying claim.** This statute modifies common law rule that actions for indemnification accrue when the indemnitor actually pays the liability not when the underlying claim accrues. Nelson, Haley, Patterson and Quirk, Inc. v. Garney Companies, Inc., 781 P.2d 153 (Colo. App. 1989); Maryland Cas. Co. v. Formwork Servs., Inc., 812 F. Supp. 1127 (D. Colo. 1993).

**A presumption arises that § 13-80-127 is the controlling limitations statute if it was in effect when the action commenced,** unless § 13-80-104 has express language otherwise. Wood Brothers Homes, Inc. v. Howard, 862 P.2d 925 (Colo. 1993) (decided under former § 13-80-127).

**Applied in City of Aurora v. Bechtel Corp.,** 599 F.2d 382 (10th Cir. 1979); Williams v. Genesee Dev. Co. No. 2, 759 P.2d 823 (Colo. App. 1988).

**13-80-105. Limitation of actions against land surveyors.** (1) Notwithstanding any statutory provision to the contrary, all actions against any land surveyor brought to recover damages resulting from any alleged negligent or defective land survey shall be brought within the time provided in section 13-80-101 after the person bringing the action either discovered or in the exercise of reasonable diligence and concern should have discovered the negligence or defect which gave rise to such action, and not thereafter, but in no case shall such an action be brought more than ten years after the completion of the survey upon which such action is based.

(2) For purposes of this section, "land survey" or "improvement survey" means any survey conducted by or under the direction and control of a land surveyor licensed pursuant to the provisions of part 2 of article 25 of title 12, C.R.S., and includes but is not limited to professional land surveying, as defined in section 12-25-202 (6), C.R.S. Nothing in this section shall be construed as extending the period or periods provided by the laws of Colorado or by agreement of the parties for bringing any action, nor shall this section be construed as creating any claim for relief not existing or recognized on or before July 1, 1979.

(3) (a) The limitations set forth in subsections (1) and (2) of this section shall not apply to any survey unless the documentary evidence of such land survey contains, clearly depicted thereon, the following statement:

**NOTICE:** According to Colorado law you **must** commence any legal action based upon any defect in this survey within three years after you first discover such defect. In no event may any action based upon any defect in this survey be commenced more than ten years from the date of the certification shown hereon.

(b) If any survey is performed that does not require documentation, the limitations set forth in subsections (1) and (2) of this section shall nevertheless apply if, not more than ninety days after the completion of the survey, written notice of the provisions of this article is provided to all persons holding an interest in the property upon which such survey is conducted.

**Source:** L. 86: Entire article R&RE, p. 698, § 1, effective July 1. L. 87: (2) amended, p. 1577, § 19, effective July 10. L. 2006: (3)(b) amended, p. 339, § 3, effective August 7.

**Editor's note:** This section is similar to former § 13-80-127.3 as it existed prior to 1986.

#### ANNOTATION

This section contains a 10-year statute of repose that sets a date after which a claim may be barred whether or not an injury has been discovered previously. Cornforth v. Larsen, 49 P.3d 346 (Colo. App. 2002).

Under the plain language of this section, in order for the 10-year statute of repose to

apply, a survey must contain the notice required by subsection (3). If a survey does not contain the notice, the 10-year statute of repose has no application and a plaintiff may sue a land surveyor outside of the 10-year time frame. Cornforth v. Larsen, 49 P.3d 346 (Colo. App. 2002).

#### 13-80-106. Limitation of actions against manufacturers or sellers of products.

(1) Notwithstanding any other statutory provisions to the contrary, all actions except those governed by section 4-2-725, C.R.S., brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product shall be brought within two years after the claim for relief arises and not thereafter.

(2) If any person entitled to bring any action mentioned in this section is under the age of eighteen years, mentally incompetent, imprisoned, or absent from the United States at the time the cause of action accrues and is without spouse or natural or legal guardian, such person may bring said action within the time limit specified in this section after the disability is removed. If such person has a legal representative, such person's representative shall bring the action within the period of limitation imposed by this section.

**Source:** L. 86: Entire article R&RE, p. 698, § 1, effective July 1.

**Editor's note:** This section is similar to former § 13-80-127.5 as it existed prior to 1986.

#### ANNOTATION

**Annotator's note.** Since § 13-80-106 is similar to former § 13-80-127.5 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this section.

Section held not to violate equal protection guarantees of United States and Colorado Constitutions. Persichini v. Brad Ragan, Inc., 735 P.2d 168 (Colo. 1987).

By enacting this statute, the legislature made manifest its intent to encompass all forms of product liability actions against manufacturers of products regardless of the

substantive legal theory or theories upon which the action is brought. Persichini v. Brad Ragan, Inc., 735 P.2d 168 (Colo. 1987); Boyd v. A.O. Smith Harvestore Prods., 776 P.2d 1125 (Colo. App. 1989).

Where claim is based on allegedly improper design and construction of improvement to real property and not on allegedly defective product, former § 13-80-127 controls the time limits for filing and not former § 13-80-127.5. Stanske v. Wazee Elec. Co., 722 P.2d 402 (Colo. 1986).

Statute by its terms does not apply to claims arising from injuries caused by hidden



**defects in equipment.** *Urban v. Beloit Corp.*, 711 P.2d 685 (Colo. 1985).

**Claims for breach of warranty governed by § 4-2-725** since they are causes of action based upon contract. *Ayala v. Joy Mfg. Co.*, 580 F. Supp. 521 (D. Colo. 1984).

**Actions or claims for breach of express and implied warranties** under the UCC are governed by the limitation period in § 4-2-725 and not this section. *Wieser v. Firestone Tire & Rubber Co.*, 596 F. Supp. 1473 (D. Colo. 1984).

**Liability of materialmen.** Materialmen are in a position distinct from the architect, contractor, engineer or inspector in that the materialman provides manufactured goods and should be held accountable under the general tort rules governing liability for defects in those products. *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822 (Colo. 1982).

**Claims against company found not barred** by three-year statute of limitations. *Alley v. Gubser Dev. Co.*, 569 F. Supp. 36 (D. Colo. 1983).

**Applicability of statutes of limitations.** In the absence of a clear expression of legislative intent to the contrary, a statute of limitations specifically addressing a particular class of cases will control over a more general or catch-all statute of limitations. *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168 (Colo. 1987).

**This section was adopted as a part of a legislative package that provided for actions based upon injury or damage caused by de-**

**fective products.** *Stanske v. Wazee Elec. Co.*, 722 P.2d 402 (Colo. 1986); *Boyd v. A.O. Smith Harvestore Prods.*, 776 P.2d 1125 (Colo. App. 1989).

**Buyers' deceit and negligent misrepresentation claims against a manufacturer**, were founded on a fundamental design defect theory within the intentment of this section. *Boyd v. A.O. Smith Harvestore Prods.*, 776 P.2d 1125 (Colo. App. 1989).

**Buyers' claim for relief arose** when they knew or should have known that damage to their corn was caused by a defect in the silo. *Boyd v. A.O. Smith Harvestore Prods.*, 776 P.2d 1125 (Colo. App. 1989).

**Negligently showing a film as part of selling tires for large earth movers qualifies tire supplier as a "seller"** of a product within the intentment of this section. *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168 (Colo. 1987).

**The second anniversary of the injury is within the two year filing period created by this section.** *Simon v. Wisconsin Marine Inc.*, 947 F.2d 446 (10th Cir. 1991).

**Discovery of an initial asbestos-related disease did not trigger the running of a statute of limitations on a separate, distinct, and later manifested disease caused by the same asbestos exposure.** *Miller v. Armstrong World Industries, Inc.*, 949 F.2d 1088 (10th Cir. 1991) (decided under law in effect prior to 1986 repeal and reenactment).

**Applied in Haberkorn by Haberkorn v. ROHM-GMBH**, 709 P.2d 44 (Colo. App. 1985).

**13-80-107. Limitation of actions against manufacturers, sellers, or lessors of new manufacturing equipment.** (1) (a) Notwithstanding any statutory provision to the contrary, all actions for or on account of personal injury, death, or property damage brought against a person or entity on account of the design, assembly, fabrication, production, or construction of new manufacturing equipment, or any component part thereof, or involving the sale or lease of such equipment shall be brought within the time provided in section 13-80-102 and not thereafter.

(b) Except as provided in paragraph (c) of this subsection (1), no such action shall be brought on a claim arising more than seven years after such equipment was first used for its intended purpose by someone not engaged in the business of manufacturing, selling, or leasing such equipment, except when the claim arises from injury due to hidden defects or prolonged exposure to hazardous material.

(c) The time limitation specified in paragraph (b) of this subsection (1) shall not apply if the manufacturer, seller, or lessor intentionally misrepresented or fraudulently concealed any material fact concerning said equipment which is a proximate cause of the injury, death, or property damage.

(2) As used in this section, "manufacturing equipment" means equipment used in the operation or process of producing a new product, article, substance, or commodity for the purposes of commercial sale and different from and having a distinctive name, character, or use from the raw or prepared materials used in the operation or process.

(3) The provisions of subsection (1) of this section shall not apply to a claim against a manufacturer, seller, or lessor, who, in an express written warranty, warranted manufacturing equipment to be free of defects in design, manufacture, or materials for a period of time greater than that set forth in paragraph (b) of subsection (1) of this section, if the injury complained of occurred and the claim for relief arose during the period of the express written warranty.

(4) The provisions of subsection (1) of this section shall not be applicable to indemnity actions brought by a manufacturer, seller, or lessor of manufacturing equipment or any other product against any other person who is or may be liable to said manufacturer, seller, or lessor for all or a portion of any judgment rendered against said manufacturer, seller, or lessor.

**Source:** L. 86: Entire article R&RE, p. 699, § 1, effective July 1. L. 87: (1)(a) amended, p. 568, § 5, effective July 1; (1)(a) amended, p. 594, § 19, effective July 10.

**Editor's note:** This section is similar to former § 13-80-127.6 as it existed prior to 1986.

## ANNOTATION

**Annotator's note.** Since § 13-80-107 is similar to former § 13-80-127.6, as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this section.

**This section is substantive law, not procedural,** since it is directed to the products liability action created in part 4 of article 21 of this title and qualifies the right to bring an action. *Nieman v. Press & Equip. Sales Co.*, 588 F. Supp. 650 (S. D. Ohio 1984) (decided under former § 13-80-127.6).

**Section held constitutional under the equal protection clause of fourteenth amendment.** *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637 (Colo. 1988); *Eaton v. Jarvis*, 965 F.2d 922 (10th Cir. 1992).

**Test for this section is whether the defect was not readily apparent or discoverable by a reasonably prudent user.** From the legislative history of this section, the legislature did not intend to include the failure to warn within the exception it created for hidden defects under this section. *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637 (Colo. 1988).

**The statute does not apply to bar an action when the claim arises from injury due to hidden defects.** *Niemet v. Gen. Elec. Co.*, 843 P.2d 87 (Colo. App. 1992).

**Hidden defect exception to the statute of repose operates to prevent the statute from barring plaintiff's action** when malfunctioning transformer contained a defect that was present at the time of manufacture and the defect was not discovered, and could not have been discovered, until the entire transformer was cut in half. *Niemet v. Gen. Elec. Co.*, 843 P.2d 87 (Colo. App. 1992).

**13-80-107.5. Limitation of actions for uninsured or underinsured motorist insurance.** (1) Notwithstanding any statutory provision to the contrary, all actions or arbitrations under sections 10-4-609 and 10-4-610, C.R.S., pertaining to insurance protection against uninsured or underinsured motorists shall be commenced within the following time limitations and not thereafter:

(a) An action or arbitration of an "uninsured motorist" insurance claim, as defined in sections 10-4-609 and 10-4-610, C.R.S., shall be commenced or demanded by arbitration demand within three years after the cause of action accrues; except that, if the underlying

**Whether a product is unreasonably dangerous because of a defect generally is a question of fact,** and the appropriate standard for determination of issue is based upon actual awareness of dangerous condition of machine. *Wayda v. Comet Intern. Corp.*, 738 P.2d 391 (Colo. App. 1987).

**Subsection (1)(b) creates a statute of repose rather than a statute of limitations.** A statute of repose may bar a claim before an injury occurs because it sets a time after the sale or first use of a product beyond which the manufacturer cannot be held liable. *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637 (Colo. 1988); *Villalobos v. Heidelberger Druckmaschinen Artengesellschaft*, 869 F. Supp. 1355 (D. Colo. 1994).

**Defendant that did not manufacture, sell, or lease the equipment in question may not avail itself of the statute of repose created in subsection (1)(b).** *Villalobos v. Heidelberger Druckmaschinen Artengesellschaft*, 869 F. Supp. 1355 (D. Colo. 1994).

**Statute of repose began to run when the "new manufacturing equipment" was first installed and used as intended, not when the alleged defective component was first used.** *Eaton v. Jarvis*, 965 F.2d 922 (10th Cir. 1992).

**Printing press falls within the definition of "manufacturing equipment"** since the end-product of the press has a character and use distinct from the raw materials used in the printing operation and the final product is prepared exclusively for commercial sale. *Villalobos v. Heidelberger Druckmaschinen Artengesellschaft*, 869 F. Supp. 1355 (D. Colo. 1994).



bodily injury liability claim against the uninsured motorist is preserved by commencing an action against the uninsured motorist within the time limit specified in sections 13-80-101 (1) (n) and 13-80-102 (1) (d), then an action or arbitration of an uninsured motorist claim shall be timely if such action is commenced or such arbitration is demanded within two years after the insured knows that the particular tortfeasor is not covered by any applicable insurance. In no event shall the insured have less than three years after the cause of action accrues within which to commence such action or demand arbitration.

(b) An action or arbitration of an "underinsured motorist" insurance claim, as defined in section 10-4-609 (4), C.R.S., shall be commenced or demanded by arbitration demand within three years after the cause of action accrues; except that, if the underlying bodily injury liability claim against the underinsured motorist is preserved by commencing an action against the underinsured motorist or by payment of either the liability claim settlement or judgment within the time limit specified in sections 13-80-101 (1) (n) and 13-80-102 (1) (d), then an action or arbitration of an underinsured motorist claim shall be timely if such action is commenced or such arbitration is demanded within two years after the insured received payment of the settlement or judgment on the underlying bodily injury liability claim. In no event shall the insured have less than three years after the cause of action accrues within which to commence such action or demand arbitration.

(2) As used in this section, unless the context otherwise requires:

(a) "Action" means a lawsuit commenced in a court of competent jurisdiction; and

(b) "Arbitration demand" means a written demand for arbitration delivered to the insurer that reasonably identifies the person making the claim, the identity of the uninsured or underinsured motorist, if known, and the fact that an uninsured or underinsured motorist insurance arbitration is being demanded.

(3) An uninsured or underinsured motorist cause of action accrues after both the existence of the death, injury, or damage giving rise to the claim and the cause of the death, injury, or damage are known or should have been known by the exercise of reasonable diligence.

**Source:** L. 94: Entire section added, p. 2825, § 3, effective July 1.

#### ANNOTATION

**The three-year period in which to commence an action against the uninsured and the two-year period to commence an uninsured motorist claim may run concurrently if the plaintiff knew or, in the exercise of reasonable diligence, should have known that there was no applicable insurance at the time of the accident.** The requirement that a plaintiff use due diligence does not reward self-denial or self-indulgence; therefore, the uninsured's oral advisement at the time of the accident that he or she does not have insurance is enough to commence the two-year limitation period in which to bring a claim against an uninsured motorist carrier. *Sulca v. Allstate Ins. Co.*, 77 P.3d 897 (Colo. App. 2003).

**Two-year period began to run at time of accident,** when uninsured driver admitted to having been uninsured or, at the latest, when the insured told his or her doctor he or she was involved in uninsured motorist litigation. Therefore, failure to join the insurer as a defendant until more than two years later required dismissal of the claim against the insurer. *Trigg v. State Farm Mut. Auto. Ins. Co.*, 129 P.3d 1099 (Colo. App. 2005).

"Relation back" doctrine based on mistake of identity did not apply where plaintiff sued the uninsured motorist for negligence and later added the plaintiff's insurer based on a separate transaction or conduct arising from the insurance contract. *Trigg v. State Farm Mut. Auto. Ins. Co.*, 129 P.3d 1099 (Colo. App. 2005).

**The two-year period described in the second clause of subsection (1)(a) cannot apply to shorten the length of time to sue an insurer;** it can only be applied to lengthen the three-year limitations period by as much as two years if the insured has preserved its rights by suing the driver and the injured person learned the driver was uninsured and filed suit against the insurer within two years after learning of that status. *Rider v. State Farm Mut. Auto. Ins. Co.*, 205 P.3d 519 (Colo. App. 2009).

**The statute of limitations in subsection (1)(a) does not begin to run** when the insured consults with an attorney or an attorney informs the insured that he or she has a claim, but when an insured knew, or should have known in the exercise of reasonable diligence, that there was no applicable insurance. *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849 (Colo. App. 2007).

A demand satisfying the statute of limitations described in subsection (1)(b) can be made only under a preexisting mandatory arbitration agreement and not where the parties' agreement acknowledges only that arbitration may occur by consent. *Cork v. Sentry Ins.*, 194 P.3d 422 (Colo. App. 2008).

A "civil action" is a lawsuit that has actually been commenced in a court of competent jurisdiction. *Ortiz v. Davis*, 902 P.2d 905 (Colo. App. 1995).

**13-80-108. When a cause of action accrues.** (1) Except as provided in subsection (12) of this section, a cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.

(2) A cause of action for wrongful death shall be considered to accrue on the date of death.

(3) A cause of action for fraud, misrepresentation, concealment, or deceit shall be considered to accrue on the date such fraud, misrepresentation, concealment, or deceit is discovered or should have been discovered by the exercise of reasonable diligence.

(4) A cause of action for debt, obligation, money owed, or performance shall be considered to accrue on the date such debt, obligation, money owed, or performance becomes due.

(5) A cause of action for balance due on an open account for goods or services shall accrue at the time of the last item of goods or services proved in such account.

(6) A cause of action for breach of any express or implied contract, agreement, warranty, or trust shall be considered to accrue on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence.

(7) A cause of action for wrongful possession of personal property, goods, or chattels shall accrue at the time the wrongful possession is discovered or should have been discovered by the exercise of reasonable diligence.

(8) A cause of action for losses or damages not otherwise enumerated in this article shall be deemed to accrue when the injury, loss, damage, or conduct giving rise to the cause of action is discovered or should have been discovered by the exercise of reasonable diligence.

(9) A cause of action for penalties shall be deemed to accrue when the determination of overpayment or delinquency for which such penalties are assessed is no longer subject to appeal.

(10) A cause of action for recovery of erroneous or excessive refunds of any tax administered under section 39-21-102, C.R.S., shall accrue on the date the department of revenue issues said refund.

(11) A cause of action for a penalty for commission of a class A or a class B traffic infraction, as defined in section 42-4-1701, C.R.S., shall be deemed to accrue on the date the traffic infraction was committed.

(12) A cause of action for bodily injury or property damage arising out of the use or operation of a motor vehicle accrues on the date that both the existence of the injury or damage and the cause of the injury or damage are known or should have been known by the exercise of reasonable diligence.

(13) A cause of action by the public employees' retirement association against an employer for unpaid contributions shall accrue on the date the nonpayment of contributions is discovered or should have been discovered by the exercise of reasonable diligence. This subsection (13) shall apply to causes of action as provided in section 24-51-402 (2), C.R.S.

**Source:** L. 86: Entire article R&RE, p. 699, § 1, effective July 1. L. 87: (10) added, p. 568, § 6, effective July 1; (11) added, p. 1495, § 3, effective July 1. L. 94: (1) amended and (12) added, p. 2826, § 4, effective July 1; (11) amended, p. 2550, § 35, effective January 1, 1995. L. 95: (13) added, p. 562, § 21, effective May 22.



## ANNOTATION

- I. General Consideration.
- II. Fraud, Misrepresentation.
- III. Debt, Obligation.
- IV. Balance due on Open Account.
- V. Breach of Contract, Agreement.
- VI. Wrongful Possession of Personal Property, Goods.
- VII. Injuries.
  - A. In General.
  - B. Discovery.
  - C. Fraudulent Concealment.
- VIII. Tolling of Statute of Limitations.
- IX. Former Statute of Repose.

## I. GENERAL CONSIDERATION.

**Substitution of parties is not new cause of action.** The substitution of an insurer for an insured as party plaintiff does not constitute the filing of a new cause of action, and the substituted party benefits from the filing date of the original complaint and is not barred by the statute of limitations of the original complaint was timely filed. *Travelers Ins. Co. v. Gasper*, 630 P.2d 97 (Colo. App. 1981).

A "cause of action" "accrues" based upon the happening of certain extrajudicial events. *Ortiz v. Davis*, 902 P.2d 905 (Colo. App. 1995).

**Severing bad faith tort claims** from an administrative proceeding is consistent with the statutory definition of accrual in subsection (1). *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139 (Colo. 2007).

**Critical inquiry of when an action accrues is knowledge of facts essential to the cause of action, not knowledge of the legal theory upon which the action may be brought.** *Morris v. Geer*, 720 P.2d 994 (Colo. App. 1986); *Winkler v. Rocky Mtn. Conference*, 923 P.2d 152 (Colo. App. 1995); *Murry v. GuideOne Specialty Mut. Ins. Co.*, 194 P.3d 489 (Colo. App. 2008).

**Inquiry notice does not trigger the discovery rule**, and suspicion of a possible connection does not necessarily put a reasonable person on notice of the nature, extent, and cause of an injury. *Salazar v. Am. Sterlizer Co.*, 5 P.3d 357 (Colo. App. 2000).

**This section applies in determining when a cause of action "accrues" in an action for sexual assault on a child.** *Sailsbery v. Parks*, 983 P.2d 137 (Colo. App. 1999).

**Section 13-80-103.7 does not purport to define when an action for sexual assault on a child "accrues"**, but rather establishes the six-year limitation period and provides that the period runs from accrual or from the date of removal of disability. *Sailsbery v. Parks*, 983 P.2d 137 (Colo. App. 1999).

**Trial court erred in granting summary judgment where a genuine issue of material fact as to when plaintiff knew or should have known of her injuries and their cause remained.** *Sailsbery v. Parks*, 983 P.2d 137 (Colo. App. 1999).

**When the statutory scheme of this article is considered as a whole, it manifests a clear intent to prescribe a six-year limitation period for actions to recover a determinable amount of money owed, whether by contractual agreement or not, which, under subsection (4), accrues on the date the debt becomes due.** By contrast, all other actions for breach of contract are subject to a three-year limitation period which, under subsection (6), does not accrue until the breach is, or reasonably should have been, discovered. To the extent these two provisions are not reconcilable by construing the scheme as a whole, subsection (4) as the more specific of the two prevails. *BP Am. Prod. Co. v. Patterson*, 185 P.3d 811 (Colo. 2008).

## II. FRAUD, MISREPRESENTATION.

**Annotator's note.** Relevant cases construing the accrual of causes of action under former § 13-80-109 as it existed prior to the 1986 repeal and reenactment of this article have been included with the annotations to subsection (3).

**The three-year statute of limitations begins to run when the defrauded person has knowledge of facts** which, in the exercise of proper prudence and diligence, would enable him to discover the fraud perpetuated against him. *Norton v. Leadville Corp.*, 43 Colo. App. 527, 610 P.2d 1348 (1979); *Morgan v. Dain Bosworth*, 545 F. Supp. 953 (D. Colo. 1982).

The limitations period in this section begins to run when the aggrieved party discovers, or should have discovered by the exercise of reasonable diligence, the facts constituting the fraud. *Laymon v. McComb*, 524 F. Supp. 1091 (D. Colo. 1981); *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402 (Colo. App. 2000).

The limitations period is tolled until the aggrieved party learns of the fraud or should have discovered it by the exercise of reasonable diligence. *Hackbart v. Holmes*, 675 F.2d 1114 (10th Cir. 1982); *Noland v. Gurley*, 566 F. Supp. 210 (D. Colo. 1983).

**Allegations of wrongdoing constituted material facts regarding when statute begins to run.** Where the plaintiff's affidavit alleges that the defendant made misleading and deceptive statements which allayed any suspicions that the plaintiffs might have had about possible securities law violations, and that the defendant's opposition to the plaintiffs' attempts to conduct discovery to determine the defendant's true financial status prevented discovery of the alleged

wrongdoing until 1978, these allegations, if true, constitute material facts regarding when the statute of limitations began to run with respect to the plaintiffs' claims under section 17 of the Securities Act of 1933 and common-law fraud. *Norton v. Leadville Corp.*, 43 Colo. App. 527, 610 P.2d 1348 (1979).

**Bad faith tort claims are distinct and separate actions available to workers' compensation claimants in addition to remedies under the Workers' Compensation Act**, and the resolution of bad faith tort claims is independent from the resolution of workers' compensation claims. There is no requirement under this section that any element of a workers' compensation claimant's bad faith tort claim be acknowledged or affirmed by an administrative body or other authority before a bad faith tort claim can be pursued. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139 (Colo. 2007).

**Subsection (3) is inactive until discovery of the fraud.** *Hunter v. Williams*, 96 Colo. 435, 44 P.2d 509 (1935); *Miller v. Goff*, 100 Colo. 545, 68 P.2d 915 (1937).

**Where one is kept in ignorance, by false statements of another**, of the true situation concerning a claim which he is entitled to assert against him, the statute of limitations does not begin to run against the deceived party and in favor of the wrongdoer until the former has discovered the truth. *Alfred v. Esser*, 91 Colo. 466, 15 P.2d 714 (1932); *Rogers v. Rogers*, 96 Colo. 473, 44 P.2d 909 (1935).

**The statute of limitations begins to run when the defrauded person has knowledge of facts** which in the exercise of proper prudence and diligence would enable him to discover the fraud perpetrated against him. *Greco v. Pullara*, 166 Colo. 465, 444 P.2d 383 (1968); *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972); *Hansen v. Lederman*, 759 P.2d 810 (Colo. App. 1988); *In re Munoz*, 111 Bankr. 928 (Bankr. D. Colo. 1990); *Chidester v. E. Gas and Fuel Assoc.*, 859 P.2d 222 (Colo. App. 1992); *First Interstate Bank v. Berenbaum*, 872 P.2d 1297 (Colo. App. 1993); *In re Walden*, 207 Bankr. 1 (Bankr. D. Colo. 1997).

This statute bars a suit three years after knowledge of facts which would awaken a person of ordinary prudence to an inquiry, which, if pursued with reasonable diligence, would lead to a discovery of the facts constituting the fraud as effectually as it limits suits commenced three years after the discovery of the facts constituting the fraud. *Swift v. Smith*, 79 F. 709 (8th Cir. 1897); *Redd v. Brun*, 157 F. 190 (8th Cir. 1907).

**The possession of means of detecting fraud is same as knowledge.** Courts of equity will not interfere if a party slumbers on his rights or the means of detecting fraud. The full possession of the means of detecting a fraud is the same as knowledge. *Pipe v. Smith*, 5 Colo. 146 (1879); *Bowman v. May*, 102 Colo. 417, 80 P.2d 327

(1938); *Wright v. Nelson*, 125 Colo. 217, 242 P.2d 243 (1952).

**Where misrepresentations known three years before suit action is barred.** Action to rescind contract for the purchase of corporate stock procured by false representations held barred by this section, where all the actionable misrepresentations were known to plaintiff more than three years prior to the commencement of his action. *Morgan v. King*, 27 Colo. 539, 63 P. 416 (1900); *Donovan v. Nat'l Glass Casket Co.*, 75 Colo. 262, 226 P. 295 (1924); *Williams v. Williams*, 83 Colo. 180, 263 P. 725 (1927).

**Jury must find fraud could not have been discovered within three years.** The jury was properly instructed on the requisites for proving fraud, and, if proved, on the necessity of finding that it could not with reasonable diligence have been discovered prior to three years before suit was commenced. *Knisley v. Parsons*, 172 Colo. 533, 474 P.2d 599 (1970).

**Statute does not begin to run until cause of action has accrued.** Under this section requiring bills for relief on the grounds of fraud, to be filed within three years after the discovery of the fraud the statute of limitations does not begin to run until the cause of action has accrued, although the party applying for relief may have discovered the fraud before the time the cause of action accrued. *Rose v. Dunklee*, 12 Colo. App. 403, 56 P. 342 (1899); *Arnett v. Berg*, 18 Colo. App. 341, 71 P. 636 (1903).

**When an action is not a new action but is merely an amendment to an earlier complaint**, it relates back to the original complaint. *Platte Valley Motor Co. v. Wagner*, 130 Colo. 365, 278 P.2d 870 (1954).

**Recording of a deed is constructive notice only to persons claiming under same grantor and same chain of title.** The recording of a voluntary conveyance is not constructive notice to creditors of the voluntary character of the instrument, or of the insolvency of the grantor, so as to start the statute of limitations against an action to set aside the conveyance as in fraud of creditors. *Rose v. Dunklee*, 12 Colo. App. 403, 56 P. 342 (1899); *Greco v. Pullara*, 166 Colo. 465, 444 P.2d 383 (1968).

**For stockholders not having knowledge of fraudulent stock transfer**, see *Irvin v. W. End Dev. Co.*, 342 F. Supp. 687 (D. Colo. 1972).

**Runs from time stockholders knew of stock trust violation.** Where the actual sale of stock was concealed from the stockholders until 1965, but the stockholders when they learned of the sale of stock had no reason to object because they were unaware of the restriction on its sale, and they had no knowledge of the restriction until they received copies of the articles of incorporation in 1970, the statute of limitations could not begin to run until the appellees knew in 1970 of the trust which was violated. *Irwin v. W. End Dev. Co.*, 481 F.2d 34 (10th Cir. 1973),



cert. denied, 414 U.S. 1158, 94 S. Ct. 915, 34 L. Ed.2d 110 (1974).

**Whether a claim is barred by the statute of limitations is normally a jury fact question**, but if the complaint shows the action was brought after the statute of limitations period and the defendant has pled the statute of limitations, the plaintiff has the burden to show tolling of the statute of limitations. *First Interstate Bank v. Berenbaum*, 872 P.2d 1297 (Colo. App. 1993).

**A presumption exists that a corporation has knowledge** of the content of its files and records, and the presumption may be the basis of a judgment unless contrary evidence exists. *First Interstate Bank v. Berenbaum*, 872 P.2d 1297 (Colo. App. 1993).

**In dispute between mother and daughter over mother's acquisition of winning lottery ticket, despite fact that money obligation was paid in installments, there was no breach of an agreement that one party would make installment payments to another**, thus three-year statute of limitations from date that daughter discovered or should have discovered the injury applied. *Curtis v. Counce*, 32 P.3d 585 (Colo. App. 2001).

**Plaintiff's fraud claims were time-barred**. Because conservation deed, which was in plaintiff's chain of title at time of purchase, does not permit open and unfettered access to subject property, it gave actual or constructive notice that defendant's representation was false. As such, statute of limitations ran against plaintiffs before they commenced action. *Bolinger v. Neal*, 259 P.3d 1259 (Colo. App. 2010).

### III. DEBT, OBLIGATION.

**Annotator's note.** Relevant cases construing the accrual of causes of action under former § 13-80-110 as it existed prior to the 1986 repeal and reenactment of this article have been included with the annotations to subsection (4).

**Cause of action against stockholders for unpaid balance of stock arose when assessment was made** and statute began to run then. *Felker v. Sullivan*, 34 Colo. 212, 83 P. 213 (1905); *Sweet v. Barnard*, 66 Colo. 526, 182 P. 22 (1919).

**On a county warrant.** The statute of limitations does not begin to run against an action on a county warrant until the conditions upon which it is payable have arisen. *Forbes v. Bd. of County Comm'rs*, 23 Colo. 344, 47 P.388 (1897).

**On insufficiently funded pension plan.** The date on which the "debt, obligation, money owed, or performance be[came] due" was the date on which the employer transferred insufficient funds to the pension plan. It was on that date, therefore, that the employees' cause of action accrued. *Aull v. Cavalcade Pension Plan*, 988 F. Supp. 1360 (D. Colo. 1997).

**County orders containing no day for payment** are payable on demand, and their presentation for payment to the county treasurer, and his indorsement of the fact, constitute demand, acceptance, and promise to pay the amount in money. This gives the holder an immediate right of action, and the statute of limitations commences to run from that date. *Schloss v. Bd. of County Comm'rs*, 1 Colo. App. 145, 28 P. 18 (1891).

**On municipal bonds.** It would be a harsh and thoroughly impracticable rule to establish that the holder of a claim against a municipality is bound by any consideration of contract to pay the same, as long as the municipality itself recognizes such express contract as a valid and binding obligation. The effect of such a rule would be to permit the municipality to lull the holders of its obligations into inaction, and thereby, taking advantage of its own wrong, deprive them of a valuable right. Therefore, a bondholder had a lawful right to institute suit to recover upon the implied obligation at any time within six years after the district repudiated the express obligation. *Geer v. Sch. Dist. No. 11*, 111 F. 682 (8th Cir. 1901).

**Default in interest payment on note does not precipitate claim.** For purposes of the statute of limitations, default in payment of interest does not precipitate a claim on the note even though the note contains an acceleration clause where the holder may elect whether to accelerate payment and chooses not to do so. *Temple v. Frank*, 41 Colo. App. 332, 585 P.2d 311 (1978).

**Claims of royalty owners for underpayment of natural gas royalties accrued when the payments were due under subsection (4)**, not when the underpayment was or reasonably should have been discovered under subsection (6). *BP Am. Prod. Co. v. Patterson*, 185 P.3d 811 (Colo. 2008).

**Uninsured driver's cause of action for reimbursement of medical expenses paid to such uninsured driver's passenger against insurer of vehicle which caused accident pursuant to § 10-4-713 does not accrue until actual payment of medical expenses.** *Sakala v. Safeco Ins. Co.*, 833 P.2d 879 (Colo. App. 1992).

**Coverage for underinsured motorist benefits accrues** under the terms of the policy when settlement under the tortfeasor's liability policy is obtained, not on the date of the accident. *State Farm Mut. Auto Ins. v. Springle*, 870 P.2d 578 (Colo. App. 1993).

**Pursuant to the terms of the parties' agreement, the notice of default, and § 5-5-111, plaintiff had no right to accelerate the obligation or obtain possession of the mobile home until October 29, 1992, 20 days after the required notice was given.** Accordingly, plaintiff's replevin claim did not accrue until that date. Because plaintiff commenced its ac-

tion on October 6, 1998, which was within six years of that accrual date, the action was timely. *Green Tree Fin. v. Short*, 10 P.3d 721 (Colo. App. 2000).

#### IV. BALANCE DUE ON OPEN ACCOUNT.

**Statute begins to run from the last item on the account.** *Walsh v. Welsh*, 46 Colo. 344, 104 P. 399 (1909); *Lanke v. Am. Med. & Dental Ass'n*, 97 Colo. 521, 50 P.2d 790 (1935) (decided under former § 13-80-111).

#### V. BREACH OF CONTRACT, AGREEMENT.

**Annotator's note.** Relevant cases construing the accrual of causes of actions under former §§ 13-80-110 and 13-80-114 as said sections existed prior to the 1986 repeal and reenactment of this article have been included with the annotations to subsection (6).

**When the undisputed facts demonstrate that a plaintiff discovered** or reasonably should have discovered the defendant's conduct as of a particular date, the issue of when the cause of action accrued may be determined as a matter of law. *Anderson v. Somatogen, Inc.*, 940 P.2d 1079 (Colo. App. 1996).

**Claim on contract formerly accrued upon failure to perform required act.** A claim for relief in actions arising out of nonperformance of contract obligations accrued at the time of failure to perform the act required under the contract. *Goeddel v. Aircraft Fin., Inc.*, 152 Colo. 419, 382 P.2d 812 (1963).

**Where contract for sale of land provided that if the vendor failed to procure patent purchaser should receive back all money paid** on the contract, limitation would begin to run against an action by the purchaser to recover back money paid, from the time a patent to the land was issued to another party and not from the time the money was paid. *Platte Land Co. v. Hubbard*, 12 Colo. App. 465, 56 P. 64 (1899).

**Claims on executory agreement may accrue yearly.** Where defendant's obligations under an agreement were executory in nature, maturing into enforceable duties on a yearly basis, plaintiff's claim for relief from defendant's failure to perform accrued with each delinquent performance. *D'Amico v. Smith*, 42 Colo. App. 369, 600 P.2d 84 (1979).

**Where by agreement personal services are to be compensated only at the death of the party receiving them,** the action accrues upon his death, and the statute runs from the same date. *Norton's Estate v. McAlister*, 22 Colo. App. 293, 123 P. 963 (1912).

**Claimant's cause of action to establish constructive trust accrues,** for purposes of the statute of limitations, when the claimant is

aware, or reasonably should be aware, of facts which would make a reasonable person suspicious of the wrongdoing asserted as the basis of the trust. *Lucas v. Abbott*, 198 Colo. 477, 601 P.2d 1376 (1979).

Claim to enforce a trust does not accrue upon a constructive trust until the claimant acquires or should have acquired knowledge of the existence of the trust. *Abbott v. Lucas*, 44 Colo. App. 415, 615 P.2d 37 (1978), *aff'd*, 198 Colo. 477, 601 P.2d 1376 (1979).

**Action accrues upon failure to pay installment of interest on note secured by trust deed if creditor elects to foreclose.** A deed of trust securing promissory notes and providing that, upon default of any installment of interest, the whole principal and interest to the time of sale "may at once become due and payable, and the said premises be sold with the same effect as if the indebtedness had matured", if the creditor, after such default, elects to take advantage thereof and direct a sale of the premises pursuant to the power, the cause of action upon the note accrues, and the statute runs, from the time of the default. *Lovell v. Goss*, 45 Colo. 304, 101 P. 72 (1909).

**The statutes of limitations on an action against the estate arising under resulting trusts** could not begin to run against claimant until there was a repudiation of the trusts. There being no repudiation of either trust created, the statutes of limitations did not begin to run against the claimant until decedent's death. *First Nat'l Bank v. Harry W. Rabb Found.*, 29 Colo. App. 34, 479 P.2d 986 (1970).

**Full possession of the means of detecting a fraud is equivalent to knowledge** for the purpose of invoking this section. *Parsons v. Shackleford*, 117 Colo. 545, 188 P.2d 587 (1948).

**Refusal of trustee to convey to beneficiary lands which he holds for him is a repudiation** of the trust, setting in motion the statute of limitations. *Schlosser v. Schlosser*, 62 Colo. 270, 162 P. 153 (1916).

**Accrual of action under contract giving option to purchase stock.** Under a contract giving an option for the purchase of corporate stock, no cause of action would arise for a breach until the party had attempted to exercise his option and the other had refused to sell. Upon such refusal a cause of action accrued, and an action for specific performance commenced within five years thereafter would not be barred by this section. *Johnson v. Johnson*, 87 Colo. 207, 286 P. 109 (1930).

**In action to quiet title to water rights sold under trust deed,** the cause of action does not accrue until after sale by the trustee and final refusal of the irrigation company to continue to deliver the water. *Hastings & Heyden Realty Co. v. Gest*, 70 Colo. 278, 201 P. 37 (1921).



**In suit to cancel excess water rights.** Where plaintiff and others bought certain water rights under deeds providing that when rights were sold and in force equal to the estimated capacity of the system of supply water, the title to the canal system should pass to the owners and holders of such water rights, plaintiff's right of action to have excess rights canceled accrued immediately after the contracts and deeds conveying such excess rights were issued, and was barred after five years thereafter by this section. *Patterson v. Fort Lyon Canal Co.*, 36 Colo. 175, 84 P. 807 (1906).

**In case of constructive trust statute begins to run from knowledge of trust.** In equity, the suitor must allege and prove excuse for delay and want of diligence, especially where it is sought to enforce a constructive trust. Such delay and want of diligence is within this section; but the time begins to run from actual or constructive knowledge of the trust. *Cliff v. Cliff*, 23 Colo. App. 183, 128 P. 860 (1912).

**Statute does not begin to run until recording of trust deed.** Under this section the bar of the statute does not begin to run until a tax deed is recorded, for the reason that it is only after it has been filed for record that any title of the owner is conveyed. *Morris v. St. Louis Nat'l Bank*, 17 Colo. 231, 29 P. 802 (1892); *Sayre v. Sage*, 47 Colo. 559, 108 P. 160 (1910).

**Commission of wrongful act by executor starts running of statute against surety.** In Colorado all that is required to expose the surety to liability on the executor's bond is the commission of the wrongful act. The wrongful act occurred when the executor placed the purchasers in possession without payment of the full purchase price, and that wrongful act was judicially recognized in 1955, not in 1965 when the decree of surcharge was entered, and the action is barred. *People ex rel. Barker v. Transamerica Ins. Co.*, 385 F.2d 61 (10th Cir. 1967).

**Where an action is brought on an official bond** for breach of duty the statute formerly began to run at the time of the occurrence of the consequential injury caused by the officer's breach of duty, and not at the time of the breach. *People ex rel. Fed. Land Bank v. Ginn*, 106 Colo. 417, 106 P.2d 479 (1940).

**Discovery of erroneous levy.** In an action by the personal representatives of a taxpayer against a board of county commissioners to recover taxes he had paid for 13 years on lands assessed to him on the mistaken premise that he was the owner thereof, it was held that the representatives were entitled to recover, and the six-year statute of limitations did not apply where almost immediately on discovery of the erroneous levy a refund was demanded and on refusal thereof the action was promptly begun. *Bd. of Comm'rs v. Doherty*, 114 Colo. 594, 168 P.2d 556 (1946).

**A cause of action for breach of trust accrues** on date the breach is discovered or should have been discovered by the exercise of reasonable diligence and, therefore, cause of action accrued when plaintiff went to her bank and discovered that the defendant had withdrawn plaintiff's money. *Eads v. Dearing*, 874 P.2d 474 (Colo. App. 1993).

**The injury resulting from a breach of fiduciary duty, triggering accrual of the claim, is the violation of trust not any attendant financial harm.** A claim for breach of confidentiality does not require proof of economic loss; the injury is the disclosure of protected information. Indeed, the purpose of such a claim is to remedy not a lost contractual expectation but rather the loss of secrecy. *Grynberg v. Shell Exploration B.V.*, 433 F. Supp. 2d 1229 (D. Colo. 2006), aff'd, 538 F.3d 1336 (10th Cir. 2008), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1585, 173 L. Ed. 2d 677 (2009).

**A claim for breach of contract accrues on the date the breach is discovered or should have been discovered through reasonable diligence.** *Farmers Ins. Exch. v. Am. Mfrs. Mut. Ins. Co.*, 897 P.2d 880 (Colo. App. 1995).

**A claim for breach of warranty does not accrue until the plaintiff discovers or should have discovered the defendant's refusal or inability to comply with the warranties made.** *Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221 (Colo. 2001); *Stiff v. BilDen Homes, Inc.*, 88 P.3d 639 (Colo. App. 2003).

**A cause of action for bad-faith breach of insurance contract accrues upon first instance of unreasonable behavior.** *Harmon v. Fred S. James & Co.*, 899 P.2d 258 (Colo. App. 1994).

**Statute of limitations for an action contesting a rate increase commences to run when the rate is enacted** not when each bill is sent. *Bennett Bear Creek Water & San. v. Denver*, 907 P.2d 648 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 928 P.2d 1254 (Colo. 1996).

**Claims of royalty owners for underpayment of natural gas royalties accrued when the payments were due under subsection (4),** not when the underpayment was or reasonably should have been discovered under subsection (6). *BP Am. Prod. Co. v. Patterson*, 185 P.3d 811 (Colo. 2008).

**Withdrawing attorney's claim in quantum meruit against former co-counsel** laboring under a contingent fee agreement cannot accrue earlier than the time when recovery occurs in the underlying litigation because that is the earliest time when the unjustness of any retention of the benefit can be determined. *Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP*, \_\_\_ P.3d \_\_\_ (Colo. App. 2011).

## VI. WRONGFUL POSSESSION OF PERSONAL PROPERTY, GOODS.

**The statute of limitations does not begin to run in favor of a bailee until he converts the property to his own use.** *Austin v. Van Loon*, 36 Colo. 196, 85 P. 183 (1906) (decided under former § 13-80-110).

**Cause of action for conversion accrued** when it was discovered, not on the dates of forged endorsements. *Stjernholm v. Life Ins. Co. of N. Amer.*, 782 P.2d 810 (Colo. App. 1989).

## VII. INJURIES.

### A. In General.

**Annotator's note.** Relevant cases construing the accrual of causes of actions under former §§ 13-80-102, 13-80-105, 13-80-108, and 13-80-110 as said sections existed prior to the 1986 repeal and reenactment of this article have been included with the annotations to subsections (1) and (8) dealing with injuries.

**The claim accrues at the time of the disabling injury.** *Bd. of Trustees of Policemen's Pension Fund v. Koman*, 133 Colo. 598, 298 P.2d 737 (1956).

**The cause of action accrues in a libel case when the libel is published.** *Evans v. Republican Publ'g Co.*, 20 Colo. App. 281, 78 P. 311 (1904); *Spears Free Clinic & Hosp. for Poor Children v. Maier*, 128 Colo. 263, 261 P.2d 488 (1953).

**Period begins to run on date libel occurs.** The one-year statutory period for the initiation of a libel action begins to run on the date the alleged libel occurs. *Dillingham v. Greeley Publ'g Co.*, 661 P.2d 700 (Colo. App. 1983), *rev'd* on other grounds, 701 P.2d 27 (Colo. 1985).

**Where plaintiffs suffered no damages until adverse claim of government was determined** to be valid and plaintiffs were found to be trespassers, with the consequent damages resulting from their being required to remove their house from government land, the statute of limitations did not begin to run until the judgment became final. *Doyle v. Linn*, 37 Colo. App. 214, 547 P.2d 257 (1975).

**Action by railroad employees seeking reinstatement to their jobs and damages accrued** when the employees resigned their positions with the railroad. *Copsy v. Bhd. of Locomotive Engineers*, 767 P.2d 676 (10th Cir. 1985).

**Damages from water seepage.** The action is barred after the lapse of six years from the first visible and sensible appearance of the injury caused by seepage from an irrigation ditch. *Middelkamp v. Bessemer Irrigating Co.*, 46 Colo. 102, 103 P. 280 (1909); *Rose v. Agric. Ditch & Reservoir Co.*, 70 Colo. 446, 202 P. 112

(1921); *Zimmerman v. Hinderlider*, 105 Colo. 340, 97 P.2d 443 (1939).

**In action to recover for damage to land by reason of use of natural channel by reservoir company** for carrying water, the statute of limitations began to run when the company commenced using the channel as a carrier, since the land was immediately damaged by such use. *Seven Lakes Reservoir Co. v. Majors*, 69 Colo. 590, 196 P. 334 (1921).

**In a suit by a guest against a landlord for conversion of baggage**, the action did not accrue until demand, the refusal of which constituted conversion, at which time the statute of limitations began to run. See *Carper v. Risdon*, 19 Colo. App. 530, 76 P. 744 (1904); *Austin v. Van Loon*, 36 Colo. 196, 85 P. 183 (1906); *Dutton Hotel Co. v. Fitzpatrick*, 69 Colo. 229, 193 P. 549 (1920).

**In an action by the owner of abutting property for permanent damages occasioned by the construction and operation of a railroad** through a public street in an ordinary and lawful manner, the statute of limitations begins to run from time the railroad company first occupied the street for such purposes. *Union Pac. Ry. v. Foley*, 19 Colo. 280, 35 P. 542 (1893).

**Action for wrongful discharge is an action in tort which accrues when the injury of losing the job occurs** and not when notice of termination is given. *Lorenz v. Martin Marietta Corp., Inc.*, 802 P.2d 1146 (Colo. App. 1990), *aff'd*, 823 P.2d 100 (Colo. 1992).

**Cause of action for personal injuries under Colorado Auto Accident Reparations Act** accrues on the date that both the physical injury and its cause are known or should have been known by exercise of reasonable diligence. Such actions may be filed as soon as it is reasonably expected that claimant's medical expenses will exceed \$2,500. *Jones v. Cox*, 828 P.2d 218 (Colo. 1992).

Although the police investigation report may provide helpful information regarding the claim, the claim itself accrues when the plaintiff is aware of his injuries and their cause. The police department's failure to provide copies of the investigation report does not postpone accrual of the claim. *Reider v. Dawson*, 856 P.2d 31 (Colo. App. 1992), *aff'd*, 872 P.2d 212 (Colo. 1994).

A cause of action for injury to property shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. *Bad Boys of Cripple Creek Mining Co. v. City of Cripple Creek*, 996 P.2d 792 (Colo. App. 2000).

Plaintiffs' cause of action for inverse condemnation accrued when the city began using the property with plaintiffs' knowledge. *Bad Boys of Cripple Creek Mining Co. v. City of Cripple Creek*, 996 P.2d 792 (Colo. App. 2000).



A cause of action accrues when the insured knew, or should have known in the exercise of reasonable diligence, of the injury and its cause, not when the insured consults with an attorney or an attorney informs the insured that he or she has a claim. *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849 (Colo. App. 2007).

#### B. Discovery.

**“Injury” in statute of limitations means legal injury** and, therefore, statute of limitations in claim for lack of informed consent begins to run when claimant has knowledge of facts which would put reasonable person on notice of nature of injury and that injury was caused by wrongful conduct of another. *Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984).

**A plaintiff cannot commence an action until he knows he has a cause.** To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. *Owens v. Brochner*, 172 Colo. 525, 474 P.2d 603 (1970).

**In a professional negligence case the cause of action “accrues” when the patient discovers or, in the exercise of reasonable diligence, should have discovered the doctor’s negligence.** *Owens v. Brochner*, 172 Colo. 525, 474 P.2d 603 (1970); *Nitka v. Bell*, 29 Colo. App. 504, 487 P.2d 379 (1971).

**In a professional negligence case the cause of action does not accrue until the plaintiff, as a lay person, discovers, or in the exercise of reasonable diligence should have discovered, that the physician was negligent according to the standards prevailing in the community for members of his profession.** *Short v. Downs*, 36 Colo. App. 109, 537 P.2d 754 (1975).

Critical fact is the plaintiff’s knowledge of facts essential to cause of action. *Morris v. Geer*, 720 P.2d 994 (Colo. App. 1986).

In a legal malpractice action, once a client becomes aware of the attorney’s negligence and incurs damage in the form of legal fees to ameliorate the impact of that negligence, he or she, has suffered injury for the purpose of accrual of a legal claim. Moreover, a client’s cause of action can accrue before the attorney ceases representation. *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995).

**When limitations period begins.** The limitations period in former § 13-80-108 began to run when the aggrieved party discovered, or should have discovered by the exercise of reasonable diligence, the facts constituting the fraud. *Laymon v. McComb*, 524 F. Supp. 1091 (D. Colo. 1981); *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402 (Colo. App. 2000).

The limitations period was tolled until the aggrieved party learns of the fraud or should have discovered it by the exercise of reasonable diligence. *Hackbart v. Holmes*, 675 F.2d 1114 (10th Cir. 1982); *Noland v. Gurley*, 566 F. Supp. 210 (D. Colo. 1983).

Limitations period did not begin until the trial court determined that the defendant law firm was bound by the offer of settlement and had received an overpayment. Prior to that holding, plaintiff had no right to apply for relief. *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149 (Colo. App. 1993).

**The requisite knowledge under the general discovery rule includes knowledge of facts that would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another.** *Yund v. Bridgestone/Firestone, Inc.*, 200 F. Supp.2d 997 (S.D. Ind. 2002).

**Accrual in malpractice claim against engineer or architect.** In an action for professional malpractice against an engineer or architect brought under the six-year statute of limitations contained in this section, the cause of action does not accrue until the plaintiff knows, or should know, in the exercise of reasonable diligence, all material facts essential to show the elements of that cause of action. *City of Aurora v. Bechtel Corp.*, 599 F.2d 382 (10th Cir. 1979).

**Action for infringement of copyright and theft of trade secret** occurred at time when the plaintiff discovered, or in the exercise of reasonable diligence, should have discovered the facts giving rise to his claim. *DeGette v. Mine Co. Restaurant, Inc.*, 751 F.2d 1143 (10th Cir. 1985).

**Two-year provision did not begin to run** when owner or property first discovered physical processes leading up to injury, but only when he discovered, or in exercise of reasonable diligence should have discovered, alleged “defect” in improvement that produced injury. *Financial Associates v. G.E. Johnson Const.*, 723 P.2d 135 (Colo. 1986).

**Statute begins to run when unauthorized foreign object is discovered in plaintiff’s body.** Where doctors left a large gauze pad inside the incision and body of plaintiff more than 10 years before action was brought and in the interim plaintiff, in order to ascertain the cause of her constant pain and suffering, consulted and was treated by various surgeons and physicians, and when her condition became extremely grave a laparotomy was performed and the gauze pad discovered and removed, this being the first notice to plaintiff of the negligence, carelessness, and recklessness of defendants, it was held that an action, started within two years of this discovery, was not barred by this section. *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944).

**Unauthorized foreign object** is an object left inadvertently in a patient’s body and which has

no therapeutic or diagnostic purpose or effect. *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984).

Items not customarily left in a patient's body do not constitute "unauthorized foreign objects" under § 13-80-105 if all of the following are present: (1) The device is intentionally placed in the body or is intentionally allowed to remain therein; (2) the device is allowed to remain in the patient's body with the knowledge and consent of the patient; and (3) its remaining in the patient's body has a therapeutic or diagnostic purpose. If any one of these three elements is missing, the item is an unauthorized foreign object. *Nieto v. Chavez*, 721 P.2d 1223 (Colo. App. 1986) (decided under law in effect prior to 1986 repeal and reenactment).

Rods surgically inserted in patient's back with patient's knowledge did not constitute "unauthorized foreign objects". *Hoary v. Lowe*, 734 P.2d 154 (Colo. App. 1987).

**This is a jury question.** Whether or not the plaintiff actually knew or had reason to know of the cause of her injuries prior to the date of the alleged discovery is a question for the jury. *Davis v. Bonebrake*, 135 Colo. 506, 313 P.2d 982 (1957); *Owens v. Brochner*, 172 Colo. 525, 474 P.2d 603 (1970); *Nitka v. Bell*, 29 Colo. App. 504, 487 P.2d 379 (1971).

The determination of when a plaintiff discovered or should have discovered the seriousness and character of his injuries and the negligence giving rise to his cause of action is an unresolved question of fact, and is therefore, a question for the jury to determine, and summary judgment is improper. *DiChellis v. Peterson Chiropractic Clinic*, 630 P.2d 103 (Colo. App. 1981); *Phillips v. Beethe*, 679 P.2d 126 (Colo. App. 1984); *Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984).

**And question of timing of discovery of damage for trier of fact.** The question of whether or not the plaintiff actually discovered, or should have discovered, that damage occurred and that it probably resulted from professional malpractice is a question which should be left for the trier of fact or, in appropriate cases, summary judgment. *City of Aurora v. Bechtel Corp.*, 599 F.2d 382 (10th Cir. 1979).

**Question of fact.** The time when a plaintiff discovered, or through the use of reasonable diligence should have discovered, the negligent conduct giving rise to the cause of action is normally a question of fact that must be resolved by the trier of fact. *Winkler v. Rocky Mtn. Conference*, 923 P.2d 152 (Colo. App. 1995); *Murry v. GuideOne Specialty Mut. Ins. Co.*, 194 P.3d 489 (Colo. App. 2008).

Whether a medical malpractice action is barred by the statute of limitations is dependent upon the determination of a question of fact as to when the action occurred. *Short v. Downs*, 36 Colo. App. 109, 537 P.2d 754 (1975).

Issue may be decided as a matter of law where undisputed facts clearly show that plaintiff discovered, or reasonably should have discovered, negligent conduct as of a particular date. *Morris v. Geer*, 720 P.2d 994 (Colo. App. 1986); *Reider v. Dawson*, 856 P.2d 31 (Colo. App. 1992), *aff'd*, 872 P.2d 212 (Colo. 1994); *Winkler v. Rocky Mtn. Conference*, 923 P.2d 152 (Colo. App. 1995); *Murry v. GuideOne Specialty Mut. Ins. Co.*, 194 P.3d 489 (Colo. App. 2008).

**Question of timing of discovery not determination as matter of law.** Whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law. *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036 (10th Cir. 1980).

**Summary judgment on issue of diligence improper.** Since the issue of proper diligence under Colorado law should apparently be left to a jury, summary judgment on that claim is improper. *Morgan v. Dain Bosworth*, 545 F. Supp. 953 (D. Colo. 1982).

**Statutes of repose, also known as "strict" statutes of limitation, are not subject to the discovery rule codified in this section.** Such a statute bars a claim after the specified period regardless of the date on which the claimant discovers the error or omission that gave rise to the claim. *Kuhn v. State Dept. of Rev.*, 897 P.2d 792 (Colo. 1995).

**Accrual of personal injury claim based on negligence.** A personal injury claim based on alleged negligence accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. *Cade v. Regensberger*, 804 P.2d 238 (Colo. App. 1990).

**In cases involving personal injury, a plaintiff's claim for relief accrues on the date the fact of injury and its cause are known or should have been known,** and a plaintiff's uncertainty as to the full extent of the damage does not prevent the filing of a timely complaint. *Taylor v. Goldsmith*, 870 P.2d 1264 (Colo. App. 1994).

**Accrual of claim based upon libel or slander.** Subsection (1) supersedes the accrual rule stated in decisions prior to 1986 and a claim for relief based upon injury to reputation is now considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. *Taylor v. Goldsmith*, 870 P.2d 1264 (Colo. App. 1994).

**Once plaintiff knew her injuries were caused by her use of a keyboard, she then had two years to discover the keyboard manufacturer with reasonable diligence.** Where the identity of the defendant could be discovered through reasonable diligence, the action was properly barred if not filed within the two-year



limitation period. *Yoder v. Honeywell, Inc.*, 900 F. Supp. 240 (D. Colo. 1995).

**Receipt of a neurologist's letter stating that a plaintiff's injuries could have been caused by exposure to a toxic substance did not constitute discovery of the cause of her injuries**, and the plaintiff proceeded with reasonable diligence when suit was filed less than two years after her receipt of a toxicologist's letter stating that her condition was caused by exposure to a toxic substance. *Salazar v. Am. Sterilizer Co.*, 5 P.3d 357 (Colo. App. 2000).

**Plaintiff knew, or should have known by the exercise of reasonable diligence**, of the injury to his reputation and the cause of that injury; consequently, because the complaint was filed more than two years after plaintiff learned of the statements, the trial court properly dismissed plaintiff's claims for libel, slander, and outrageous conduct as barred by §§ 13-80-102 (1)(a) and 13-80-103 (1)(a). *Taylor v. Goldsmith*, 870 P.2d 1264 (Colo. App. 1994).

**Action against insurance company for bad faith failure to settle resulting in excess liability judgment** accrued only after excess liability was ultimately established. *Vanderloop v. Progressive Cas. Ins. Co.*, 769 F. Supp. 1172 (D. Colo. 1991).

**Plaintiff's tortious interference with contract claim** accrued from the date the fact of injury or damage was evident, although the nature of the contracts at issue left the precise extent of the injury or damage uncertain. *Sterebuch v. Goss*, 266 P.3d 428 (Colo. App. 2011).

**Because plaintiff asserted that respondents were handling claim in bad faith in a letter dated more than two years before filing bad faith claim**, the letter evidences that petitioner's bad faith tort claims accrued no later than the date of the letter and the filing exceeded the statute of limitations. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139 (Colo. 2007).

Plaintiff's death does not extend the bad faith tort claim accrual date beyond the initial acknowledgment by plaintiff's attorney of bad faith. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139 (Colo. 2007).

**Claim based on negligence of attorney in drafting contract** accrued when client bank knew or reasonably should have known all facts essential to claim and had already incurred some damage as a result, regardless of whether action was classified as arising in tort or in contract. It was not necessary to await suit by other party to contract, or to ascertain the precise extent of damage, before limitation period began to run. *Palisades Nat. Bank v. Williams*, 816 P.2d 961 (Colo. App. 1991).

**"Discovery rule" did not apply** to claims for negligence and outrageous conduct arising from alleged sexual assault on minors. Despite therapists' and plaintiffs' statements that plaintiffs

did not realize the full import of defendant's actions until they sought counseling years after the assaults, plaintiffs' admissions of emotional upset at time of assaults and knowledge that defendant's actions were improper and illegal indicated that plaintiffs were on adequate notice of the essential elements of the tort. Therefore, cause of action accrued when plaintiffs reached the age of majority. *Cassidy v. Smith*, 817 P.2d 555 (Colo. App. 1991).

**Plaintiff knew or should have known both the injury and its cause by the exercise of reasonable diligence**. It is not true that, once the affidavit of a psychologist is injected into a case, there is automatically an issue of fact regarding timing. The court found it very important that plaintiff did not argue that he ever repressed his memory that events of alleged sexual abuse by a priest happened but merely his knowledge that the events constituted abuse which harmed him. According to the court, the idea that a person of plaintiff's background and education could be aware of such events and his own troubled psychological state and not tie them together was inconceivable as a matter of law. Consequently, the court granted summary judgment based on the statute of limitations. *Ayon v. Gourley*, 47 F. Supp.2d 1246 (D. Colo. 1998).

**Outrageous conduct is a separate tort, even though it may be premised on conduct amounting to a battery**. Therefore, the applicable statute of limitations under § 13-80-102 is two years from the date of accrual for outrageous conduct, rather than the one year limit under § 13-80-103 for battery. *Winkler v. Rocky Mtn. Conference*, 923 P.2d 152 (Colo. App. 1995).

**Further, where a claim may be pursued on two theories having different limitations**, the longer limitation applies. *Winkler v. Rocky Mtn. Conference*, 923 P.2d 152 (Colo. App. 1995).

**Applied** in *Miller v. Celotex Corp.*, 708 F. Supp. 306 (D. Colo. 1989) (decided under former § 13-80-127.5); *Stiff v. BilDen Homes, Inc.*, 88 P.3d 639 (Colo. App. 2003).

## C. Fraudulent Concealment.

**Law reviews**. For note, "Concealment of a Cause of Action as Tolling the Two-Year Statute of Limitation in Malpractice", see 17 *Rocky Mt. L. Rev.* 124 (1944).

**Running of statute is delayed when defendant conceals from the plaintiff the existence of the cause**. Where the defendants had concealed from the plaintiff the existence of a cause of action during the time that the period of limitations was running, the supreme court held that one may not be permitted to take advantage of his own wrong, and that the alleged cause of action was not barred by the statute of limita-

tions. *Klamm Shell v. Berg*, 165 Colo. 540, 441 P.2d 10 (1968).

**As when doctor assures the patient that nothing is wrong.** The fraudulent concealment issue would be applicable, where a plaintiff discovers an injury and then is reassured by the doctor that nothing is wrong. *Owens v. Brochner*, 172 Colo. 525, 474 P.2d 603 (1970).

**The Colorado court does not require a showing of all of the elements of fraud** in order to support a finding of "fraudulent concealment" as negligence is equally damaging and the victim equally helpless regardless of the motive for concealment. *Murphy v. Dyer*, 260 F. Supp. 822 (D. Colo. 1966).

**The statute of limitations is not intended to require the commencement of an action** when the injured party is justifiably ignorant of the existence of one. The law does not impose upon the injured party a constructive knowledge of facts—i.e., standards of practice, medical causation—which are, indeed, unknown to the court itself without the assistance of expert testimony. *Nitka v. Bell*, 29 Colo. App. 504, 487 P.2d 379 (1971).

**Fraudulent concealment provision of former § 13-80-105 required two wrongs:** The original negligent act and the subsequent concealment of same. *Adams v. Richardson*, 714 P.2d 921 (Colo. App. 1986).

**Knowing concealment and foreign object exceptions apply only to three-year statute of repose and not to two-year statute of limitations** in former § 13-80-105. *Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984).

## VIII. TOLLING OF STATUTE OF LIMITATIONS.

**Annotator's note.** Relevant cases construing the tolling of the statute of limitations under former § 13-80-110 as said section existed prior to the 1986 repeal and reenactment of this article have been included with the annotations to this section.

**Plaintiff has burden of establishing factual basis for tolling of statute.** While the statute of limitations is an affirmative defense, when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute. *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036 (10th Cir. 1980).

**Federal law may control tolling of limitations when state statute applicable.** Though the limitations period for an action brought in federal district court based on claims arising under section 17 of the Securities Act of 1933 and sections 10(b) and 20 of the Securities Exchange Act of 1934 is supplied by the law of Colorado, the circumstances which will toll the running of the statute are matters of federal law.

*Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. 402 (D. Colo. 1979), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895, 102 S. Ct. 392, 70 L. Ed.2d 209 (1981).

**Time consumed by pendency of action not deductible.** A party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice to him. *Commercial Equity Corp. v. Majestic Sav. & Loan Ass'n*, 620 P.2d 56 (Colo. App. 1980).

**Commencement of action within statutory period arrests running of statute.** It seems to be the well established rule in all jurisdictions that the commencement of an action within the statutory period to enforce a claim or demand arrests the running of the general statute of limitations against the same. *Bd. of County Comm'rs v. Flanagan*, 21 Colo. App. 467, 122 P. 801 (1912); *Kingsley v. Clark*, 57 Colo. 352, 141 P. 464 (1914).

**Filing and withdrawal of claim against estate does not constitute commencement of an action** to prevent the statute of limitations from running. *Morse v. Clark*, 10 Colo. 216, 14 P. 327 (1887).

**The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties** had the suit been permitted to continue as a class action. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223 (10th Cir. 2008) (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)).

**Only the first class action tolls the statute of limitations.** If a plaintiff has been a member of the class in two lawsuits, only the first tolls the statute of limitations. The filing of successive class actions cannot serve to perpetually toll the running of the statute of limitations. *Jackson v. Am. Family Mut. Ins. Co.*, 258 P.3d 328 (Colo. App. 2011).

**The presentation to the county commissioners of a claim against the county**, and diligent and active effort by the claimant to induce action by the board, stays the course of the general statute of limitations. *Bd. of County Comm'rs v. Flanagan*, 21 Colo. App. 467, 122 P. 801 (1912).

**In workmen's compensation cases the earliest disability for which compensation is either awarded or paid** will arrest the running of any statute of limitations. *London Guarantee & Accident Co. v. Sauer*, 92 Colo. 565, 22 P.2d 624 (1933).



**An indorsement of payment on a promissory note** made by or under authority of the maker and within the time fixed by the statute of limitations, interrupts the running of the statute. *Christensen v. Woods Mercantile Co.*, 104 Colo. 463, 91 P.2d 999 (1939).

**Book entries corresponding to the date and amount of an indorsement of payment on a promissory note** are not sufficient alone to interrupt the running of the statute of limitations or to revive a barred debt. *Christensen v. Woods Mercantile Co.*, 104 Colo. 463, 91 P.2d 999 (1939).

**Where claim against estate consists of promissory notes, they must be filed to arrest statute.** Where a claim against the estate of a decedent consists in his promissory notes, the notes themselves must be filed in the county court in which administration is pending, and the filing of a list or statement of the notes is not a compliance with the statute and has no effect to stay the operation of the statute of limitations. *Gordon-Tiger Mining & Reduction Co. v. Loomer*, 50 Colo. 409, 115 P. 717 (1911).

**A promise of the administrator to look after a claim** for the expenses of administration and bring it forward has no effect to stay the course of the statute. *Gordon-Tiger Mining & Reduction Co. v. Loomer*, 50 Colo. 409, 115 P. 717 (1911).

**Ignorance of the law** respecting the remedy which it provides does not prevent the statute from running. *Pipe v. Smith*, 5 Colo. 146 (1879).

**The burden is on the party suing on a debt** apparently barred by the statute of limitations to show that the statute has been tolled. *Capek v. Monahan*, 117 Colo. 131, 184 P.2d 501 (1947).

**Statute of limitations not tolled between time of injury and time when investigative report released** since report would not result in any civil relief to plaintiff. *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo. App. 1991).

**A change in the law does not revive claims otherwise barred by a statute of limitations.** *Kuhn v. State Dept. of Rev.*, 897 P.2d 792 (Colo. 1995).

**No tolling under course-of-treatment exception or "continuing violation" doctrine in a bad-faith breach of workers' compensation insurance case**, because insurer's failure to pay

benefits when due puts claimant on notice of the fact of injury and its cause even if there is only a single episode of unreasonable behavior. *Harmon v. Fred S. James & Co.*, 899 P.2d 258 (Colo. App. 1994).

**"Continuing violation" doctrine does not apply to shareholder action** based on breach of fiduciary duty by directors of corporation. *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402 (Colo. App. 2000).

## IX. FORMER STATUTE OF REPOSE.

**Annotator's note.** Relevant cases construing the statute of repose under former § 13-80-105 as said section existed prior to the 1986 repeal and reenactment of this article have been included with the annotations to this section.

**Former statute of repose did not deny equal protection.** *Adams v. Richardson*, 714 P.2d 921 (Colo. App. 1986).

**Tolling provisions of § 13-81-103 applied to former § 13-80-105** relating to limitation and repose periods applicable to medical malpractice claims. *Southard v. Miles*, 714 P.2d 891 (Colo. 1986).

**Former statute of repose applied to continuing acts or omissions;** however, statute of repose does not bar recovery for acts or omissions that occurred during the last three years preceding institution of suit. *Comstock v. Collier*, 694 P.2d 1282 (Colo. App. 1984), modified in part and rev'd in part on other grounds, 737 P.2d 845 (Colo. 1987).

**Negligent misdiagnosis is exception to former three-year statute of repose.** Legislative scheme which permits foreign object and knowing concealment claimants to invoke the discovery rule to the three-year statute of repose in former § 13-80-105 but denies such discovery rule to negligent misdiagnosis claimants is unconstitutional as a denial of equal protection and the appropriate remedy is to make claims based on negligent misdiagnosis another exception to the former three-year statute of repose. *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984).

Whether claim alleged a misdiagnosis claim is applied in *Comstock v. Collier*, 737 P.2d 845 (Colo. 1987).

**Applied in** *Hoary v. Lowe*, 734 P.2d 154 (Colo. App. 1987).

**13-80-109. Limitations apply to noncompulsory counterclaims and setoffs.** Except for causes of action arising out of the transaction or occurrence which is the subject matter of the opposing party's claim, the limitation provisions of this article shall apply to the case of any debt, contract, obligation, injury, or liability alleged by a defending party as a counterclaim or setoff. A counterclaim or setoff arising out of the transaction or occurrence which is the subject matter of the opposing party's claim shall be commenced within one year after service of the complaint by the opposing party and not thereafter.

**Source:** L. 86: Entire article R&RE, p. 700, § 1, effective July 1.

**Editor's note:** This section is similar to former § 13-80-112 as it existed prior to 1986.

## ANNOTATION

The language of this provision makes it clear that its purpose is to allow a party against whom a claim has initially been asserted to plead a stale claim only in response to the claim asserted against that party and only if it arises out of the same transaction or occurrence, or the same series thereof. *Duell v. United Bank of Pueblo, N.A.*, 892 P.2d 336 (Colo. App. 1994); *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138 (10th Cir. 2000).

Under Colorado law, the filing of a complaint does toll the statute of limitations on counterclaims arising out of the same transaction or occurrence. The amount of time a defendant has to file such a counterclaim is measured with reference to the plaintiff's complaint, giving the defendant one year, but no more, to file the counterclaim. *Full Draw Prods. v. Easton Sports, Inc.*, 85 F. Supp.2d 1001 (D. Colo. 2000).

This section provides that the limitation provisions of this article shall apply to any debt or contract alleged by way of setoff. *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962) (decided under former § 13-80-112).

Counterclaims for damages arising from transaction that was the subject of an action

to stay arbitration were compulsory and revived under this section. *E-21 Eng'g v. Steve Stock & Assocs.*, 252 P.3d 36 (Colo. App. 2010).

Under this section, a plaintiff cannot revive time-barred claims simply by re-pleading them as counterclaims to a defendant's compulsory counterclaim. *Duell v. United Bank of Pueblo, N.A.*, 892 P.2d 336 (Colo. App. 1994).

This section does not apply in declaratory judgment actions for nonliability on limitations grounds. The suggestion that a plaintiff in one action can "revive" his concededly stale claims by filing them as counterclaims in a parallel action brought by the defendant solely for the purpose of having those claims declared stale is illogical and unsound. *Hamilton v. Cunningham*, 880 F. Supp. 1407 (D. Colo. 1995).

Action for declaratory judgment of nonliability based on statute of limitations grounds is not a "claim" triggering the counterclaim revival statute. Such an interpretation of the statute would lead to an absurd result. *Tidwell v. Bevan Props., Ltd.*, 262 P.3d 964 (Colo. App. 2011).

Applied in *Plains Metro. Dist. v. Ken-Caryl Ranch*, 250 P.3d 697 (Colo. App. 2010).

**13-80-110. Causes barred in state of origin.** If a cause of action arises in another state or territory or in a foreign country and, by the laws thereof, an action thereon cannot be maintained in that state, territory, or foreign country by reason of lapse of time, the cause of action shall not be maintained in this state.

Source: L. 86: Entire article R&RE, p. 700, § 1, effective July 1.

## ANNOTATION

**Law reviews.** For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts, and Equity", see 23 *Rocky Mt. L. Rev.* 247 (1951). For article, "Conflict of Laws, Constitutional Law, Elections", see 30 *Dicta* 449 (1953). For article, "Statutes of Limitation in the Conflict of Laws Borrowing Statutes", see 32 *Rocky Mt. L. Rev.* 287 (1960).

**Annotator's note.** Since § 13-80-110 is similar to former § 13-80-118 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this section.

This section evidenced the purpose of the general assembly to afford to a debtor sued in Colorado relief from a creditor seeking judgment on a debt barred in the jurisdiction where the cause arose. *Simon v. Wilnes*, 97 Colo. 78, 47 P.2d 406 (1935).

This section does not violate the "full faith and credit" clause in § 1 of art. IV, U.S. Const. *Kelly v. Heller*, 74 Colo. 470, 222 P. 648 (1924).

"Arises in another state" must mean in the courts of that state. It cannot mean a right of action not cognizable by the courts of that state. *Folda Real Estate Co. v. Jacobsen*, 75 Colo. 16, 223 P. 748 (1924).

This section provides in substance that an action shall not be maintained in this state on a claim arising in another state and barred by the laws thereof. *Smith v. Kent Oil Co.*, 128 Colo. 80, 261 P.2d 149 (1953).

If an action is not barred in the state where the cause of action arose because of the defendant's absence therefrom, it is not barred in Colorado. *Schoenfeld v. Neher*, 428 F.2d 152 (10th Cir. 1970).

In the absence of a showing, there is a presumption that the law of another jurisdiction



tion is the same as the common law of Colorado, but no presumption that it is the same as Colorado statute law. *Smith v. Kent Oil Co.*, 128 Colo. 80, 261 P.2d 149 (1953).

**Specific adoption of the choice of law provision under the Uniform Interstate Family Support Act by both Colorado, in § 14-5-604, and Texas overrides application of the general borrowing limitations statute set forth in this section.** In *re Morris*, 32 P.3d 625 (Colo. App. 2001).

**Neither the borrowing statute nor the Uniform Conflict of Laws - Limitations Act (UCL-LA), §§ 13-82-101 to 13-82-107, is more specific than the other.** Because each

statute uses different factors to assign a limitations period, the court is prevented from directly comparing them in order to read one as an exception to the other. *Jenkins v. Pan. Canal Ry. Co.*, 208 P.3d 238 (Colo. 2009).

**Because it was enacted more recently, the borrowing statute, and not the UCL-LA, controls.** Based on the general assembly's prescribed rules of statutory construction, because the conflicts between the statutes cannot be resolved on specificity and the borrowing statute is the more recent enactment, the borrowing statute applies to plaintiffs' claims. *Jenkins v. Pan. Canal Ry. Co.*, 208 P.3d 238 (Colo. 2009).

**13-80-111. Commencement of new action upon involuntary dismissal.** (1) If an action is commenced within the period allowed by this article and is terminated because of lack of jurisdiction or improper venue, the plaintiff or, if he dies and the cause of action survives, the personal representative may commence a new action upon the same cause of action within ninety days after the termination of the original action or within the period otherwise allowed by this article, whichever is later, and the defendant may interpose any defense, counterclaim, or setoff which might have been interposed in the original action.

(2) This section shall be applicable to all actions which are first commenced in a federal court as well as those first commenced in the courts of Colorado or of any other state.

**Source:** L. 86: Entire article R&RE, p. 700, § 1, effective July 1.

**Editor's note:** This section is similar to former § 13-80-128 as it existed prior to 1986.

## ANNOTATION

**Annotator's note.** Since § 13-80-111 is similar to former § 13-80-128 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this section.

**Purpose of section.** The remedial revival statute reflects a legislative intent to enable litigants to avoid hardships which might result from strict adherence to the provisions of statutes of limitations. *Soehner v. Soehner*, 642 P.2d 27 (Colo. App. 1981).

**Section inapplicable to wrongful death actions.** By its own terms, this section does not apply to wrongful death actions. *Ritter v. Aspen Skiing Corp.*, 519 F. Supp. 907 (D. Colo. 1981); *Phillips v. Beethe*, 679 P.2d 126 (Colo. App. 1984).

**And to actions under the Federal Arbitration Act,** as a result of preemption by 9 U.S.C. § 12. *Chilcott Entm't v. John G. Kinnard Co., Inc.*, 10 P.3d 723 (Colo. App. 2000).

**But does apply to medical malpractice claims.** This section applies to actions set forth in this article and medical malpractice is one of those claims. *Phillips v. Beethe*, 679 P.2d 126 (Colo. App. 1984).

**Statute should be liberally interpreted;** therefore, the term "a new action" should not be

interpreted to mean only one new action. *Sharp Bros. Contr. v. Westvaco Corp.*, 817 P.2d 547 (Colo. App. 1991).

**Remedial revival statute tolls the running of the statute of limitations when the original action is terminated for lack of jurisdiction.** Failure to file a nonresident cost bond, however, does not affect either subject matter jurisdiction or jurisdiction over the person and, therefore, the remedial revival statute was inapplicable to plaintiff's second complaint. *Nguyen v. Swedish Med. Ctr.*, 890 P.2d 255 (Colo. App. 1995).

**But the remedial revival statute does not toll the statute of limitations** where plaintiff's action is not timely filed because plaintiff attempted to pay the filing fees with an insufficient funds check. In such case, the action was not dismissed for lack of jurisdiction. *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860 (Colo. App. 1998).

**The remedial revival statute does not toll the statute of limitations** where plaintiff's complaint is dismissed due to a lack of capacity to sue, because, in such case, the action is not dismissed for lack of jurisdiction. *SMLL, L.L.C. v. Peak Nat'l Bank*, 111 P.3d 563 (Colo. App. 2005).

**Trial court properly dismissed case on statute of limitations grounds.** Trial court had sub-

ject matter jurisdiction over deceased defendant named in original complaint and personal jurisdiction over defendant after complaint was amended. Therefore, remedial revival statute could not be invoked because case was not "terminated because of lack of jurisdiction or improper venue" within the meaning of the

statute, rather it was dismissed based on the statute of limitations. *Currier v. Sutherland*, 218 P.3d 709 (Colo. 2009).

**Remedial revival statute cannot be invoked, and untimely amended complaints do not relate back to original complaint.** *Currier v. Sutherland*, 218 P.3d 709 (Colo. 2009).

**13-80-112. When action survives death.** If any person entitled to bring any action dies before the expiration of the time limited therefor and if the cause of action does by law survive, the action may be commenced by the personal representative of the deceased person at any time within one year after the date of death and not afterwards if barred by provision of this article.

**Source:** L. 86: Entire article R&RE, p. 701, § 1, effective July 1.

#### ANNOTATION

**For inapplicability of this section to actions not abated or discontinued by plaintiff's**

**death,** see *Barlew v. Hitzler*, 40 Colo. 109, 90 P. 90 (1907) (decided under former § 13-80-117).

**13-80-113. New promise - effect of payment.** No acknowledgment or promise shall be evidence of a new or continuing contract sufficient to take a case out of the operation of the statute of limitations, unless it is in writing signed by the party to be charged; but this section shall not alter the effect of a payment of principal or interest.

**Source:** L. 86: Entire article R&RE, p. 701, § 1, effective July 1.

**Editor's note:** This section is similar to former § 13-80-125 as it existed prior to 1986.

#### ANNOTATION

**Law reviews.** For article, "A Victim of 'Permissive Counterclaims'", see 18 *Dicta* 83 (1941). For comment on *Fastenau v. Asher*, appearing below, see 24 *Rocky Mt. L. Rev.* 119 (1951).

**Annotator's note.** Since § 13-80-113 is similar to former § 13-80-125 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this section.

**This section affects only the mode of proof** and does not alter the substantive law. *Van Diest v. Towle*, 116 Colo. 204, 179 P.2d 984 (1947).

**This section applies only to actions in personam.** *Fastenau v. Asher*, 124 Colo. 161, 235 P.2d 587 (1951).

**The promise to pay must be express.** To remove the bar of the statute of limitations so that a debt otherwise barred may be recovered upon a new promise, there must be an express promise to pay it. *Thomas v. Carey*, 26 Colo. 485, 58 P. 1093 (1899).

**It must be a full recognition of the indebtedness and a promise to pay it.** Although, after a new promise, the action can be maintained upon the original consideration, recovery can

only be had upon the new contract to pay, hence, it must have the necessary elements of a contract. It must be a full recognition of the indebtedness evidenced by the note, and a promise to pay that particular debt. *Sears v. Hicklin*, 3 Colo. App. 331, 33 P. 137 (1893).

**The debtor may impose conditions.** Where the debtor was under no legal obligation whatever to pay the debt, whatever promise he made was entirely voluntary; and the authorities universally recognize his right to impose any condition which he might deem proper. *Richardson v. Bricker*, 7 Colo. 58, 1 P. 433, 49 Am. R. 344 (1883).

**This section does not interfere with general rule as to effect of payment.** This section clearly evidences the legislative intent not to interfere with the general rule that the payment of interest, before the running of the statute, removes the demand therefrom, and that proof of payment may be by parol. *Lieske v. Swan*, 93 Colo. 396, 26 P.2d 807 (1933).

**An offer in compromise is not an admission of the debt** so as to remove the bar of the statute. *Van Diest v. Towle*, 116 Colo. 204, 179 P.2d 984 (1947).

**Nor are references to debt only for purpose of identifying collateral.** References to a debt



in correspondence about exchange of the collateral on the debt pursuant to a corporate reorganization did not constitute an acknowledgment of the debt, where the reference was made to the debt only for the purpose of identifying the collateral. *Van Diest v. Towle*, 116 Colo. 204, 179 P.2d 984 (1947).

**Alleged promise to pay a debt** is not evidence of a new or continuing contract sufficient to bar application of the statute of limitations unless it is in writing. An oral acknowledgment

of an existing debt and forbearance to bring suit alone are insufficient to invoke equitable estoppel. Equitable estoppel requires evidence that the defendant's actions adversely affected filing the plaintiff's claim. *Samples-Ehrlich v. Simon*, 876 P.2d 108 (Colo. App. 1994).

**Applied** in *Berthoud Nat. Bank v. Dunn*, 762 P.2d 759 (Colo. App. 1988); *Mountainwood Condo. v. Cal-Colorado*, 765 P.2d 1066 (Colo. App. 1988).

**13-80-114. Promise by one of parties in joint interest.** No joint debtor, obligor, or his personal representative or successor shall lose the benefit of the provisions of this article so as to be chargeable by reason only of any acknowledgment, promise, or payment made by any other of them.

**Source:** L. 86: Entire article R&RE, p. 701, § 1, effective July 1.

**Editor's note:** This section is similar to former §§ 13-80-120 and 13-80-124 as they existed prior to 1986.

#### ANNOTATION

**Payments of one indorser of a promissory note operate only** to avoid the bar of the statute of limitations as to himself not as to a joint maker. *Coulter v. Bank of Clear Creek County*,

18 Colo. App. 444, 72 P. 602 (1903); *Torbit v. Heath*, 11 Colo. App. 492, 53 P. 615 (1898) (decided under former § 13-80-124).

**13-80-115. Endorsement by payee - effect.** Nothing in this article shall alter, take away, or lessen the effect of a payment of any principal or interest made by any person; but no endorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment is made, or purports to be made, shall be deemed sufficient proof of the payment so as to take the case out of operation of the provisions of this article.

**Source:** L. 86: Entire article R&RE, p. 701, § 1, effective July 1.

**Editor's note:** This section is similar to former § 13-80-123 as it existed prior to 1986.

#### ANNOTATION

**Annotator's note.** Since § 13-80-115 is similar to former § 13-80-123 as it existed prior to the 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this section.

**This section establishes a rule of evidence** and not a rule of pleading. *Meyer v. Binkleman*, 5 Colo. 262 (1880); *MacGinnis v. Pickett*, 109 Colo. 169, 123 P.2d 410 (1942).

**It was not intended to lessen the effect of a payment**, but to require proof that a payment was in fact made, whenever it shall be relied upon to revive an action otherwise barred. Without such a requirement there would practically be no bar to an action upon a promissory note, for the simple indorsement of a credit without

payment in fact, would always operate to revive the cause of action. Under this section, however, the plaintiff must not only state a subsisting cause of action, but he must prove such a cause. *Meyer v. Binkleman*, 5 Colo. 262 (1880); *MacGinnis v. Pickett*, 109 Colo. 169, 123 P.2d 410 (1942).

**A voluntary payment by the defendant who owes the principal debt**, or is bound for it, will stop the running of the statute. *Nat'l State Bank v. Rowland*, 1 Colo. App. 468, 29 P. 465 (1892); *Adams v. Tucker*, 6 Colo. App. 393, 40 P. 783 (1895); *Dodger v. East*, 100 Colo. 36, 64 P.2d 1270 (1937).

**Since it amounts to acknowledgment from which new promise is implied.** The principle upon which a part payment by a debtor will

prevent his availing himself of the bar of the statute is that such a payment amounts to an acknowledgment of the debt, and from an absolute acknowledgment the law implies a new promise founded upon the old consideration. *Sears v. Hicklin*, 3 Colo. App. 331, 33 P. 137 (1893).

**To pay subsisting debt then due.** The authorities generally declare that the new promise implied by a part payment is a promise to pay a subsisting debt then due; not a debt which might thereafter become due under the terms of the contract. *Buckingham v. Orr*, 6 Colo. 587 (1883).

**The mere indorsement of a partial payment upon a note will not** in and of itself toll the running of the statute of limitations. *Christensen v. Hugh M. Woods Mercantile Co.*, 104 Colo. 403, 91 P.2d 999 (1934); *MacGinnis v. Pickett*, 109 Colo. 169, 123 P.2d 410 (1942).

**There must be payment and clear acknowledgment of additional debt.** In order to avert the bar of the statute of limitations a payment of a portion of an admitted debt must be made and accepted by the creditor and accompanied by circumstances amounting to an unqualified acknowledgment of more being due from which a promise must be inferred to pay the remainder. *Holmquist v. Gilbert*, 41 Colo. 113, 92 P. 232 (1907); *Ferris v. Curtis*, 53 Colo. 340, 127 P. 236 (1912).

**13-80-116. Action against joint debtors or obligors.** If, in an action against joint debtors or obligors, the plaintiff is barred by the provisions of this article as to one or more of the debtors or obligors, but is entitled to recover against any other of them by virtue of a new acknowledgment, promise, or payment, the plaintiff shall be entitled to proceed as against that defendant.

**Source:** L. 86: Entire article R&RE, p. 701, § 1, effective July 1.

**Editor's note:** This section is similar to former § 13-80-121 as it existed prior to 1986.

**13-80-117. No dismissal for nonjoinder.** In an action on contract, it shall not be a defense that the plaintiff failed to join a person against whom claim is barred by this article.

**Source:** L. 86: Entire article R&RE, p. 701, § 1, effective July 1.

**Editor's note:** This section is similar to former § 13-80-122 as it existed prior to 1986.

**13-80-118. Absence or concealment of a party subject to suit.** If, when a cause of action accrues against a person, the person is out of this state and not subject to service of process or has concealed himself, the period limited for the commencement of the action by any statute of limitations shall not begin to run until he comes into this state or while he is so concealed. If, after the cause of action accrues, he departs from this state and is not subject to service of process or conceals himself, the time of his absence while not subject to service of process or the time of his concealment while not subject to service of process shall not be computed as a part of the period within which the action must be brought.

**Source:** L. 86: Entire article R&RE, p. 701, § 1, effective July 1.

**Payment must be voluntary and by the debtor to the creditor.** *Sears v. Hicklin*, 3 Colo. App. 331, 33 P. 137 (1893).

**For payment of interest being sufficient acknowledgment of debt,** see *Purdy v. Deprez*, 39 Colo. 68, 88 P. 972 (1906).

**Indorsement on note of amount standing to maker's credit on books of bank is ineffective.** The indorsement on the promissory note of a debtor to a banking corporation, without the assent of the maker, of a balance to the maker's credit standing on the books of the corporation, does not constitute a voluntary payment on the note, and is not effective to stop the running of the statute of limitations as to the note. *Nat'l State Bank v. Rowland*, 1 Colo. App. 468, 29 P. 465 (1892).

**Indorsement of partial payment on note is insufficient.** "Generally speaking, the rule is well established that the mere indorsement of a partial payment upon a note will not in and of itself toll the running of the statute of limitations." *MacGinnis v. Pickett*, 109 Colo. 169, 123 P.2d 410 (1942).

**Burden of proof is upon plaintiff.** In an action on a promissory note the burden of proving part payment so as to remove the bar of the statute of limitations is upon the plaintiff. *Manby v. Sweet Inv. Co.*, 78 Colo. 371, 242 P. 51 (1925); *MacGinnis v. Pickett*, 109 Colo. 169, 123 P.2d 410 (1942).



**Editor's note:** This section is similar to former § 13-80-126 as it existed prior to 1986.

### ANNOTATION

**Law reviews.** For article, "Enforcement of Justice Court Judgments", see 12 *Dicta* 274 (1935). For note, "Does Physical Non-Presence Toll the Statute of Limitations?", see 13 *Rocky Mt. L. Rev.* 152 (1941). For article, "Another Decade of Colorado Conflicts", see 33 *Rocky Mt. L. Rev.* 139 (1961).

**Annotator's note.** Since § 13-80-118 is similar to former § 13-80-126 as it existed prior to this 1986 repeal and reenactment of this article, relevant cases construing that provision have been included with the annotations to this section.

**This section tolls statute of limitations until defendant enters Colorado.** A suit on a foreign judgment based upon a cause of action accruing more than six years prior to the filing of an action thereon in Colorado, and more than three months after the entry thereof, would be barred by the provisions of § 13-80-121, except for the provisions of this section, which tolled the running of the statute until defendant came into the state of Colorado. *Blackmon v. Klein*, 144 Colo. 461, 357 P.2d 91 (1960).

**Plaintiff must show statute has been tolled.** The statute of limitations having been pleaded in bar and prima facie appearing to be a bar from the note set out in the complaint, the burden shifted to plaintiff to establish that the statute had been tolled. *Smith v. Kent Oil Co.*, 128 Colo. 80, 261 P.2d 149 (1953); *Norton v. Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P.2d 866 (1961).

**This section is limited in its provisions to causes of action in personam**, and is wholly inapplicable to actions in rem or actions quasi in rem. *Fastenau v. Asher*, 124 Colo. 161, 235 P.2d 587 (1951).

**This section specifically fixes time when period of limitation begins to run.** *Jones v. O'Connell*, 87 Colo. 103, 285 P. 762 (1930).

**This section is clearly a statute of limitations.** *Jones v. O'Connell*, 87 Colo. 103, 285 P. 762 (1930).

**Mere fact that person moved to another state did not constitute an effort to conceal himself or herself in an effort to avoid service.** *McGee v. Hardina*, 140 P.3d 165 (Colo. App. 2005).

**It applies only to absence from state of Colorado.** This section applies to absence from the state of Colorado, not to absence from another state or from a territory or foreign country. If the section were intended to cover the latter situation, it would have said "out of the state, territory, or foreign country where the cause of action accrued", and "depart from such state, territory, or foreign country". *Simon v. Wilnes*, 97 Colo. 78, 47 P.2d 406 (1935)(concurring opinion).

**Amendment to former § 13-80-126 not retroactive.** Because this section is a tolling statute and is remedial in nature, it should not be given retroactive application; thus, in any suit where the cause of action accrued prior to the effective date of the amendment of the former section, the action should be controlled by this section as it read prior to the amendment. *United Bank of Denver Nat'l Ass'n v. Wright*, 660 P.2d 510 (Colo. App. 1983).

**This section does not toll limitation period for wrongful death action.** The Colorado wrongful death act is not a "statute of limitations but a statute of creation." Thus this action will not toll the two-year period in which one has to commence a wrongful death action. *Nelson v. Hall*, 573 F. Supp. 1097 (D. Colo. 1983).

**Applied in** *Kendall v. Costa*, 659 P.2d 715 (Colo. App. 1982).

**13-80-119. Damages sustained during commission of a felonious act or in flight from the commission of a felonious act.** (1) No person, his or her estate, or his or her personal representative shall have a right to recover damages sustained during the commission of or during immediate flight from an act that is defined by any law of this state or the United States to be a felony, if the conditions stipulated in this section apply.

(2) (a) The court shall dismiss the action for damages and award attorney fees and costs to the person against whom the action was brought if the person bringing the action, on whose behalf an action has been brought, or in the case of a wrongful death action, the decedent, has been convicted of the felony or has been adjudicated a delinquent as a result of the commission of the act, unless the damage was caused by the willful and deliberate act of another person; except that such exception shall not apply if the person who caused the injuries acted:

(I) Under a reasonable belief that physical force was reasonable and appropriate to prevent injury to himself or herself or to others, using a degree of force that he or she reasonably believed necessary for that purpose; or

(II) Under a reasonable belief that physical force was reasonable and appropriate to

prevent the commission of a felony, using a degree of force that he or she reasonably believed necessary for that purpose; or

(III) As a peace officer, as such person is described in section 16-2.5-101, C.R.S., acting within the scope of the officer's employment and acting pursuant to section 18-1-707, C.R.S.

(a.5) The court shall dismiss the action for damages and award attorney fees and costs to the person against whom the action was brought if the person against whom the action was brought is found not guilty of criminal charges for causing the injuries sustained by the person who committed the felony or act that is defined as a felony, or in the case of a wrongful death action for causing the decedent's death, as a result of the commission of the act, unless the damage was caused by the willful and deliberate act of another person; except that such exception shall not apply if the person who caused the injuries acted:

(I) Under a reasonable belief that physical force was reasonable and appropriate to prevent injury to himself or herself or to others, using a degree of force that he or she reasonably believed necessary for that purpose; or

(II) Under a reasonable belief that physical force was reasonable and appropriate to prevent the commission of a felony, using a degree of force that he or she reasonably believed necessary for that purpose; or

(III) As a peace officer, as such person is described in section 16-2.5-101, C.R.S., acting within the scope of the officer's employment and acting pursuant to section 18-1-707, C.R.S.

(a.6) For purposes of paragraph (a.5) of this subsection (2), a finding of not guilty of criminal charges does not include a finding of not guilty by reason of insanity or a finding of not guilty by reason of impaired mental condition.

(b) If paragraph (a.5) of this subsection (2) does not apply and if the person bringing the action for damages or on whose behalf an action has been brought is not convicted of a felony or adjudicated a delinquent as a result of the commission of the act or in the case of a wrongful death action, the court shall submit to the jury hearing the damages claim the issue of whether or not, by a preponderance of the evidence, the person committed an act that is defined by any law of this state or the United States to be a felony. The court shall dismiss the action and award attorney fees and costs to the person against whom the action was brought if the court or jury determines that the damage was sustained during the commission of or during immediate flight from an act that is defined by any law of this state or the United States to be a felony, unless the damage was caused by the willful and deliberate act of another person; except that such exception shall not apply if the person who caused the injury acted:

(I) Under a reasonable belief that physical force was reasonable and appropriate to prevent injury to himself or herself or to others, using a degree of force that he or she reasonably believed necessary for that purpose; or

(II) Under a reasonable belief that physical force was reasonable and appropriate to prevent the commission of a felony, using a degree of force that he or she reasonably believed necessary for that purpose; or

(III) As a peace officer, as such person is described in section 16-2.5-101, C.R.S., acting within the scope of the officer's employment and acting pursuant to section 18-1-707, C.R.S.

**Source:** L. 87: Entire section added, p. 568, § 7, effective July 1. L. 93: Entire section amended, p. 464, § 1, effective July 1. L. 98: Entire section amended, p. 386, § 1, effective August 5. L. 2003: (2)(a)(III), (2)(a.5)(III), and (2)(b)(III) amended, p. 1620, § 32, effective August 6.

#### ANNOTATION

The legislative intent underlying the statute here at issue is to allow a citizen to prevent the commission of a felony, or flight by the felon, by the use of physical force, so long as the

citizen reasonably believes that such use is reasonable and appropriate and the degree of force used is reasonable without incurring liability from any injury sustained by the other party.



Molnar v. Law, 776 P.2d 1156 (Colo. App. 1989).

**It is irrelevant whether the injury is sustained** as the result of the deliberate application of reasonable force or by the negligent use of physical force that is otherwise reasonable and appropriate under the circumstances. Molnar v. Law, 776 P.2d 1156 (Colo. App. 1989).

**The issue of reasonableness of defendant's actions under the statute was one for resolution by the jury.** Molnar v. Law, 776 P.2d 1156 (Colo. App. 1989).

**It is unreasonable and contrary to legislative intent** to interpret the statute to mean protection for the citizen ceased at the very moment that his actions were successful in causing the cessation of the unlawful actions by the other party. Until the incident is brought to a close, it

cannot be said, at least as a matter of law, that the citizen is not still in the act of preventing injury to himself or others or of preventing the commission of a felony. Molnar v. Law, 776 P.2d 1156 (Colo. App. 1989).

**Court did not abuse its discretion in granting attorney fees** to the defendant since the requirements of this section were satisfied. Molnar v. Law, 776 P.2d 1156 (Colo. App. 1989).

**Dismissal of state common-law claims and award of attorney fees based on this section inappropriate** where no finding was made that person acted in reasonable belief that actions were required to prevent the commission of a felony. Crouse v. City of Colo. Springs, 766 P.2d 655 (Colo. 1988) (decided under former § 13-80-129).

## ARTICLE 81

### Limitations - Persons Under Disability

**Cross references:** For extension of time for filing real property actions, see § 38-41-112; for limitations on redemption of real property sold for taxes, see § 39-12-101.

13-81-101.	Definitions.	13-81-105.	Failure of trustee to take action.
13-81-101.5.	Appointment of legal representative.	13-81-106.	Removal of disability - effect.
13-81-102.	Right of legal representative.	13-81-107.	Action prosecuted to final decision.
13-81-103.	Statute begins to run - when.		
13-81-104.	Right of trustee.		

**13-81-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Applicable statute of limitations" means any statute of limitations which would apply in a similar case to a person not a person under disability.

(2) "Legal representative" means a guardian, conservator, personal representative, executor, or administrator duly appointed by a court having jurisdiction of any person under disability or his estate.

(3) "Person under disability" means any person who is a minor under eighteen years of age, a mental incompetent, or a person under other legal disability and who does not have a legal guardian.

(4) "Take action" means the bringing, commencement, maintenance, or prosecution of any action, suit, or proceeding to enforce any right, or the assertion of any such right in any other manner, affirmatively or by way of defense. "Take action" shall also include exercising the right to elect to receive a lump-sum payment on behalf of the plaintiff in a civil action for purposes of section 13-64-205 (1) (f) when the legal representative determines that the election is in the best interest of the plaintiff.

**Source:** L. 39: p. 449, § 1. CSA: C. 102, § 28. CRS 53: § 87-3-1. C.R.S. 1963: § 87-2-1. L. 76: (3) amended, p. 528, § 3, effective May 27. L. 77: (3) amended, p. 818, § 3, effective July 1. L. 86: (2) and (3) amended, p. 701, § 3, effective July 1. L. 2007: (4) amended, p. 172, § 3, effective August 3.

**Cross references:** (1) For use of the term "mentally or mental incompetent", see § 27-10.5-135.

(2) For the legislative declaration contained in the 2007 act amending subsection (4), see section 1 of chapter 49, Session Laws of Colorado 2007.

## ANNOTATION

**Law reviews.** For article, "What Constitutes 'Benefits' for Urban Drainage Projects", see 51 Den. L. J. 551 (1974). For article, "1988 Update on Colorado Tort Reform Legislation — Part I", see 17 Colo. Law. 1719 (1988).

**"Legal representative" does not include a natural parent who has not been court appointed as guardian.** *Tenney v. Flaxer*, 727 P.2d 1079 (Colo. 1986).

**Each alternative part of subsection (3) is left intact and given full effect** and construed in

pari materia with § 13-80-105. *Haberkorn by Haberkorn v. ROHM-GMBH*, 709 P.2d 44 (Colo. App. 1985).

**Nonresidence of plaintiff standing alone does not constitute a legal disability** within the meaning of this article. *Chuchuru v. Chutchurru*, 185 F.2d 62 (10th Cir. 1950).

**Applied** in *McClanahan v. Am. Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo. 1980); *Adams County Sch. Dist. No. 1 v. District Court*, 199 Colo. 284, 611 P.2d 963 (1980).

**13-81-101.5. Appointment of legal representative.** Any real party in interest, including the party against whom an action may be brought, may apply to the court for the appointment of a legal representative.

**Source: L. 86:** Entire section added, p. 702, § 4, effective July 1.

## ANNOTATION

**Law reviews.** For article, "1986 Colorado Tort Reform Legislation", see 15 Colo. Law. 1363 (1986).

**13-81-102. Right of legal representative.** (1) When there is a legal representative appointed for a person under disability, all rights to take action, except rights of the person under disability against the legal representative himself or herself, vest in said legal representative for the benefit of the person under disability, and the legal representative has authority to take action thereon in his or her own name.

(2) A legal representative may:

(a) Elect, on behalf of a plaintiff in a civil action, a form of funding of a judgment for periodic payments, as described in section 13-64-207;

(b) Elect to receive the immediate payment to the plaintiff of the present value of the future damage award in a lump-sum amount, in lieu of periodic payments;

(c) Petition a court of competent jurisdiction to establish a disability trust pursuant to section 15-14-412.8, C.R.S., funded by the proceeds of a settlement or judgment received by, or on behalf of, a person under disability who is under sixty-five years of age and who is disabled, as defined in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1382c (a) (3); or

(d) Petition a court of competent jurisdiction to establish a pooled trust account pursuant to section 15-14-412.9, C.R.S., funded by the proceeds of a settlement or judgment received by, or on behalf of, a person under disability who is disabled, as defined in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1382c (a) (3).

**Source: L. 39:** p. 449, § 2. **CSA: C. 102, § 29. CRS 53:** § 87-3-2. **C.R.S. 1963:** § 87-2-2. **L. 2007:** Entire section amended, p. 172, § 4, effective August 3.

**Cross references:** For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 49, Session Laws of Colorado 2007.

## ANNOTATION

**Law reviews.** For article, "What Constitutes 'Benefits' for Urban Drainage Projects", see 51 Den. L.J. 551 (1974).



**13-81-103. Statute begins to run - when.** (1) When in any of the statutes of the state of Colorado a limitation is fixed upon the time within which a right of action, right of redemption, or any other right may be asserted either affirmatively or by way of defense or an action, suit, or proceeding based thereon may be brought, commenced, maintained, or prosecuted and the true owner of said right is a person under disability at the time such right accrues, then:

(a) If such person under disability is represented by a legal representative at the time the right accrues, or if a legal representative is appointed for such person under disability at any time after the right accrues and prior to the termination of such disability, the applicable statute of limitations shall run against such person under disability in the same manner, for the same period, and with the same effect as it runs against persons not under disability. Such legal representative, or his successor in trust, in any event shall be allowed not less than two years after his appointment within which to take action on behalf of such person under disability, even though the two-year period expires after the expiration of the period fixed by the applicable statute of limitations.

(b) If the person under disability dies before the termination of his disability and before the expiration of the period of limitation in paragraph (a) of this subsection (1) and the right is one which survives to the executor or administrator of a decedent, such executor or administrator shall take action within one year after the death of such person under disability;

(c) If the disability of any person is terminated before the expiration of the period of limitation in paragraph (a) of this subsection (1) and no legal representative has been appointed for him, such person shall be allowed to take action within the period fixed by the applicable statute of limitations or within two years after the removal of the disability, whichever period expires later.

(2) After the expiration of the period fixed in paragraph (a), (b), or (c) of subsection (1) of this section, neither the person under disability, nor his legal representative, nor anyone for him shall be permitted or allowed to take action based on any such right.

**Source:** L. 39: p. 449, § 3. CSA: C. 102, § 30. CRS 53: § 87-3-3. C.R.S. 1963: § 87-2-3.

#### ANNOTATION

**Law reviews.** For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969). For note, "Medical Products and Services Liability: Public Policy Requires Legislative Innovation and Judicial Restraint", see 53 Den. L. J. 387 (1976). For article, "1988 Update on Colorado Tort Reform Legislation — Part I", see 17 Colo. Law. 1790 (1988).

**This section specifically applies to all limitations of time** contained in any of the statutes of the state of Colorado. *Ball v. Indus. Comm'n*, 30 Colo. App. 583, 503 P.2d 1040 (1972).

**Section does not affect jurisdiction.** The provisions of subsection (1)(c) are not intended to affect the jurisdiction of a court to act, but rather are intended as a statutory toll to statutes of limitations. *In re Estate of Daigle*, 634 P.2d 71 (Colo. 1981).

**Statute does not run without legal representative.** If a person under a disability is without a "legal representative", statutes of limitation do not run against him. *Price v. Sommermeyer*, 41 Colo. App. 147, 584 P.2d

1220 (1978), *aff'd*, 198 Colo. 548, 603 P.2d 135 (1979); *Barnhill v. Pub. Serv. Co.*, 649 P.2d 716 (Colo. App. 1982), *aff'd*, 690 P.2d 1248 (Colo. 1984).

Definition of "legal representative" includes a guardian appointed by a court having jurisdiction of any person under disability, but does not include a natural parent not so appointed. *Tenney v. Flaxer*, 727 P.2d 1079 (Colo. 1986).

**Once a defendant raises the statute of limitations as an affirmative defense, the burden shifts to the plaintiff to show that the statute has been tolled by proving that no legal representative had been appointed for him.** *Goldsmith v. Learjet, Inc.*, 90 F.3d 1490 (10th Cir. 1996).

**The time limitation of § 8-53-119 is tolled by this section.** *Ball v. Indus. Comm'n*, 30 Colo. App. 583, 503 P.2d 1040 (1972).

**The time limitation of § 13-21-204 is tolled by this statute.** The statute of limitations for wrongful death actions is not a "nonclaim statute" which prohibits filing of a lawsuit after a specific period of time, and, therefore, it is subject to the tolling provision of this section for

persons under a disability. *Pub. Serv. Co. v. Barnhill*, 690 P.2d 1248 (Colo. 1984).

**Tolling provisions of this section apply** to both the limitation and repose periods applicable to former § 13-80-105 (now § 13-80-102) medical malpractice claims. *Southard v. Miles*, 714 P.2d 891 (Colo. 1986).

**Minors are "persons under disability" for purposes of section.** *McClanahan v. Am. Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo. 1980); *Tenney v. Flaxer*, 727 P.2d 1079 (Colo. 1986); *Estate of Stevenson v. Hollywood Bar*, 832 P.2d 718 (Colo. 1992).

**If workmen's compensation claimant was under disability at time his right to compensation occurred**, and continued to be under disability at time he filed petition to reopen claim, the statute of limitations could not run against employee for whom a legal representative had not been appointed. *Jaimes v. Brookhart Lumber Co.*, 727 P.2d 1119 (Colo. App. 1986).

**Industrial commission was not proper forum in which to raise or decide the issue of whether workmen's compensation claimant was under a disability for purposes of tolling workmen's compensation statute of limitations.** An interested person must petition the court for a specific finding as to the existence of a legal disability. *James v. Brookhart Lumber Co.*, 727 P.2d 1119 (Colo. App. 1986).

**For claim of mental incompetent for injuries sustained as result of medical malpractice** the medical negligence statute of limitations is tolled until mental incompetency is removed or until legal representative is appointed, in which event action must be filed within two years. *Tenney v. Flaxer*, 727 P.2d 1079 (Colo. 1986).

**For excluding § 13-80-101 et seq. from the operation of this section**, see *Johnson v. Dodrill*, 265 F. Supp. 243 (D. Colo. 1967).

**This statute, which tolls statute of limitations for persons under disability**, does not apply to the notice of claim provisions of the Governmental Immunity Act. *McMahon v. Denver Water Bd.*, 780 P.2d 28 (Colo. App. 1989);

*Brown v. Teitelbaum*, 830 P.2d 1081 (Colo. App. 1991); *Hergenreter v. Morgan County Sch. Dist.*, 888 P.2d 346 (Colo. App. 1994).

**Substantial compliance with the 180-day notice provision is a condition precedent to any "action" brought under the Governmental Immunity Act**, therefore, the time for filing minors' notice is not extended pursuant to the tolling provisions of this section until two years after the minors' legal representative is appointed. *Brown v. Teitelbaum*, 830 P.2d 1081 (Colo. App. 1991).

**This statute was applicable** to claims for negligence and outrageous conduct arising from alleged sexual assault on minors. Plaintiffs' admissions of emotional upset at time of assaults and knowledge that defendant's actions were improper and illegal indicated that plaintiffs were on adequate notice of the essential elements of the tort when plaintiffs reached the age of majority. *Cassidy v. Smith*, 817 P.2d 555 (Colo. App. 1991).

**There is no conflict between the provisions of this section and § 13-22-101 (1)(c).** This section addresses how the statute of limitations applies to a suit while the other section addresses how a suit may be brought. *Elgin v. Bartlett*, 994 P.2d 411 (Colo. 1999).

**A genuine issue of material fact as to whether the statute of limitations was tolled because husband was "under disability" existed, and thus summary judgment on husband's claim against the sheriff was improper.** *Terry v. Sullivan*, 58 P.3d 1098 (Colo. App. 2002).

**Derivative claims are subject to the same defenses available to the underlying claim; nevertheless, derivative claims are distinct causes of action** separate from the claims of the injured person, and statute of limitations is not tolled for a derivative claim based on the tolling of the underlying claim. *Terry v. Sullivan*, 58 P.3d 1098 (Colo. App. 2002).

**Applied** in *Adams County Sch. Dist. No. 1 v. District Court*, 199 Colo. 284, 611 P.2d 963 (1980).

**13-81-104. Right of trustee.** If by virtue of any agreement, trust indenture, will, or other instrument in writing a trustee or other representative is or has been designated and appointed for any such person under disability and by the terms of such agreement, trust indenture, will, or other instrument in writing said trustee or other representative is vested with the right and power to take action, then the right to take action for any right which a person under disability may have arising in any way from said trust or agency shall vest in the trustee or other representative, and the applicable statute of limitations shall run against such person under disability and against such trustee or other representative as to all rights to take such action in the same manner, for the same period, and with the same effect as it runs against persons not under disability. After the expiration of the period fixed by such applicable statute of limitations, neither the person under disability, nor his trustee or other representative, nor anyone for him shall be permitted or allowed to take action based on any such right.



**Source:** L. 39: p. 450, § 4. CSA: C. 102, § 31. CRS 53: § 87-3-4. C.R.S. 1963: § 87-2-4.

**13-81-105. Failure of trustee to take action.** When a legal representative, or trustee, or other representative appointed under any agreement, trust indenture, will, or other instrument in writing has been duly appointed for any person under disability and such legal representative, or trustee, or other representative does not promptly, after demand therefor by the person under disability or anyone for him, take action, then such person under disability by next friend may take action before the expiration of the periods fixed in this article for the taking of such action by any person under disability, or his legal representative, or trustee, or other representative, but not thereafter.

**Source:** L. 39: p. 451, § 5. CSA: C. 102, § 32. CRS 53: § 87-3-5. C.R.S. 1963: § 87-2-5.

**13-81-106. Removal of disability - effect.** If before the expiration of the period fixed by the applicable statute of limitations the disability of any person under disability is removed, the fact of such removal shall not in any way affect or stop the running of the applicable statute of limitations, except as provided in section 13-81-103 (1) (c).

**Source:** L. 39: p. 451, § 6. CSA: C. 102, § 33. CRS 53: § 87-3-6. C.R.S. 1963: § 87-2-6.

ANNOTATION

**Applied in** In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

**13-81-107. Action prosecuted to final decision.** If any action or proceeding is begun within the period fixed by the applicable statute of limitations or the periods provided for in this article, then such action or proceeding may be prosecuted to final decision notwithstanding the fact that the period of limitation shall expire after the commencement and during the prosecution of such action or proceeding.

**Source:** L. 39: p. 451, § 7. CSA: C. 102, § 34. CRS 53: § 87-3-7. C.R.S. 1963: § 87-2-7.

ARTICLE 82

Uniform Conflict of Laws -  
Limitation Periods

13-82-101.	Short title.	13-82-105.	periods.
13-82-102.	Uniformity of application and construction.		Rules applicable to computation of limitation period.
13-82-103.	Definitions.	13-82-106.	Unfairness.
13-82-104.	Conflict of laws - limitation	13-82-107.	Existing and future claims.

**13-82-101. Short title.** This article shall be known and may be cited as the “Uniform Conflict of Laws - Limitations Act”.

**Source:** L. 84: Entire article added, p. 477, § 1, effective July 1.

**13-82-102. Uniformity of application and construction.** This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

**Source:** L. 84: Entire article added, p. 477, § 1, effective July 1.

#### ANNOTATION

Neither § 13-80-110 nor the Uniform Conflict of Laws - Limitations Act (UCL-LA) is more specific than the other. Because each statute uses different factors to assign a limitations period, the court is prevented from directly comparing them in order to read one as an exception to the other. *Jenkins v. Pan. Canal Ry. Co.*, 208 P.3d 238 (Colo. 2009).

Because it was enacted more recently,

§ 13-80-110 and not the UCL-LA, controls. Based on the general assembly's prescribed rules of statutory construction, because the conflicts between the statutes cannot be resolved on specificity and the borrowing statute is the more recent enactment, the borrowing statute applies to the plaintiffs' claims. *Jenkins v. Pan. Canal Ry. Co.*, 208 P.3d 238 (Colo. 2009).

**13-82-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Claim" means a right of action that may be asserted in a civil action or proceeding and includes a right of action created by statute.

(2) "State" means a state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country, or a political subdivision of any of them.

**Source:** L. 84: Entire article added, p. 477, § 1, effective July 1.

**13-82-104. Conflict of laws - limitation periods.** (1) Except as provided in section 13-82-106, if a claim is substantively based:

(a) Upon the law of one other state, the limitation period of that state applies; or

(b) Upon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this state applies.

(2) The limitation period of this state applies to all other claims.

**Source:** L. 84: Entire article added, p. 477, § 1, effective July 1.

#### ANNOTATION

**Applied** in *Brown v. Globe Union, Div. of Johnson Controls*, 661 F. Supp. 1188 (D. Colo. 1987).

**13-82-105. Rules applicable to computation of limitation period.** If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply.

**Source:** L. 84: Entire article added, p. 478, § 1, effective July 1.

**13-82-106. Unfairness.** If the court determines that the limitation period of another state applicable under sections 13-82-104 and 13-82-105 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon or imposes an unfair burden in defending against the claim, the limitation period of this state applies.

**Source:** L. 84: Entire article added, p. 478, § 1, effective July 1.



ANNOTATION

Where length of foreign government's statute of limitations was not so fundamentally unfair or unjust as to be repugnant to Colorado's public policy, section does not provide a basis for non-recognition of a final, conclusive foreign judgment. *Milhoux v. Linder*, 902 P.2d 856 (Colo. App. 1995).

The plain language of this section limits its

applicability to cases in which a court determines under the Uniform Conflict of Laws-Limitations Act (and not § 13-80-110) that a claim is barred by the limitations period of another state. *Jenkins v. Haymore*, 208 P.3d 265 (Colo. App. 2007), *aff'd*, 208 P.3d 238 (Colo. 2009).

**13-82-107. Existing and future claims.** (1) This article applies to claims:

- (a) Accruing after July 1, 1984; or
- (b) Asserted in a civil action or proceeding more than one year after July 1, 1984, but it does not revive a claim barred before July 1, 1984.

**Source:** L. 84: Entire article added, p. 478, § 1, effective July 1.

PRIORITY OF ACTIONS

ARTICLE 85

Priority of Certain Civil Actions

13-85-101.	Legislative declaration.		ity.
13-85-102.	Definitions.	13-85-104.	Appellate review of certain
13-85-103.	Civil actions entitled to prior-		actions entitled to priority.

**13-85-101. Legislative declaration.** The general assembly hereby determines, finds, and declares that traffic congestion and other transportation difficulties in the Denver metropolitan area seriously threaten the public health and welfare. In an effort to reduce air pollution and stimulate the economic development of the Denver metropolitan area, the general assembly has directed the regional transportation district to proceed with the planning, construction, and operation of a fixed guideway mass transit system. Since the success of the mass transit system depends on its prompt construction and commencement of operation, the general assembly finds that it is necessary to avoid any possible delays in such construction and operation. To that end, the general assembly further finds that the trial of lawsuits arising out of the planning, development, financing, or construction of these projects should be given priority in the district and appellate courts of this state.

**Source:** L. 88: Entire article added, p. 628, § 1, effective July 1. L. 93: Entire section amended, p. 1775, § 34, effective June 6.

- 13-85-102. Definitions.** As used in this article, unless the context otherwise requires:
- (1) "Fixed guideway mass transit system" means the fixed guideway mass transit system authorized by section 32-9-107.5, C.R.S.
  - (2) Repealed.
  - (3) "Regional transportation district" means the regional transportation district established by article 9 of title 32, C.R.S.
  - (4) Repealed.

**Source:** L. 88: Entire article added, p. 628, § 1, effective July 1. L. 94: (2) and (4) repealed, p. 1325, § 5, effective May 25.

**13-85-103. Civil actions entitled to priority.** The trial of all civil actions pertaining to or arising out of the planning, development, financing, or construction of the mass transportation system in the Denver metropolitan area, or any election pertaining to said

project, or any action against or pertaining to the authority of the regional transportation district to plan, develop, finance, or construct said system shall be entitled to priority in the county and district courts of this state.

**Source:** **L. 88:** Entire article added, p. 629, § 1, effective July 1. **L. 93:** Entire section amended, p. 1776, § 35, effective June 6. **L. 94:** Entire section amended, p. 1325, § 6, effective May 25.

**13-85-104. Appellate review of certain actions entitled to priority.** Appellate review in the district court, court of appeals, and supreme court of those actions entitled to priority pursuant to section 13-85-103 shall be entitled to priority in said courts.

**Source:** **L. 88:** Entire article added, p. 629, § 1, effective July 1.

WITNESSES

ARTICLE 90

Witnesses

**Cross references:** For assistance to witnesses to crimes, see article 4.2 of title 24; for guidelines for assuring the rights of witnesses to crimes, see part 3 of article 4.1 of title 24; for the “Colorado Victim and Witness Protection Act of 1984”, see part 7 of article 8 of title 18.

**Law reviews:** For a discussion of a Tenth Circuit decision dealing with witnesses, see 66 Den. U.L. Rev. 815 (1989).

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GENERAL PROVISIONS		13-90-116.	Examination of party to record by adverse party.
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13-90-102.	Testimony concerning oral statements made by person incapable of testifying - when allowed.	13-90-117.5.	Oath or affirmation taken by a child.
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13-90-106.	Who may not testify.	APPOINTMENT OF INTERPRETERS FOR PERSONS WHO ARE DEAF OR HARD OF HEARING	
13-90-107.	Who may not testify without consent.	13-90-201.	Legislative declaration.
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13-90-114.	Paid by state.	13-90-208.	Waiver.
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## PART 1

## GENERAL PROVISIONS

**13-90-101. Who may testify - interest.** All persons, without exception, other than those specified in sections 13-90-102 to 13-90-108 may be witnesses. Neither parties nor other persons who have an interest in the event of an action or proceeding shall be excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief. In every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness. The fact of such conviction may be proved like any other fact, not of record, either by the witness himself, who shall be compelled to testify thereto, or by any other person cognizant of such conviction as impeaching testimony or by any other competent testimony. Evidence of a previous conviction of a felony where the witness testifying was convicted five years prior to the time when the witness testifies shall not be admissible in evidence in any civil action.

**Source:** L. 1883: p. 289, § 1. G.S. § 3647. R.S. 08: § 7266. C.L. § 6555. CSA: C. 177, § 1. L. 41: p. 924, § 1. CRS 53: § 153-1-1. C.R.S. 1963: § 154-1-1.

## ANNOTATION

I. General Consideration.

II. Prior Felony Conviction.

**I. GENERAL CONSIDERATION.**

**Law reviews.** For article, "Fearing Hell as Essential to Validity of Affidavit", see 18 Dicta 144 (1941). For note, "Impeachment of Nonreligious Witnesses", see 13 Rocky Mt. L. Rev. 336 (1941). For article, "The Right to Practice Law as Dependent on Fear of Hell", see 19 Dicta 206 (1942). For article, "Bishop Rice's Last Battle for Civil Rights", see 22 Dicta 139 (1945). For note, "Some Problems Relating to Testamentary Witnesses", see 23 Rocky Mt. L. Rev. 458 (1951). For article, "Evidence in Estate Proceedings", see 24 Rocky Mt. L. Rev. 437 (1952). For article, "One Year Review of Wills, Estates, and Trusts", see 38 Dicta 115 (1960). For comment, "Reporter's Privilege: Pankratz v. District Court", see 58 Den. L.J. 681 (1981). For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990). For article, "The Defendant's Decision Not to Testify", see 19 Colo. Law. 1589 (1990). For article, "Admissibility of Prior Felony Convictions for Impeachment Purposes", see 32 Colo. Law. 79 (November 2003). For article, "Age Requirements in Colorado: A Guide for Estate Planners", see 34 Colo. Law. 87 (August 2005).

**Annotator's note.** Cases material to § 13-90-101 decided prior to its earliest source, L. 1883, p. 289, § 1, have also been included in the annotations to this section.

**This section is constitutional.** People v. Honey, 198 Colo. 64, 596 P.2d 751 (1979).

Section does not violate § 21 of art. VI, Colo. Const., as an intrusion into matters exclusively

judicial. Legislative policymaking and judicial rulemaking powers may overlap to some extent as long as there is no substantial conflict between statute and rule. People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978); People v. Diaz, 985 P.2d 83 (Colo. App. 1999).

**For constitutionality of this section,** see Trackman v. People, 22 Colo. 83, 43 P. 662 (1896).

**The right to testify in the courts of the state is not a privilege or immunity protected by the fourteenth amendment,** and the state general assembly has the power to declare who shall be competent to testify, and to regulate the production of evidence in the state courts. Estate of Freeman v. Young, 172 Colo. 322, 473 P.2d 704 (1970).

**This section does not endow party witnesses in a civil action with a fundamental right to testify.** Rather, it simply renders a party competent to testify and the testimony of all witnesses remains subject to the applicable rules of evidence. Williams v. Chrysler Ins. Co., 928 P.2d 1375 (Colo. App. 1996).

**The general assembly has the right to control the general competency of witnesses** and the subjects of their testimony; but a court cannot be empowered to make a party a competent witness contrary to the general law. Estate of Freeman v. Young, 172 Colo. 322, 473 P.2d 704 (1970).

**Language of this section is mandatory and not discretionary.** Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (1979).

**It removes the disqualification of witnesses** on the ground of interest, or the conviction of crime, except as set forth in the following sections. Palmer v. Hanna, 6 Colo. 55 (1881); Es-

tate of Freeman v. Young, 172 Colo. 322, 473 P.2d 704 (1970).

**There is a presumption that a witness is competent to testify.** People v. Piro, 671 P.2d 1341 (Colo. App. 1983).

**Rule excluding parties interested in outcome of suit abolished.** General common-law rule, that the testimony of all parties to a lawsuit and of all persons who stood to gain or lose by the outcome of the case was excluded as incompetent has been abolished in Colorado. Wise v. Hillman, 625 P.2d 364 (Colo. 1981).

**The parties to an action are competent witnesses in their own behalf,** and they are thus placed on an equality. Whitsett v. Kershow, 4 Colo. 419 (1878); Levy v. Dwight, 12 Colo. 101, 20 P. 12 (1888).

**Defendant testifying on own behalf is witness.** When a defendant takes the stand in his own defense, he becomes a witness within the meaning of this section. People v. Evans, 630 P.2d 94 (Colo. App. 1981).

**It was the intention of the general assembly, by this section, to entirely remove the disqualification theretofore resting upon husband and wife** on account of the marriage relation, or, as stated by Chancellor Kent, on account of public policy. Butler v. Phillips, 38 Colo. 378, 88 P. 480 (1906).

**Husband may testify in suit involving wife's property.** Under this and the following section the husband may be permitted to testify in a cause wherein the separate property of the wife is concerned. Hanna v. Barker, 6 Colo. 303 (1882).

**There still are certain exceptions.** At common law, a party to a suit could not testify at all in his own behalf, and while this statute has changed this rule of the common law, certain exceptions are still provided for. Cliff v. Cliff, 23 Colo. App. 183, 128 P. 860 (1912).

**Objection to competency of witnesses must be made in trial court.** An objection to the admission or exclusion of evidence on the ground of the competency of a witness must be made in the trial court. Otherwise, it will not be considered on review. Holm v. People, 72 Colo. 257, 210 P. 698 (1922).

**This section has no application to proceedings inquiring into a party's mental health.** In the special statutory proceeding to inquire into the mental health of a party, the provisions of this section have no application to such proceedings being neither civil nor criminal, and in no sense adversary, a wife may testify as to the mental condition of her husband as illustrated by his acts. Sabon v. People, 142 Colo. 323, 350 P.2d 576 (1960).

**Prosecuting attorney as witness.** In Colorado, a prosecuting attorney is competent to be a witness for the state, but ordinarily he should withdraw from active participation in a case when he learns he will be a witness. People v.

Hauschel, 37 Colo. App. 114, 550 P.2d 876 (1976).

Where the district attorney's participation in the trial was limited, and pursuant to court order, after he testified he took no further part in the trial, nor was the nature of the district attorney's testimony here as significant or damning as that in People v. Spencer (182 Colo. 189, 512 P.2d 260 (1973)), the district attorney's indiscretion did not rise to the seriousness of constituting a denial of a fair trial, and thus the refusal to grant a mistrial after his testimony was not reversible error. People v. Hauschel, 37 Colo. App. 114, 550 P.2d 876 (1976).

**Testimony properly allowed despite witness's hearing deficiency.** Although defendant's mother was incapacitated by reason of a hearing loss, her testimony was properly allowed where the record reveals that although the witness had a hearing deficiency and several questions had to be repeated her answers were responsive to the questions asked, which clearly indicates that she perceived the meaning of the questions. People v. Forbes, 185 Colo. 410, 524 P.2d 1377 (1974).

**Impeachment of defendant may not be accomplished by attacking witness's general character.** While evidence of prior misconduct, including misdemeanor convictions, may be admitted to attack the veracity of specific testimony by a defendant, impeachment of a defendant may not be accomplished by attacking the general character of the witness. People v. Sasson, 628 P.2d 120 (Colo. App. 1980).

**Witness is presumed to be competent,** and whether or not a witness is competent is within the sound discretion of the trial court, and its ruling may be disturbed only upon a finding of clear abuse of discretion. People v. Woertman, 786 P.2d 443 (Colo. App. 1989).

**Cross-examination regarding prior misdemeanor conviction was proper** in trial for violation of custody where prior conviction was for violation of custody and was directly relevant to defendant's state of mind and tended to refute defendant's own testimony that he had no prior arrest record. People v. Metcalf, 926 P.2d 133 (Colo. App. 1996).

**Grand jury proceedings constitute judicial proceedings which entitle witnesses to absolute immunity from subsequent civil liability for his or her testimony.** Wagner v. Bd. of County Comm'rs, 933 P.2d 1311 (Colo. 1997).

**For history of section,** see People v. Yeager, 182 Colo. 397, 513 P.2d 1057 (1973).

**Applied in** Williams v. People, 157 Colo. 443, 403 P.2d 436 (1965); People v. Lambert, 194 Colo. App. 421, 572 P.2d 847 (1977); People v. Stinson, 632 P.2d 631 (Colo. App. 1981); People v. Jones, 675 P.2d 9 (Colo. 1984).

## II. PRIOR FELONY CONVICTION.

**Section is constitutional.** Section which specifically allows previous felony conviction to be



shown for the purpose of affecting the credibility of a witness is constitutional. *Velarde v. People*, 179 Colo. 207, 500 P.2d 125 (1972); *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Griffith*, 197 Colo. 544, 595 P.2d 231 (1979).

**Section does not deprive defendant of due process of law under amendment XIV, U.S. Const., and § 25 of art. II, Colo. Const., in that it precludes the exercise of any judicial discretion in admitting prior felony convictions for purposes of impeachment.** *People v. Meyers*, 617 P.2d 808 (Colo. 1980).

**Distinction in handling defendant's evidence not violative of equal protection guarantees.** Distinction between admitting evidence of prior felony convictions when a defendant chooses to testify, and excluding such evidence when the defendant has chosen not to take the witness stand does not violate equal protection guarantees. *People v. Layton*, 200 Colo. 59, 612 P.2d 83 (1980); *People v. Diaz*, 985 P.2d 83 (Colo. App. 1999).

This section does treat those defendants who choose to testify on their behalf differently than those defendants who do not take the witness stand, but these two classes of defendants are not similarly situated. *People v. Layton*, 200 Colo. 59, 612 P.2d 83 (1980).

**This section is not violative of defendant's right to due process** and does not impermissibly chill the exercise of his right to testify on his own behalf. *People v. Henry*, 195 Colo. 309, 578 P.2d 1041, appeal dismissed, 439 U.S. 961, 99 S. Ct. 445, 58 L. Ed.2d 419 (1978); *People v. Diaz*, 985 P.2d 83 (Colo. App. 1999).

It is within the province of the Colorado general assembly to make provision for use of prior convictions in the event a defendant-witness testifies. The Colorado statutory procedure does not impermissibly affect a defendant's due process rights and right to testify in his own behalf, and thus impeachment of a defendant-witness by showing prior convictions is not unconstitutional. *Hubbard v. Wilson*, 401 F. Supp. 495 (D. Colo. 1975).

**Fact that this does not apply to criminal actions does not violate equal protection.** The argument that this section should also be applied to criminal actions, and that if the limitation does not apply to criminal prosecutions then there has been a violation of his constitutional right to equal protection of the laws as guaranteed by the Colorado and United States Constitutions is without merit. *Nunez v. People*, 173 Colo. 236, 477 P.2d 366 (1970); *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971).

Criminal defendant was not denied equal protection of the laws because his testimony was impeached by a felony conviction committed more than five years prior to his court testimony, even though this statute does not provide for

impeachment by felony convictions over five years old in civil cases. *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

Statute which permits impeachment in a criminal case by felony conviction over five years old, while such is not permissible in a civil proceeding, does not deny equal protection of the law. *People v. Davis*, 183 Colo. 228, 516 P.2d 120 (1973); *People v. Velarde*, 196 Colo. 254, 586 P.2d 6 (1978).

Fact that this statute limits, for purpose of impeachment in civil actions, evidence of a conviction of a witness to those felonies occurring within five years of the time of his testifying, whereas, in criminal cases there is no time limitation, does not deny equal protection of the law to criminal defendants. *People v. Yeager*, 182 Colo. 397, 513 P.2d 1057 (1973).

**Distinction has a reasonable basis.** It cannot be said that the general assembly's distinction between impeachment tools permitted in civil and criminal actions is without a reasonable basis, considering the grave consequences of criminal proceedings where both the personal freedom of the accused and the interests of society as a whole are weighed in a delicate balance. *Lee v. People*, 170 Colo. 268, 460 P.2d 796 (1969).

**Evidence of prior criminal convictions admissible for impeachment purposes.** Notwithstanding its inherent prejudiciality, evidence of prior criminal convictions may properly be admitted to impeach the credibility of a defendant's testimony. *People v. Chavez*, 621 P.2d 1362 (Colo. 1981), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed.2d 398 (1981); *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983); *People v. Hardy*, 677 P.2d 429 (Colo. App. 1983); *Molnar v. Law*, 776 P.2d 1156 (Colo. App. 1989); *People v. Ziglar*, 45 P.3d 1266 (Colo. 2002).

While this section does not permit the use of a witness's prior misdemeanor conviction for impeachment purposes, it was never intended to prohibit testimony tending to show motive, bias, prejudice or interest of a witness in the outcome of a trial. *People v. Jones*, 635 P.2d 904 (Colo. App. 1981).

To warrant suppression of a prior conviction, the accused must make a prima facie showing of a constitutional violation, and the mere showing of uncertainty as to whether a violation has occurred is insufficient. *People v. Lemons*, 824 P.2d 56 (Colo. App. 1991).

**A balancing test is not required prior to admitting evidence of felony convictions for purposes of impeachment of an accused,** given that this state has not adopted a rule of evidence similar to Fed. R. Evid. 609. *People v. Diaz*, 985 P.2d 83 (Colo. App. 1999).

**Evidence of defendant's prior misdemeanor convictions not admissible.** *People v. Sasson*, 628 P.2d 120 (Colo. App. 1980).

**Evidence of prior misdemeanor convictions involving false statements to police held admissible for impeachment purposes** where focus was on the specific instances of lying, not on the convictions themselves, and jury was instructed to consider the evidence only for the limited purpose of evaluating defendant's credibility. *People v. Gillis*, 883 P.2d 554 (Colo. App. 1994).

**Military conviction admissible for impeachment.** A military conviction for an offense that would be punishable as a felony under the law of Colorado is admissible for impeachment under this section. *People v. Apodaca*, 668 P.2d 941 (Colo. App. 1982), *aff'd* in part and *rev'd* on other grounds, 712 P.2d 467 (Colo. 1985).

A court does not err in allowing the people to attack the defendant's credibility by questioning him about a prior Air Force court martial conviction for assault with intent to commit rape. *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983).

**Whether a military conviction qualifies as a felony conviction** under Colorado's impeachment statute should be resolved on the basis of the following two-part test: (1) Whether the maximum penalty applicable to the military offense is substantially equivalent to the punishment reserved for a felony offense in Colorado; and (2) whether the same criminal conduct if committed in Colorado, would be classified as a felony under Colorado law. *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

Defendant's conviction of rape under Article 120 of the Uniform Code of Military Justice qualifies as a felony conviction within the intentment of this section since the maximum sentence, life imprisonment, is a penalty applicable for the most serious felonies in Colorado and the offense of rape, if committed in Colorado, would constitute either the class 2 or class 3 felony of sexual assault in the first degree, or the class 4 felony of sexual assault in the second degree. *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

Defendant's prior military conviction is admissible to impeach the defendant only if the court has ruled that the conviction was obtained in a constitutionally valid manner. *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

**Prior felony conviction which had been expunged** after three years of probation was not a "prior felony conviction" within the meaning of this section. *People v. Wright*, 678 P.2d 1072 (Colo. App. 1984).

**A juvenile adjudication may not be used for impeachment purposes**, as a juvenile adjudication is not a criminal proceeding. *People v. Apodaca*, 668 P.2d 941 (Colo. App. 1982), *aff'd* in part and *rev'd* on other grounds, 712 P.2d 467 (Colo. 1985); *People v. Armand*, 873 P.2d 7 (Colo. App. 1993).

Trial court committed reversible error in allowing the impeachment of defendant's credibility with a New York youthful offender adjudication that is defined as not being a judgment of conviction for a crime or any other offense. *People v. D'Apice*, 735 P.2d 882 (Colo. App. 1986).

**This section limits inquiry concerning any felony conviction to a proceeding five years in civil actions.** *Nunez v. People*, 173 Colo. 236, 477 P.2d 366 (1970); *Taylor v. People*, 176 Colo. 316, 490 P.2d 292 (1971).

**This is exclusionary in character.** *Pasternak v. Pan Am. Petroleum Corp.*, 417 F.2d 1292 (10th Cir. 1969).

**This section is not applicable to federal courts.** The fact that certain evidence might be inadmissible under a state exclusionary rule or a state statute is not controlling in the federal courts. While state rules of admissibility are controlling in the federal courts, state exclusionary rules are not, and evidence of a conviction five and one-half years prior to the date of testifying must be received even though the state courts would hold otherwise. *Pasternak v. Pan Am. Petroleum Corp.*, 417 F.2d 1292 (10th Cir. 1969).

**A "conviction" based on a plea of nolo contendere is within the meaning** of that word as it is used in this section. *Lacey v. People*, 166 Colo. 152, 442 P.2d 402 (1968); *Reynolds v. People*, 172 Colo. 137, 471 P.2d 417 (1970).

**A "conviction" based on a guilty plea is also admissible.** *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997).

**So is a conviction in a sister state or in a federal court** for the purpose of affecting the credibility of a witness, unless the statute authorizing the use of such evidence precludes a so-called foreign conviction. The Colorado statute contains no such limiting language. *Lacey v. People*, 166 Colo. 152, 442 P.2d 402 (1968).

**This section permits use of only final convictions, for purpose of impeachment.** *People v. Goff*, 187 Colo. 57, 530 P.2d 512 (1974).

**Policy behind requirement that judgment of conviction be final before it is utilized** for impeachment purposes is to guarantee that an accused will be subject to impeachment only after the trial judge has passed upon a motion for a new trial and has imposed sentence. *People v. Goff*, 187 Colo. 57, 530 P.2d 512 (1974).

**Conviction for impeachment purposes does not require imposition of sentence.** Since it is immaterial whether guilt is established by a verdict of guilty, supported by a denial of a motion for new trial, or be a plea of guilty, that a conviction for impeachment purposes does not require the imposition of sentence is as applicable to convictions arising from the acceptance of a guilty plea as it is to convictions following a guilty verdict. *People v. Baca*, 44 Colo. App. 167, 610 P.2d 1083 (1980).



**Conviction may be used for impeachment purposes at a later proceeding even if the appeal of the conviction is pending.** *People v. McNeely*, 68 P.3d 540 (Colo. App. 2002).

**Use of untested, unsentenced jury verdict prohibited.** A jury verdict which has not been tested by a motion for a new trial and has not been then supported by the imposition of sentence cannot be used for the purpose of impeachment. *People v. Goff*, 187 Colo. 57, 530 P.2d 512 (1974).

**Portion of rule in *People v. Goff* does not stand alone.** That portion of the rule in *People v. Goff*, supra, requiring sentencing as a condition precedent to subsequent use of a conviction for impeachment purposes, does not stand alone and does not go to the heart of the "truth-finding function" or raise "serious questions about the accuracy of guilty verdicts". *People v. Johnson*, 192 Colo. 483, 560 P.2d 465 (1977).

**The essential function of the rule articulated in *People v. Goff*, supra, i.e., that a jury verdict which has not been tested by motion for new trial "and has not been supported by the imposition of sentence" cannot be used for impeachment purposes, was to ensure that impeachment would not be based upon a conviction which had not withstood the test of judicial scrutiny and the review provided by a motion for a new trial.** *People v. Johnson*, 192 Colo. 483, 560 P.2d 465 (1977).

**A felony conviction, after denial of a motion for a new trial but prior to sentencing, may be used for impeachment purposes.** *People v. Johnson*, 192 Colo. 483, 560 P.2d 465 (1977).

**Credibility of "remote" conviction jury question.** A previous felony conviction of a witness, whatever its age, may be shown to affect credibility, and the effect on credibility of a "remote" conviction must be left to the judgment of the jury. *People v. Yeager*, 182 Colo. 397, 513 P.2d 1057 (1973).

**Use of prior felony convictions for impeachment of witnesses is not discretionary with trial judge.** *People v. Yeager*, 182 Colo. 397, 513 P.2d 1057 (1973); *People v. Wright*, 678 P.2d 1072 (Colo. App. 1984); *Molnar v. Law*, 776 P.2d 1156 (Colo. App. 1989); *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997).

The decisions of Colorado supreme court interpreting this section have not granted the trial judge discretion to foreclose the use of prior felony convictions to impeach a defendant's testimony. *People v. Hubbard*, 184 Colo. 225, 519 P.2d 951 (1974); *People v. Medina*, 40 Colo. App. 490, 583 P.2d 293 (1978); *People v. Velarde*, 196 Colo. 254, 586 P.2d 6 (1978); *People v. Renstrom*, 657 P.2d 461 (Colo. App. 1982); *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997).

The nature of the conviction can be established by a brief recital of the circumstances. Only the extent of the examination into those

circumstances is within the trial court's discretion. *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997).

**Felony conviction obtained by a guilty plea is admissible to the same extent as one obtained by a jury verdict.** *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997).

**This section makes no exception for guilty pleas by an alleged accomplice** that are based on the same incident leading to the charges against the defendant. *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997).

Where witness plead guilty to a felony drug offense after being found by the court to be a person in need of treatment and after having the proceedings suspended without an imposition of a sentence, court had no discretion to prohibit the use of the felony conviction to impeach the witness' testimony, despite the fact that the felony conviction might be set aside after successful completion of the rehabilitation program. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Where, before the defendant testified in his defense, he moved that the court prohibit the prosecution from showing on cross-examination that he had been previously convicted of a felony, the court correctly denied the motion to suppress as it was without discretion to prohibit such evidence. *People v. Bueno*, 183 Colo. 304, 516 P.2d 434 (1973).

**Judge may determine whether questioning is in good faith.** Questions posed to a defendant who has taken the stand in his own behalf about prior felonies must be asked by the prosecuting attorney in good faith; and it is within the judge's discretion to determine whether good faith is present. *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

**One convicted of a felony is a competent witness** in a criminal case as well as in a civil action, whose credibility is a matter for the jury to determine. *Trackman v. People*, 22 Colo. 83, 43 P. 662 (1896).

**Right to testify deemed subject to impeachment.** While the possibility of impeachment by prior conviction may present a defendant with a difficult strategic decision on whether to testify, the constitutional right to testify does not include a right to foreclose impeachment by evidence of a prior conviction. *People v. Montez*, 197 Colo. 126, 589 P.2d 1368 (1979).

A prosecutor may utilize a defendant's prior felony convictions for impeachment purposes if the defendant elects to testify in his own behalf. *People v. Griffith*, 197 Colo. 544, 595 P.2d 231 (1979).

**Ruling on defendant's motion to suppress prior conviction evidence.** A timely judicial ruling on a defendant's motion to suppress prior conviction evidence for the purpose of impeachment serves the vital function of providing the defendant with the meaningful opportunity to make the type of informed decision contem-

plated by the fundamental nature of the right to testify in one's own defense. *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

The trial court's refusal to rule on the defendant's motion to prohibit prosecutorial use of defendant's 1976 military conviction until such time as the prosecution actually sought to impeach the defendant constituted an impermissible burden on the defendant's constitutional right to testify in his own defense. *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

**Evidentiary hearing required on admissibility of prior conviction evidence.** Trial court must hold evidentiary hearing on defendant's ineffective assistance of counsel claim regarding prior conviction evidence offered for the purpose of defendant's impeachment. *Bales v. People*, 713 P.2d 1280 (Colo. 1986).

**Weaknesses and misdeeds which may not be used for impeachment purposes.** Even though conviction of a felony may be made the subject of cross-examination for impeachment purposes, supposed weaknesses or misdeeds attributed to the witness which fall short of criminal conviction and which attempt to discredit or impeach a witness by impugning the witness' character may not be utilized for this purpose. *People v. Roberts*, 37 Colo. App. 490, 553 P.2d 93 (1976).

In this state, it is improper to ask questions pertaining to a witness's purported drug addiction merely for purposes of attacking the credibility of the witness. *People v. Roberts*, 37 Colo. App. 490, 553 P.2d 93 (1976).

**It is permissible to prove a former conviction of crime as bearing upon the credibility of a witness**, but the showing must be limited to evidence of conviction. Questions as to indictment, arrest, commission of offenses, or immoral acts are not permitted. *Dennison v. People*, 65 Colo. 15, 174 P. 595 (1918); *Tarling v. People*, 69 Colo. 477, 194 P. 939 (1921); *Hoffman v. People*, 72 Colo. 552, 212 P. 848 (1923); *Hendricks v. People*, 78 Colo. 264, 241 P. 734 (1925).

This section permits the showing of prior felony convictions for the purpose of impeaching the credibility of any witness, including a defendant. *People v. Huguley*, 39 Colo. App. 481, 568 P.2d 1177 (1977), rev'd on other grounds, 195 Colo. 259, 577 P.2d 746 (1978).

**Whether the nature of the crime was elicited from defendant or codefendant is immaterial** if the fact of the conviction is otherwise admissible. *Hampton v. People*, 146 Colo. 570, 362 P.2d 864 (1961).

**A wide latitude is allowed in the cross-examination of witnesses** upon matters which bear upon their credibility. *Tarling v. People*, 69 Colo. 477, 194 P. 939 (1921); *Davis v. People*, 77 Colo. 546, 238 P. 25 (1925).

**A witness may be asked on cross-examina-**

**tion if he has been convicted of a crime.** *Dively v. People*, 74 Colo. 268, 220 P. 991 (1923).

**Scope of questioning as to prior conviction limited.** The court has discretion to limit cross-examination as to prior felony convictions to exclude detailed cross-questioning concerning the facts involved in the appellant's prior conviction. *People v. Medina*, 40 Colo. App. 490, 583 P.2d 293 (1978); *People v. Renstrom*, 657 P.2d 461 (Colo. App. 1982); *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997).

**Cross-examination held proper.** Where the record discloses that the cross-examination was directed at another, permissible purpose, i.e., attempting to prove that the witnesses were under the influence of the narcotic substance at the time of the occurrence as to which they were testifying, or at the time of testifying at trial, matters which might affect the witnesses' ability to perceive, remember, or testify as to a particular event, then the cross-examination was properly related to a material matter, and did not constitute impermissible impeachment of credibility. *People v. Roberts*, 37 Colo. App. 490, 553 P.2d 93 (1976).

**In impeaching a witness, the inquiry ought to be directed to the witness' credibility rather than to his moral character.** *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972).

**The nature and name of the crime may be brought out.** The inquiry is not confined to the mere fact of conviction of some crime, but the nature or name of the particular crime of which the witness was convicted may be brought out. *Davis v. People*, 77 Colo. 546, 238 P. 25 (1925); *Hendricks v. People*, 78 Colo. 264, 241 P. 734 (1925); *Hampton v. People*, 146 Colo. 570, 362 P.2d 864 (1961).

Where the district attorney asked only if defendant had pled guilty to the charge of possession of burglar tools in a prior unrelated case, the inquiry was not beyond the proper scope concerning a prior felony conviction where evidence of the nature of the offense is permissible. *People v. Bueno*, 183 Colo. 304, 516 P.2d 434 (1973).

**This section does not prohibit showing the number and place of convictions.** Questions, such as are complained of, have generally been held proper. It was not error to allow them in the instant case. *Dively v. People*, 74 Colo. 268, 220 P. 991 (1923).

**Counsel may offer proof if prior conviction denied.** The only way that counsel can establish good faith in asking questions about prior felonies if the defendant denies prior felony convictions is to make an offer of proof to the court. *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

**Question as to prior conviction when it is known there was none is reversible error.** Asking defendant, who had taken the stand in



his own defense, whether he had ever been arrested for a felony when the district attorney knew that there was no prior felony conviction was reversible error. *People v. Robles*, 183 Colo. 4, 514 P.2d 630 (1973).

**The general rule is that evidence of arrests and of pending charges against a witness before conviction is not admissible** as bearing upon the witness' credibility for the reason that want of credibility may not logically be inferred from naked accusations of which the law presumes a person innocent until convicted, but the rule was never intended to prohibit testimony tending to show motive, bias, prejudice, or interest of a witness in the outcome of the trial. *People v. King*, 179 Colo. 94, 498 P.2d 1142 (1972).

A witness in a criminal trial may only be impeached by showing a prior felony conviction, and it is immaterial what the grounds for arrest or the original charges were. *People v. Robles*, 183 Colo. 4, 514 P.2d 630 (1973).

**Absent special circumstances, a defendant may be impeached with felony convictions that occurred after the offense for which he or she is being tried.** *People v. Bradley*, 25 P.3d 1271 (Colo. App. 2001).

**Where evidence is offered to show the motive of a paid informant witness and that he is interested in the outcome of the case by reason of pending criminal charges against him, the prosecution of which may or may not be pursued by reason of the testimony he has given on behalf of the people, such evidence is competent and to deny its admissibility would erode defendant's right of confrontation.** *People v. King*, 179 Colo. 94, 498 P.2d 1142 (1972).

**Or when he may be testifying in hope of leniency for him.** A trial court should allow broad cross-examination of a prosecution witness with respect to the witness' motive for testifying, especially where such witness is charged with or threatened with criminal prosecution for other alleged offenses not connected with the case in which he testifies, and where his testimony against the defendant might be influenced by a promise of, or hope or expectation of, immunity or leniency with respect to the pending charges against him, as a consideration for testifying against the defendant. *People v. King*, 179 Colo. 94, 498 P.2d 1142 (1972).

**When a defendant offers himself as a witness in his own behalf, he is subject to the general rules of examination** applicable to other witnesses, including examination as to matters which tend to show him unworthy of belief. *Tarling v. People*, 69 Colo. 477, 194 P. 939 (1921); *Routa v. People*, 117 Colo. 564, 192 P.2d 436 (1948); *Mitchell v. People*, 137 Colo. 5, 320 P.2d 342 (1958); *Hampton v. People*, 146 Colo. 570, 362 P.2d 864 (1961); *Candelaria v. People*, 177 Colo. 136, 493 P.2d 355 (1972); *People v. Medina*, 40 Colo. App. 490, 583 P.2d

293 (1978); *People v. Renstrom*, 657 P.2d 461 (Colo. App. 1982).

**Evidence of defendant's prior conviction may be considered only regarding his credibility.** The defendant voluntarily testified during the trial and his credibility thereupon became an issue in the case. On cross-examination the defendant admitted that he had been convicted of a felony. Such evidence was for the purpose of affecting the credibility of the defendant so limited by the court's instructions to the jury, was clearly within the ambit of this section. *Diaz v. People*, 161 Colo. 172, 420 P.2d 824 (1966); *Taylor v. People*, 176 Colo. 71, 490 P.2d 292 (1971).

A defendant who elects to be a witness in his own behalf in a criminal case subjects his credibility to question, like any other witness, and he may therefore be examined on the matter of previous felony convictions. *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

**Evidence cannot be used in an attempt to show common scheme.** The district attorney in bringing out defendant's prior felony assault conviction in a forgery trial was not attempting to show common scheme, device, or plan, but was doing so in an effort to attack his credibility as a witness in the case, as is permitted by this section. *Lacey v. People*, 166 Colo. 152, 442 P.2d 402 (1968).

**A criminal contempt is such a crime as may be shown on cross-examination under our statute, to impeach the credibility of a defendant who takes the stand in his own behalf.** *Dockerty v. People*, 96 Colo. 338, 44 P. 2d 1013 (1935).

**Colorado law determines what is a "felony".** The sections now limits evidence of this nature to felony convictions. There is no such thing as a felony in New Jersey; crimes in that state are classified as either misdemeanors, or high misdemeanors. This "labeling" or "classifying" of crimes by New Jersey is not controlling. In interpreting a Colorado statute, reference should be made to § 4 of art. XVIII, Colo. Const., which defines the term "felony". The word "felony" as used in our statute includes any crime in a sister state which carries with it as a possible penalty, incarceration in the state penitentiary. *Lacey v. People*, 166 Colo. 152, 442 P.2d 402 (1968).

**Classification of crimes based on classification at time offense committed.** For purposes of the impeachment statute, the classification of a felony hinges on its classification at the time of the commission of the offense. *People v. Anders*, 38 Colo. App. 185, 559 P.2d 239 (1976).

A subsequent reclassification of defendant's prior offense from a felony to a misdemeanor does not change the fact that the defendant did, at the time, commit a felony. *People v. Anders*, 38 Colo. App. 185, 559 P.2d 239 (1976).

**For waiver of protection of this section when no objection is made to evidence of**

convictions more than five years prior, see *Yarber v. City & County of Denver*, 116 Colo. 540, 182 P.2d 897 (1947).

A felony conviction which has been set aside under the Federal Youth Correction Act, 18 USC §§ 5005-5026, is no longer a viable conviction and cannot be used for purposes of impeachment. *People v. Jones*, 743 P.2d 44 (Colo. App. 1987).

Conviction arising from same set of facts as civil action may be used for impeachment. *Clark v. Buhring*, 761 P.2d 266 (Colo. App. 1988).

The advisement by the trial court of the defendant's right to testify was inadequate when the court failed to inform defendant that the decision to testify was personal to the defendant and failed to advise defendant as to the limited evidentiary use of any admission by the defendant. *People v. Chavez*, 832 P.2d 1026 (Colo. App. 1991), *aff'd*, 853 P.2d 1149 (Colo. 1993).

Applied in *Cheney v. Hailey*, 686 P.2d 808 (Colo. App. 1984).

**13-90-102. Testimony concerning oral statements made by person incapable of testifying - when allowed.** (1) Subject to the law of evidence, in any civil action by or against a person incapable of testifying, each party and person in interest with a party shall be allowed to testify regarding an oral statement made by the person incapable of testifying if:

(a) The statement was made under oath at a time when such person was competent to testify;

(b) The statement is corroborated by material evidence of an independent and trustworthy nature; or

(c) The opposing party introduces evidence of related communications.

(2) Questions of admissibility that arise under this section shall be determined by the court as a matter of law.

(3) For purposes of this section:

(a) "Person incapable of testifying" means any decedent or any person who is otherwise not competent to testify.

(b) "Person in interest with a party" means a person having an interest in the outcome of the civil action or any other interest that makes the person's testimony, standing alone, untrustworthy. "Person in interest with a party" does not include a person whose only interest is an expectation of receiving just compensation for the value of services rendered as a witness.

**Source:** L. 1870: p. 63, § 2. G.L. § 2952. G.S. § 3641. L. 07: p. 629, § 1. R.S. 08: § 7267. L. 11: p. 676, § 1. C.L. § 6556. CSA: C. 177, § 2. CRS 53: § 153-1-2. C.R.S. 1963: § 154-1-2. L. 69: p. 1244, § 1. L. 73: p. 1651, § 23. L. 75: IP(1) amended, p. 925, § 19, effective July 1. L. 77: (1.5) added, p. 822, § 1, effective July 1. L. 81: (1)(a) amended, p. 899, § 1, effective July 1. L. 87: (1)(f) amended, p. 1577, § 20, effective July 10. L. 94: IP(1) and (1)(g) amended, p. 1040, § 19, effective July 1, 1995. L. 2002: Entire section R&RE, p. 31, § 1, effective July 1.

## ANNOTATION

I. General Consideration.

II. Disqualified Witnesses.

A. Certain Plaintiffs and Defendants.

B. Interested Parties.

III. Exceptions.

A. In General.

B. Witnesses Called by Adverse Party.

C. Facts Occurring After Death of Decedent.

D. Conversations or Transactions with Decedent.

E. Deposition of Deceased Entered in Evidence.

F. Conversations in Presence of Certain People.

G. Previous Testimony in Probate Proceedings.

## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Right to Practice Law as Dependent on Fear of Hell", see 19 *Dicta* 206 (1942). For note, "Some Problems Relating to Testamentary Witnesses", see 23 *Rocky Mt. L. Rev.* 458 (1951). For comment on *Risbry v. Swan*, appearing below, see 24 *Rocky Mt. L. Rev.* 372 (1952). For article, "Evidence



in Estate Proceedings", see 24 Rocky Mt. L. Rev. 437 (1952). For article, "Reciprocal Wills and Contracts to Will", see 29 Rocky Mt. L. Rev. 453 (1957). For article, "One Year Review of Contracts", see 35 Dicta 18 (1958). For note, "The Colorado Dead Man Statute", see 43 Den. L.J. 349 (1966). For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990). For article, "Prenuptial Agreements and the Dead Man's Statute", see 23 Colo. Law. 357 (1994). For article, "Colorado Dead Man's Statute: Time for Repeal or Reform?", see 29 Colo. Law. 45 (January 2000). For article, "The New Colorado Dead Man's Statute", see 31 Colo. Law. 119 (July 2002).

**Annotator's note.** The following annotations include cases decided under prior versions of this section.

**Constitutionality.** The constitutionality of dead man's statute has been upheld as not violative of constitutionally protected rights to due process, equal protection, and is not a legislative usurpation of judicial function of determining a witness's competency and credibility. *Music City, Inc. v. Estate of Duncan*, 185 Colo. 245, 523 P.2d 983 (1974).

The dead man's statute involves neither a suspect classification nor an infringement of a fundamental right. *Lopata v. Metzel*, 641 P.2d 952 (Colo. 1982).

**This section is commonly known as the dead man's statute.** *Estate of Thomas v. Davis*, 144 Colo. 358, 356 P.2d 963 (1960); *Estate of Freeman v. Young*, 172 Colo. 322, 473 P.2d 704 (1970).

**It contains several exceptions to § 13-90-101.** *Palmer v. Hanna*, 6 Colo. 55 (1881).

**And is a limitation on that section.** This section is a limitation on § 13-90-101, which permits, with certain exceptions, all persons who have an interest in the event of an action to be witnesses. *Patterson v. Pitoniak*, 173 Colo. 454, 480 P.2d 579 (1971); *First Nat'l Bank of Colo. Springs v. Morris*, 721 P.2d 1192 (Colo. App. 1985).

**This section is clear, specific, and incapable of misconstruction.** *Fetta v. Vandevier*, 3 Colo. App. 419, 34 P. 168 (1893); *Brantner v. Papish*, 109 Colo. 437, 126 P.2d 1032 (1942).

**And free from all possible doubt as to its purpose.** Its terms are plain, clear, and direct. It evidently means just what it says and says just what it means, and needs no construction. *Cree v. Becker*, 49 Colo. 268, 112 P. 783 (1910).

**Purpose is to protect estates from claims of strangers.** The purpose of this section in preventing a party to an action, suit, or proceeding, or person directly interested in the result thereof, from testifying in his own behalf, is to protect the undisputed heirs of an intestate from claims against the estate, or for any part thereof, by persons who do not claim as undisputed heirs or distributees, but as strangers to the estate, or to

that part of it, which they claim. *Cliff v. Cliff*, 23 Colo. App. 183, 128 P. 860 (1912); *Nat'l State Bank v. Brayman*, 30 Colo. App. 554, 497 P.2d 710 (1972), rev'd on other grounds, 180 Colo. 304, 505 P.2d 11 (1973).

The policy underlying this section is to guard against perjury by prohibiting living interested witnesses from testifying when the deceased cannot refute the testimony and thus to protect the decedent's estate against unjust claims. *DeLeon v. Tompkins*, 40 Colo. App. 241, 576 P.2d 563 (1977), rev'd on other grounds, 197 Colo. 569, 595 P.2d 242 (1979); *Coon v. Berger*, 41 Colo. App. 358, 588 P.2d 386 (1978), aff'd, 199 Colo. 133, 606 P.2d 68 (1980); *First Nat. Bank of Colo. Springs v. Morris*, 721 P.2d 1192 (Colo. App. 1985); *In re Estate of Crenshaw*, 100 P.3d 568 (Colo. App. 2004) (decided prior to 2002 repeal and reenactment).

The purpose of this section is to protect decedents' estates and mental incompetents from false claims as these parties are in need of protection because they are at a disadvantage in a lawsuit due to their inability to answer the allegations of their opponents. *Lopata v. Metzel*, 641 P.2d 952 (Colo. 1982).

**By excluding their testimony when the adverse party is an executor or administrator.** The true object and purpose of this section, as ascertained from the language used and from the decision of the courts upon similar statutes, seem to be to absolutely exclude the testimony of a party to an action, when the adverse party is an executor or administrator, except as such party may be made competent to testify by the action of such executor or administrator. *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

**Purpose of dead man's statute** is to attempt to maintain equality between parties at trial through limitations upon admissibility of evidence, thereby promoting justice. *Berger v. Coon*, 199 Colo. 133, 606 P.2d 68 (1980).

This section's purpose is to promote equal justice between the parties at trial by excluding evidence which might otherwise be relevant, in other words, it is intended to place parties on an equal footing. *Wise v. Hillman*, 625 P.2d 364 (Colo. 1981).

Case law has held the purpose of the statute to be to protect decedent's estates and mental incompetents from false claims. *In re Estate of Hill*, 713 P.2d 928 (Colo. App. 1985).

**It performs traditional function of guarding against perjury** by protecting the mentally incompetent and the estates of decedents from unjust claims. *Wise v. Hillman*, 625 P.2d 364 (Colo. 1981).

**Section cannot apply where proceeding cannot increase or decrease estate size.** Where the result of a proceeding can neither increase nor diminish the estate, the dead man's statute cannot be said to apply. *Nat'l State Bank v. Brayman*, 30 Colo. App. 554, 497 P.2d 710

(1972), rev'd on other grounds, 180 Colo. 304, 505 P.2d 11 (1973).

**Section does apply when a witness stands to share in the estate to the detriment of other heirs.** When the purpose of a witness as the purported common law spouse of the decedent is to gain a share of the estate, witness should not be allowed to testify regarding the marriage with decedent, the validity of which would diminish the interest of some heirs. In re Estate of Crenshaw, 100 P.3d 568 (Colo. App. 2004) (decided prior to 2002 repeal and reenactment).

**Person may not claim section in part and waive in part.** He for whose protection the statute was enacted may not juggle with it. He may not claim it in part and waive it in part as suits his convenience. Otherwise this act, passed for the purpose of preventing fraud, might become the instrument of fraud. Hillman v. Bray Lines, 41 Colo. App. 493, 591 P.2d 1332 (1978), aff'd sub nom. Wise v. Hillman, 625 P.2d 364 (Colo. 1981).

**Dead man's statute does not preclude a claimant's testimony** as to transactions occurring outside the presence of the mental incompetent concerning which the mental incompetent could not testify of her own knowledge had she been competent. In re Estate of Hill, 713 P.2d 928 (Colo. App. 1985).

**This section should be liberally construed.** The spirit of this section is to exclude the testimony of a party when the opposite party is deceased, and cannot give his testimony upon the matters in controversy, and the statute should receive a liberal construction, and the spirit, rather than the technical letter, should govern in its application. Levy v. Dwight, 12 Colo. 101, 20 P. 12 (1888).

**In order to place the parties on an equality.** The object and spirit of the provision of this section, which excludes a living party from testifying in his own behalf when the adverse party is an executor or administrator, is to place the parties on an equality. This object can be attained by giving to the language used in this section such meaning as will make it harmonize with other statutes and with the usual and well understood practice of courts in the introduction of evidence. Whitsett v. Kershow, 4 Colo. 419 (1878); Levy v. Dwight, 12 Colo. 101, 20 P. 12 (1888).

**This section must be judiciously applied.** Beneficent as the statutory rule is, which precludes parties and persons interested in an action from testifying therein when the opposite party sues or defends as an administrator, the rule must be judiciously applied, or it may work great wrong and injury. Prewitt v. Lambert, 19 Colo. 7, 34 P. 684 (1893); Brantner v. Papish, 109 Colo. 437, 126 P.2d 1032 (1942).

**Section should not be so restricted as to fail in its intention.** Although this section may, in some instances, work a hardship and prevent

parties from establishing honest defenses, it is a salutary one and necessary for the protection of estates, widows, and minor heirs, who, without some rule of evidence of this kind, would find themselves at the mercy of any unprincipled debtor, and while the rule need not be unnecessarily extended, it should not be so restricted as to fail in its intention. Williams v. Carr, 4 Colo. App. 363, 36 P. 644 (1894).

**This section applies in equity and at law.** The statutory prohibition against a party to an action or directly interested therein testifying of his own motion or in his own behalf, when the adverse party sues or defends as the executor or administrator of a deceased person, is the same in equity as at law. Williams v. Carr, 4 Colo. App. 368, 36 P. 646 (1894).

**This section does not properly apply unless it unquestionably appears that the party is suing or defending as executor or administrator.** Prewitt v. Lambert, 19 Colo. 7, 34 P. 684 (1893).

**Which fact must be established by positive averment and proof.** When a person sued individually for the conversion of property undertakes to defend as administrator, he must establish by positive averment and proof his status as administrator and that he is possessed of, or entitled to, such property, and chargeable therewith in such capacity, by some appropriate preliminary trial, before the opposite party, or other interested parties, can properly be excluded as witnesses upon the merits of the case. Prewitt v. Lambert, 19 Colo. 7, 34 P. 684 (1893).

**Disqualifying interest determined at time of testimony.** The disqualifying interest within the meaning of the dead man's statute is determined as of the time the testimony sought to be excluded is offered. Gaddis v. McDonald, 633 P.2d 1102 (Colo. App. 1981); David v. Powder Mt. Ranch, 656 P.2d 716 (Colo. App. 1982).

**Interest must be shown.** The interest of a witness must be shown before the bar of the statute may be invoked. David v. Powder Mt. Ranch, 656 P.2d 716 (Colo. App. 1982).

**This section does not apply to an executrix defending in her individual right.** One who, being sued both in her individual capacity and as executrix, defends solely in her individual right, cannot exclude the testimony of plaintiff under this section. Gabrin v. Brister, 65 Colo. 407, 177 P. 134 (1918); Lamborn v. Kirkpatrick, 97 Colo. 421, 50 P.2d 542 (1935).

**This section does not permit an executor to join an uninterested person as a party defendant and thereby deny him the right to testify.** Klein v. Munz, 87 Colo. 223, 286 P. 112 (1930).

**The combined effect of this and the preceding section is to enlarge common-law competency so as to embrace all persons, except those within this section and as to those to leave competency as at common law.** "Competency as witnesses of persons not parties to the record is



presumed until the contrary appears, and the onus is upon the objector to show the incompetency." Jones v. Henshall, 3 Colo. App. 448, 34 P. 254 (1893); King Shoe Co. v. Chittenden, 16 Colo. App. 441, 66 P. 173 (1901).

**In some cases an administrator is not an adverse party.** In a suit to impress a trust upon a decedent's estate as a result of a contract to execute reciprocal wills, the administrator being under no obligation to defend the issues raised is not, under a proper interpretation of this section an adverse party, and is without right to interpose an objection to evidence offered by the plaintiff as a witness in her own behalf. Risbry v. Swan, 124 Colo. 567, 239 P.2d 600 (1951).

**State not "adverse party."** In a suit in which it is sought to impress a trust upon a decedent's estate, the state of Colorado has presently no enforceable claim against the estate, and strictly construed, may well be said at the present time not to fall even within the classification of "adverse party" since it becomes entitled to no right of enforcement until the court in whose hands the estate is being administered shall enter a proper decree directing the personal representative to pay the money over to the state treasurer pursuant to the escheat statute. Risbry v. Swan, 124 Colo. 567, 239 P.2d 600 (1951).

**Objection may be waived.** The exception engrafted upon the general competency of all parties, that where one is dead and is represented in the suit, then the living party shall not be permitted to testify, is only a regulation to secure mutuality in the action itself. The admission of such testimony affects no one but the parties, and none but the parties are interested in the exercise of the power given to exclude this testimony. Faden v. Midcap's Estate, 112 Colo. 573, 152 P.2d 682 (1944); Risbry v. Swan, 124 Colo. 567, 239 P.2d 600 (1951).

**Even though minors are interested in estate.** Representative may waive objection to incompetency although minors may be interested in the estate. Faden v. Midcap's Estate, 112 Colo. 573, 152 P.2d 682 (1944).

**Admitting evidence of a conversation with a party since deceased is not reversible error where it did not affect the issue on trial.** Tourtelotte v. Brown, 18 Colo. App. 335, 71 P. 638 (1903).

**Grand jury testimony was not released merely to circumvent the evidencing problems encountered by operation of the Dead Man's Statute.** In re Lynde, 922 F.2d 1448 (10th Cir. 1991).

**Applied in** In re Estate of Abbott, 39 Colo. App. 536, 571 P.2d 311 (1977); Taylor v. Barnes, 41 Colo. App. 246, 586 P.2d 238 (1978); Tompkins v. DeLeon, 197 Colo. 569, 595 P.2d 242 (1979); Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998); Glover v. Innis, 252 P.3d 1204 (Colo. App. 2011).

## II. DISQUALIFIED WITNESSES.

### A. Certain Plaintiffs and Defendants.

**The competency or incompetency of a plaintiff's proffered testimony in his own behalf is determined by this section.** Miller v. Hepner, 136 Colo. 48, 314 P.2d 604 (1957).

**The protection of this section extends only to adverse parties within the designated class, and not to their co-parties not within such class.** Nesbitt v. Swallow, 63 Colo. 194, 164 P. 1163 (1917); Gabrin v. Brister, 65 Colo. 407, 177 P. 134 (1918); Watson v. Woodley, 71 Colo. 391, 207 P. 335 (1922); Steward v. Burt, 73 Colo. 468, 216 P. 258 (1923); Sauer v. First Nat'l Bank, 75 Colo. 119, 224 P. 227 (1924); Haffner v. Van Blarcom, 84 Colo. 565, 272 P. 621 (1928).

**An "adverse party" is any person** whose personal or property or other rights may be adversely affected by the operation of the judgment. In re Stepp's Estate, 101 Colo. 506, 75 P.2d 146 (1937).

**A party to an action is incompetent to testify of his own motion, or in his own behalf, when the adverse party sues as executor or administrator.** Williams v. Carr, 4 Colo. App. 363, 36 P. 644 (1894); Rogers v. McMillen, 6 Colo. App. 14, 39 P. 891 (1895); Cree v. Becker, 49 Colo. 268, 112 P. 783 (1910).

**Or when any person appears and sues or defends as heir.** Whitsett v. Kershow, 4 Colo. 419 (1878); Gilham v. French, 6 Colo. 196 (1882); Fetta v. Vandevier, 3 Colo. App. 419, 34 P. 168 (1893); Lancaster v. Coale, 27 Colo. App. 495, 150 P. 821 (1915).

**Unless he comes within some of the exceptions expressed in this section.** Fetta v. Vandevier, 3 Colo. App. 419, 34 P. 168 (1893); Carpenter v. Ware, 4 Colo. App. 458, 36 P. 298 (1894).

**This does not affect the rights of executors to become parties.** The fact that, by making the executors of a vendor parties to an action, defendants were rendered incompetent to testify as witnesses in their own behalf, does not affect the right of the executors to become parties. Butler v. Rockwell, 14 Colo. 125, 23 P. 462 (1890).

**Witness may be incompetent against executor, but competent against other defendants.** In an action where one is defending as an heir or legal representative, a witness who is incompetent against the heir or representative, under the statute, may be competent to testify against other defendants in the action, who are not representatives or heirs. Nesbitt v. Swallow, 63 Colo. 194, 164 P. 1163 (1917); Gabrin v. Brister, 65 Colo. 407, 177 P. 134 (1918); Watson v. Woodley, 71 Colo. 391, 207 P. 335 (1922).

**The dead man's statute is not applicable where a party is not suing or defending as an heir.** Askins v. Easterling, 141 Colo. 83, 347 P.2d 126 (1959).

**Such as a grantor and grantee.** The dead man's statute has no application where parties are suing or defending as grantor and grantee and not as heirs. *Askins v. Easterling*, 141 Colo. 83, 347 P.2d 126 (1959); *Linker v. Linker*, 28 Colo. App. 136, 470 P.2d 882 (1970).

**Or as a corporate stockholder.** This section does not apply where the objecting party is suing, not as an heir but as a stockholder in a corporation; and whether she inherited or purchased the stock is unimportant. *Allen v. Fleming*, 97 Colo. 204, 48 P.2d 810 (1935).

**This section is not altered, when a general objection is made before the witness is sworn,** whether the testimony elicited was upon the direct or cross-examination. *Whitsett v. Kershaw*, 4 Colo. 419 (1878).

**If a party is incompetent the character of his testimony and the subject matter about which he testifies are totally unimportant.** If the evidence which he gives is relevant to any issue made in the case, it is error to permit him to give it at his own instance, and if the objection be properly interposed in apt time, it must be sustained. *Jones v. Henshall*, 3 Colo. App. 448, 34 P. 254 (1893); *Brown v. First Nat'l Bank*, 49 Colo. 393, 113 P. 483 (1911).

**Examination of one witness who is incompetent under section operates as waiver of incompetency as to other adverse witnesses** where the testimony of the adverse witness is offered after the examination of the first witness and relates to matters testified to by the first witness. *Wise v. Hillman*, 625 P.2d 364 (Colo. 1981).

**This section prohibits the surviving party's testifying in a suit by the executor of the deceased party's estate.** *Oswald v. Dawn*, 143 Colo. 487, 354 P.2d 505 (1960).

**Also plaintiff in suit for services to a decedent.** In an action for the value of care and services rendered a deceased defendant, it is error under this section, to permit a plaintiff to testify in his own behalf over the objection of defendant, defending the action as administratrix. *Temple v. Magruder*, 36 Colo. 390, 85 P. 832 (1906); *Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959).

**And a claimant, as injured passenger in automobile collision,** who brought suit against operator of another motor vehicle was precluded by this section from testifying as to anything that occurred prior to date of decedent's death. *Gushurst v. Benham*, 160 Colo. 428, 417 P.2d 777 (1966); *Nat'l State Bank v. Brayman*, 30 Colo. App. 554, 497 P.2d 710 (1972), rev'd on other grounds, 180 Colo. 304, 505 P.2d 11 (1973).

**Also, a plaintiff in a new trial on issue of damages.** Where the supreme court had ruled in previous opinion that unless the plaintiff consented to reduction of the award for exemplary damages within 10 days after the issuance of the

remittitur, the judgment would be reversed as to issue of damages, and a new trial ordered on that issue alone, and nothing transpired for approximately three and one-half years or until shortly after the defendant's death when the plaintiff applied to set damages issue for trial, under the circumstances the trial court did not err in ruling that the plaintiff was precluded from testifying under the provisions of this section, the "dead man's statute". *Bennett v. Kresse*, 174 Colo. 200, 483 P.2d 384 (1971).

**In addition, no self-serving statement by disqualified claimant is competent evidence.** In a proceeding upon the allowance of a claim against the estate of a decedent, a deposition taken by the administrator was introduced and read by claimant. Attached to the deposition as an exhibit was a letter written by the claimant to the deponent after the death of the decedent, in which was set forth in detail the amount and character of the services rendered upon which the claim against the estate was based, and such letter was allowed in evidence over the objection of the administrator. Held, that the claimant being disqualified as a witness under this section no self-serving statement made by him in the form of a letter could be competent evidence. *Butler v. Phillips*, 38 Colo. 378, 88 P. 480 (1906).

**The administratrix of the estate of a deceased person is incompetent** to testify, in a hearing to set aside the allowance of a claim against the estate, regarding matters which occurred prior to the death of claimant. *Lego v. Olson*, 110 Colo. 508, 136 P.2d 277 (1943).

**Beneficiaries under a will are incompetent to testify** in contested proceedings to have admitted to probate over the objection of heirs of the testator. In re *Shapter's Estate*, 35 Colo. 578, 85 P. 688 (1906); In re *Eder's Estate*, 94 Colo. 173, 29 P.2d 631 (1934); In re *Livingston's Estate*, 102 Colo. 148, 77 P.2d 649 (1938); *Cole v. Christopher*, 121 Colo. 461, 217 P.2d 620 (1950).

**Widow claiming interest in estate is incompetent.** In an action by a widow against the administrator of her deceased husband, the plaintiff proposed to testify, of her own motion, that certain property sold in the lifetime of her husband belonged to her; that she consented to the sale, and permitted the husband to take the money, with the understanding that he was to reinvest it in another homestead, which was to belong to her, but which was never done. Under this section such testimony is specifically prohibited. *Palmer v. Hanna*, 6 Colo. 55 (1881); *Carpenter v. Ware*, 4 Colo. App. 458, 36 P. 298 (1894); *Stratton v. Rice*, 66 Colo. 407, 181 P. 529 (1919); *Walker v. Walker*, 131 Colo. 328, 281 P.2d 1010 (1955).

**As is child seeking statutory allowance from father's estate.** A minor child, unless within some of the exceptions enumerated in



this section is incompetent to testify in proceedings wherein he is seeking a statutory allowance from the estate of his deceased father. *Lyons v. Egan*, 110 Colo. 227, 132 P.2d 794 (1942).

**The executor of a will is a party to a will contest, and, therefore, not a competent witness**, under this section. In *re Shapter's Estate*, 35 Colo. 578, 85 P. 688 (1906).

**Plaintiff in action on promissory note is incompetent.** In an action against the administrator of an estate on a promissory note of the deceased, the plaintiff cannot testify on his own motion or in his own behalf. *Reiter v. Pollard*, 75 Colo. 203, 225 P. 222 (1924).

**As is surviving partner proving partnership.** In an action against two persons alleged to be co-partners for the collection of a claim against the firm, wherein service of summons is made on one only, who answers denying the partnership and his own liability as well, but dies before trial of the issues, and his administratrix is substituted as defendant, the alleged surviving partner is not a competent witness for the plaintiffs under the statute to prove the partnership. No acknowledgment by a surviving partner, made after the death of his co-partner, will revive a debt against the estate of the deceased partner. *Cooper v. Wood*, 1 Colo. App. 101, 27 P. 884 (1891); *Hottel v. Mason*, 16 Colo. 43, 26 P. 335 (1891).

**A disqualified person is not to be censured for failing to offer to testify.** *Irvine v. Minshull*, 60 Colo. 112, 152 P. 1150 (1915).

#### B. Interested Parties.

**This section has no application to witnesses who have no interest in the result of the litigation.** *Kitts v. Hill*, 89 Colo. 186, 300 P. 610 (1931); *Lamborn v. Kirkpatrick*, 97 Colo. 421, 50 P.2d 542 (1935); In *re Stepp's Estate*, 101 Colo. 506, 75 P.2d 146 (1937).

**Nor to a witness whose testimony cannot be prejudicial.** It is unnecessary to determine whether or not a witness is disqualified by virtue of the provisions of this section where his testimony is of a character that cannot possibly be prejudicial to the interests of the executrix or the estate which she represents. *Cone v. Eldridge*, 51 Colo. 564, 119 P. 616 (1911).

**Such witnesses are competent to testify under the preceding section.** Further, being competent under the common law to testify, and common-law competency not being abridged by our statute, his deposition should have been received. The deposition went to material matters. Prejudicial error was committed in its rejection. *King Shoe Co. v. Chittenden*, 16 Colo. App. 441, 66 P. 173 (1901).

**The interest of a defendant or witness must be shown before the bar of the statute may be invoked.** *Klein v. Munz*, 87 Colo. 223, 286 P. 112 (1930).

**The test of the interest of a witness is whether he will gain or lose by the direct legal operation of the judgment.** *Popejoy v. Bahr*, 67 Colo. 385, 176 P. 947 (1919); *Norris v. Bradshaw*, 92 Colo. 34, 18 P.2d 467 (1932); In *re Eder's Estate*, 94 Colo. 173, 29 P.2d 631 (1934); *Denver Nat'l Bank v. McLagan*, 133 Colo. 487, 298 P.2d 386 (1956); *Sussman v. Barash*, 157 Colo. 124, 401 P.2d 608 (1965); *David v. Powder Mt. Ranch*, 656 P.2d 716 (Colo. App. 1982).

**Test of interest is made at time testimony is offered.** The decisive test is when, in point of time, the interest is to be determined. The competency of a witness, insofar as his interest is concerned, generally depends on the facts as they exist at the time when his testimony is offered, rather than at the time of the filing of the petition. *Miller v. Hepner*, 136 Colo. 48, 314 P.2d 604 (1957); *Zietz v. Estate of Turner*, 168 Colo. 499, 452 P.2d 1 (1969); In *re Estate of Granberry*, 30 Colo. App. 590, 498 P.2d 960 (1972).

**The interest of a witness in the result of litigation is made to appear by a consideration of the rights created or extinguished by its issue.** *Cordingly v. Kennedy*, 239 F. 645 (8th Cir. 1917).

**Consent will not remove the disability of interest.** The disability, under this peculiar statute, so far as interest is concerned, is not one which is removable by the consent of the party offering it as in the case of interest at the common law. *Williams v. Carr*, 4 Colo. App. 368, 36 P. 646 (1894).

**Testimony will not be barred when interest is merely an expectancy.** This section does not bar testimony of claimant regarding a conversation that claimant had with deceased to the effect that deceased was holding land in trust for claimant's mother when at the time the action was begun the claimant's mother was living and claimant's interest in the property was only an expectancy. In *re Estate of Granberry*, 30 Colo. App. 590, 498 P.2d 960 (1972).

**Wife of defendant is not directly interested.** The fact that a witness is the wife of the defendant would not, of itself, make her directly interested in the event of the suit, within the meaning of the statute, so as to exclude her testimony. *Butler v. Phillips*, 38 Colo. 378, 88 P. 480 (1906); *White v. Christopherson*, 46 Colo. 46, 102 P. 747 (1909); *Norris v. Bradshaw*, 92 Colo. 34, 18 P.2d 467 (1932).

**Husband need not have direct interest.** Where husband of claimant had no "direct interest" in the outcome of the litigation, his testimony did not offend this section. *Gushurst v. Benham*, 160 Colo. 428, 417 P.2d 777 (1966).

**Mere fact that witness is mother of party does not render her incompetent.** There was no testimony to suggest that the mother was directly interested in the outcome of the lawsuit,

brought by her son, other than the normal interest a parent has for the welfare of a child. At the time of the trial, she was 70 years of age, and had never received support from the plaintiff, and was competent to testify in support of the agreement benefitting her son. *Zietz v. Estate of Turner*, 168 Colo. 449, 452 P.2d 1 (1969).

**Agent is not necessarily interested.** So far as the evidence discloses, deponent had no direct interest in the event of the action. *King Shoe Co. v. Chittenden*, 16 Colo. App. 441, 66 P. 173 (1901).

**Under this section a stockholder in a corporation is not a competent witness** to establish a claim of such corporation against a decedent's estate. *Brown v. First Nat'l Bank*, 49 Colo. 393, 113 P. 483 (1911); *Gilmour v. Hawley Merchandise Co.*, 21 Colo. App. 307, 121 P. 765 (1912).

A stockholder of a claimant corporation is an interested party within the meaning of the dead man's statute, and therefore incompetent to testify. *Music City, Inc. v. Estate of Duncan*, 185 Colo. 245, 523 P.2d 983 (1974).

**The mere fact that witnesses to a will were employees of a corporation in which the testatrix had an interest,** and as such employees might be eligible to receive a bonus from the company if and when any such should be paid, did not render them incompetent to testify as to the execution of the will, their interest, if any, being too remote and too indirect to disqualify them. *Estate of Ainsworth*, 102 Colo. 392, 79 P.2d 1045 (1938).

**Attorneys are competent to testify.** The statutory provision that no person directly interested in the event of a civil action may testify therein when the adverse party sues or defends as an executor, does not apply to the attorney of a party because of the ordinary and usual fee he would receive for acting as such attorney. *Estate of Leibold*, 102 Colo. 408, 79 P.2d 1049 (1938).

Decedent's attorney was not incompetent to testify in proceeding to establish lost will because, as attorney for the estate, he had a financial interest in the estate. *In re Estate of Enz*, 33 Colo. App. 24, 515 P.2d 1133 (1973).

**Attorney for proponents of will may testify.** An attorney for proponents of a will is not disqualified as a witness to testify in court relative thereto merely because of fees he may be entitled to receive because of his employment as counsel. *In re Eder's Estate*, 94 Colo. 173, 29 P.2d 631 (1934); *Denver Nat'l Bank v. McLagan*, 133 Colo. 487, 298 P.2d 386 (1956).

**As to father of defendant in ejectment action.** Defendant in ejectment claimed under a conveyance from the wife of plaintiff, the validity of which was contested. The father of the defendant claiming other lands, under a different conveyance contested upon the same grounds asserted in the present action, was held compe-

tent. *Allen v. Shires*, 47 Colo. 433, 107 P. 1070 (1910).

**And wife of a legatee.** The wife of a legatee is a competent attesting witness under this section when examined for and with his consent. *White v. Bower*, 56 Colo. 575, 136 P. 1053 (1913).

**Also, brothers and sisters of a devisee are competent witnesses to sustain a will.** *Butler v. Phillips*, 38 Colo. 378, 88 P. 480 (1906); *White v. Christopherson*, 46 Colo. 46, 102 P. 747 (1909); *In re Hatfield's Will*, 21 Colo. App. 443, 122 P. 63 (1912); *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913).

**Generally, one entering into a contract for the benefit of a third person may testify** as to it in an action by the beneficiary, against the estate of the other party. *Sussman v. Barash*, 157 Colo. 124, 401 P.2d 608 (1965).

**As may a witness concerned in another suit.** A witness is not excluded under this section, where he has no interest in the suit in which his testimony is offered, even though he is concerned in a different suit, involving the validity of a contract, upon which depends the suit in which he is offered. *Love v. Cotten*, 65 Colo. 593, 179 P. 806 (1919).

**So may part owner of chattel in replevin proceedings.** One not a party to an action of replevin by an administrator is not disqualified, under this section, as a witness for the defendant, by reason of the fact that he is the owner of some of the chattel. *Popejoy v. Bahr*, 67 Colo. 385, 176 P. 947 (1919).

**Interested person incompetent to lay foundation for admission of book accounts.** An interested person, within the meaning of this section, is not a competent witness for laying a foundation for admission of book accounts into evidence under § 13-90-103. *Music City, Inc. v. Estate of Duncan*, 185 Colo. 245, 523 P.2d 983 (1974).

**Witness relieved of liability by judgment against executor.** One who is not a party to an action against an executor is not disqualified as a witness for the plaintiff by the mere fact the he may be, himself, relieved of liability by a judgment against the executor. He is not "directly interested", within the meaning of the statute. *Selkregg v. Thomas*, 27 Colo. App. 259, 149 P. 273 (1915).

### III. EXCEPTIONS.

#### A. In General.

**Competency attends where voluntary testimony is given without objection.** A claimant, if called by the representative of the estate for that purpose, is competent to testify of and concerning his claim, and competency also attends where, proceeding without objection, claimant voluntarily testifies in that behalf. The



latter consideration is emphasized when the representative of the estate has conducted an exhaustive cross-examination of claimant on the merits of his claim. *Faden v. Midcap's Estate*, 112 Colo. 573, 152 P.2d 682 (1944).

**The provisions of this section relating to the manner in which incompetency can be removed are not uncertain or ambiguous** as to what must be done to render such incompetent witness competent, to the extent therein provided. *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

**There is no reason for judicial interpretation of the legislative intent.** The general assembly having said that the living party may testify, under certain circumstances, when the adverse party is an executor or administrator, it must be held to have expressed its full intention in that regard, and there is no call for a judicial interpretation of the legislative intention when such intention is clearly expressed. *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

**No judicial exceptions may be created.** The circumstance that the action is upon a bond in which one still living but not joined was surety, affords no ground to make an exception to the rule prescribed by this section. *Cree v. Becker*, 49 Colo. 268, 112 P. 783 (1910).

**It is only under one of the exceptions that testimony may be admissible where witness is a party to the action or directly interested.** This section prohibits a party to the action, or any person directly interested in the event thereof, from giving testimony of his own motion or in his own behalf, when the adverse party sues or defends as the administrator of a deceased person, unless the testimony is admissible under one of the exceptions enumerated in this section. *Brown v. First Nat'l Bank*, 49 Colo. 393, 113 P. 483 (1911).

**Whether witness is within exceptions should appear before he is admitted to testify.** Under this section when a party is offered as a witness, and before he is admitted to testify, it should be made to appear from his status in the case whether he is brought within any of the enumerated exceptions to the disqualifying section of the statute. *Whitsett v. Kershow*, 4 Colo. 419 (1878).

**Proponent of will may testify to contradict testimony of drawing attorney.** In a will contest, testimony of the proponent concerning the preparation of the will by an attorney, such testimony being in direct conflict with that of the attorney respecting the circumstances surrounding the drawing and execution of the will, was not barred by the "dead man's" statute. *Ofstad v. Sarconi*, 131 Colo. 541, 285 P.2d 828 (1955).

**Dead man's statute was not a bar to testimony concerning conversations party had with attorney** when record clearly indicates conversations occurred outside presence of decedent. *Difede v. Mountain States Tel. & Tel.*,

763 P. 2d 298 (Colo. App. 1988), rev'd on other grounds, 780 P.2d 533 (Colo. 1989).

**Use by defendant of deposition statements made by plaintiff regarding conversations she had with decedent constitutes waiver of right to bar testimony** regarding same conversations. *Crandell v. Resley*, 804 P.2d 272 (Colo. App. 1990).

#### B. Witnesses Called by Adverse Party.

**Disqualified witness called by adverse party is thereby rendered competent for all purposes.** When a disqualified witness is called by the adverse party and examined by him as a witness upon certain matters pertinent to some of the issues in the case, such witness is thereby rendered competent for all purposes. *Warren v. Adams*, 19 Colo. 515, 36 P. 604 (1894); *Jerome v. Bohn*, 21 Colo. 322, 40 P. 570 (1895); *Allen v. Shires*, 47 Colo. 433, 107 P. 1070 (1910); *Zackheim v. Zackheim*, 75 Colo. 161, 225 P. 268 (1924); *Stender v. Cunningham*, 123 Colo. 5, 225 P.2d 52 (1950); *Estate of Thomas v. Davis*, 144 Colo. 358, 356 P.2d 963 (1960).

**Objection to competency is not waived where witness is not called by adverse party but is cross-examined to show interest.** Where a witness was not called by the adverse party under § 13-90-116, but was cross-examined only to such extent as would fully disclose that he was a party directly interested in the result of the controversy, which was made clearly to appear, this does not waive objection to competency. *Cordingly v. Kennedy*, 239 F. 645 (8th Cir. 1917).

**Waiver of defense where incompetent testifies.** The examination of one witness who is incompetent under this section operates as a waiver of incompetency as to other adverse witnesses, at least where the testimony of the adverse witness relates to subjects covered by the first witness. *Hillman v. Bray Lines*, 41 Colo. App. 493, 591 P.2d 1332 (1978), aff'd sub nom., *Wise v. Hillman*, 625 P.2d 364 (Colo. 1981).

#### C. Facts Occurring After Death of Decedent.

**It is not error to receive testimony of plaintiffs to facts occurring subsequent to the death of the defendants' ancestor.** *Fillmore v. Wells*, 10 Colo. 228, 15 P. 343 (1887).

**Or testimony as to facts occurring after death of testator.** In a proceeding contesting the admission of a will to probate, witnesses are competent to testify to facts occurring after the death of the testator regardless of their interest in the outcome of the proceeding. In re *Eder's Estate*, 94 Colo. 173, 29 P.2d 631 (1934).

**Such as conversation between witness and administrator.** In an action against an administrator, a conversation between the administrator

and a party to the suit who has since died, which did not relate to matters transpiring prior to the death of the administrator's decedent, is not prohibited from admission in evidence by this section. *Tourtelotte v. Brown*, 18 Colo. App. 335, 71 P. 638 (1903).

**Heirs cannot testify as to statements of testator made before his decease.** Testimony of a daughter and her husband concerning statements of the father made before his decease as to the disposition of his property held, under the disclosed facts, to be inadmissible; further held, that the witnesses were incompetent to testify as to such statements, and the admission of the evidence was reversible error. *Norris v. Bradshaw*, 92 Colo. 34, 18 P.2d 467 (1932).

#### D. Conversations or Transactions with Decedent.

**The exception as to conversations and transactions with the deceased does not extend to deposit slips, and checks,** in the handwriting of the deceased, dated at times when, according to the assertions of the claimant, he was in another state. *Stratton v. Rice*, 66 Colo. 407, 181 P. 529 (1919).

#### E. Deposition of Deceased Entered in Evidence.

**Use of decedent's prior recorded testimony.** Either party may offer decedent's prior recorded testimony into evidence, and thereafter claimant, by virtue of such offer, may become a competent witness on his own behalf. *Coon v. Berger*, 41 Colo. App. 358, 588 P.2d 386 (1978), aff'd, 199 Colo. 133, 606 P.2d 68 (1980).

**Deposition of deceased may be read by either party.** When one party sues or defends as an executor or administrator of a deceased person, by excluding the testimony of the adverse party the parties are placed on an equality; but, if the deposition of the deceased party has been taken, "it may be read in any stage of the same action or proceeding by either party and shall then be deemed evidence of the party reading it". *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

**If read by the representative of deceased, the living party may testify in his own behalf.** If the testimony of a deceased party, given on a former trial, is offered in evidence by the administrator of such deceased party, the reason for the exclusion of the testimony of the living party is taken away; and to place the parties on an equality, as is the intention of the statute, the living party must be allowed to testify in his own behalf as to the matters testified to by the deceased party on the former trial. *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

**Otherwise he is incompetent to testify.** By the plain provisions of this subdivision, appellee

could not be made a witness in his own behalf, unless the deposition of the deceased defendant be read in evidence. He was rendered incompetent to testify in the case by the death of the adverse party, and must remain incompetent until his incompetency was removed in the manner provided by the statute. *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

**If offered by the living party it is regarded as the testimony of his own witness.** The testimony of the deceased, given at a former trial, may be offered in evidence by the living party, and then it is to be regarded as the testimony of his own witness, and subject to all the rules applicable to the testimony of any other witness in his behalf; but the introduction of such testimony by the living party will not make such party a competent witness in his own behalf. *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

**The testimony of the living party is to be in rebuttal of the deposition.** The fair implication arising from the restriction of this subdivision is that the testimony of the living party is to be in rebuttal of the deposition of the deceased party; that it is optional with the executor or administrator to introduce the deposition in evidence, or to withhold it from introduction. *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

**The mere existence of a deposition is not sufficient to entitle living party to testify.** To hold that the requirement of this subdivision is complied with by showing the existence of a deposition of a deceased party that can be read in evidence would be judicial legislation. *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

**Rebuttable by testimony limited to matters relevant to decedent's statement.** In a retrial of a malpractice action against an attorney who has since died, the clients are not prevented from testifying if the decedent's prior court testimony is first admitted into evidence and their testimony is limited to relevant and competent matters encompassed within the decedent's prior testimony. *Berger v. Coon*, 199 Colo. 133, 606 P.2d 68 (1980).

**This provision is limited to depositions of deceased persons and does not expressly include lunatics or distracted persons.** *Fleming v. Miller*, 84 Colo. 27, 267 P. 1064 (1928).

#### F. Conversations in Presence of Certain People.

**Testimony of conversation made in presence of decedent's wife admissible.** Under this section, testimony offered by a plaintiff of conversations and agreements with a deceased in the presence of his wife who is a beneficiary of his estate and who is present at the trial is competent and admissible. *Miller v. Hepner*, 136 Colo. 48, 314 P.2d 604 (1957).

**Heirs may testify to deceased's conversations after their sixteenth birthday.** Any con-



versation or admission, or as to all matters and things connected with the subject matter of will contest may be testified to by the heirs of deceased where such conversations or admissions occurred after the heirs became "over the age of sixteen years". *Brantner v. Papish*, 109 Colo. 437, 126 P.2d 1032 (1942).

**Person before whom deceased spoke must be present at the trial.** The purpose of the exclusionary provision in the sixth subdivision is to prevent the despoiling of estates by testimony relating to transactions with persons who, by death, have been rendered unable to contradict such testimony. Where, however, an heir of the deceased was present at the transaction and was also present at the trial, it was considered that the heir would have a sufficient interest in preserving the assets of the estate to check any attempt to establish a fictitious claim against the estate or to its assets. *Norris v. Bradshaw*, 92 Colo. 34, 18 P.2d 467 (1932).

**The words "member of the family" of the deceased, in the sense here used, include** only such persons living with the deceased, as would inherit from him by the laws of descent. Others, such as heirs, legatees, and devisees, who do not live with deceased so as to constitute members

of his family, are specially mentioned in the statute. *Fagan v. Troutman*, 25 Colo. App. 251, 138 P. 442 (1914).

#### G. Previous Testimony in Probate Proceedings.

**Under paragraph (g), brothers of the testator were held properly admitted** to deny statements made by the testator touching alleged troubles and controversies with them, the statements having been made in the presence of the proponent of the will, and the principal beneficiary thereunder. *James v. James*, 64 Colo. 133, 170 P. 285 (1918).

**Under paragraph (g), the testimony of a widow in the county court**, when cited and examined under § 15-10-106, was admissible in her behalf. *Lane v. Lane*, 57 Colo. 419, 140 P. 804 (1914).

**Executor may also testify.** This subsection is a further exception to the dead man's statute which specifically permits the executor named in a will to testify in a will contest. *Estate of Freeman v. Young*, 172 Colo. 322, 473 P.2d 704 (1970).

### 13-90-103. Book account, how identified. (Repealed)

**Source:** L. 1870: p. 64, § 3. G.L. § 2953. G.S. § 3642. L. 07: p. 630, § 1. R.S. 08: § 7268. C.L. § 6557. CSA: C. 177, § 3. CRS 53: § 153-1-3. C.R.S. 1963: § 154-1-3. L. 77: Entire section repealed, p. 293, § 5, effective May 26.

**13-90-104. Conversation of deceased partner.** In any action, suit, or proceeding by or against any surviving partner or joint contractor, no adverse party or person adversely interested in the event thereof is a competent witness to testify, by virtue of section 13-90-101, to any admission or conversation by any deceased partner or joint contractor, unless one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation.

**Source:** L. 1870: p. 64, § 4. G.L. § 2954. G.S. § 3643. R.S. 08: § 7269. C.L. § 6558. CSA: C. 177, § 4. CRS 53: § 153-1-4. C.R.S. 1963: § 154-1-4.

**Cross references:** For the nature of the joint liability of the partnership, see §§ 7-60-111 and 7-60-115.

### ANNOTATION

**Purpose is to protect surviving copartner.** The purpose of this section is wise and wholesome, to the end that a surviving copartner may be protected from injury and wrong, which otherwise might easily be perpetrated. *Watkins v. Adams*, 53 Colo. 290, 125 P. 122 (1912).

**In an action against the survivors of a partnership the plaintiff is not a competent witness** to testify to a contract made, or conversation had with the deceased partner, not in the

presence of any of the survivors. *Watkins v. Adams*, 53 Colo. 290, 125 P. 122 (1912).

**Unless one of the surviving partners was present.** This section clearly indicates, that where the suit is brought against any surviving partner or joint contractor, that the testimony relative to any admission or conversation by the deceased person or joint contractor shall not be admitted unless some one or more of the surviving partners or joint contractors were present

at the time of the admission or conversation.  
*Savard v. Herbert*, 1 Colo. App. 445, 29 P. 461 (1892).

**13-90-105. Incompetent not restored by release.** In any civil action, suit, or proceeding, no person who would, if a party thereto, be incompetent to testify therein under the provisions of section 13-90-102 shall become competent by reason of any assignment or release of his claim made for the purpose of allowing such person to testify.

**Source:** L. 1870: p. 65, § 7. G.L. § 2957. G.S. § 3644. R.S. 08: § 7270. C.L. § 6559. CSA: C. 177, § 5. CRS 53: § 153-1-5. C.R.S 1963: § 154-1-5. L. 77: Entire section amended, p. 293, § 6, effective May 26.

#### ANNOTATION

**Effect of this section is to bar party in interest from disclaiming interest in the lawsuit in order to establish competency as a witness.** In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972).

**This heir, despite disclaimer of interest, may not testify as to mental incompetency of deceased.** Caveator and heir, who would take if

attack on will was successful, could not, in view of dead man's statute objection, testify as to the alleged mental incompetence of testator at time will is executed, notwithstanding caveator's disclaimer of any interest in the estate. In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972).

**13-90-106. Who may not testify.** (1) The following persons shall not be witnesses:

(a) Persons who are of unsound mind at the time of their production for examination;  
 (b) (I) Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly.

(II) This proscription does not apply to a child under ten years of age, in any civil or criminal proceeding for child abuse, sexual abuse, a sexual offense pursuant to part 4 of article 3 of title 18, C.R.S., or incest, when the child is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined.

**Source:** L. 1883: p. 290, § 2. G.S. § 3648. R.S. 08: § 7273. C.L. § 6562. CSA: C. 177, § 8. CRS 53: § 153-1-6. C.R.S. 1963: § 154-1-6. L. 83: (1)(b) amended, p. 635, § 1, effective April 22. L. 89: (1)(b)(II) amended, p. 862, § 1, effective April 12. L. 2003: (1)(b)(II) amended, p. 1433, § 24, effective April 29.

#### ANNOTATION

- I. General Consideration.
- II. Mental Incompetency.
- III. Incompetency of a Child.

#### I. GENERAL CONSIDERATION.

**Applied** in *People v. Norwood*, 37 Colo. App. 157, 547 P.2d 273 (1975); *People v. Trujillo*, 40 Colo. App. 220, 577 P.2d 297 (1977).

#### II. MENTAL INCOMPETENCY.

**Every person of unsound mind is not incompetent to testify as a witness.** *Howard v. Hester*, 139 Colo. 255, 338 P.2d 106 (1959).

**Fact that a child is under care of a psychologist is merely one factor for the court to consider** and does not necessarily affect the

child's competency to testify. *People v. Piro*, 671 P.2d 1341 (Colo. App. 1983).

**In determining whether a compelling reason exists for a psychological examination of a witness**, the trial court must balance the possible emotional trauma and embarrassment to, or intimidation of, the witness against the likelihood of the examination producing relevant, as distinguished from speculative, evidence. *People v. Piro*, 671 P.2d 1341 (Colo. App. 1983).

**Decision to order involuntary psychiatric examination of a witness** for purpose of determining competency to testify is within the sound discretion of the trial court and should only be granted where a compelling reason for it exists. Where defendant's only grounds for challenging competence of witness because of mental state pertained to credibility rather than competence,



court did not err in denying motion. *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983).

**An adjudication of insanity only raises a rebuttable presumption of incompetency.** *People v. Coca*, 39 Colo. App. 264, 564 P.2d 431 (1977).

An adjudication of insanity is sufficient to create a prima facie showing of incompetency, shifting the burden of proof of competency to the proponent of the testimony. *People v. Coca*, 39 Colo. App. 264, 564 P.2d 431 (1977).

**There need not be a formal adjudication of sanity prior to testifying.** *People v. Coca*, 39 Colo. App. 264, 564 P.2d 431 (1977).

**The mere fact that an individual has been adjudicated as a feeble-minded person does not disqualify him as a witness.** *Howard v. Hester*, 139 Colo. 255, 338 P.2d 106 (1959).

Adjudication of insanity does not conclusively render a witness incompetent. *People v. Coca*, 39 Colo. App. 264, 564 P.2d 431 (1977).

**The matter of permitting an aged person to testify rests largely in a trial court's discretion**, and its determination will not be disturbed in the absence of a clear abuse of discretion. *Howard v. Hester*, 139 Colo. 255, 338 P.2d 106 (1959); *Garrison v. People*, 158 Colo. 348, 408 P.2d 60 (1965).

**A witness's intoxication, alone, is not sufficient to determine that the witness is incompetent to testify.** There is nothing in the record that indicated the witness lacked the capacity to observe, recollect, communicate, and understand the oath to tell the truth. The witness was thoroughly cross-examined by defense counsel and the court informed the jury of the witness's intoxication status. There was no error in allowing the witness's testimony. *People v. Alley*, 232 P.3d 272 (Colo. App. 2010).

**Further, a witness's intoxication, alone, does not require the court to conduct a competency hearing.** The court has wide latitude to determine whether to admit an intoxicated witness's testimony, and it is the jury's role to determine the witness's credibility. *People v. Alley*, 232 P.3d 272 (Colo. App. 2010).

**If a witness has the capacity to observe, recollect, and communicate he is competent**, and his mental deficiency is considered only insofar as it affects the weight to be given his testimony. *Howard v. Hester*, 139 Colo. 255, 338 P.2d 106 (1959).

A person adjudged incompetent may testify so long as the trial court determines through appropriate voir dire examination and proper testimony in camera that, regardless of sanity, the witness appreciates and understands the nature and obligation of the oath and is capable of accurate recollection and narration. *People v. Coca*, 39 Colo. App. 264, 564 P.2d 431 (1977).

**When no question is raised as to competency, weight of testimony is for jury.** The plaintiffs did not examine the witness on voir

dire, nor did they object to her testimony on the grounds that she was of unsound mind. Testimony that the witness was a retarded individual and frequently told untrue stories was for impeachment purposes. No question was raised as to the admissibility. Under this state of the record the weight of the witness's testimony was for the jury alone. *Kirk v. Himes*, 170 Colo. 378, 461 P.2d 444 (1969).

**Abuse of discretion.** Where the court concluded that the witness, who had previously been adjudicated insane, was competent, without making any inquiries of the witness to determine present competency, the ruling constituted an abuse of discretion. *People v. Coca*, 39 Colo. App. 264, 564 P.2d 431 (1977).

**Sufficiency of verdict and medical report in release hearing.** The difference between release and insanity proceedings militates against viewing the jury verdict and medical report in the release hearing as sufficient in themselves to support a finding of competency to testify. *People v. Coca*, 39 Colo. App. 264, 564 P.2d 431 (1977).

**The court of appeals will not attempt to ascertain from the transcript alone whether the witness was competent at trial.** *People v. Coca*, 39 Colo. App. 264, 564 P.2d 431 (1977).

**For determination of "unsound mind" by review of transcripts**, see *People v. District Court*, 647 P.2d 1206 (Colo. 1982).

### III. INCOMPETENCY OF A CHILD.

**Law reviews.** For article, "Children as Witnesses: Competency and Rules Favoring Their Testimony", see 12 Colo. Law. 1982 (1983). For article "The Child Witness", see 22 Colo. Law. 1201 (1993). For article, "Children as Witnesses", see 31 Colo. Law. 15 (October 2002).

**There is no per se rule against conducting a child competency hearing in front of the jury, but the better practice is to excuse the jury.** The defendant was not prejudiced by holding the hearing in front of the jury. *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009).

**The provision of this section does not apply to all children under 10 years of age**, but only to those under that age who "appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly". *Victor v. Smilanich*, 54 Colo. 479, 131 P. 392 (1913).

**Child six and one-half years has been permitted to testify.** Where it appeared that a boy of six and a half years understood that he was required to tell the truth, and could be punished if he did not, that he had a fair understanding of the obligation of an oath, and of the facts which he detailed, held, that no abuse of discretion was committed in receiving his testimony. *Victor v. Smilanich*, 54 Colo. 479, 131 P. 392 (1913).

**The trial court committed no error in permitting a boy seven and one-half years of age to testify** where, after extensive examination, the court determined that the boy was competent and was capable of receiving just impressions of fact and truthfully relating the same. *Berger v. People*, 122 Colo. 367, 224 P.2d 228 (1950).

**Some eight-year-olds may testify.** Where the record shows lengthy cross-examinations of the eight-year-old witness, both during the initial voir dire and during her testimony in open court, and her testimony was clear and not obviously coached or rehearsed, the trial court did not abuse its discretion in finding that the witness was competent to testify in an indecent liberties action. *Jordan v. People*, 161 Colo. 54, 419 P.2d 656 (1966), cert. denied, 386 U.S. 992, 87 S. Ct. 1308, 18 L. Ed.2d 338 (1967).

**If a witness has the ability to observe and relate facts accurately and understand the moral obligation to tell the truth**, then he will be held competent to testify regardless of the fact that he may not know or be able to give an adequate technical, legal definition of the term "oath". *Marn v. People*, 175 Colo. 242, 486 P.2d 424 (1971).

**Competency of such children is addressed to court's discretion.** This language clearly implies that the competency of a child as a witness under the prescribed age, is a question addressed to the sound discretion of the trial court to determine. *Victor v. Smilanich*, 54 Colo. 479, 131 P. 392 (1913); *Pillod v. People*, 119 Colo. 116, 200 P.2d 919 (1948); *Wesner v. People*, 126 Colo. 400, 250 P.2d 124 (1952); *Hood v. People*, 130 Colo. 531, 277 P.2d 223 (1954); *Harris v. People*, 174 Colo. 483, 484 P.2d 1223 (1971); *People v. Lancaster*, 43 Colo. App. 328, 605 P.2d 67 (1979), aff'd, 200 Colo. 448, 615 P.2d 720 (1980); *People v. Hise*, 738 P.2d 13 (Colo. App. 1986); *People v. District Court*, 791 P.2d 682 (Colo. 1990); *People v. Vialpando*, 804 P.2d 219 (Colo. App. 1990); *People v. Seacrist*, 874 P.2d 438 (Colo. App. 1993).

**Court's determination will not be disturbed unless abused.** When, therefore, the trial court has determined this question, it will not be disturbed on review, unless it appears from the examination of the child on the voir dire, or from his testimony, that the trial court clearly abused its discretion. *Victor v. Smilanich*, 54 Colo. 479, 131 P. 392 (1913); *Holm v. People*, 72 Colo. 257, 210 P. 698 (1922); *Brasher v. People*, 81 Colo. 113, 253 P. 827 (1927); *Marn v. People*, 175 Colo. 242, 486 P.2d 424 (1971).

**Each case turns on its own facts.** The competency of a witness in any case turns upon the facts in the particular inquiry. *Hood v. People*, 130 Colo. 531, 277 P.2d 223 (1954).

**An objection to the admission or exclusion of evidence on the ground of the competency**

**of a witness must be made in the trial court.** Otherwise, it will not be considered on review. *Holm v. People*, 72 Colo. 257, 210 P. 698 (1922); *Pillod v. People*, 119 Colo. 116, 200 P.2d 920 (1948); *Harris v. People*, 174 Colo. 483, 484 P.2d 1223 (1971).

**Limited voir dire examination not prejudicial.** If, on a limited examination of a child witness by the court, the child was permitted to testify and its testimony discloses that on the whole she was capable of receiving just impressions of the facts respecting which she was examined, and that she related them truthfully, and it is further disclosed that she had an idea of the obligation of an oath in connection therewith, then it is at once apparent that the quick judgment of the trial court was correct and no prejudice to the defendant occurred by the brief voir dire examination. *Wesner v. People*, 126 Colo. 400, 250 P.2d 124 (1952).

**Declarant's testimonial incapacity due to age does not vitiate admission of declarant's assertion** under the res gestae exception to the hearsay rule. *Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980).

**Statements admitted under excited utterance exception to hearsay rule.** Even if a child's age makes him incompetent to testify, this incapacity does not vitiate the admission of his statements under the excited utterance exception to the hearsay rule. *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983).

**Inconsistencies in testimony go to weight of evidence, not victim's competency to testify.** *People v. Galloway*, 726 P.2d 249 (Colo. App. 1986).

**Child under ten years of age is competent to testify as witness** if the child is able to describe or relate in language appropriate for a child that age the events or facts about which the child is being examined. *People v. Bowers*, 801 P.2d 511 (Colo. 1990); *People v. Trujillo*, 923 P.2d 277 (Colo. App. 1996).

**Child presumed competent.** As with other witnesses, defendant has the burden of establishing that a child witness is incompetent. *People v. Gillispie*, 767 P.2d 778 (Colo. App. 1988).

**Finding that child is incompetent to testify** pursuant to this section does not automatically preclude admission of child's hearsay statements if such statements fall within exception to hearsay rule; however such finding is significant where the hearsay exception requires the child to have the ability to understand the purpose of questioning and to relate accurate information. *Oldsen v. People*, 732 P.2d 1132 (Colo. 1986).

**Finding child incompetent to testify due to child's reluctance to answer questions in courtroom setting** does not automatically impair the guarantees of reliability of child's hearsay statement and render such statement inadmissible. *People v. Bowers*, 801 P.2d 511 (Colo. 1990).



**A child is not competent to testify in a sexual assault proceeding** if he or she is unable to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined. *People v. District Court*, 776 P.2d 1083 (Colo. 1989); *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989).

**This section does not require that all of the child's testimony be in language that is appropriate to the child's age.** Where most of the child's testimony was in age-appropriate language, the court did not abuse its discretion in allowing the child to testify even though she used the phrase "sex abuser", which was not appropriate to her age. *People v. Seacrist*, 874 P.2d 438 (Colo. App. 1993).

**Purpose of adoption of subsection (1)(b)(II)** was to allow juries to assess the weight and credibility of the testimony of victims of child abuse. *People v. District Court*, 791 P.2d 682 (Colo. 1990).

**The lesser standard established in subsection (1)(b)(II) does not apply only to the sexual assault victim**, but may be used to allow any child to testify in a sexual assault case if the child's testimony satisfies the statutory require-

ments. *People v. Seacrist*, 874 P.2d 438 (Colo. App. 1993).

**A child need not be able to understand what it means to take an oath to tell the truth** and need not be able to explain what it means to tell the truth in order to be judged competent to testify under subsection (1)(b)(II). *People v. District Court*, 791 P.2d 682 (Colo. 1990).

**Questioning a child-witness about the actual events of the charged offense is not required** before a determination of his or her competency can be made. *People v. Trujillo*, 923 P.2d 277 (Colo. App. 1996).

**The manner and scope of examination at competency hearings** should be left to the sound discretion of the trial court. *People v. Trujillo*, 923 P.2d 277 (Colo. App. 1996).

**Trial court did not abuse discretion in limiting defendant's cross-examination of child-witness** at the competency hearing about the alleged acts of sexual assault or in finding her competent to testify at trial where the victim was able to relate the events or facts upon which she was examined. *People v. Trujillo*, 923 P.2d 277 (Colo. App. 1996).

**13-90-107. Who may not testify without consent.** (1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

(a) (I) Except as otherwise provided in section 14-13-310 (4), C.R.S., a husband shall not be examined for or against his wife without her consent nor a wife for or against her husband without his consent; nor during the marriage or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, a criminal action or proceeding for a crime committed by one against the other, or a criminal action or proceeding against one or both spouses when the alleged offense occurred prior to the date of the parties' marriage. However, this exception shall not attach if the otherwise privileged information is communicated after the marriage.

(II) The privilege described in this paragraph (a) does not apply to class 1, 2, or 3 felonies as described in section 18-1.3-401 (1) (a) (IV) and (1) (a) (V), C.R.S. In this instance, during the marriage or afterward, a husband shall not be examined for or against his wife as to any communications intended to be made in confidence and made by one to the other during the marriage without his consent, and a wife shall not be examined for or against her husband as to any communications intended to be made in confidence and made by one to the other without her consent.

(III) Communications between a husband and wife are not privileged pursuant to this paragraph (a) if such communications are made for the purpose of aiding the commission of a future crime or of a present continuing crime.

(IV) The burden of proving the existence of a marriage for the purposes of this paragraph (a) shall be on the party asserting the claim.

(V) Notice of the assertion of the marital privilege shall be given as soon as practicable but not less than ten days prior to assertion at any hearing.

(b) An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

(c) A clergy member, minister, priest, or rabbi shall not be examined without both his or her consent and also the consent of the person making the confidential communication

as to any confidential communication made to him or her in his or her professional capacity in the course of discipline expected by the religious body to which he or she belongs.

(d) A physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of this state or any other state shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient, but this paragraph (d) shall not apply to:

(I) A physician, surgeon, or registered professional nurse who is sued by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient;

(II) A physician, surgeon, or registered professional nurse who was in consultation with a physician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises;

(III) A review of a physician's or registered professional nurse's services by any of the following:

(A) The governing board of a hospital licensed pursuant to part 1 of article 3 of title 25, C.R.S., where said physician or registered professional nurse practices or the medical staff of such hospital if the medical staff operates pursuant to written bylaws approved by the governing board of such hospital;

(B) An organization authorized by federal or state law or contract to review physicians' or registered professional nurses' services or an organization which reviews the cost or quality of physicians' or registered professional nurses' services under a contract with the sponsor of a nongovernment group health care program;

(C) The Colorado medical board, the state board of nursing, or a person or group authorized by such board to make an investigation in its behalf;

(D) A peer review committee of a society or association of physicians or registered professional nurses whose membership includes not less than one-third of the medical doctors or doctors of osteopathy or registered professional nurses licensed to practice in this state and only if the physician or registered professional nurse whose services are the subject of review is a member of such society or association and said physician or registered professional nurse has signed a release authorizing such review;

(E) A committee, board, agency, government official, or court to which appeal may be taken from any of the organizations or groups listed in this subparagraph (III);

(IV) A physician or any health care provider who was in consultation with the physician who may have acquired any information or records relating to the services performed by the physician specified in subparagraph (III) of this paragraph (d);

(V) A registered professional nurse who is subject to any claim or the nurse's employer subject to any claim therein based on a nurse's actions, which claims are required to be defended and indemnified by any insurance company or trust obligated by contract;

(VI) A physician, surgeon, or registered professional nurse who is being examined as a witness as a result of his consultation for medical care or genetic counseling or screening pursuant to section 13-64-502 in connection with a civil action to which section 13-64-502 applies.

(e) A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure.

(f) (I) A certified public accountant shall not be examined without the consent of his or her client as to any communication made by the client to him or her in person or through the media of books of account and financial records or his or her advice, reports, or working papers given or made thereon in the course of professional employment; nor shall a secretary, stenographer, clerk, or assistant of a certified public accountant be examined without the consent of the client concerned concerning any fact, the knowledge of which he or she has acquired in such capacity.

(II) No certified public accountant in the employ of the state auditor's office shall be examined as to any communication made in the course of professional service to the legislative audit committee either in person or through the media of books of account and



financial records or advice, reports, or working papers given or made thereon; nor shall a secretary, clerk, or assistant of a certified public accountant who is in the employ of the state auditor's office be examined concerning any fact, the knowledge of which such secretary, clerk, or assistant acquired in such capacity, unless such information has been made open to public inspection by a majority vote of the members of the legislative audit committee.

(III) (A) **Subpoena powers for public entity audit and reviews.** Subparagraph (I) of this paragraph (f) shall not apply to the Colorado state board of accountancy, nor to a person or group authorized by the board to make an investigation on the board's behalf, concerning an accountant's reports, working papers, or advice to a public entity that relate to audit or review accounting activities of the certified public accountant or certified public accounting firm being investigated.

(B) For the purposes of this subparagraph (III), a "public entity" shall include a governmental agency or entity; quasi-governmental entity; nonprofit entity; or public company that is considered an "issuer", as defined in section 2 of the federal "Sarbanes-Oxley Act of 2002", 15 U.S.C. sec. 7201.

(IV) (A) **Subpoena powers for private entity audit and reviews.** Subparagraph (I) of this paragraph (f) shall not apply to the Colorado state board of accountancy, nor to a person or group authorized by the board to make an investigation on the board's behalf, concerning an accountant's reports or working papers of a private entity that is not publicly traded and relate to audit or review attest activities of the certified public accountant or certified public accounting firm being investigated. This subparagraph (IV) shall not be construed to authorize the Colorado state board of accountancy or its agent to subpoena or examine income tax returns.

(B) At the request of either the client of the certified public accountant or certified public accounting firm or the certified public accountant or certified public accounting firm subject to the subpoena pursuant to this subparagraph (IV), a second certified public accounting firm or certified public accountant with no interest in the matter may review the report or working papers for compliance with the provisions of article 2 of title 12, C.R.S. The second certified public accounting firm or certified public accountant conducting the review must be approved by the board prior to beginning its review. The approval of the second certified public accounting firm or certified public accountant shall be in good faith. The written report issued by a second certified public accounting firm or certified public accountant shall be in lieu of a review by the board. Such report shall be limited to matters directly related to the work performed by the certified public accountant or certified public accounting firm being investigated and should exclude specific references to client financial information. The party requesting that a second certified public accounting firm or certified public accountant review the reports and working papers shall pay any additional expenses related to retaining the second certified public accounting firm or certified public accountant by the party who made the request. The written report of the second certified public accounting firm or certified public accountant shall be submitted to the board. The board may use the findings of the second certified public accounting firm or certified public accountant as grounds for discipline pursuant to article 2 of title 12, C.R.S.

(V) Disclosure of information under subparagraph (III) or (IV) of this paragraph (f) shall not waive or otherwise limit the confidentiality and privilege of such information nor relieve any certified public accountant, any certified public accounting firm, the Colorado state board of accountancy, or a person or group authorized by such board of the obligation of confidentiality. Disclosure which is not in good faith of such information shall subject the board, a member thereof, or its agent to civil liability pursuant to section 12-2-103 (6), C.R.S.

(VI) Any certified public accountant or certified public accounting firm that receives a subpoena for reports or accountant's working papers related to the audit or review attest activities of the accountant or accounting firm pursuant to subparagraph (III) or (IV) of this paragraph (f) shall notify his or her client of the subpoena within three business days after the date of service of the subpoena.

(VII) Subparagraph (III) or (IV) of this paragraph (f) shall not operate as a waiver, on behalf of any third party or the certified public accountant or certified public accounting firm, of due process remedies available under the "State Administrative Procedure Act",

article 4 of title 24, C.R.S., the open records laws, article 72 of title 24, C.R.S., or any other provision of law.

(VIII) Prior to the disclosure of information pursuant to subparagraph (III) or (IV) of this paragraph (f), the certified public accountant, certified public accounting firm, or client thereof shall have the opportunity to designate reports or working papers related to the attest function under subpoena as privileged and confidential pursuant to this paragraph (f) or the open records laws, article 72 of title 24, C.R.S., in order to assure that the report or working papers shall not be disseminated or otherwise republished and shall only be reviewed pursuant to limited authority granted to the board under subparagraph (III) or (IV) of this paragraph (f).

(IX) No later than thirty days after the board of accountancy completes the investigation for which records or working papers are subpoenaed pursuant to subparagraph (III) or (IV) of this paragraph (f), the board shall return all original records, working papers, or copies thereof to the certified public accountant or certified public accounting firm.

(X) Nothing in subparagraphs (III) and (IV) of this paragraph (f) shall cause the accountant-client privilege to be waived as to customer financial and account information of depository institutions or to the regulatory examinations and other regulatory information relating to depository institutions.

(XI) For the purposes of subparagraphs (III) to (X) of this paragraph (f), "entity" shall have the same meaning as in section 7-90-102 (20), C.R.S.

(g) A licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, or a certified addiction counselor shall not be examined without the consent of the licensee's, certificate holder's, or registrant's client as to any communication made by the client to the licensee, certificate holder, or registrant or the licensee's, certificate holder's, or registrant's advice given in the course of professional employment; nor shall any secretary, stenographer, or clerk employed by a licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, or a certified addiction counselor be examined without the consent of the employer of the secretary, stenographer, or clerk concerning any fact, the knowledge of which the employee has acquired in such capacity; nor shall any person who has participated in any psychotherapy, conducted under the supervision of a person authorized by law to conduct such therapy, including group therapy sessions, be examined concerning any knowledge gained during the course of such therapy without the consent of the person to whom the testimony sought relates.

(h) A qualified interpreter, pursuant to section 13-90-202, who is called upon to testify concerning the communications he interpreted between a hearing-impaired person and another person, one of whom holds a privilege pursuant to this subsection (1), shall not be examined without the written consent of the person who holds the privilege.

(i) A confidential intermediary, as defined in section 19-1-103 (26), C.R.S., shall not be examined as to communications made to him or her in official confidence when the public interests, in the judgment of the court, would suffer by the disclosure of such communications.

(j) (I) (A) If any person or entity performs a voluntary self-evaluation, the person, any officer or employee of the entity or person involved with the voluntary self-evaluation, if a specific responsibility of such employee was the performance of or participation in the voluntary self-evaluation or the preparation of the environmental audit report, or any consultant who is hired for the purpose of performing the voluntary self-evaluation for the person or entity may not be examined as to the voluntary self-evaluation or environmental audit report without the consent of the person or entity or unless ordered to do so by any court of record, or, pursuant to section 24-4-105, C.R.S., by an administrative law judge. For the purposes of this paragraph (j), "voluntary self-evaluation" and "environmental audit report" have the meanings provided for the terms in section 13-25-126.5 (2).

(B) This paragraph (j) does not apply if the voluntary self-evaluation is subject to an exception allowing admission into evidence or discovery pursuant to the provisions of section 13-25-126.5 (3) or (4).

(II) This paragraph (j) applies to voluntary self-evaluations that are performed on or after June 1, 1994.



(k) (I) A victim's advocate shall not be examined as to any communication made to such victim's advocate by a victim of domestic violence, as defined in section 18-6-800.3 (1), C.R.S., or a victim of sexual assault, as described in sections 18-3-401 to 18-3-405.5, 18-6-301, and 18-6-302, C.R.S., in person or through the media of written records or reports without the consent of the victim.

(II) For purposes of this paragraph (k), a "victim's advocate" means a person at a battered women's shelter or rape crisis organization or a comparable community-based advocacy program for victims of domestic violence or sexual assault and does not include an advocate employed by any law enforcement agency:

(A) Whose primary function is to render advice, counsel, or assist victims of domestic or family violence or sexual assault; and

(B) Who has undergone not less than fifteen hours of training as a victim's advocate or, with respect to an advocate who assists victims of sexual assault, not less than thirty hours of training as a sexual assault victim's advocate; and

(C) Who supervises employees of the program, administers the program, or works under the direction of a supervisor of the program.

(l) (I) A parent may not be examined as to any communication made in confidence by the parent's minor child to the parent when the minor child and the parent were in the presence of an attorney representing the minor child, or in the presence of a physician who has a confidential relationship with the minor child pursuant to paragraph (d) of this subsection (1), or in the presence of a mental health professional who has a confidential relationship with the minor child pursuant to paragraph (g) of this subsection (1), or in the presence of a clergy member, minister, priest, or rabbi who has a confidential relationship with the minor child pursuant to paragraph (c) of this subsection (1). The exception may be waived by express consent to disclosure by the minor child who made the communication or by failure of the minor child to object when the contents of the communication are demanded. This exception does not relieve any physician, mental health professional, or clergy member, minister, priest, or rabbi from any statutory reporting requirements.

(II) This exception does not apply to:

(A) Any civil action or proceeding by one parent against the other or by a parent or minor child against the other;

(B) Any proceeding to commit either the minor child or parent, pursuant to title 27, C.R.S., to whom the communication was made;

(C) Any guardianship or conservatorship action to place the person or property or both under the control of another because of an alleged mental or physical condition of the minor child or the minor child's parent;

(D) Any criminal action or proceeding in which a minor's parent is charged with a crime committed against the communicating minor child, the parent's spouse, or a minor child of either the parent or the parent's spouse;

(E) Any action or proceeding for termination of the parent-child legal relationship;

(F) Any action or proceeding for voluntary relinquishment of the parent-child legal relationship; or

(G) Any action or proceeding on a petition alleging child abuse, dependency or neglect, abandonment, or non-support by a parent.

(III) For purposes of this paragraph (l):

(A) "Minor child" means any person under the age of eighteen years.

(B) "Parent" includes the legal guardian or legal custodian of a minor child as well as adoptive parents.

(m) (I) A law enforcement or firefighter peer support team member shall not be examined without the consent of the person to whom peer support services have been provided as to any communication made by the person to the peer support team member under the circumstances described in subparagraph (III) of this paragraph (m); nor shall a recipient of individual peer support services be examined as to any such communication without the recipient's consent.

(II) For purposes of this paragraph (m):

(A) "Communication" means an oral statement, written statement, note, record, report, or document, made during, or arising out of, a meeting with a peer support team member.

(B) "Law enforcement or firefighter peer support team member" means a peace officer, civilian employee, or volunteer member of a law enforcement agency or a regular or volunteer member of a fire department or other person who has been trained in peer support skills and who is officially designated by a police chief, the chief of the Colorado state patrol, a sheriff, or a fire chief as a member of a law enforcement agency's peer support team or a fire department's peer support team.

(III) The provisions of this paragraph (m) shall apply only to communications made during individual interactions conducted by a peer support team member:

(A) Acting in the person's official capacity as a law enforcement or firefighter peer support team member; and

(B) Functioning within the written peer support guidelines that are in effect for the person's respective law enforcement agency or fire department.

(IV) This paragraph (m) shall not apply in cases in which:

(A) A law enforcement or firefighter peer support team member was a witness or a party to an incident which prompted the delivery of peer support services;

(B) Information received by a peer support team member is indicative of actual or suspected child abuse, as described in section 18-6-401, C.R.S., or actual or suspected child neglect, as described in section 19-3-102, C.R.S.;

(C) Due to alcohol or other substance intoxication or abuse, as described in sections 27-81-111 and 27-82-107, C.R.S., the person receiving peer support is a clear and immediate danger to the person's self or others;

(D) There is reasonable cause to believe that the person receiving peer support has a mental illness and, due to the mental illness, is an imminent threat to himself or herself or others or is gravely disabled as defined in section 27-65-102, C.R.S.; or

(E) There is information indicative of any criminal conduct.

(2) The medical records produced for use in the review provided for in subparagraphs (III), (IV), and (V) of paragraph (d) of subsection (1) of this section shall not become public records by virtue of such use. The identity of any patient whose records are so reviewed shall not be disclosed to any person not directly involved in such review process, and procedures shall be adopted by the Colorado medical board or state board of nursing to ensure that the identity of the patient shall be concealed during the review process itself.

(3) The provisions of paragraph (d) of subsection (1) of this section shall not apply to physicians required to make reports in accordance with section 12-36-135, C.R.S. In addition, the provisions of paragraphs (d) and (g) of subsection (1) of this section shall not apply to physicians or psychologists eligible to testify concerning a criminal defendant's mental condition pursuant to section 16-8-103.6, C.R.S. Physicians and psychologists testifying concerning a criminal defendant's mental condition pursuant to section 16-8-103.6, C.R.S., do not fall under the attorney-client privilege in paragraph (b) of subsection (1) of this section.

**Source:** L. 1883: p. 290, § 3. G.S. § 3649. R.S. 08: § 7274. L. 11: p. 679, § 1. C.L. § 6563. L. 29: p. 642, § 1. CSA: C. 177, § 9. CRS 53: §153-1-7. L. 61: p. 603, § 16. C.R.S. 1963: § 154-1-7. L. 67: p. 809, § 12. L. 76: (1)(d) R&RE and (2) added, pp. 525, 526, §§ 2, 3, effective July 1. L. 81: (1)(b) amended, p. 900, § 1, effective May 26. L. 83: (1)(d) and (2) amended, p. 636, § 1, effective May 25; (1)(a) amended, p. 663, § 1, effective July 1. L. 84: (1)(g) amended, p. 1118, § 8, effective June 7. L. 87: (1)(h) added, p. 572, § 2, effective April 23; (3) added, p. 623, § 5, effective July 1. L. 88: (1)(a) and (1)(c) amended, pp. 708, 630, §§ 3, 1, effective July 1. L. 89: (1)(i) added, p. 943, § 2, effective March 27; (1)(d)(VI) added, p. 763, § 5, effective July 1. L. 93: (1)(f) amended, p. 15, § 3, effective March 2; (1)(g) amended, p. 363, § 1, effective April 12. L. 94: (1)(j) added, p. 1869, § 2, effective June 1; (1)(k) added, p. 2031, § 7, effective July 1. L. 95: (1)(k) amended, p. 948, § 4, effective July 1; (3) amended, p. 1249, § 2, effective July 1. L. 96: (1)(a)(II) amended, p. 1842, § 6, effective July 1. L. 98: (1)(g) amended, p. 1158, § 29, effective July 1; (1)(i) amended, p. 819, § 16, effective August 5. L. 99: (1)(j)(II) amended, p. 301, § 2, effective April 14. L. 2000: (1)(a)(I) amended, p. 1537, § 3, effective July 1. L. 2002: (1)(c) and (1)(l)(I) amended, pp. 1146, 1145, §§ 3, 2, effective June 3; (1)(l) added, p. 399, § 1, effective August 7; (1)(a)(II) amended, p. 1489, § 127,



effective October 1. **L. 2003:** (1)(f) amended, p. 1391, § 1, effective August 6. **L. 2004:** (1)(g) amended, p. 919, § 25, effective July 1. **L. 2005:** (1)(m) added, p. 89, § 1, effective July 1. **L. 2006:** (1)(m)(IV)(D) amended, p. 1396, § 38, effective August 7. **L. 2010:** (1)(m)(IV)(C) and (1)(m)(IV)(D) amended, (SB 10-175), ch. 188, p. 782, § 18, effective April 29; IP(1)(d), (1)(d)(III)(C), and (2) amended, (HB 10-1260), ch. 403, p. 1985, § 72, effective July 1. **L. 2011:** (1)(g) amended, (SB 11-187), ch. 285, p. 1327, § 68, effective July 1.

**Cross references:** (1) For circumstances in which the statutory privilege will not be allowed, see §§ 18-3-102 (4), 18-3-411 (5), 18-6-401 (3), 18-6-401.1, and 18-6.5-104.

(2) For the legislative declaration contained in the 2002 act amending subsection (1)(a)(II), see section 1 of chapter 318, Session Laws of Colorado 2002.

(3) For statutory provisions addressing the licensure of persons to practice law or for the special admission of counselors from other states, see article 5 of title 12; for statutory provisions addressing the licensure of persons to practice medicine, see article 36 of title 12; for statutory provisions addressing the licensure of persons to practice certified public accounting, see article 2 of title 12; for statutory provisions addressing the licensure of persons to practice psychology, social work, marriage and family therapy, and professional counseling, see article 43 of title 12; for statutory provisions addressing unlicensed psychotherapy, see article 43 of title 12 and § 22-60.5-210.

## ANNOTATION

- I. General Consideration.
- II. Spouse.
  - A. In General.
  - B. Crime by One Spouse Against the Other.
- III. Attorney.
  - A. In General.
  - B. "Crime-Fraud" Exception.
- IV. Clergy.
- V. Physician.
- VI. Public Officer.
- VII. Accountant.
- VIII. Psychiatrist.
- IX. Psychologist.
- X. Victim's Advocate.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "One Year Review of Domestic Relations", see 35 *Dicta* 36 (1958). For article, "The Physician-Patient Privilege in Colorado", see 37 *U. Colo. L. Rev.* 349 (1965). For note on privileged communications in Colorado, see 37 *U. Colo. L. Rev.* 388 (1965). For comment, "Reporter's Privilege: Pankratz v. District Court", see 58 *Den. L.J.* 681 (1981). For article, "The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client", see 59 *Den. L.J.* 75 (1981). For article, "The Authorization to Release Medical Information Form: Its Genesis and Usage", see 11 *Colo. Law.* 1179 (1982). For article, "Attorney-Client Privilege — the Colorado Law", see 12 *Colo. Law.* 766 (1983). For comment, "Colorado's Approach to Searches and Seizures in Law Offices", see 54 *U. Colo. L. Rev.* 571 (1983). For article, "Attorney Disclosure: The Model Rules in the Corporate/Securities Area",

see 12 *Colo. Law.* 1975 (1983). For article, "Incest and Ethics: Confidentiality's Severest Test", see 61 *Den. L.J.* 619 (1984). For case note, "Caldwell v. District Court: Colorado Looks at the Crime and Fraud Exception to the Attorney-Client Privilege", see 55 *U. Colo. L. Rev.* 319 (1984). For article, "Ethical Problems in Bankruptcy", see 14 *Colo. Law.* 2147 (1985). For comment, "Limiting Prosecutorial Discovery Under the Sixth Amendment Right to Effective Assistance of Counsel: *Hutchinson v. People*", see 66 *Den. U. L. Rev.* 123 (1988). For article, "A Trial Lawyer's View of Attorney's Fees Awards", see 17 *Colo. Law.* 465 (1988). For article, "Suggested Modifications to the Durable Power of Attorney Form", see 17 *Colo. Law.* 2135 (1988). For article, "Colorado's New Spousal Privilege", see 18 *Colo. Law.* 451 (1989). For article, "Divorce and Family Mediation: Must it be Confidential?", see 18 *Colo. Law.* 925 (1989). For comment, "Attorney-Client Confidences: Punishing the Innocent", see 61 *U. Colo. L. Rev.* 185 (1990). For article, "The Use of Mental Health Treatment Records to Impeach Credibility", see 23 *Colo. Law.* 839 (1994). For article, "Admissibility of Mental and Physical Health Records and Testimony", see 29 *Colo. Law.* 61 (December 2000). For article, "Beyond the Client: The Protection of the Corporate Attorney-Client Privilege", see 35 *Colo. Law.* 31 (June 2006).

**Separate classifications of persons are included under the terms of this section** and in each classification it is provided that such persons "shall not be examined" as a witness. *Weck v. District Court*, 158 *Colo.* 521, 408 P.2d 987 (1965).

**The privilege is inviolable.** The privilege created by this section for the benefit of the

persons who may seek their protection, is equally inviolable whether created by statute or constitutional provision. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Testimonial exclusionary rules and privileges contravene fundamental principle that the public has a right to every man's evidence.** *Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L.Ed.2d 186 (1980).

**Thus, testimonial exclusionary rules must be strictly construed** and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. *Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L.Ed.2d 186 (1980).

Privileges are strictly construed and the burden of proving that a communication is protected by a privilege is upon the person asserting the privilege. *People v. Agado*, 964 P.2d 565 (Colo. App. 1998).

**Applicable in criminal cases.** There is nothing in the language of this section which provides or even suggests that the privilege it affords does not apply in criminal cases. *People v. Reynolds*, 195 Colo. 386, 578 P.2d 647 (1978).

**No privilege for financial reports made to department of revenue.** There is no testimonial privilege protecting against the disclosure of financial reports made to the department of revenue comparable to the privileges for other certain confidential communications made under this section. *Losavio v. Robb*, 195 Colo. 533, 579 P.2d 1152 (1978).

**No privilege for a statement defendant made to parents following murder.** Court declines to adopt parent-child privilege. *People v. Agado*, 964 P.2d 565 (Colo. App. 1998).

**Pleading held implied waiver of privilege.** When the privilege holder pleads a physical or mental condition as the basis of a claim or as an affirmative defense, the only reasonable conclusion is that he thereby impliedly waives any claim of confidentiality respecting that same condition. The privilege holder under these circumstances has utilized his physical or mental condition as the predicate for some form of judicial relief, and his legal position as to that condition is irreconcilable with a claim of confidentiality. *Clark v. District Court*, 668 P.2d 3 (Colo. 1983); *Rohda v. Franklin Life Ins. Co.*, 689 F. Supp 1034 (D. Colo. 1988).

**Extent of waiver.** Although plaintiff had waived the patient-physician privilege in a civil action against the defendant, she was not a party in the criminal action involving said defendant and did not expressly waive her privilege or impliedly waive her privilege by injecting her mental or physical condition into that case. *Rohda v. Franklin Life Ins. Co.*, 689 F. Supp. 1034 (D. Colo. 1988).

**Choice of law.** Where it is asserted that the law of another state should govern a claim of privilege, Restatement (Second) Conflict of Laws § 139(2) provides an appropriate framework for analysis. *People v. Thompson*, 950 P.2d 608 (Colo. App. 1997).

**No "special" reason exists for applying the law of another state** merely because such other state had the most significant relationship with the communication, regardless of the interests of the forum state. *People v. Thompson*, 950 P.2d 608 (Colo. App. 1997).

**Applied in** *People v. Norwood*, 37 Colo. App. 157, 547 P.2d 273 (1975); *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980); *People v. Buhrlé*, 744 P.2d 747 (Colo. 1987); *Colo. Bd. of Nursing v. Bethesda Hosp.*, 809 P.2d 1051 (Colo. App. 1990); *People v. Bachofer*, 192 P.3d 454 (Colo. App. 2008).

## II. SPOUSE.

### A. In General.

**Section perpetuates the common-law doctrine.** Although in federal criminal prosecutions, the witness-spouse alone may invoke the marital privilege, this section perpetuates the common-law doctrine of witness disqualification in the case of non-consensual spousal testimony regardless of its content. *People v. Lucero*, 707 P.2d 1040 (Colo. App. 1985), *aff'd* in part and *rev'd* in part on other grounds, 747 P.2d 660 (Colo. 1987).

**Spousal privilege is not based on a constitutional right.** Therefore, subsection (1)(a)(II), which alters the nature of the privilege in certain cases, is constitutional. *People v. Thompson*, 950 P.2d 608 (Colo. App. 1997).

**It was not intended to be declaratory of the common law merely.** *Dill v. People*, 19 Colo. 469, 36 P. 229, 41 Am. St. R. 254 (1894); *Vasquez v. Esquibel*, 141 Colo. 5, 346 P.2d 293 (1959).

**In federal prosecutions, witness's spouse alone has privilege to refuse to testify adversely;** the witness may be neither compelled to testify nor foreclosed from testifying. *Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L.Ed.2d 186 (1980).

**The purpose of this provision is primarily the protection of the home.** To permit the prohibition to work a gross injustice to an injured wife by allowing its aid to be invoked by an outsider who has intermeddled in family affairs when the husband, as here, does not raise the question, would be to use the statute to defeat the very purpose of its enactment. *McAllister v. McAllister*, 72 Colo. 28, 209 P. 788 (1922).

**And the sanctity and tranquility of the marital relationship.** The reason for the rule at common law disqualifying the wife is to protect



the sanctity and tranquility of the marital relationship. *Archina v. People*, 135 Colo. 8, 307 P.2d 1083 (1957); *Petro-Lewis Corp. v. District Court*, 727 P.2d 41 (Colo. 1986).

**Thus, ostensible wives are competent to testify.** *Archina v. People*, 135 Colo. 8, 307 P.2d 1083 (1957).

**For living together, whatever their intentions for the future, is not enough;** in order to invoke this section, there must be a valid contract of marriage in existence at the time the testimony is offered. *Archina v. People*, 135 Colo. 8, 307 P.2d 1083 (1957); *Lewis v. People*, 174 Colo. 334, 483 P.2d 949 (1971).

Where witness' uncontradicted testimony showed witness' and defendant's mutual consent to be married and their open assumption of the marital relationship, such evidence establishes the existence of a common-law marriage. As such, the marital privilege could be asserted and the trial court erred by admitting testimony which should have been excluded on the basis of the defendant's assertion of the privilege. *People v. Lucero*, 707 P.2d 1040 (Colo. App. 1985).

A decree granting dissolution of a marriage is final when entered and dissolves the marital status of the parties even if the order is not treated as final for the purpose of appellate review. *People v. Inman*, 950 P.2d 640 (Colo. App. 1997).

**And this section applies only to matters occurring during the time the parties were married.** There is no privilege for statements made by an intended spouse before the marriage, nor for statements made by a former spouse after dissolution of the marriage. Therefore, defendant could not object to testimony by his ex-wife concerning his words and deeds before they were married or after the entry of the decree dissolving their marriage, notwithstanding that final orders were not issued immediately. *People v. Inman*, 950 P.2d 640 (Colo. App. 1997).

**This section contemplates the existence of a valid marriage.** Where both parties to a purported common-law marriage admit prior marriages which to their knowledge remain undissolved, such evidence is competent to support the trial court's finding that no marriage exists for the purpose of invoking the privilege. *People v. Maes*, 43 Colo. App. 426, 609 P.2d 1105 (1979).

**This section contains the only limitation on the ground of public policy.** This section providing that the wife shall not be examined for or against her husband without his consent and vice versa, contains the only limitation on the ground of public policy, and is controlling on the subject, and not the common law. *White v. Bower*, 56 Colo. 575, 136 P. 1053 (1913).

**It prohibits merely the examination of either husband or wife** as to any communication made by one to the other during the marriage. To

extend this prohibition to the exclusion of communications themselves, is to give it a liberal construction, and thus prevent the ascertainment of the truth as to a material issue in the case. *Keeler v. Russum*, 68 Colo. 196, 189 P. 255 (1920).

**This section should be so construed as to work no injustice,** if susceptible of such construction. *Keeler v. Russum*, 68 Colo. 196, 189 P. 255 (1920).

**The marital communications privilege is personal to the spouses and may not be invoked by a third party.** *W. Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570 (Colo. App. 2006).

**The authorities are to the effect that this section should be strictly construed,** because the tendency of the privilege is to prevent the full disclosure of the truth. *Keeler v. Russum*, 68 Colo. 196, 189 P. 255 (1920); *Petro-Lewis Corp. v. District Court*, 727 P.2d 41 (Colo. 1986).

**It is error to compel both husband and wife to testify, against their objection,** in a cause seeking to impeach a conveyance by one to the other, as fraudulent against creditors. *Jasper v. Bicknell*, 68 Colo. 308, 191 P. 115 (1920).

**Once husband testifies, wife is subject to questioning.** In an action against husband and wife for the possession of real estate, the husband by answer, disclaimed any interest in the property. On the trial the court refused plaintiff permission to cross-examine the wife under the statute, without the consent of her husband, because of this section. This was error. *Horn v. Hurwitz*, 76 Colo. 389, 231 P. 1116 (1925).

**Unauthorized disclosure by the husband does not waive the wife's privilege.** Objecting to a copy of the letter is not a waiver of the wife's privilege. *Dalton v. People*, 68 Colo. 44, 189 P. 37 (1920).

**Defendant's remarks to wife in courtroom held privileged.** A municipal judge had no authority, without the consent of the defendant or his wife, to order him to reveal what he had told her. *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

Where, although others were in the courtroom, there was no evidence that anyone else overheard the content of the defendant's comment to his wife, absent such evidence, which might have shown waiver of the privilege, the circumstances justified a reasonable expectation of privacy in this husband-wife communication. *Thrap v. People*, 192 Colo. 341, 558 P.2d 576 (1977).

**Marital privilege extends to in-court testimony,** as well as depositions, interrogatories, requests for admissions, and other forms of testimonial discovery. *Petro-Lewis Corp. v. District Court*, 727 P.2d 41 (Colo. 1986).

**Discovery relating to party's liability held not privileged despite consequent unfavorable disclosure of facts relating to spouse's**

**liability.** Where discovery requests do not relate solely to a spouse's liability, a party may be compelled to comply with all such proper requests for discovery which pertain to that party's liability, even though some responses may be adverse to the party's spouse. *Petro-Lewis Corp. v. District Court*, 727 P.2d 41 (Colo. 1986).

**Discovery must be determined on an ad hoc basis.** Where the marital privilege is in issue, discovery must be determined on an ad hoc basis. *Petro-Lewis Corp. v. District Court*, 727 P.2d 41 (Colo. 1986).

**Marital privilege does not extend to communications made in the presence of a third party.** *South Carolina Ins. Co. v. Fisher*, 698 P.2d 1369 (Colo. App. 1984).

**Spousal privilege does not extend to communications made for the purpose of aiding the commission of a future crime or continuing a present continuing crime.** Statements made during an ongoing pattern of criminal activity are not subject to spousal privilege. *People v. James*, 40 P.3d 36 (Colo. App. 2001).

**It seems clear that this section is not applicable to a mental health proceeding,** and it cannot be said that the wife was testifying against the husband as prohibited by that section. An action in the county court to inquire into the mental health of a party can best be described as a special statutory proceeding, and is neither a criminal case nor a civil action. *Sabon v. People*, 142 Colo. 323, 350 P.2d 576 (1960).

**A husband may testify without the consent of the wife in a civil action by one against the other.** *Boyd v. McElroy*, 105 Colo. 527, 100 P.2d 624 (1940).

**State agent's testimony on interspousal conversation not violative of section.** Testimony given by an agent of the state who lawfully monitored a conversation between husband and wife in the visiting room of a jail does not violate this section. *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

**For history of marital communications privilege and rule of spousal disqualification as a witness,** see *Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L.Ed.2d 186 (1980).

**Mother's invocation of privilege prohibited non-custodial father from calling mother's current spouse as a witness during a custody modification hearing in regard to the mother's care and treatment of her child.** *In re Bozarth*, 779 P.2d 1346 (Colo. 1989).

**Permitting commentary on a defendant's invocation of the privilege is no less damaging to the privilege than allowing remarks alluding to an accused's invocation of the fifth amendment.** *People v. Harris*, 729 P.2d 1000 (Colo. App. 1986), *aff'd*, 762 P.2d 651 (Colo. 1988), *cert. denied*, 488 U.S. 985, 109 S. Ct. 541, 103 L.Ed.2d 804 (1988).

**The marital privilege may be waived by the acts or omissions of trial counsel.** By accusing the defendant's wife of the murders in his opening statement, defense counsel invited a response which necessarily could come only from wife. *Cummings v. People*, 785 P.2d 920 (Colo. 1990).

**Scope of privilege** is not limited to confidential communications. *Cummings v. People*, 785 P.2d 920 (Colo. 1990).

**Where the witness-spouse has failed to claim a marital privilege and make a timely objection to his or her testimony,** the witness-spouse has waived the privilege, and on appeal, the defendant spouse may not successfully contest the issue pursuant to subsection (1)(a)(II). *People v. Wickham*, 53 P.3d 691 (Colo. App. 2001).

**Counsel for the witness-spouse waived the privilege for her by accepting immunity and allowing her to testify** where the defendant was charged with a class one felony and only the witness-spouse was entitled to raise the marital privilege. *People v. Wickham*, 53 P.3d 691 (Colo. App. 2001).

**Spousal disqualification and spousal testimonial privileges were waived by a husband in a personal injury action** where the husband called the wife as a witness to testify as to the husband's medical condition and the legitimacy and severity of the husband's injuries. As a result, the wife could be cross-examined about the fraudulent nature of the husband's personal injury claim against his employer. *Burlington Northern R.R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990).

**Failure by a husband to assert claim of a spousal testimonial privilege during the deposition of the husband's wife in a personal injury case clearly indicates a waiver of confidentiality** and the spouse may be questioned at trial about the fraudulent nature of the husband's personal injury claim. *Burlington Northern R.R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990).

**However, where the crime at issue is a class 3 or more serious felony, under subsection (1)(a)(II) it is the witness-spouse who holds the privilege, not the defendant-spouse.** *People v. Delgado*, 890 P.2d 141 (Colo. App. 1994); *People v. Thompson*, 950 P.2d 608 (Colo. App. 1997).

**Portions of written communications between the defendant and his wife were for the purpose of aiding the crime of witness tampering and were held to be admissible and not confidential.** *People v. Fox*, 862 P.2d 1000 (Colo. App. 1993).

#### B. Crime by One Spouse Against the Other.

**This paragraph does not limit the right of the husband or wife to testify to criminal prosecutions for crimes involving personal**



**violence**, either actual or constructive; the language is unqualified that the husband or wife may testify against the other "in a criminal action or proceeding for a crime committed by one against the other". This language is broad enough to include any crime, whether of violence to the person, or other crime committed by the husband or wife directly affecting the other. *Dill v. People*, 19 Colo. 469, 36 P. 229 (1894).

**"Crime" includes private wrong in public crime.** The word crime in that clause of this section which permits the husband or wife to testify against the other in a "criminal action or proceeding for a crime committed by one against the other", means the private wrong or injury included in such public crime. The word must have such meaning, or the statute is meaningless. *Dill v. People*, 19 Colo. 469, 36 P. 229 (1894); *Wilkinson v. People*, 86 Colo. 406, 282 P. 257 (1929).

**Exception applies for crime committed against spouse and companion.** Where the defendant is prosecuted for crimes committed in one criminal episode against his wife and a companion, the statutory exception to the spousal exclusionary rule applies, whether the charges are tried separately or in one proceeding. *People v. McGregor*, 635 P.2d 912 (Colo. App. 1981).

**Spouse may testify as to personal injury inflicted by the other spouse.** The rule as to privileged communications does not preclude evidence by one spouse as to a personal injury or violence inflicted on him or her by the other, or as to ill-treatment to which he or she was subjected by the other spouse. *Sabon v. People*, 142 Colo. 323, 350 P.2d 576 (1960).

**Perjury in divorce proceeding is a crime against spouse.** Where a husband is indicted for wilful and corrupt perjury in making a false affidavit in a suit for divorce against his wife, the wife is a competent witness for the state on the trial of such indictment. *Dill v. People*, 19 Colo. 469, 36 P. 229 (1894).

**As is bigamy.** The wife is a competent witness against the husband in a prosecution for bigamy. The offense is a crime against the wife within the meaning of this section. *Schell v. People*, 65 Colo. 116, 173 P. 1141 (1918).

**And rape.** The innocent wife is not precluded by this section from testifying against her husband who stands charged with the crime of rape. She is a competent witness with or without his consent, and her evidence is not within the prohibition of the statute. *Wilkinson v. People*, 86 Colo. 406, 282 P. 257 (1929).

**The murder by one spouse of the other's child is a crime committed by one spouse against the other** and the reason for the rule and protection of this section is annihilated. *O'Loughlin v. People*, 90 Colo. 368, 10 P.2d 543 (1932); *Archina v. People*, 135 Colo. 8, 307 P.2d

1083 (1957); *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965).

**As is the rape of a stepchild.** The supreme court has held the spouse to be a competent witness in prosecutions for murder of a stepchild, rape of a stepchild. A prosecution for taking indecent liberties is no less a crime against the wife and the wife was a competent witness to testify against her husband. *Jordan v. People*, 161 Colo. 54, 419 P.2d 656 (1966), cert. denied, 386 U.S. 992, 87 S. Ct. 1308, 18 L.Ed.2d 338 (1967).

**As is child abuse.** The marital privilege cannot be invoked to exclude a spouse's testimony in a case involving child abuse. *People v. Corbett*, 656 P.2d 687 (Colo. 1983).

**Applied** in *People v. Unrein*, 677 P.2d 951 (Colo. App. 1983).

### III. ATTORNEY.

#### A. In General.

**Attorney-client privilege originated in common law**, and it is now codified in most jurisdictions. *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975).

**The purpose of this paragraph is to protect the client against publicity** as to admissions or statements made by him to his attorney while the relation of client and attorney exists between them, and is undoubtedly for the benefit of the client. *In re Shapter's Estate*, 35 Colo. 578, 85 P. 688 (1906); *Sholine v. Harris*, 22 Colo. App. 63, 123 P. 330 (1912).

**Client protected by not permitting his communications to be disclosed without his consent.** The object of this section is to extend to the client the privilege that his communication shall not be disclosed without his consent. *Fearnley v. Fearnley*, 44 Colo. 417, 98 P. 819 (1908).

**This paragraph protects client and not attorney.** Paragraph (b) is intended for the benefit of the client, not the attorney. *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894); *Mauro v. Tracy*, 152 Colo. 106, 380 P.2d 570 (1963).

The legislative intent behind paragraph (b) was to protect the client and not the attorney. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L.Ed.2d 167 (1976).

**Ensures candid and open attorney-client discussion.** The purpose of the attorney-client privilege is to secure the orderly administration of justice by insuring candid and open discussion by the client to the attorney without fear of disclosure. *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975).

The purpose of the privilege is to encourage full and frank communications between attorneys and their clients which promote the admin-

istration of justice and preserve the dignity of the individual. *People v. Swearingen*, 649 P.2d 1102 (Colo. 1982).

**Attorney-client privilege is personal with client.** *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975).

The attorney-client privilege exists for the personal benefit and protection of the client. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 96 S. Ct. 3187, 50 L.Ed.2d 751 (1977); *Lanari v. People*, 827 P.2d 495 (Colo. 1992).

**Hence, the privilege may be waived only by the client.** *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975); *Lanari v. People*, 827 P.2d 495 (Colo. 1992).

The attorney-client privilege may be expressly or implicitly waived, but only by the client. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 96 S. Ct. 3187, 50 L. Ed. 2d 751 (1977).

**Attorney-client relationship must exist for privilege to apply.** Documents made for an insurance company acting as the agent of an attorney are also covered by the privilege, but the attorney-client relationship between the insurance company and its lawyer must exist at the time the documents are created for the privilege to apply. *Kay Labs., Inc. v. District Court*, 653 P.2d 721 (Colo. 1982).

**Privilege is available to corporations.** The privilege exists "without regard to the noncorporate or corporate character of the client", and, therefore, the attorney-client privilege is available to corporations. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 96 S. Ct. 3187, 50 L.Ed.2d 751 (1977).

**Rule of protection ceases if client testifies as to admissions.** When the client sees fit to voluntarily appear in a court of justice and testify under oath as to statements or admissions, there is no longer any reason for the application of the rule, and we believe it is the universal practice, when such a situation exists, to permit the attorney to be examined fully in relation thereto. *Sholine v. Harris*, 22 Colo. App. 63, 123 P. 330 (1912).

**This is because this section gives a personal privilege, and if the client makes the disclosure himself, it ceases to be a secret.** The defendant testified to what transpired between her husband, the attorney, and herself. By so doing she made it public, and thereby waived her right to object to the attorney giving his own account of the matter. *Fearnley v. Fearnley*, 44 Colo. 417, 98 P. 819 (1908); *Mauro v. Tracy*, 152 Colo. 106, 380 P.2d 570 (1963).

**The attorney may thereafter be examined in regard thereto.** *Fearnley v. Fearnley*, 44 Colo. 417, 98 P. 819 (1908).

**As defendant put in issue what advice he did or did not receive from counsel, he**

**waived the attorney-client privilege** with respect to his discussions with counsel on these topics. *People v. Sickich*, 935 P.2d 70 (Colo. App. 1996).

**The seal of silence is not removed by breach of professional relations.** The general rule undoubtedly is that a breach of professional relations between attorney and client, whatever may be the cause, does not of itself remove the seal of silence from the lips of the attorney in respect to matters received by him in confidence from his client. *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894).

**The attorney-client privilege and the work-product exemption are distinct but related theories,** arising out of similar policy interests. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 96 S. Ct. 3187, 50 L.Ed.2d 751 (1977).

Generally, the attorney-client privilege protects communications between the attorney and the client, and the promotion of such confidences is said to exist for the benefit of the client. On the other hand, the work-product exemption generally applies to "documents and tangible things . . . prepared in anticipation of litigation or for trial", and its goal is to ensure the privacy of the attorney from opposing parties and counsel. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 96 S. Ct. 3187, 50 L.Ed.2d 751 (1977); *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

**Attorney-client privilege not absolute.** Neither the attorney-client privilege nor the work-product exemption is absolute. The social policies underlying each doctrine may sometimes conflict with other prevailing public policies and, in such circumstances, the attorney-client privilege and the work-product doctrine must give way. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982); *People v. Salazar*, 835 P.2d 592 (Colo. App. 1992).

Neither the attorney-client privilege nor the work-product doctrine creates an absolute immunity for statements made to attorneys or to their agents. *Kay Labs., Inc. v. District Court*, 653 P.2d 721 (Colo. 1982).

There are recognized exceptions to the privilege, and the privilege may be waived in certain circumstances. The exceptions, however, are simply exceptions. To drive the privilege away, there must be something to give color to the charge; there must be prima facie evidence that it has some foundation in fact. The rule is that attorney-client communications are privileged and protected from discovery by opposing parties. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**Courts have found implied waiver of the attorney-client privilege when** a defendant places the allegedly privileged communication



at issue in the litigation, because any other rule would enable the client to use as a sword the protection that is awarded him or her as a shield. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**Implied waiver may occur when the defendant raises a claim of ineffective assistance of counsel** as to any communications relevant to that claim. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

Implied waiver in these circumstances is comparable to a situation where the trial court gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**The trial court must enter appropriate orders clearly delineating the contours of the limited waiver before the privilege holder discloses communications** that would be privileged attorney-client communications but for the privilege holder's assertion of an ineffective assistance of counsel claim. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**The court must impose a waiver no broader than needed to ensure the fairness of the proceedings** before it. Rather than endorsing a blanket waiver, courts have adopted a three-pronged test for implied waiver of the attorney-client privilege that asks whether: (1) Assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his or her defense. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**Different types of ineffective assistance of counsel claims would raise very different implied waivers of the attorney-client privilege**, and the documents that would be relevant to the claims would be very different as well. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**In camera review is appropriate when a party opposing assertion of the attorney-client privilege makes some showing that an exception to the attorney-client privilege applies** or that the privilege has been waived either explicitly or impliedly. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**Before engaging in an in camera review of an attorney's file, the judge should require a showing of a factual basis adequate to support a good faith belief** by a reasonable person that in camera review of the materials may reveal evidence to establish the claim that the attorney-client privilege does not protect all of the documents in the file. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**A trial court must focus on the facts and circumstances of each case to determine the scope of the implied waiver.** Before granting a request for in camera inspection of an attorney's case file, the trial court must determine (1) as precisely as possible, the information sought to be discovered, (2) whether the information is relevant to a matter at issue, (3) whether the information could be obtained by any other means, (4) whether the information is privileged, (5) if it is privileged, whether the privilege has been waived, and (6) if it is privileged, but has been waived, either explicitly or impliedly, the scope of the waiver. By using this analytical framework, a trial court can determine whether the moving party has shown a reasonable good faith belief that in camera inspection will reveal that the documents sought fall within an exception to the attorney-client privilege or that the defendant waived the privilege. *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**By entering a plea agreement**, defendant does not waive his or her attorney-client privilege. *People v. Trujillo*, 144 P.3d 539 (Colo. 2006).

**Agreeing to provide truthful testimony** does not effect a waiver of attorney-client privilege. *People v. Trujillo*, 144 P.3d 539 (Colo. 2006).

**Informational memo to insurer's general counsel** prepared by outside counsel acting as a claims investigator not exempt from discovery under attorney-client privilege or work product doctrine. *Nat. Farmers Union Prop. & Cas. v. District Court*, 718 P.2d 1044 (Colo. 1986).

Where a lawyer is acting in an investigative capacity and not as a legal counselor with reference to whether an insurance claim should be paid, then neither the privilege created in this section nor the work product privilege protects communications from a lawyer to an insurance carrier. *Munoz v. State Farm Mut. Auto. Ins. Co.*, 968 P.2d 126 (Colo. App. 1998).

**Client waives privilege when she orders production of letters to attorney.** When plaintiff took the witness stand and asked that her letters to her alleged attorney be produced in order that she might refresh her memory from them, she impliedly gave her consent to their introduction and waived the privilege, if any there were. *Hill v. Hill*, 106 Colo. 492, 107 P.2d 597 (1940).

**Trial court properly admitted a letter containing defendant's inculpatory statements.** In authorizing his attorney to deliver the letter to the victim's family, the defendant waived attorney-client privilege and the letter was properly admitted as evidence. *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

**Disclosing privileged communications to a third party.** Statements made to opposing counsel regarding the underlying crime charged should not be construed as a waiver of attorney-

client privilege, merely because the subject matter of the statements may also have been discussed in the privileged communications. *People v. Trujillo*, 144 P.3d 539 (Colo. 2006).

**Judge may warn client that his testimony may waive privilege.** Where the record reflects that the trial judge granted the defendant an opportunity to consider that his testimony as to his attorney's incompetence would waive the attorney-client privilege, and defendant elected to remain silent after advice of his present lawyer, the trial judge correctly pinpointed the issue without coercing a decision, because had the appellant testified as to the alleged incompetence of his counsel, it would have been proper for his counsel to testify as to his version of the event or transaction that led to that all-too-frequent charge of incompetence. *Morse v. People*, 180 Colo. 49, 501 P.2d 1328 (1972).

**Determination of whether an alleged inadvertent disclosure is considered a waiver of the privilege, during the course of judicial discovery, relies on several factors:** (1) The extent to which reasonable precautions were taken to prevent the disclosure of privileged information; (2) the number of inadvertent disclosures made in relation to the total number of documents produced; (3) the extent to which the disclosure, albeit inadvertent, has, nevertheless, caused such a lack of confidentiality that no meaningful confidentiality can be restored; (4) the extent to which the disclosing party has sought remedial measures in a timely fashion; and (5) considerations of fairness to both parties under the circumstances. *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997); *In re Amich*, 192 P.3d 422 (Colo. App. 2007).

**Attorney may defend his ethics and conduct.** It would be a strange rule which would prevent an attorney whose ethics and professional conduct are questioned from filing an affidavit in which his position in the matter is set forth. *Browning v. Potter*, 129 Colo. 448, 271 P.2d 418 (1954).

**Where both client and law firm are defendants in same action, trial court is within its discretion to protect client's privileged information by bifurcating trial.** The trial court, after finding that crime-fraud exception did not apply, may order a bifurcated trial so as not to allow the plaintiff to use privileged information proffered by the law firm in its own defense against the client. *Colo. Coffee Bean v. Peaberry Coffee*, 251 P.3d 9 (Colo. App. 2010).

**By testifying to alleged incompetence of his trial counsel, defendant waives attorney-client privilege.** Further, if the defendant testifies as to the incompetence of his trial counsel, it would be proper for the trial counsel to testify as to his version of the events and transactions which led to the charge of incompetence. *People v. Mullins*, 188 Colo. 29, 532 P.2d 736 (1975).

**This paragraph should be fairly construed and applied.** When a party invokes the protection of paragraph (b), it should not be unduly extended or restricted, but should be fairly construed and applied according to the plain import of its terms so as to effectuate its intent and purpose. *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894).

**Privileged communications made between defendant and his attorneys remain privileged after defendant's death.** Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime. *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001).

**It does not apply after client's death.** While a client is living an attorney could not testify as to privileged communication without his consent, the rule is otherwise after his death in regard to matters in dispute arising in probate between devisees and heirs. *In re Shapter's Estate*, 35 Colo. 578, 85 P. 688 (1906).

**Testamentary exception allowing attorney who drafted the will of a deceased client to disclose attorney-client communications concerning the will and transactions leading to its execution in a suit between the testator's heirs, devisees, or other parties who claim by succession from the testator does not apply in tort case brought against testator by his heir.** *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001).

**Communications made to an attorney for the purpose of being conveyed by him to others** are stripped of the idea of a confidential disclosure, and, therefore, are not privileged. *Hill v. Hill*, 106 Colo. 492, 107 P.2d 597 (1940); *South Carolina Ins. Co. v. Fisher*, 698 P.2d 1369 (Colo. App. 1984).

**An attorney is a competent witness in behalf of his client** in the very cause which he prosecutes or defends. *Sholine v. Harris*, 22 Colo. App. 63, 123 P. 330 (1912).

**In a lunacy inquisition** an attorney who has had charge of defendant's legal business may testify as to his inability to properly manage his affairs. Such testimony does not violate this section. *Hawkyard v. People*, 115 Colo. 35, 169 P.2d 178 (1946).

**Client's perjury not grounds for attorney's breach of confidences.** An attorney may not breach his duty of maintaining his client's confidences even when he knows his client has previously perjured himself. *People v. Schultheis*, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

**Court may not compel attorney's disclosure.** The trial court may explore the adequacy of trial counsel's representations regarding his



grounds for withdrawal, but in the course of this inquiry, the court may not compel the attorney to disclose any confidential communications. *People v. Schultheis*, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

**In determining whether or not an attorney should be required or permitted to testify** to a conversation between himself and another person without the consent of the latter, the test is: Had such person at the time of the conversation employed the attorney in his professional capacity in respect to the subject matter of the conversation? If yes, the testimony would not be admissible; otherwise, it would be. *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894).

**Privilege is established by client seeking professional advice from lawyer.** *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975).

**Employment is established if consultation is had by person seeking professional advice.** If a person, in respect to his business affairs or troubles of any kind, consults with an attorney in his professional capacity with the view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established; and the communication made by the client or advice given by the attorney under such circumstances is privileged. *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894).

**Even if it is the person's preliminary statement of his case.** An attorney is employed — that is, he is engaged in his professional capacity as a lawyer or counselor — when he is listening to his client's preliminary statement of his case, or when he is giving advice thereon, just as truly as when he is drawing his client's pleadings, or advocating his client's cause in open court. It is the consultation between attorney and client which is privileged, and which must ever remain so, even though the attorney, after hearing the preliminary statement, should decline to be retained further in the cause, or the client, after hearing the attorney's advice, should decline to further employ him. *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894).

**A communication said to be within the privilege must relate to subject matter of the employment.** *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975).

**Communications which pertain only to attorney's employment probably would not be privileged.** *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975).

**Privilege extends only to confidential matters communicated by or to client** in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations. *Losavio v. District Court*, 188 Colo. 127, 533

P.2d 32 (1975); *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

Where attorney testified as to existence of a written stipulation the contents of which were known by third parties, the attorney did not testify as to confidential communications. *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

The privilege applies only to statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential. *Lanari v. People*, 827 P.2d 495 (Colo. 1992); *People in Interest of E.H.*, 837 P.2d 284 (Colo. App. 1992).

Where the evidence to be obtained from prior counsel was not of a confidential nature, the attorney-client privilege did not protect its disclosure. *People v. Williamson*, 839 P.2d 519 (Colo. App. 1992).

**Just because report is made upon advice of counsel does not make it privileged.** The practice of making a hospital incident report may have resulted from the advice of counsel, but it is plain that these incident reports were not prepared for the attorney. They were prepared for certain administrative officials of the hospital and they were available to the hospital's attorney. To entitle the party to the protection accorded to privileged communications, the communications must have been made to the attorney acting in the character of legal advisor, and made by the client for the purpose of professional advice or aid upon the subject of his rights and liabilities. *Bernardi v. Cmty. Hosp. Ass'n*, 166 Colo. 280, 443 P.2d 708 (1968).

**Applicability of privilege to physical evidence.** Protection for confidential communications does not apply to physical evidence unless the evidence is created in the course of the lawyer-client consultation. *People v. Swearingen*, 649 P.2d 1102 (Colo. 1982).

**Privilege before grand jury decided by trial court.** An attorney-witness must, except in the most exceptional of circumstances, honor a properly issued subpoena by appearing before the grand jury. It is then for the trial court to determine whether a specific interrogatory posed by the grand jury or the district attorney calls for an answer which falls within or without the privilege; or, whether the information sought to be elicited is so inextricably intertwined with confidential communications that, if untangled, that which is not within the privilege would be meaningless without that which is privileged. In the latter event the privilege should also be respected. *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975).

**Sunshine act impact.** The sunshine act cannot and does not repeal by implication the statute concerning the attorney-client evidentiary privilege. Thus the provision concerning executive sessions involving "attorney-client communications" in the laws of the regents is upheld. *Associated Students of Univ. of Colo. v. Regents*

of Univ. of Colo., 189 Colo. 482, 543 P.2d 59 (1975).

**Applicability to attorney's employees.** Paragraph (b) can only be reasonably interpreted as extending privilege to an attorney's employees if the attorney is also so privileged. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L.Ed.2d 167 (1976); *Sequa v. Lititech, Inc.*, 807 F. Supp. 653 (D. Colo. 1992).

The last clause in paragraph (b) concerning employees refers to cases where the lawyer himself is unable to testify because of the attorney-client privilege. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L.Ed.2d 167 (1976).

Once an attorney can no longer claim privilege, he likewise can no longer prevent his employees from testifying. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L.Ed.2d 167 (1976).

**Determination of whether an attorney-client privilege exists between a governmental entity's legal counsel and the governmental entity's independent contractor is based on a four-part test.** (1) The information-giver must be an employee, agent, or independent contractor with a significant relationship not only to the governmental entity but also to the transaction that is the subject of the governmental entity's need for legal services. If the first requirement is satisfied, the party seeking to exercise the privilege must also show: (2) The communication was made for the purpose of seeking or providing legal assistance; (3) the subject matter of the communication was within the scope of the duties provided to the entity by its employee, agent, or independent contractor; and, (4) the communication was treated as confidential and disseminated only to those persons with a specific need to know its contents. *Alliance Constr. Solutions, Inc. v. Dept. of Corr.*, 54 P.3d 861 (Colo. 2002).

**Privilege does not encompass handwriting expert's testimony** since it was based on his observations derived from sources other than the client's confidential communications. *People v. Perez*, 701 P.2d 104 (Colo. App. 1985), rev'd on other grounds, 745 P.2d 650 (Colo. 1987).

**Attorney-client privilege relates to communications made by insured to his insurance company** where the insurance company is bound by the terms of the insurance contract to represent him. *Bellmann v. District Court*, 187 Colo. 350, 531 P.2d 632 (1975).

**Colorado recognizes the "co-defendant" or "joint clients" application of the attorney-client privilege.** Matters learned of during a meeting with a co-defendant and a joint attorney concerning an issue of common interest or joint defense are subject to the attorney-client privilege. *Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000).

**Burden of establishing a waiver of the attorney-client privilege** is on the party seeking to overcome the privilege. *Miller v. District Court*, 737 P.2d 834 (Colo. 1987); *Mtn. States Tel. & Tel. Co. v. DiFede*, 780 P.2d 533 (Colo. 1989); *People v. Sickich*, 935 P.2d 70 (Colo. App. 1996); *People v. Madera*, 112 P.3d 688 (Colo. 2005).

**Evaluation of mother's relationship with her children not privileged under attorney-client privilege** since mother requested court to appoint the psychologist and since the psychologist was appointed and hired under circumstances which prevented the creation of any attorney-client privilege. *People in Interest of O.J.S.*, 844 P.2d 1230 (Colo. App. 1992).

**Burden of proving that a communication is protected** by the attorney-client privilege is upon the person asserting the privilege. *People v. Salazar*, 835 P.2d 592 (Colo. App. 1992).

**By placing in issue a confidential communication going directly to the claim or defense**, a party impliedly waives the attorney-client privilege with respect to that communication. *Mtn. States Tel. & Tel. v. DiFede*, 780 P.2d 533 (Colo. 1989).

**The defendant impliedly waived the attorney-client privilege** with respect to information obtained by the prosecution during an interview with a psychiatrist because defendant listed the psychiatrist as a potential witness. *Lanari v. People*, 827 P.2d 495 (Colo. 1992).

**Defendant's assertion of a mental status defense** does not indicate an implied waiver of the attorney-client privilege. *Miller v. District Court*, 737 P.2d 834 (Colo. 1987).

**Statements made initially in confidence to an attorney lose the shield of the attorney-client privilege** if the statements are subsequently disclosed to third parties. *Lanari v. People*, 827 P.2d 495 (Colo. 1992).

**Communications made at joint meetings with defendant, his wife, and counsel, were not privileged, however**, suicide letters which disclose communications made at joint meetings do not waive all other communications which would have been privileged absent the suicide letters and the statements made therein; absent proof of another basis to pierce the protection of the attorney-client privilege, all other communications between defendant and his counsel remain privileged. *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001).

**Testimony by attorney concerning amounts received from client is not within privilege** where the nature of the representation is known to all parties and payment of fees does not necessarily reflect the subject matter of a previously undisclosed, protected communication. *In re Schneider*, 831 P.2d 919 (Colo. App. 1992).

**Once the privilege has been waived in one proceeding**, it cannot be reasserted with respect



to the same communications in a different proceeding. *People in Interest of E.H.*, 837 P.2d 284 (Colo. App. 1992).

**An attorney's consent to the interview of his former legal secretary is required only when privileged information is sought.** *Sequa v. Lititech, Inc.*, 807 F. Supp. 653 (D. Colo. 1992).

**A plain reading of this section and § 16-8-103.6** is that the attorney-client and the physician-patient privileges do not apply to communications made to physicians or psychologists who are eligible to testify concerning a defendant's mental condition once the defendant enters a mental condition plea or defense. *Gray v. District Court*, 884 P.2d 286 (Colo. 1994).

A defendant who places his or her mental condition at issue waives the attorney-client and the physician-patient privileges. The prosecution may use the testimony of a physician retained by the defense even though the defense does not intend to use the physician at trial. In addition, the prosecution may use pre-offense or post-offense information concerning the defendant's mental condition. *Gray v. District Court*, 884 P.2d 286 (Colo. 1994).

**There is no piercing of attorney-client privilege when the application of the privilege results in manifest injustice.** *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001).

**Guardian ad litem (GAL) may testify without the consent of the child regarding the child's communications to the GAL.** The GAL does not have an attorney-client relationship with a child who is the subject of a dependency and neglect proceeding, and the evidentiary privilege in subsection (1)(b) does not preclude the GAL's testimony in a criminal action against stepfather. The GAL is statutorily tasked with assessing and making recommendations to the court concerning the best interests of the child, and neither the statutes requiring the appointment of a GAL nor chief justice directive 04-06 creates an attorney-client relationship. *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011).

#### B. "Crime-Fraud" Exception.

**"Crime-fraud" exception to privilege.** The "crime-fraud" or "criminal purposes" exception has developed as a limitation on the applicability of the attorney-client privilege and the work-product exemption. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

The crime-fraud exception provides that communications between a client and his attorney are not privileged if they are made for the purpose of aiding the commission of a future crime or of a present continuing crime. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

**"Future crimes" exception to the attorney-client privilege extends** to communications between attorney and client for the purpose of aiding and continuing or future civil wrong. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

This exception is also applicable to advice or aid secured in the perpetration of a fraud. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

**Client must know of unlawfulness of conduct.** In order for the crime or fraud exception to the attorney-client privilege to apply, the client must know or reasonably should know of the unlawfulness of his conduct. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

**Prima facie showing required to invoke exception.** A prima facie showing — one which gives a foundation in fact for the assertion of ongoing or future criminal conduct — is sufficient to invoke the applicability of the crime-fraud exception. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

There must be a prima facie showing that the "crime-fraud" exception applies before the communication is stripped of its privilege. *People v. Board*, 656 P.2d 712 (Colo. App. 1982).

**Applicability of exception is within trial court's discretion.** Whether the prosecution has established a proper foundation in fact for the application of the crime-fraud exception is best left for determination by the trial court, whose exercise of discretion will not be overturned unless the record shows an abuse of that discretion. *People v. Board*, 656 P.2d 712 (Colo. App. 1982).

**For procedure for determining whether civil fraud exception is applicable**, see *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

**Client's communication to attorney of proposed infraction of law does not come within privilege.** *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975).

#### IV. CLERGY.

**The purpose of subsection (1)(c)** is to protect an accused from the indirect violation of his state constitutional right against self-incrimination. *Ferrell v. Vogt*, 161 Colo. 549, 423 P.2d 844 (1967).

**Statements made to clergyman merely as a gentleman are not privileged.** Statements made to a clergyman, not in his professional character, nor in the course of any clerical discipline enjoined by the church, but voluntarily, as if made to any other gentleman, are not privileged under this section. *Milburn v. Haworth*, 47 Colo. 593, 108 P. 155 (1910); *People v. Police*, 651 P.2d 430 (Colo. App. 1982).

## V. PHYSICIAN.

**This section is in derogation of the common law** and was adopted to achieve the purpose of placing a patient in a position in which he or she would be more inclined to make a full disclosure to the doctor and to prevent the patient from being humiliated and embarrassed by disclosure of information about the patient by his or her doctor. *Cnty. Hosp. Ass'n v. District Court*, 194 Colo. 98, 570 P.2d 243 (1977).

**Policy of the law is to preserve information procured from a patient** by a physician for the purpose of treating him as a secret between them and inviolate except with the consent of the patient. *Riss & Co. v. Galloway*, 108 Colo. 93, 114 P.2d 550 (1941).

**This relationship involves private matters.** The relationship between a physician and his patient and any information acquired from that relationship are extremely private matters warranting a high degree of protection. *Stauffer v. Karabin*, 30 Colo. App. 357, 492 P.2d 862 (1971).

**The provisions of this paragraph are clear, intelligible and easily understood**, cannot be said to be in any sense unreasonable or absurd, are subversive of no legal private rights, and are not inconsistent with themselves or with any other law. Under such circumstances, however fully we might agree with counsel that they should be extended and broadened, the courts are without power in that regard. The remedy is with the general assembly alone. *Head Camp, Pac. Jurisdiction, Woodmen of the World v. Loeher*, 17 Colo. App. 247, 68 P. 136 (1902).

**The privilege is personal to the patient.** *Stauffer v. Karabin*, 30 Colo. App. 357, 492 P.2d 862 (1971).

**Or to his estate.** *Stauffer v. Karabin*, 30 Colo. App. 357, 492 P.2d 862 (1971).

**It does not matter how the information may be acquired.** Whether it comes to the surgeon in the shape of oral statements, or by reason of his examination, he cannot be interrogated respecting it. *Colo. Fuel & Iron Co. v. Cummings*, 8 Colo. App. 541, 46 P. 875 (1896).

**The information must be necessary for physician to act for patient.** Where the accused refused to permit the physician who attended him for the wound in question to remove the bullet, and refused to tell him how he received the wound, allowing the testimony of the physician as to this matter was no violation of this section. *Cook v. People*, 60 Colo. 263, 153 P. 214 (1915); *Cont'l Inv. Co. v. Garcher*, 83 Colo. 239, 264 P. 723 (1928).

**Statutory privilege did not apply to statements that were not necessary to enable nurse to prescribe or act for defendant.** *People v. Garrison*, 109 P.3d 1009 (Colo. App. 2004).

**Observations that a physician assistant was required to make in order to prescribe or act**

**for the patient would have been privileged, however,** § 12-36-135, which requires physicians to report and testify in episodes of domestic violence or gunshot wounds, abrogated the privilege. Physician assistant could testify over the objection of the patient about photographs of the patient's wounds taken by physician assistant for an investigating officer at the time of the patient's initial treatment in emergency room. *People v. Covington*, 19 P.3d 15 (Colo. 2001).

**Statements made by one to a doctor are not ipso facto privileged**, but are privileged only if they meet all of the several requirements contained in this section. *Nelson v. Grissom*, 152 Colo. 502, 382 P.2d 991 (1963).

**Information given in connection with application for admission to hospital.** Any information given by a party to a doctor who attended him as his physician and gave him treatment, in connection with his application for admission to a hospital for a nervous disorder, was a privileged communication. *Gerick v. Brock*, 120 Colo. 394, 210 P.2d 214 (1949).

**Privilege exists even if doctor is employed by patient's employer.** Defendant and another company, employing many workmen, established a hospital for the use of both in the care and treatment of their employees. It was supported, in whole or in part, by deductions from the monthly wages of the employees of both companies for a "hospital fund", which was devoted to the maintenance of the building, hire of physicians, etc. The plaintiff was an employee of the defendant, and, after sustaining an injury, put himself under the charge of the doctor employed by the company. The relation of physician and patient existed between them, and the physician could not, without the plaintiff's consent, be examined concerning the nature and character of the injuries, the knowledge of which he acquired while the plaintiff was under his treatment. *Colo. Fuel & Iron Co. v. Cummings*, 8 Colo. App. 541, 46 P. 875 (1896).

**Results of alcohol blood test are not privileged.** In an action for damages for personal injuries, the testimony of a physician at the hospital where defendant was taken in an unconscious condition, to the effect that a blood sample taken from one of the veins in defendant's arm at the request of a public officer showed sufficient blood alcohol to cause a state of drunkenness in the average person, was properly admitted, it appearing that the physician was not acting for defendant personally, or that the information obtained was necessary to enable him to prescribe or act for the patient. *Hanlon v. Woodhouse*, 113 Colo. 504, 160 P.2d 998 (1945).

**Even when patient lacks ability to consent.** Where the defendant was charged with causing injury while driving under the influence of intoxicating liquor, the trial court denied the motion to suppress the blood sample where the



defendant was in a semiconscious condition and was unable to consent or to refuse to give his consent. *People v. Fidler*, 175 Colo. 90, 485 P.2d 725 (1971).

**For admissibility of urine sample**, see *People v. Kokesh*, 175 Colo. 206, 486 P.2d 429 (1971).

**This paragraph (V) does not extend to names, addresses, and telephone numbers.** *Wolf v. People*, 117 Colo. 279, 187 P.2d 926 (1947); *People v. Perez*, 129 P.3d 1090 (Colo. App. 2005).

**If the disclosure reveals the ailments but not the patient's identity**, then such disclosure would appear not to violate the privilege. *Cnty. Hosp. Ass'n v. District Court*, 194 Colo. 98, 570 P.2d 243 (1977).

**Neither is the privilege violated when the disclosure reveals the patient's identity but not the ailment.** *In re Search Warrant for 2045 Franklin*, Denver, 709 P.2d 597 (Colo. App. 1985).

**Communications made to physician pursuant to § 14-10-127 not privileged.** Since the information was necessary to make an evaluation concerning custody and not for treatment, the physician-patient privilege is inapplicable. *Anderson v. Glismann*, 577 F. Supp. 1506 (D. Colo. 1984).

**Communication made to physician to procure controlled substance for illegitimate purpose is not privileged under § 18-18-415 (1)(b);** thus, no waiver is required to introduce the communication at trial. *People v. Harte*, 131 P.3d 1180 (Colo. App. 2005).

**The Colorado medicaid fraud control unit** is an "organization authorized by federal or state law or contract to review physicians' ... services" as contemplated by subsection (1)(d)(III)(B) and therefore the privilege does not apply. *In re Search Warrant for 2045 Franklin*, Denver, 709 P.2d 597 (Colo. App. 1985).

**The public policy of maintaining and ensuring an efficiently operating medicaid program** outweighs the privacy interests inherent in the physician-patient relationship insofar as utilization of the medicaid program is concerned. *In re Search Warrant for 2045 Franklin*, Denver, 709 P.2d 597 (Colo. App. 1985).

A recipient of medical services who has chosen to participate in the medicaid program waives the privilege to the extent necessary for the state to verify the services billed by the provider. *In re Search Warrant for 2045 Franklin*, Denver, 709 P.2d 597 (Colo. App. 1985).

**Disclosure by a physician should be prevented unless waived.** *Stauffer v. Karabin*, 30 Colo. App. 357, 492 P.2d 862 (1971).

**Trial court to determine whether exception applies.** Even if the physician-patient privilege is applicable, the trial court should determine whether one of the prescribed statutory excep-

tions applies. *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981).

**In camera hearing as to nature of information sought from physician.** Before ruling on a claim of physician-patient privilege, the trial court should determine whether the particular information sought from the doctor was in fact necessary for treatment of the patient, and an in camera hearing is normally appropriate to allow consideration of this preliminary fact question outside the presence of the jury. *People v. Reynolds*, 195 Colo. 386, 578 P.2d 647 (1978).

**Improper admission is reversible error.** Where there is improper testimony precluded by this statute which could have influenced the verdict in an action, the admission of such evidence is reversible error. *Stauffer v. Karabin*, 30 Colo. App. 357, 492 P.2d 862 (1971); *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

**The law will provide protection at the time disclosure is attempted**, rather than merely providing a remedy after violation. *Stauffer v. Karabin*, 30 Colo. App. 357, 492 P.2d 862 (1971).

**Patient may expressly or impliedly waive privilege.** In order to protect the confidential relationship existing between physician and patient, and to encourage full disclosure between the two, our statute provides that a patient may invoke a claim of privilege and prohibit a physician from testifying. Such a rule is not an absolute one. In certain instances a patient may expressly or impliedly waive such a claim of privilege. *Kelley v. Holmes*, 28 Colo. App. 79, 470 P.2d 590 (1970).

Where defendant's abusive language, loud demeanor and offensive behavior could be readily observed and heard by anyone present in the emergency room, such conduct constitutes an implied waiver of any physician-patient privilege with respect to the doctor's observation of the defendant's behavior. *People v. Deadmond*, 683 P.2d 763 (Colo. 1984).

A defendant waives the physician-patient privilege with regard to a particular subject matter when his own testimony directly raises that factual issue. *People v. Deadmond*, 683 P.2d 763 (Colo. 1984).

**Physician-patient privilege is not implicitly waived** when medical records, statutorily required to be supplied, are filed with an insurance company. *Devenyns v. Hartig*, 983 P.2d 63 (Colo. App. 1998).

**This paragraph does not apply when patient fails to object to disclosure.** This paragraph does not apply when patient is before the court, is cognizant of the proceeding, and makes no objection to the disclosure. *Wolf v. People*, 117 Colo. 279, 187 P.2d 926 (1947).

**Patient held not to have waived privilege by mere failure to ask whether all aspects of her examination were in furtherance of med-**

ical treatment, including photographs taken by a physician's assistant on behalf of an investigating officer. It is the burden of the party seeking to overcome the privilege to establish a valid waiver of the privilege, and because the record was not clear that the patient understood why pictures were being taken of her injuries, the burden was not established. *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

**Once the issue of injury is raised by a party** he is deemed to have waived his claim of privilege. *Kelley v. Holmes*, 28 Colo. App. 79, 470 P.2d 590 (1970).

**Where a plaintiff testifies as to the details of the service and treatment rendered to him by physicians**, and of the charges made therefor, he waives the protection of this section as to the matters testified to by him; it was not error to admit the testimony of the physicians concerned in rebuttal of such evidence. *Mauro v. Tracy*, 152 Colo. 106, 380 P.2d 570 (1963).

**If privilege was not already waived, admission of physician's testimony was harmless error** where physician testified that a cut on the defendant's hand could have been caused either by a knife, as asserted by the prosecution, or by a piece of broken glass, as asserted by the defense, and this testimony concerned the same subject matter as defendant's disclosure to his wife in his confession. *People v. Thompson*, 950 P.2d 608 (Colo. App. 1997).

**Waiver as to all doctors consulted about the injuries.** The nature and extent of plaintiff's injuries was in issue. Plaintiff produced evidence as to the seriousness of his injuries. Once plaintiff had raised this issue, he has waived the physician-patient privilege, not only to the doctors he has called, but as to all physicians consulted concerning these injuries. *Kelley v. Holmes*, 28 Colo. App. 79, 470 P.2d 590 (1970).

**Plaintiff in personal injury action impliedly waives physician-patient privilege** only for matters that are relevant in determining the cause and extent of injuries which form the basis of the complaint. *Samms v. District Court*, Fourth Jud. Dist., 908 P.2d 520 (Colo. 1995); *Devenyns v. Hartig*, 983 P.2d 63 (Colo. App. 1998); *Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005); *Cardenas v. Jerath*, 180 P.3d 415 (Colo. 2008).

Defense attorney must provide plaintiff with reasonable notice of an informal discussion with plaintiff's physician, and plaintiff's physician may decline to participate in such informal discussion. *Samms v. District Court*, Fourth Jud. Dist., 908 P.2d 520 (Colo. 1995).

**When a patient institutes a lawsuit against a physician and the suit arises out of the physician's professional care, the physician-patient privilege does not apply and thus the patient's entire electronic medical file is not subject to the privilege.** A review of the pa-

tient's complete medical record is relevant to the physician's ability to prepare a defense. *Ortega v. Colo. Permanente Med. Group, P.C.*, 265 P.3d 444 (Colo. 2011).

**Exception to the physician-patient privilege in subsection (1)(d)(II) for a medical provider who was in consultation with a defendant applies to a medical provider engaged in a unified course of treatment with a defendant.** Holding in *Samms v. Dist. Ct.* requiring notice of informal discussions with non-party medical providers does not apply when the medical providers are engaged in a unified course of treatment that forms the basis of the malpractice action. *Reutter v. Weber*, 179 P.3d 977 (Colo. 2007).

**Privilege does not shield guardian/conservator husband from being deposed in medical malpractice case concerning incapacitated wife's family medical history.** *Hartmann v. Nordin*, 147 P.3d 43 (Colo. 2006).

**Privilege does shield guardian/conservator husband from being deposed about his health and ability to care for incapacitated wife** because husband's health and ability to care for wife are not relevant to wife's medical malpractice claims. *Hartmann v. Nordin*, 147 P.3d 43 (Colo. 2006).

**This paragraph does not include a nurse or medical technician.** *Block v. People*, 125 Colo. 36, 240 P.2d 512 (1951), cert. denied, 343 U.S. 978, 72 S. Ct. 1076, 96 L.Ed. 1370, reh'g denied, 344 U.S. 848, 73 S. Ct. 6, 97 L.Ed. 659 (1952).

**Hospital and medical records fall within the scope of physician-patient privilege.** *Devenyns v. Hartig*, 983 P.2d 63 (Colo. App. 1998).

**Hospital records held either confidential records or hearsay**, and in either event were inadmissible for impeachment or any other purpose. *Young v. McLaughlin*, 126 Colo. 188, 247 P.2d 813 (1952).

**Privilege prohibits pretrial discovery of confidential information.** The physician-patient and psychologist-patient privileges, once they attach, prohibit not only testimonial disclosures in court but also pretrial discovery of information within the scope of the privilege. *Clark v. District Court*, 668 P.2d 3 (Colo. 1983).

**Hospital records subject to physician-patient privilege** prohibits pretrial discovery and testimony disclosures of information within the scope of the privilege, and where there is neither an express nor an implied waiver and there is no showing of a particularized need the privilege is absolute. *People v. Overton*, 759 P.2d 772 (Colo. App. 1988).

**Privilege applies only to a physician, surgeon, or registered professional nurse** duly authorized to practice and does not apply to medical technicians. *Belle Bonfils Memorial*



Blood Ctr. v. District Court, 763 P.2d 1003 (Colo. 1988).

**A plain reading of this section and § 16-8-103.6** is that the attorney-client and the physician-patient privileges do not apply to communications made to physicians or psychologists who are eligible to testify concerning a defendant's mental condition once the defendant enters a mental condition plea or defense. Gray v. District Court, 884 P.2d 286 (Colo. 1994).

A defendant who places his or her mental condition at issue waives the attorney-client and the physician-patient privileges. The prosecution may use the testimony of a physician retained by the defense even though the defense does not intend to use the physician at trial. In addition, the prosecution may use pre-offense or post-offense information concerning the defendant's mental condition. Gray v. District Court, 884 P.2d 286 (Colo. 1994).

**Attorney-client privilege did not attach to expert evaluation conducted by expert appointed under § 19-3-607 (1) at request of mother in action for termination of parental rights.** D.A.S. v. People, 863 P.2d 291 (Colo. 1993).

**Personal injury plaintiff with generic claims for mental suffering has not placed her mental condition at issue** where the mental suffering alleged is incident to the plaintiff's physical injuries and does not exceed the suffering and loss an ordinary person would likely experience. Therefore, the trial court may not find an implied waiver of the plaintiff's physician-patient or psychotherapist-client privileges based on a claim for mental suffering damages and trial court erred in ordering that records related to plaintiff's psychiatric and marriage counseling be disclosed. Johnson v. Trujillo, 977 P.2d 152 (Colo. 1999); Hoffman v. Brookfield Republic, Inc., 87 P.3d 858 (Colo. 2004).

Bare allegations of mental anguish, emotional distress, pain and suffering, and loss of enjoyment of life asserted in a complaint do not rise to the level of injecting plaintiff's prior mental and physical conditions into the case such that he or she completely waived the physician-patient privilege. Weil v. Dillon Cos., Inc., 109 P.3d 127 (Colo. 2005).

While plaintiff impliedly made a limited release of his or her medical records by filing the lawsuit, his or her generic claims for pain and suffering and loss of quality of life incident to the injuries he or she sustained do not amount to a complete release of his or her prior medical records. Therefore, the trial court erred when it required plaintiff to make a complete disclosure of his or her medical records so that defendant would know his or her quality of life prior to the injury. Weil v. Dillon Cos., Inc., 109 P.3d 127 (Colo. 2005).

## VI. PUBLIC OFFICER.

**Conversations among the district attorney, his deputies and his assistants taking place prior to the impaneling of the grand jury** and concerning the upcoming grand jury investigation are made in "official confidence" within the meaning of subsection (1)(e). People v. District Court, 193 Colo. 528, 568 P.2d 445 (1977).

**This paragraph is not applicable to an employee of the district court**, who, though designated as an "officer", is not in fact a "public officer" within the meaning and intent of the statute. The purpose of the statute was to protect matters relating to "affairs of state" and "state secrets" within the different branches of the government. Saucerman v. Saucerman, 170 Colo. 318, 461 P.2d 18 (1969).

**Confidential communications made to a probation officer in the performance of investigatory duties** enjoined upon him by court order may be privileged in the event the public interest demands that the confidence thereof be preserved. Saucerman v. Saucerman, 170 Colo. 318, 461 P.2d 18 (1969).

**This paragraph makes the trial court the sole judge as to when the public interests would suffer by the disclosure.** When a public officer is called upon on the witness stand to disclose such communications, his opinion that such disclosure is improper, and the reasons therefor, are matters to be presented to the court and are for the determination of the court — not the witness. Lindsey v. People ex rel. Rush, 66 Colo. 343, 181 P. 531 (1919).

**If there are exceptions to this paragraph they are only such as fall** within those stated by Stephens' Evidence, art. 112, p. 163: "The executive of the nation, or of a state, and cabinet officers (and perhaps others falling in the same general class) are entitled, in the exercise of their discretion, to determine how far in a judicial inquiry they will produce papers or answer questions as to public affairs." Lindsey v. People ex rel. Rush, 181 P. 531 (1919).

## VII. ACCOUNTANT.

**Law reviews.** For article, "Colorado's Accountant-Client Privilege", see 24 Colo. Law. 283 (1995).

**General assembly clearly intended the accountant-client privilege** to apply without exception to all communications between client and the certified public accountant and the accountant's employees specified in the statute. There is no legislative expression which would indicate that the general assembly intended to qualify the privilege. Colo. State Bd. of Accountancy v. Raisch, 931 P.2d 498 (Colo. App. 1996), aff'd, 960 P.2d 102 (Colo. 1998).

**The privilege created by this section is not the privilege of the accountant but that of the client.** *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**All certified and uncertified work is privileged.** The general assembly's purpose was to preserve the confidential relations set out in the statute. This purpose would not be served by holding that only certified work remains privileged. *Pattie Lea, Inc. v. District Court*, 161 Colo. 493, 423 P.2d 27 (1967).

**The accountant-client privilege under this section does apply to an accountant's work papers, reports, and financial statements, and to communications between accountants and their client and between each of them and third persons, which result in financial statements and an audit report thereon to bar their disclosure to shareholders of the corporation in an action by the shareholders against former officers and directors of the corporation and against the accountants, which action is based upon negligence, gross negligence, fraud, and conspiracy in the preparation and audit of the corporation's financial statements.** *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Certified public accountants hired by a corporation are hired for the benefit of all of its stockholders** and such employment forbids concealment from the stockholders of information given the accountant by the corporation. *Pattie Lea, Inc. v. District Court*, 161 Colo. 493, 423 P.2d 27 (1967).

**Privilege is invalid in a stockholder derivative suit.** The respondent is a stockholder in three of the corporations who are defendants in the original suit in the trial court. The certified public accountant-client privilege does not protect a corporation from being required to disclose to its own stockholders in a derivative suit brought in good faith against the corporation, communications made by the corporation to its certified public accountant. A corporate entity acts only for its stockholders and no greater liberality will be applied to facts which determine privilege in the case of a corporation than would be applied in the case of a natural person or association of persons. *Pattie Lea, Inc. v. District Court*, 161 Colo. 493, 423 P.2d 27 (1967).

**Where accountant-client privilege should not apply.** Where the question involved is whether the corporation was governed properly or inimically to shareholder interests is a central issue of the case, shareholders should be allowed disclosure, and the accountant-client privilege should not apply. *Neusteter v. District Court*, 675 P.2d 1 (Colo. 1984).

**Information certified public accountant received as corporate director is subject to disclosure.** Insofar as a certified public accountant may be in possession of any information which he received as a director, he is subject to the

same evidentiary rules as any other corporate director. If faced with the problem, the trial court will correctly distinguish the privileged from the nonprivileged information. The witness is subject to questioning as to nonprivileged information to the same extent as any other witness. *Pattie Lea, Inc. v. District Court*, 161 Colo. 493, 423 P.2d 27 (1967).

**However, a certified public accountant's subsequent employment by a corporation does not waive privilege.** A witness does not waive his right to claim a privilege by accepting employment by a corporation several years prior to the commencement of an action in which an attempt is made to compel him to testify notwithstanding the privilege created by this paragraph. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Where an accountant was appointed by the court to audit the books of a corporation half-owned by the defendant and defendant neither ordered, controlled, nor paid for the accountant's services, defendant could not invoke accountant-client privilege.** *People v. Zimelman*, 194 Colo. 384, 572 P.2d 830 (1977).

**This paragraph concerning testimony of accountants held to have no application to a criminal case in which it appeared that the accountant testifying was not employed by, and was not a client of, defendant.** *Hopkins v. People*, 89 Colo. 296, 1 P.2d 937 (1931).

## VIII. PSYCHIATRIST.

**Law reviews.** For article, "New Definitions of Therapist Confidentiality", see 18 Colo. Law. 251 (1989).

**It is error to deny one the opportunity to show that hospital records and the testimony of a psychiatrist were not privileged, and were otherwise competent.** *Nelson v. Grissom*, 152 Colo. 502, 382 P.2d 991 (1963).

**Respondent-patient entitled to assert privilege where she sought voluntary treatment.** Where respondent sought voluntary treatment and her psychiatrist petitioned alleging that she would not remain in a voluntary treatment program, the respondent was entitled to assert her statutory physician-patient privilege if her psychiatrist was called upon as a witness to testify about any information he acquired in attending the respondent which was necessary for him to prescribe or act for her during the period of her voluntary treatment. *People v. Taylor*, 618 P.2d 1127 (Colo. 1980).

**Psychiatrist-patient privilege did not apply to statements made to a police detective.** *Williams v. People*, 687 P.2d 950 (Colo. App. 1984).

**Where a psychiatrist was retained by defense counsel to evaluate the defendant's condition, the defendant's confidential communications to the psychiatrist were privileged under**



this section. *Miller v. District Court*, 737 P.2d 834 (Colo. 1987).

**Defendant's statement to psychiatrist that was provided to the prosecution under Crim. P. 16 loses its confidential nature** and cross-examination of the defendant concerning such statements as prior inconsistent statements is proper impeachment, even if the psychiatrist did not testify at the defendant's trial. Use of such statements do not violate the attorney-client privilege or the right to effective assistance of counsel. *People v. Lanari*, 811 P.2d 399 (Colo. App. 1989), *aff'd*, 827 P.2d 495 (Colo. 1992).

Where an immunity agreement has been drafted by the government, basic considerations of fairness dictate that any ambiguity as to the scope of the governmental promise be resolved in favor of the defendant. Given reasonable alternative interpretations as to the scope of the governmental promise, the court will choose the interpretation favoring the defendant so long as that interpretation has a reasonable foundation in the document itself and in the circumstances surrounding its execution. *People v. Romero*, 745 P.2d 1003 (Colo. 1987), *cert. denied*, 485 U.S. 990, 108 S. Ct. 1296, 99 L.Ed.2d 506 (1988).

**"Use immunity" distinguished.** "Use immunity" results in prohibiting the state from making use of any statements made by the defendant during the time covered by the agreement, and also bars state use of any evidence derived directly or indirectly from those statements. *People v. Romero*, 745 P.2d 1003 (Colo. 1987), *cert. denied*, 485 U.S. 990, 108 S. Ct. 1296, 99 L.Ed.2d 506 (1988).

**A plain reading of this section and § 16-8-103.6** is that the attorney-client and the physician-patient privileges do not apply to communications made to physicians or psychologists who are eligible to testify concerning a defendant's mental condition once the defendant enters a mental condition plea or defense. *Gray v. District Court*, 884 P.2d 286 (Colo. 1994).

A defendant who places his or her mental condition at issue waives the attorney-client and the physician-patient privileges. The prosecution may use the testimony of a physician retained by the defense even though the defense does not intend to use the physician at trial. In addition, the prosecution may use pre-offense or post-offense information concerning the defendant's mental condition. *Gray v. District Court*, 884 P.2d 286 (Colo. 1994).

When a patient alleges a physical or mental condition as a basis for a claim of damages and thereby injects the issue into the case, the patient waives his or her physician-patient privilege with respect to the medical condition. *Samms v. District Court*, 908 P.2d 520 (Colo. 1995); *Middleton v. Beckett*, 960 P.2d 1213 (Colo. App. 1998).

## IX. PSYCHOLOGIST.

The purpose of the statutory psychologist-patient privilege is to aid in the effective diagnosis and treatment of mental illness by encouraging the patient to fully disclose information to the psychologist without fear of embarrassment or humiliation caused by disclosure of such confidential information. *People v. District Court*, 719 P.2d 722 (Colo. 1986); *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993); *People v. Dill*, 904 P.2d 1367 (Colo. App. 1995), *aff'd*, 927 P.2d 1315 (Colo. 1996); *Berg v. Shapiro*, 948 P.2d 59 (Colo. App. 1997).

**The psychologist-patient privilege provides that a licensed psychologist may not be examined without the consent of the client as to any communications made by the client to the psychologist or the psychologist's advice to the client.** In order to compel discovery of the psychologist's records, there must be a waiver. The waiver may be implied if the privilege holder places their mental condition at issue. The privilege holder did not waive the privilege. *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

**Psychologist-patient privilege did not apply** to statements made to a police detective. *Williams v. People*, 687 P.2d 950 (Colo. 1984).

**Psychologist-patient privilege did not apply to preclude discovery** of data underlying a psychological consultant firm's report regarding the general relationship between the medical staff and the administration of a hospital. *Berg v. Shapiro*, 948 P.2d 59 (Colo. App. 1997).

**Psychologist-patient privilege did not apply to mandatory production of relevant confidential documents** and other information used by a governing board in determining the propriety of a psychologist's actions. *Colo. Bd. of Psychologist Exam'rs v. I.W.*, 140 P.3d 186 (Colo. App. 2006).

**Probate court did not err in ruling exception to privilege was applicable** to preclude respondent's assertion of the psychologist-client privilege in a proceeding for long-term treatment certification. *People v. Hynes*, 917 P.2d 328 (Colo. App. 1996).

**A session with a psychologist "to find out if there was truth to the allegations" is a psychologist session that falls within the ambit of the psychologist-patient privilege.** *People v. Marsh*, \_\_ P.3d \_\_ (Colo. App. 2011).

**A corporation cannot be a client of a psychologist and thus cannot assert the psychologist-patient privilege.** *Berg v. Shapiro*, 948 P.2d 59 (Colo. App. 1997).

**Focus of 1993 amendments to subsection (1)(g)** was to extend the applicability of the privilege to other types of health care providers, not to alter the scope of the privilege. *People v. Hynes*, 917 P.2d 328 (Colo. App. 1996).

**Privilege prohibits pretrial discovery of confidential information.** The physician-pa-

tient and psychologist-patient privileges, once they attach, prohibit not only testimonial disclosures in court but also pretrial discovery of information within the scope of the privilege. *Clark v. District Court*, 668 P.2d 3 (Colo. 1983).

**The court of appeals erred in conducting an in camera review of the victim's mental health records** since the victim did not waive her psychologist-patient privilege. Without a waiver, the records are not subject to review. *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009).

**Psychologist-patient privilege applies to the records of a therapist** who is an unlicensed psychologist when such therapy is conducted under the supervision of a person authorized by law to conduct such therapy. *People v. District Court*, 719 P.2d 722 (Colo. 1986).

**When physician-patient and psychologist-patient privileges are not waived**, applicability of the privileges is not conditional on a judicial balancing of interests once privileges attach. *Clark v. District Court*, 668 P.2d 3 (Colo. 1983).

**Mere filing of a pleading by a person protected by psychologist-patient privilege does not operate as a waiver.** The appropriate inquiry under such circumstances should be whether the privilege holder has injected his physical or mental condition into the case as the basis of a claim or an affirmative defense. *People v. District Court*, 719 P.2d 722 (Colo. 1986); *Hoffman v. Brookfield Republic, Inc.*, 87 P.3d 858 (Colo. 2004).

**When privilege holder does not place his or her physical or mental condition at issue and does not assert his or her physical or mental condition as an affirmative defense**, privilege holder's answer cannot be fairly construed as a manifestation of his or her intent to forego confidentiality attaching to his or her communications to a treating psychologist or psychiatrist and is not inconsistent with a claim of privilege with respect to these communications. *Clark v. District Court*, 668 P.2d 3 (Colo. 1983); *Hoffman v. Brookfield Republic, Inc.*, 87 P.3d 858 (Colo. 2004).

**Court must balance the competing interests** of protecting the confidentiality of plaintiffs' communications with their treating therapists against defendant's interest in obtaining sufficient evidence to contest damage claims for mental suffering and emotional distress and should consider the flexible array of protective orders suggested by C.R.C.P. 26(c) to accommodate the needs of the party seeking discovery while protecting the legitimate interests of the parties opposing discovery. *Bond v. Denver Dist. Ct.*, 682 P.2d 33 (Colo. App. 1984).

**Defendant's constitutional right to confront adverse witnesses does not supersede a victim's rights under this section.** The vague assertion that the victim may have made statements to her therapist that might possibly differ from the victim's anticipated trial testimony

does not provide a sufficient basis to justify ignoring the victim's right to rely upon her statutory privilege. *People v. District Court*, 719 P.2d 722 (Colo. 1986); *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993).

**By taking advantage of opportunity to have an expert appointed by the court pursuant to § 19-3-607**, an individual submits to the disclosure of the evaluation to all parties and waives any psychologist-patient privilege which may have attached. *People in Interest of T.S.B.*, 757 P.2d 1112 (Colo. App. 1988), *aff'd*, 785 P.2d 132 (Colo. 1990).

**Testimony of victim in criminal case as to emotional effects of alleged assault did not operate as waiver of psychologist-patient privilege.** *People v. Silva*, 782 P.2d 846 (Colo. App. 1989).

**Psychologist-client privilege** created in this section does not apply to information obtained and records prepared in evaluating a person who has been involuntarily detained pending judicial review of a psychologist's certification. *People v. District Court*, 797 P.2d 1259 (Colo. 1990).

**Prior to 1989 amendment of § 19-3-311, plain language of said section did not abolish psychologist-patient privilege** for communications between social worker and client concerning child abuse or neglect. *People v. Bowman*, 812 P.2d 725 (Colo. App. 1991).

**In order to harmonize potential statutory conflict between § 19-3-304 concerning required reporting of child abuse and this section prior to 1989 amendment to § 19-3-311**, § 19-3-304 required psychologists to report suspected child abuse to the appropriate authorities while subsection (1)(g) prohibited psychologists from testifying against their clients without consent. *People v. Bowman*, 812 P.2d 725 (Colo. App. 1991).

**Improper admission of privileged communications between social worker and defendant constituted harmless error** due to other overwhelming evidence against defendant offered at trial. *People v. Bowman*, 812 P.2d 725 (Colo. App. 1991).

**Trial court's admission of child abuse reports by psychologist based upon privileged communications between psychologist and defendant** did not constitute error because allowing privilege to prevent use of child abuse reports would defeat one of purposes of reports to aid in the investigation and prosecution of child abusers. *People v. Bowman*, 812 P.2d 725 (Colo. App. 1991).

**Tainted-fruit rationale applied to unauthorized disclosure.** Where defendant sought records of alleged victim's psychologist based on information provided by the psychologist to a police officer in violation of the psychologist-patient privilege and included by the officer in his report, the records remained privileged notwithstanding the defendant's assertion that the



psychologist was an "essential witness" to his defense. "The holder of the privilege should not suffer the consequences of either an accidental or intentional revelation of privileged matters by the treating professional." *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993).

**A plain reading of this section and § 16-8-103.6** is that the attorney-client and the physician-patient privileges do not apply to communications made to physicians or psychologists who are eligible to testify concerning a defendant's mental condition once the defendant enters a mental condition plea or defense. *Gray v. District Court*, 884 P.2d 286 (Colo. 1994).

A defendant who places his or her mental condition at issue waives the attorney-client and the physician-patient privileges. The prosecution may use the testimony of a physician retained by the defense even though the defense does not intend to use the physician at trial. In addition, the prosecution may use pre-offense or post-offense information concerning the defendant's mental condition. *Gray v. District Court*, 884 P.2d 286 (Colo. 1994).

**Section 19-3-311 abrogates the psychologist-patient privilege**, but only for communication that is the basis for a report of alleged child abuse to the county department of social services or local law enforcement. *Dill v. People*, 927 P.2d 1315 (Colo. 1996).

**Testimony of psychologist concerning report of alleged child abuse filed with law enforcement was not a waiver of the psychologist-patient privilege** because § 19-3-311 abrogates that privilege. *Dill v. People*, 927 P.2d 1315 (Colo. 1996).

**Trial court properly refused defendant in sexual abuse proceeding access to psychologist's notes and reports from ongoing counseling sessions** because they were protected under the psychologist-patient privilege. *People v. Dill*, 904 P.2d 1367 (Colo. App. 1995), *aff'd*, 927 P.2d 1315 (Colo. 1996).

**Personal injury plaintiff with generic claims for mental suffering has not placed her mental condition at issue** where the mental suffering alleged is incident to the plaintiff's physical injuries and does not exceed the suffer-

ing and loss an ordinary person would likely experience. Therefore, the trial court may not find an implied waiver of the plaintiff's physician-patient or psychotherapist-client privileges based on a claim for mental suffering damages and trial court erred in ordering that records related to plaintiff's psychiatric and marriage counseling be disclosed. *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999).

**Absent a clear waiver of psychologist-patient privilege**, a trial court may not review even in camera documents related to a patient's treatment. *People v. Sisneros*, 55 P.3d 797 (Colo. 2002).

**A conflict between the interests of a parent and his or her child may preclude the parent from waiving the child's psychologist-patient privilege.** Since the child's mother was in the middle of a conflict between her child and her father and she was antagonistic toward the prosecution, she lacked the authority to waive the privilege. The decision of whether to waive the privilege was properly given to the child's guardian ad litem. *People v. Marsh*, \_\_\_ P.3d \_\_\_ (Colo. App. 2011).

## X. VICTIM'S ADVOCATE.

**Law reviews.** For article, "The Use of Victim Advocates and Expert Witnesses in Battered Women Cases", see 30 *Colo. Law.* 43 (December 2001).

**The victim advocate privilege in subsection (1)(k)(I) extends to records of service or assistance provided by the victim's advocate**, because the records are a part of "any communication" made to the advocate by the domestic violence victim. *People v. Turner*, 109 P.3d 639 (Colo. 2005).

**A defendant may not obtain records of any assistance, advice, or other communication provided by a victim's advocate to a victim unless the defendant demonstrates that the victim has waived the privilege.** *People v. Turner*, 109 P.3d 639 (Colo. 2005).

**The mere endorsement of a domestic violence expert by the prosecution cannot operate to waive the privilege.** *People v. Turner*, 109 P.3d 639 (Colo. 2005).

**13-90-108. Offer taken as consent.** The offer of a person of himself as a witness shall be deemed a consent to the examination. The offer of a wife, husband, attorney, clergyman, physician, surgeon, certified public accountant, or certified psychologist as a witness shall be deemed a consent to the examination, within the meaning of section 13-90-107 (1) (a) to (1) (d), (1) (f), and (1) (g).

**Source:** L. 1883: p. 291, § 4. G.S. § 3650. R.S. 08: § 7275. C.L. § 6564. CSA: C. 177, § 10. CRS 53: §153-1-8. C.R.S. 1963: § 154-1-8. L. 73: p. 1419, § 112.

## ANNOTATION

**Law reviews.** For article, "Attorney-Client Privilege — the Colorado Law", see 12 Colo. Law. 766 (1983).

**Express directions concerning the manner in which the protection of § 13-90-107 shall be waived** are contained in this section. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**An effective waiver requires voluntary action based upon knowledge of consequences.** *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Stockholders may not waive corporation's privilege.** It does not lie within the power of a stockholder, or a minority of stockholders, or a majority of the stockholders to function in such

manner as to bring about this statutory waiver. The discretion to waive the protection afforded by the statute can only be exercised by the governing officials of the corporation, namely, the officers or the board of directors *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Subsequent employment with corporation does not waive privilege.** A witness does not waive his right to claim a privilege by accepting employment by a corporation several years prior to the commencement of an action in which an attempt is made to compel him to testify notwithstanding the privilege created by § 13-90-107(1)(f). *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**13-90-109. Estates of deceased persons, infants, and mentally incompetent persons.** Nothing in this article shall in any manner affect the laws now existing relating to the settlement of estates of deceased persons, infants, or mentally incompetent persons or to the acknowledgment or proof of deeds and other conveyances relating to real estate, in order to entitle the same to be recorded, or to the attestation of the execution of the last wills and testaments or of any other instrument required by law to be attested.

**Source:** L. 1870: p. 65, § 8. G.L. § 2958. G.S. § 3645. R.S. 08: § 7271. C.L. § 6560. CSA: C. 177, § 6. CRS 53: § 153-1-9. C.R.S. 1963: § 154-1-9. L. 75: Entire section amended, p. 925, § 20, effective July 1.

## ANNOTATION

**Law reviews.** For article, "One Year Review of Contracts", see 34 Dicta 85 (1957).

**Competency of attesting witnesses to a will is based on general competency to be a witness in court.** It was argued that by virtue of this section, common-law disability is still in force in Colorado, but the court did not agree with this contention, holding competency of attesting wit-

nesses to wills must be tested by the general law relating to competency of witnesses as provided by the statute, and not by the common law. The test is, whether under the statute, she would have been a competent witness in court, at the time of attesting the will, to testify to the facts of its execution. *White v. Bower*, 56 Colo. 575, 136 P. 1053 (1913).

**13-90-110. Religious opinions of witness.** No person shall be deemed incompetent to testify as a witness on account of his opinion in relation to the Supreme Being or a future state of rewards and punishments; nor shall any witness be questioned in regard to his religious opinions.

**Source:** L. 1872: p. 95, § 1. G.L. omitted. G.S. § 3646. R.S. 08: § 7272. C.L. § 6561. CSA: C. 177, § 7. CRS 53: § 153-1-10. C.R.S. 1963: § 154-1-10.

## ANNOTATION

**Law reviews.** For article, "Dying Declarations", see 16 Dicta 379 (1939). For article, "Fearing Hell as Essential to Validity of Affidavit", see 18 Dicta 144 (1941). For note, "Impeachment of Non-Religious Witnesses", see 13 Rocky Mt. L. Rev. 336 (1941). For article, "The Right to Practice Law as Dependent on Fear of Hell", see 19 Dicta 206 (1942).

**When evidence of religious beliefs admissible.** This section was not violated in felony child abuse case where defendant raised religious healing as an affirmative defense and was cross-examined as to his religious beliefs. The examination was probative of something other than the veracity of such witness and the court properly instructed the jury to consider testimony



only for limited purposes. *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

**This section and C.R.E. 610 do not apply to statements made by a prosecutor in closing**

**argument.** A prosecutor is not a witness, and his or her statements made in closing argument are not evidence. *People v. Krutsinger*, 121 P.3d 318 (Colo. App. 2005).

### **13-90-111. Power of court to enforce attendance. (Repealed)**

**Source:** L. 1887: p. 447, § 1. **R.S. 08:** § 7279. **C.L.** § 6565. **CSA:** C. 177, § 11. **CRS 53:** § 153-1-11. **C.R.S. 1963:** § 154-1-11. **L. 85:** Entire section R&RE, p. 584, § 1, effective May 24. **L. 2008:** Entire section repealed, p. 198, § 2, effective August 5.

**13-90-112. Power to enforce subpoena duces tecum.** The provisions of article 90.5 of this title shall also apply to a subpoena duces tecum.

**Source:** L. 1887: p. 448, § 2. **R.S. 08:** § 7280. **C.L.** § 6566. **CSA:** C. 177, § 12. **CRS 53:** § 153-1-12. **C.R.S. 1963:** § 154-1-12. **L. 2008:** Entire section amended, p. 198, § 3, effective August 5.

### **ANNOTATION**

**Section gives Colorado courts control over discovery by foreign litigants.** This section and § 13-90-111, while providing a means for ensuring the testimony of potential Colorado deponents by parties to a suit outside Colorado, also ensure a degree of supervision and control over discovery by the courts in Colorado by requiring a commission or *dedimus potestatem* from the foreign court which has jurisdiction

over the underlying suit. Such a requirement thus serves not only as a check on unfettered and unwarranted discovery in Colorado by foreign litigants, but also protects the interests of the parties to the litigation against whom the discovered material is sought to be used. *Falzon v. Home Ins. Co.*, 661 P.2d 696 (Colo. App. 1982).

**Applied** in *Metro. Life Ins. Co. v. Kaufman*, 104 Colo. 13, 87 P.2d 758 (1939).

**13-90-113. Interpreters - compensation.** Except as provided in section 13-90-210, when the judge of any court of record in this state has occasion to appoint an interpreter for his court, it is his duty to fix the compensation to be paid such interpreter for each day his services are required.

**Source:** L. 1891: p. 246, § 1. **R.S. 08:** § 7281. **C.L.** § 6567. **CSA:** C. 177, § 13. **CRS 53:** § 153-1-13. **C.R.S. 1963:** § 154-1-13. **L. 87:** Entire section amended, p. 573, § 3, effective April 23.

**13-90-114. Paid by state.** Except as provided in section 13-90-210, it is the duty of the state court administrator to audit the accounts of such interpreter, except for the Denver county court, as allowed by the judges of the courts of record of a county and to cause warrants to be drawn upon the state controller in payment thereof, in accordance with section 13-3-104, and the rules and regulations of the state court administrator.

**Source:** L. 1891: p. 246, § 2. **R.S. 08:** § 7282. **C.L.** § 6568. **CSA:** C. 177, § 14. **CRS 53:** § 153-1-14. **C.R.S. 1963:** § 154-1-14. **L. 73:** p. 1419, § 113. **L. 87:** Entire section amended, p. 573, § 4, effective April 23.

**13-90-115. Service of subpoena.** The service of any subpoena in any of the courts of record in this state may be made by any person over the age of eighteen years not a party to the action or proceeding. Proof of service so made shall be by the affidavit of the person making the same showing the time, place, and manner in which and the person upon whom such service has been made.

**Source:** L. 1881: p. 105, § 1. R.S. 08: § 7283. C.L. § 6569. CSA: C. 177, § 15. CRS 53: § 153-1-15. C.R.S. 1963: § 154-1-15.

**Cross references:** For matters involving service of subpoenas, see C.R.C.P. 45.

**13-90-116. Examination of party to record by adverse party.** A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, or managing agents of any corporation which is a party to the record in such action or proceeding may be examined upon the trial thereof, or upon deposition, or both, as if under cross-examination at the instance of the adverse party and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby but may rebut it by counter testimony.

**Source:** L. 1899: p. 178, § 1. R.S. 08: § 7284. C.L. § 6570. L. 33: p. 899, § 1. CSA: C. 177, § 16. CRS 53: § 153-1-16. C.R.S. 1963: § 154-1-16.

## ANNOTATION

- I. General Consideration.
- II. The Examination.
  - A. In General.
  - B. Scope.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Cross Examination Under the Statute", see 9 Dicta 198 (1932). For article, "Depositions of Parties on Oral Interrogatories, Within the State of Colorado", see 10 Dicta 256 (1933).

**This section is remedial.** It grants a right not given under the common law, but does not abridge any right granted thereunder. *Purse v. Purcell*, 43 Colo. 50, 95 P. 291 (1908); *Taylor v. Briggs Land Inv. Co.*, 92 Colo. 119, 18 P.2d 452 (1933).

**It gives adverse party a statutory right.** The right given by this section is a statutory right of far greater value to the adversary than the right to examine a party as his own witness. *Reiter v. Pollard*, 75 Colo. 203, 225 P. 222 (1924).

**It does not take from either party any legal right** they had before to use the admissions of parties in interest made in opposition to principles for which they were then contending. *Grand Lodge A. O. U. W. v. Taylor*, 24 Colo. App. 106, 131 P. 783 (1913).

**It does not limit the right of a party to cross-examine his adversary who offers himself as a witness** in his own behalf. *Purse v. Purcell*, 43 Colo. 50, 95 P. 291 (1908).

**It does not provide for such cross-examination other than upon a trial**, and must be so limited. *Taylor v. Briggs Land Inv. Co.*, 92 Colo. 119, 18 P.2d 452 (1933).

**The word "trial" as used in this section is to be construed as it is commonly understood** as applied to a civil action or proceeding, for the

reason that the statute confines it to this. *Taylor v. Briggs Land Inv. Co.*, 92 Colo. 119, 18 P.2d 452 (1933).

**"Trial" is defined as the examination before a competent tribunal**, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue. *Taylor v. Briggs Land Inv. Co.*, 92 Colo. 119, 18 P.2d 452 (1933); *Jones v. Cutting*, 92 Colo. 123, 18 P.2d 454 (1933).

**This section does not contain any reference whatsoever to the taking of a deposition before a notary.** *Taylor v. Briggs Land Inv. Co.*, 92 Colo. 119, 18 P.2d 452 (1933); *Jones v. Cutting*, 92 Colo. 123, 18 P.2d 454 (1933).

**It therefore does not authorize a cross examination before a notary public.** *Taylor v. Briggs Land Inv. Co.*, 92 Colo. 119, 18 P.2d 452 (1933).

**It is inapplicable if witness proves not to be adverse.** If a party called as an adverse witness appears to the trial court not to be adverse, he should not be held to come within this section and the matter should be left largely to the discretion of the court. *W. Inv. & Land Co. v. First Nat'l Bank*, 64 Colo. 37, 172 P. 6 (1918).

**"Managing agent" is not limited to one general manager.** Certainly the president of a corporation which was the general underwriting agent for an insurance company, and as such had charge of that branch of the company's business in four states, would be a "managing agent", within the meaning of this section. Otherwise, the term must be limited to one general manager and we think it clear that the general assembly never intended any such limitation. *London Guarantee & Accident Co. v. Officer*, 78 Colo. 441, 242 P. 989 (1925).

**Error in calling local agent is cured by the subsequent calling of such agent by other**



**party.** Where the local agent of a defendant corporation was called as a witness under this section, authorizing the calling of a managing agent of a party corporation and examining him as on cross-examination, such error, if any, in calling such agent, is cured where he is afterwards called by the corporation and the same facts brought out on cross-examination. *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 92 P. 922 (1907).

**Where witness is not in any of the listed categories, this section does not apply.** Where a witness is neither a director, officer, superintendent, or managing agent of Safeway Stores, Inc., as those words are used in C.R.C.P. 43 or this section, nor is there any showing that the witness is an "unwilling or hostile witness" to the end that under C.R.C.P. 43 he could be interrogated by leading questions, there is no error in refusing to permit plaintiff's to cross-examine the witness as a part of their case in chief. *Dale v. Safeway Stores, Inc.*, 152 Colo. 581, 383 P.2d 795 (1963).

## II. THE EXAMINATION.

### A. In General.

**Under this section the competency established at one trial obtains at subsequent trials of the same cause.** *Finch v. McCrimmon*, 100 Colo. 315, 67 P.2d 623 (1937).

**If a disqualified witness is called, the disqualification is waived.** One who calls a disqualified witness, even for cross-examination, under this section waives the disqualification and makes him a witness for all purposes. *Allen v. Shires*, 47 Colo. 433, 107 P. 1070 (1910).

**The purpose for which he is called makes no difference** in the application of the principle. *Allen v. Shires*, 47 Colo. 433, 107 P. 1070 (1910).

**If witness has already been examined by adverse party it is not error to refuse to permit him called again.** The refusal of the trial court to permit plaintiff to call as a witness the engineer of defendant company, as the company's representative for the purpose of cross-examining him, even if proper to do so under this section, was not prejudicial error where he was actually called as a witness for both parties and subjected to a most rigid and prolonged examination, and cross-examination by counsel for plaintiff. *Hottel v. Poudre Valley Reservoir Co.*, 41 Colo. 370, 92 P. 918 (1907).

**The party called for such examination shall not be concluded thereby,** but may rebut it by counter testimony. *Cordingly v. Kennedy*, 239 F. 645 (8th Cir. 1917).

**There is no error in the refusal of the trial court to bring in new parties** so that they may be cross-examined under this section, when it appears that such parties have no interest in the

issues between the major parties. *Tolland Co. v. First State Bank*, 95 Colo. 321, 35 P.2d 867 (1934).

**A defendant who has suffered a default, may, under this section, be called and examined** by plaintiff. *W. Inv. & Land Co. v. First Nat'l Bank*, 64 Colo. 37, 172 P. 6 (1918).

### B. Scope.

**Witness' own counsel cannot examine beyond scope of examination by adversary.** While this section does not permit defendant's examination by his own counsel to proceed beyond the scope of his examination as conducted by his adversary, nor permit leading questions to be propounded to him by his counsel, it does not by its terms, nor by a proper construction, deny his right to at once give further testimony within the limit indicated. *Merritt v. Hummer*, 21 Colo. App. 568, 122 P. 816 (1912).

**It is error to refuse examination within proper limits.** Where plaintiff's counsel called the defendant as a witness and examined him under this section and at the conclusion of defendant's examination by plaintiff's counsel, his own counsel asked and was denied the privilege of examining him at that time, the trial court holding that this section gave the defendant no right to testify further until plaintiff had closed his case, and he, the defendant, had been regularly called to the stand in his own defense, this was error. *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 108 P. 27 (1910); *Merritt v. Hummer*, 21 Colo. App. 568, 122 P. 816 (1912).

**A party is bound by the adverse testimony of his own witness,** and favorable evidence elicited by leading questions or distinctly cross-examining methods should be stricken on motion. In the case under consideration the evidence was fully developed by the adverse party's examination of the same witness, hence should stand. *London Guarantee & Accident Co. v. Officer*, 78 Colo. 441, 242 P. 989 (1925).

**Plaintiff bound by testimony of witnesses not called for cross-examination.** In an action against a corporation, some of the witnesses for plaintiff — officials and employees of defendant — not being called for cross-examination under this section, plaintiff was bound by their testimony. *Rio Grande Fuel Co. v. Colo. Cent. Power Co.*, 99 Colo. 395, 63 P.2d 470 (1936).

**A witness called under this section is competent "for all purposes" within meaning of § 13-90-102.** A witness called by an administrator under the provisions of this section which permits the interrogation of an adverse party as on cross-examination, removes the bar of § 13-90-102 and makes the witness a competent witness "for all purposes". *Warren v. Adams*, 19 Colo. 515, 36 P. 604 (1894); *Zackheim v. Zackheim*, 75 Colo. 161, 225 P. 268 (1924);

Finch v. McCrimmon, 100 Colo. 315, 67 P.2d 623 (1937).

**A party to the record may be examined by his adversary as if under cross-examination,** and the fact that a defendant called the plaintiff as his own witness did not cure the error committed in denying him the right to call him for cross-examination. Reiter v. Pollard, 75 Colo. 203, 225 P. 222 (1924).

**An intervener need not be given right to examine as to wholly irrelevant matter.** There was no error in refusing an intervener an opportunity to cross-examine the president of plaintiff

corporation under this section, where such cross-examination would have been directed to matters wholly irrelevant to the issues. Howry v. Sigel-Campion Livestock Comm'n Co., 80 Colo. 143, 249 P. 658 (1926).

**Refusal to permit defendant to cross-examine complainant about his homosexual relationship with witness was not reversible error,** inasmuch as testimony elicited during such cross examination would only have discredited and impeached complainant by impugning his moral character. People v. Couch, 179 Colo. 324, 500 P.2d 967 (1972).

**13-90-117. Affirmation - form - perjury.** (1) A witness who desires it, at his option, instead of taking an oath may make his solemn affirmation or declaration by assenting when addressed in the following form:

"You do solemnly affirm that the evidence you shall give in this issue (or matter), pending between ..... and ..... shall be the truth, the whole truth, and nothing but the truth."

(2) Assent to this affirmation shall be made by answer: "I do."

(3) A false affirmation or declaration is perjury in the first degree.

**Source: L. 1887:** p. 191, § 336. **Code 08:** § 370. **Code 21:** § 371. **Code 35:** § 371. **CRS 53:** § 153-1-17. **C.R.S. 1963:** § 154-1-17. **L. 72:** p. 574, § 67.

**13-90-117.5. Oath or affirmation taken by a child.** In lieu of an oath or affirmation, any child who testifies in any proceeding pursuant to section 13-90-106 (1) (b) (II) shall be asked the following: "Do you promise to tell the truth?". The court, in its discretion, may accept any indication of assent to this question by the child.

**Source: L. 90:** Entire section added, p. 985, § 4, effective April 24.

**13-90-118. Witness immunity.** (1) Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to a court or grand jury of the state of Colorado involving any laws of the state and the person presiding over the proceeding communicates to the witness an order as specified in subsection (2) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination; except that no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except a prosecution for perjury or false statement or otherwise failing to comply with the order.

(2) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court or grand jury of the state of Colorado, the district court for the judicial district in which the proceeding is or may be held, or the county court in which a misdemeanor proceeding is or may be held, may issue, upon request of any district attorney, attorney general, or special prosecutor of the state of Colorado, an order requiring such individual to give testimony or provide other information which he or she refuses to give or provide on the basis of the privilege against self-incrimination, such order to become effective as provided in subsection (1) of this section.

(3) A district attorney, attorney general, or special prosecutor of the state of Colorado may request an order as specified in subsection (2) of this section when in his or her judgment the testimony or other information from such individual may be necessary to the public interest and such individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.



**Source:** L. 69: p. 1245, § 1. C.R.S. 1963: § 154-1-18. L. 72: p. 574, § 68. L. 83: Entire section R&RE, p. 638, § 1, effective July 1. L. 2004: Entire section amended, p. 1378, § 4, effective July 1.

### ANNOTATION

**Law reviews.** For article "Witness Immunity Under Colorado Law", see 27 Colo. Law. 37 (December 1998).

**Supreme court may review immunity proceedings.** Where the Colorado supreme court retained jurisdiction to review the rulings of the trial court in "immunity proceedings", it was not intended that the court grant carte blanche interlocutory review of every procedural ruling of the trial court in the conduct of those proceedings, but review is properly limited to matters bearing upon the substantive determination of the grant of immunity relied upon by petitioner in avoidance of prosecution. *Wheeler v. District Court*, 180 Colo. 275, 504 P.2d 1094 (1973).

**Immunity granted under this section is necessarily transactional.** *Wheeler v. District Court*, 184 Colo. 193, 519 P.2d 327 (1974); *People v. Lucero*, 196 Colo. 276, 584 P.2d 1208 (1978); *Steinberger v. District Court*, 198 Colo. 59, 596 P.2d 755 (1979).

**"Transaction immunity" defined.** Transaction immunity may be simply described as that which precludes prosecution for any transaction or affair about which a witness testifies. Use immunity, by contrast, is a grant with limitations. Rather than barring a subsequent related prosecution, it acts only to suppress, in any such prosecution, the witness' testimony and evidence derived directly or indirectly from that testimony. *Steinberger v. District Court*, 198 Colo. 59, 596 P.2d 755 (1979).

**Immunity granted by this statute is no longer transactional.** Since the statute protects the witness from use of the compelled testimony in subsequent criminal proceedings, a defendant who, subsequent to conviction but prior to sentencing, was granted immunity and compelled to testify against his codefendant was not deprived of his privilege against self-incrimination. *People v. Lederer*, 717 P.2d 1017 (Colo. App. 1986).

**In order to constitute proper request for witness immunity,** defense counsel must explicitly request that the court grant a witness "immunity" at the time the witness is being questioned, and after the witness has claimed his fifth amendment privilege. *People v. Macias*, 44 Colo. App. 203, 616 P.2d 150 (1980).

**Decision to grant immunity rests within discretion of prosecution.** *People v. Macias*, 44 Colo. App. 203, 616 P.2d 150 (1980); *People v. Russom*, 107 P.3d 986 (Colo. App. 2004).

This section vests the office of the prosecutor with sole discretionary authority to apply its

provisions to any witness. *People v. Harding*, 671 P.2d 975 (Colo. App. 1983).

Courts possess no inherent power to grant immunity described in this section and may not grant it except upon request of prosecuting attorney. *People v. Merrill*, 816 P.2d 958 (Colo. App. 1991); *People v. Raibon*, 843 P.2d 46 (Colo. App. 1992); *People v. Eggert*, 923 P.2d 230 (Colo. App. 1995).

No error in grant of immunity when the prosecution believed that witness' testimony was necessary in the interest of justice and the record clearly showed that the testimony is essential to the prosecution's case. *People v. Russom*, 107 P.3d 986 (Colo. App. 2004).

**Police officer possesses the necessary apparent authority to make promises of immunity** which bind his principal, the government. *People v. Manning*, 672 P.2d 499 (Colo. 1983).

**To assess whether a person accused of criminal conduct may enforce an offer of immunity by an official not listed in this section, three inquiries must be made:** (1) Whether the defendant's privilege against self-incrimination is implicated; (2) whether the defendant reasonably and detrimentally relied upon the government official's promise by performing his or her side of the bargain; and (3) whether a remedy short of actual enforcement of the promise would approximate fundamental fairness. *Hopp & Flesch v. Backstreet*, 123 P.3d 1176 (Colo. 2005).

**Defendant who was compelled by court order to provide incriminating testimony in a civil case after having been convicted and sentenced was not entitled to postconviction relief of his criminal sentence based on transactional immunity** but was only entitled to use immunity, and since the testimony had not affected the judge's sentencing decision, trial court was correct in denying motion for postconviction relief. *People v. Singer*, 688 P.2d 248 (Colo. App. 1984).

**Witness compelled to testify after conviction but before sentencing gains immunity.** Since a recital of the sentence is an essential part of a judgment of conviction, a court which compels a witness to testify after her own conviction but before sentencing, by operation of this immunity statute, has aborted the prosecution and precluded itself from imposing a sentence or entering a final judgment of conviction. *Steinberger v. District Court*, 198 Colo. 59, 596 P.2d 755 (1979).

**Defendant, who was granted immunity but still refused to testify, was not protected from**

prosecution under this section. *People v. Castango*, 674 P.2d 978 (Colo. App. 1983).

**Certain language from former federal statute.** Language in section beginning with "but no such witness may be prosecuted" is almost a verbatim copy of the former federal immunity statute, 18 U.S.C. § 2514. *Wheeler v. District Court*, 184 Colo. 193, 519 P.2d 327 (1974).

**Grand jury witness's right to suppress intercepted communications.** A grant jury witness has a statutory right to seek the suppression of intercepted communications as well as evidence derived therefrom, and this right is not impaired by the court's grant of transactional immunity since, while such immunity adequately safeguards the witness's privilege against self-incrimination, it does not protect the witness's privacy interest in the contents of the intercepted communications. In re *P.R. v. District Court*, 637 P.2d 346 (Colo. 1981).

**Immunized grand jury testimony** cannot be used in an affidavit supporting a search warrant against the person giving the immunized testimony. Such use falls directly within the provision protecting the defendant from penalty on account of the testimony given. *People v. Henson*, 705 P.2d 996 (Colo. App. 1985).

**Extent of immunity.** When the extent of a grant of immunity is ambiguous and the actions or degree of participation covered by the grant of immunity are not ascertainable, the grant of immunity must extend to the defendant's participation in the entire transaction. *People v. Romero*, 712 P.2d 1081 (Colo. App. 1985), rev'd, 745 P.2d 1003 (Colo. 1987), cert. denied, 108 U.S. 1759, 108 S. Ct. 1296, 99 L.Ed.2d 506 (1988).

**Loss of immunity.** When a defendant has acted with reasonable and detrimental reliance on a governmental promise involving a grant of immunity, the government must be stopped from going back on its promise. *People v. Romero*, 712 P.2d 1081 (Colo. App. 1985), rev'd, 745 P.2d 1003 (Colo. 1987), cert. denied, 108 U.S. 1759, 108 S. Ct. 1296, 99 L.Ed.2d 506 (1988).

**Once a criminal defendant demonstrates that he has been compelled to testify under a grant of use immunity, the prosecution is prohibited from using the compelled testi-**

**mony in any respect** and the prosecution has the duty to prove that evidence it proposes to use is derived from an independent source. *People v. Real*, 895 P.2d 161 (Colo. App. 1994).

**Where prosecutors were exposed to defendant's immunized testimony but defendant had previously made a detailed statement concerning her part in the crime** and defendant's counsel provided additional information to the prosecutors that was not referred to in the detailed statement, possible prosecutorial use of information from the immunized testimony was not a structural defect in the trial and a harmless error analysis was appropriate. In conducting such analysis court was entitled to consider the fact that defendant's participation in the crime was not seriously contested at trial. *People v. Real*, 895 P.2d 161 (Colo. App. 1994); *People v. Real*, 950 P.2d 645 (Colo. App. 1997).

**Mere fact that witness observed the defendant at a hearing in which the defendant gave immunized testimony does not constitute a use of that testimony.** Defendant could have been compelled to appear before the witness and to speak even in the absence of the grant of immunity since the right against self-incrimination does not extend to non-testimonial actions. *People v. Real*, 895 P.2d 161 (Colo. App. 1994).

**Refusal to testify after receiving immunity deemed contempt.** A witness who, despite receiving immunity, persists before a trial court judge in refusing on fifth amendment grounds to supply grand jury testimony, commits contempt and may be punished summarily. *People v. Lucero*, 196 Colo. 276, 584 P.2d 1208 (1978).

**A witness who refused to testify after being granted immunity was guilty of contempt.** *People v. Mulberry*, 919 P.2d 835 (Colo. App. 1995).

**Immunity granted a defendant under this section was universal and therefore all jurisdictions** were precluded from using defendant's testimony in subsequent prosecution against him. *People v. Mulberry*, 919 P.2d 835 (Colo. App. 1995).

**Applied in** *Westerberg v. District Court*, 181 Colo. 10, 506 P.2d 746 (1973), cert. denied, 414 U.S. 1162, 94 S. Ct. 925, 39 L.Ed.2d 115 (1974); *People v. Marquez*, 644 P.2d 59 (Colo. App. 1981).

**13-90-119. Privilege for newperson.** (1) As used in this section, unless the context otherwise requires:

(a) "Mass medium" means any publisher of a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system.

(b) "News information" means any knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes, and reports, and the contents and sources thereof, obtained by a newperson while engaged as such, regardless of whether such items have been provided to or obtained by such newperson in confidence.

(c) "Newperson" means any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive,



observe, process, prepare, write, or edit news information for dissemination to the public through the mass media.

(d) "Press conference" means any meeting or event called for the purpose of issuing a public statement to members of the mass media, and to which members of the mass media are invited in advance.

(e) "Proceeding" means any civil or criminal investigation, discovery procedure, hearing, trial, or other process for obtaining information conducted by, before, or under the authority of any judicial body of the state of Colorado. Such term shall not include any investigation, hearing, or other process for obtaining information conducted by, before, or under the authority of the general assembly.

(f) "Source" means any person from whom or any means by or through which news information is received or procured by a newsperson, while engaged as such, regardless of whether such newsperson was requested to hold confidential the identity of such person or means.

(2) Notwithstanding any other provision of law to the contrary and except as provided in subsection (3) of this section, no newsperson shall, without such newsperson's express consent, be compelled to disclose, be examined concerning refusal to disclose, be subjected to any legal presumption of any kind, or be cited, held in contempt, punished, or subjected to any sanction in any judicial proceedings for refusal to disclose any news information received, observed, procured, processed, prepared, written, or edited by a newsperson, while acting in the capacity of a newsperson; except that the privilege of nondisclosure shall not apply to the following:

(a) News information received at a press conference;

(b) News information which has actually been published or broadcast through a medium of mass communication;

(c) News information based on a newsperson's personal observation of the commission of a crime if substantially similar news information cannot reasonably be obtained by any other means;

(d) News information based on a newsperson's personal observation of the commission of a class 1, 2, or 3 felony.

(3) Notwithstanding the privilege of nondisclosure granted in subsection (2) of this section, any party to a proceeding who is otherwise authorized by law to issue or obtain subpoenas may subpoena a newsperson in order to obtain news information by establishing by a preponderance of the evidence, in opposition to a newsperson's motion to quash such subpoena:

(a) That the news information is directly relevant to a substantial issue involved in the proceeding;

(b) That the news information cannot be obtained by any other reasonable means; and

(c) That a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.

(4) The privilege of nondisclosure established by subsection (2) of this section may be waived only by the voluntary testimony or disclosure of a newsperson that directly addresses the news information or identifies the source of such news information sought. A publication or broadcast of a news report through the mass media concerning the subject area of the news information sought, but which does not directly address the specific news information sought, shall not be deemed a waiver of the privilege of nondisclosure as to such specific news information.

(5) In any trial to a jury in an action in which a newsperson is a party as a result of such person's activities as a newsperson and in which the newsperson has invoked the privilege created by subsection (2) of this section, the jury shall be neither informed nor allowed to learn that such newsperson invoked such privilege or has thereby declined to disclose any news information.

(6) Nothing in this section shall preclude the issuance of a search warrant in compliance with the federal "Privacy Protection Act of 1980", 42 U.S.C. sec. 2000aa.

**Source:** L. 90: Entire section added, p. 1262, § 1, effective April 16.

**Cross references:** For governmental access to news information, see article 72.5 of title 24.

## ANNOTATION

**Law reviews.** For article, "New Shield Law Prohibits Most Subpoenas to Reporters", see 20 Colo. Law. 891 (1991).

**The anti-defamation league, which publishes numerous periodicals, books, and pamphlets and regularly engages in news gathering activities, is a "newsperson" pursuant to this section.** *Quigley v. Rosenthal*, 43 F. Supp.2d 1163 (D. Colo. 1999).

**Anti-defamation league defendants entitled to invoke the privilege for a newperson with regard to the record of anti-Semitic complaints filed with their office.** The information sought is not relevant to a substantial issue in the case, as required by subsection (3). *Quigley v. Rosenthal*, 43 F. Supp.2d 1163 (D. Colo. 1999).

**Section applies when newperson assists law enforcement officers.** Where police officers rode in news helicopter and pilot overflew a building suspected of containing marijuana plants, all at the officers' request, trial court did not err in quashing subpoena whereby defendant sought pilot's testimony as to helicopter's alti-

tude and flight path at the time marijuana plants were observed. *People v. Henderson*, 847 P.2d 239 (Colo. App. 1993).

**Reporter who piloted helicopter that flew police over private residence where marijuana plants were growing was protected under newperson's privilege** where reporter was full-time employee of a television station whose reports were regularly featured on news broadcasts and station assigned reporter to observe and gather information on police attempts to uncover illegal drug activity. *Henderson v. People*, 879 P.2d 383 (Colo. 1994).

**The newperson's privilege is a qualified privilege** and may be overcome by establishing the three factors in subsection (3)(a) through (c). In addition, if the newperson is a defendant in the action where the disclosure is sought, as a part of the subsection (3)(c) analysis, there must be a satisfactory showing of the probable falsity of defendant's statements. *Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000).

## PART 2

## APPOINTMENT OF INTERPRETERS FOR PERSONS WHO ARE DEAF OR HARD OF HEARING

**Editor's note:** This part 2 was numbered as article 3 of chapter 16, C.R.S. 1963. The substantive provisions of this part 2 were repealed and reenacted in 1987, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 2 prior to 1987, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated.

**13-90-201. Legislative declaration.** The general assembly hereby finds and declares that it is the policy of this state to secure the rights of persons who are deaf or hard of hearing and cannot readily hear or understand or communicate in spoken language and who consequently cannot equally participate in or benefit from proceedings of the courts or any board, commission, agency, or licensing or law enforcement authority of the state unless qualified interpreters or auxiliary services are available to assist them.

**Source:** **L. 87:** Entire part R&RE, p. 570, § 1, effective April 23. **L. 2006:** Entire section amended, p. 1086, § 1, effective May 25. **L. 2009:** Entire section amended, (SB 09-144), ch. 219, p. 992, § 8, effective August 5.

**13-90-202. Definitions.** As used in this part 2, unless the context otherwise requires:

- (1) "Appointing authority" means the presiding officer or similar official of any court, board, commission, agency, or licensing or law enforcement authority of the state.
- (2) "Assistive listening device" means an amplification system that operates in conjunction with a hearing aid to increase the volume of sounds for the hearing aid only.
- (3) "Auxiliary services" means those aids and services that assist in effective communication with a person who is deaf or hard of hearing, including but not limited to:
  - (a) The provision of a computer-aided realtime translations (CART) reporter;
  - (b) The provision of an assistive listening device; or



(c) The acquisition or modification of equipment or devices to assist in effective communication with a person who is deaf or hard of hearing.

(4) "Commission" means the Colorado commission for the deaf and hard of hearing in the department of human services created in section 26-21-104, C.R.S.

(5) "Computer-aided realtime translation (CART) reporter" means a word-for-word speech-to-text translation service for people who are deaf or hard of hearing.

(6) "Deaf or hard of hearing" means a person who has a functional hearing loss of sufficient severity to prevent aural comprehension, even with the assistance of hearing aids.

(7) "Effective communication" means those methods of communication that are individualized and culturally appropriate to a person who is deaf or hard of hearing so that he or she can easily understand all auditory information.

(8) "Qualified interpreter" means a person who has a valid certification of competency accepted by the commission and includes, but is not limited to, oral interpreters, sign language interpreters, and intermediary interpreters.

(9) "State court system" means the system of courts, or any part thereof, established pursuant to articles 1 to 9 of this title and article VI of the state constitution. "State court system" shall not include the municipal courts or any part thereof.

**Source:** L. 87: Entire part R&RE, p. 570, § 1, effective April 23. L. 94: (4) amended, p. 2642, § 93, effective July 1. L. 2006: Entire section amended, p. 1086, § 2, effective May 25. L. 2009: (1) amended and (9) added, (SB 09-144), ch. 219, p. 992, § 9, effective August 5.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (4), see section 1 of chapter 345, Session Laws of Colorado 1994.

**13-90-203. Powers and duties of the department of human services.** The department of human services shall promulgate rules pursuant to article 4 of title 24, C.R.S., which have been proposed by the commission as necessary for the implementation of this part 2. The rule-making process shall be open and available for input from the public, including but not limited to interpreters and consumers of interpreter services.

**Source:** L. 87: Entire part R&RE, p. 571, § 1, effective April 23. L. 94: Entire section amended, p. 2642, § 94, effective July 1. L. 2006: Entire section amended, p. 1087, § 3, effective May 25.

**Cross references:** For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994.

**13-90-204. Appointment of auxiliary services - when.** (1) A qualified interpreter or auxiliary service shall be provided by an appointing authority to interpret the proceedings to a person who is deaf or hard of hearing and to interpret the statements of the person who is deaf or hard of hearing in the following instances:

(a) When a person who is deaf or hard of hearing is present and participating as the principal party of interest or a witness at any civil or criminal proceeding, including but not limited to any criminal or civil court proceeding in the state court system; a court-ordered or court-provided alternative dispute resolution, mediation, arbitration, or treatment; an administrative, commission, or agency hearing; or a hearing of a licensing authority of the state;

(b) When a person who is deaf or hard of hearing is involved in any stage of grand jury or jury proceedings as a potential or selected juror;

(c) When a juvenile whose parent or parents are deaf or hard of hearing is brought before a court for any reason;

(d) When a person who is deaf or hard of hearing is arrested and taken into custody for an alleged violation of a criminal law of the state or any of its political subdivisions. Such appointment shall be made prior to any attempt to notify the arrestee of his or her

constitutional rights and prior to any attempt to interrogate or to take a statement from such person; except that a person who is deaf or hard of hearing and who is otherwise eligible for release shall not be held pending the arrival of a qualified interpreter.

(e) (Deleted by amendment, L. 2006, p. 1088, § 4, effective May 25, 2006.)

(f) When effective communication cannot be established without an auxiliary service and when an alleged victim or witness is a person who is deaf or hard of hearing, who uses sign language for effective communication, and who is questioned or otherwise interviewed by a person having a law enforcement or prosecutorial function in any criminal investigation, except where the length, importance, or complexity of the communication does not warrant provision of an auxiliary service. Assessment of whether the length, importance, or complexity of the communication warrants provision of an auxiliary service shall be made in accordance with United States department of justice regulations effectuating Title II of the federal "Americans with Disabilities Act of 1990", as from time to time may be amended, Pub.L. 101-336, codified at 42 U.S.C. sec. 12101, et seq., including regulations, analysis, and technical assistance.

(g) (Deleted by amendment, L. 2007, p. 2026, § 29, effective June 1, 2007.)

(1.5) Nothing in this part 2 shall be construed to provide less than is required by Title II of the federal "Americans with Disabilities Act of 1990", as from time to time may be amended, Pub.L. 101-336, codified at 42 U.S.C. sec. 12101 et seq., and its implementing regulations.

(2) Nothing contained in this section shall be construed to preclude the use of services of an interpreter in civil proceedings.

**Source:** L. 87: Entire part R&RE, p. 571, § 1, effective April 23. L. 2006: (1) amended, p. 1088, § 4, effective May 25. L. 2007: (1)(f) and (1)(g) amended and (1.5) added, p. 2026, § 29, effective June 1. L. 2009: (1)(a) amended, (SB 09-144), ch. 219, p. 992, § 10, effective August 5.

**Editor's note:** This section is similar to former § 13-90-201 as it existed prior to 1987.

## ANNOTATION

**Annotator's note.** Since § 13-90-204 is similar to § 13-91-201 as it existed prior to the 1987 repeal and reenactment of this part 2, a relevant case construing that provision has been included in the annotations to this section.

**Effect of violation of statute.** Assuming that accuracy is the central purpose of the statute, if a qualified interpreter who was not appointed by a court was translating, the failure to appoint an interpreter should not result in suppression; but if the interpreter was not able to accurately communicate with the defendant, the defendant's statements must be suppressed. *People v. Harper*, 726 P.2d 1129 (Colo. 1986).

**Definition of arrest.** Whether a person is in custody turns on an objective assessment of whether a reasonable person in the defendant's circumstances would have believed that he was free to leave the officer's presence, not on the

officer's subjective state of mind. *People v. Harper*, 726 P.2d 1129 (Colo. 1986).

**Only one interpreter required** by statute, and defendant's assertion that second interpreter was necessary to assist communications between the defendant and his counsel because appointed interpreter was occupied with interpreting ongoing proceedings was without merit. *People v. Hammons*, 771 P.2d 1 (Colo. App. 1988), cert. denied, 785 P.2d 611 (Colo. 1990).

**Police officer's request for blood or breath testing for alcohol is not interrogation because any person operating a motor vehicle must comply with breath and blood testing.** Therefore, defendant is not entitled to a qualified interpreter or auxiliary service when a police officer requests a blood or breath sample as part of an investigation of driving under the influence. *Shiplet v. Colo. Dept. of Rev.*, 266 P.3d 408 (Colo. App. 2011).

**13-90-205. Coordination of interpreter and auxiliary services requests.** (1) The commission, in collaboration with the judicial department, shall establish, monitor, coordinate, and publish a list of available resources regarding communication accessibility for persons who are deaf or hard of hearing, including but not limited to qualified interpreters and auxiliary services, for use by an appointing authority pursuant to section 13-90-204. Such list shall contain, but not be limited to, the names of private community programs and



agencies that secure qualified interpreters and auxiliary services for assignment.

(2) Whenever a qualified interpreter or auxiliary service is required pursuant to section 13-90-204, the appointing authority shall secure such interpreter or auxiliary service through the list of available resources made available and coordinated by the commission.

**Source:** L. 87: Entire part R&RE, p. 571, § 1, effective April 23. L. 94: (1) amended, p. 2642, § 95, effective July 1. L. 2006: Entire section amended, p. 1089, § 5, effective May 25.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (1), see section 1 of chapter 345, Session Laws of Colorado 1994.

**13-90-206. Use of an intermediary interpreter.** If the qualified interpreter makes a determination that he or she is unable to render a satisfactory interpretation without the aid of an intermediary interpreter, the appointing authority may appoint an intermediary interpreter to assist the qualified interpreter.

**Source:** L. 87: Entire part R&RE, p. 572, § 1, effective April 23. L. 2006: Entire section amended, p. 1089, § 6, effective May 25.

**13-90-207. Requirements to be met prior to commencing proceedings.** (1) Prior to commencing any proceedings pursuant to section 13-90-204 requiring a qualified interpreter or auxiliary service, the following conditions shall be met:

(a) A qualified interpreter shall take an oath that he or she shall make a true interpretation in an understandable manner to the best of his or her skills, but such oath shall only be required if the entity presiding over the proceeding has been given, by statute, the authority to administer such an oath.

(b) The qualified interpreter or auxiliary service shall be in full view and spatially situated to assure effective communication with the person or persons who are deaf or hard of hearing.

(c) The appointing authority shall make a reasonable attempt to provide a qualified interpreter or auxiliary service that is effective to the person who is deaf or hard of hearing.

**Source:** L. 87: Entire part R&RE, p. 572, § 1, effective April 23. L. 2006: (1) amended, p. 1089, § 7, effective May 25.

**Editor's note:** This section is similar to former § 13-90-203 as it existed prior to 1987.

**13-90-208. Waiver.** The right of a person who is deaf or hard of hearing to a qualified interpreter or auxiliary service may not be waived except in writing by the person who is deaf or hard of hearing. Prior to executing such a waiver, a person who is deaf or hard of hearing may have access to counsel for advice and shall have actual, full knowledge of the right to effective communication. Such waiver is subject to the approval of counsel, if any, to the person who is deaf or hard of hearing and is also subject to the approval of the appointing authority. In no event is the failure of the person who is deaf or hard of hearing to request a qualified interpreter or auxiliary service deemed a waiver of this right.

**Source:** L. 87: Entire part R&RE, p. 572, § 1, effective April 23. L. 2006: Entire section amended, p. 1090, § 8, effective May 25.

**13-90-209. Privileged communications.** If a qualified interpreter is called upon to interpret privileged communications pursuant to section 13-90-107, the interpreter shall not testify without the written consent of the person who holds the privilege.

**Source:** L. 87: Entire part R&RE, p. 572, § 1, effective April 23.

**13-90-210. Compensation.** Subject to the appropriations available to the commission, a qualified interpreter or computer-aided realtime translation reporter provided pursuant to section 13-90-204 shall be entitled to compensation for his or her services, including waiting time and necessary travel and subsistence expenses. The amount of compensation shall be based on a fee schedule for qualified interpreters and auxiliary services established by the commission.

**Source:** L. 87: Entire part R&RE, p. 572, § 1, effective April 23. L. 2006: Entire section amended, p. 1090, § 9, effective May 25.

## ARTICLE 90.5

### Uniform Interstate Depositions and Discovery Act

13-90.5-101.	Short title.		inspection.
13-90.5-102.	Definitions.	13-90.5-106.	Application to court.
13-90.5-103.	Issuance of subpoena.	13-90.5-107.	Uniformity of application and
13-90.5-104.	Service of subpoena.		construction.
13-90.5-105.	Deposition, production, and		

## PREFATORY NOTE

### 1. History of Uniform Acts

The National Conference of Commissioners on Uniform State Laws has twice promulgated acts dealing with interstate discovery procedures.

In 1920, the Uniform Foreign Depositions Act was adopted by NCCUSL. The pertinent section of that act provides:

*Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.*

The UFDA was originally adopted in 13 states. The states and territories which currently have the act include Florida, Georgia, Louisiana, Maryland, Nevada, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Wyoming, and the Virgin Islands.

In 1962, the Uniform Interstate and International Procedure Act was adopted by NCCUSL. The act was designed to supercede any previous interstate jurisdiction acts, including the UFDA, and was more extensive than the UFDA, having provisions on personal jurisdiction, service methods, deposition methods, and other topics. Section 3.02(a) of the act provides:

*[A court][The \_\_\_\_\_ court] of this state may order a person who is do-*

*miciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.*

The UIIPA was originally adopted by 6 states. The states, districts, and territories which currently have the act include Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands.

In 1977 the National Conference of Commissioners on Uniform State Laws withdrew the UIIPA from recommendation "due to its being obsolete." Until now, no other uniform act for interstate depositions has been proposed.

### 2. Common issues

While every state has a rule governing foreign depositions, those rules are hardly uniform.



These differences are extensively detailed in *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev 1, 1981. Some of the more important differences among the various states are the following:

a. In what kind of proceeding may depositions be taken?

Many states restrict depositions to those that will be used in the "courts" or "judicial proceedings" of the other state. Some states allow depositions for any "proceeding." The UFDA and UIIPA take a similar approach.

b. Who may seek depositions?

A few states limit discovery to only the parties in the action or proceeding. Other states simply use the term "party" without any further qualifier, which may be interpreted broadly to include any interested party. Still other states expressly allow any person who would have the power to take a deposition in the trial state to take a deposition in the discovery state. The UIIPA allows any "interested party" to seek discovery. The UFDA does not state who may seek discovery.

c. What matters can be covered in a subpoena?

The UFDA expressly applies only to the "testimony" of witnesses. The UIIPA expressly applies to "testimony or documents or other things." Several states follow the UIIPA approach, while others seem to limit production to documents but not physical things, and still others are silent on the subject, although some of those states recognize that the power to produce documents is implicit. Rule 45 of the FRCP is more explicit, and provides that a subpoena may be issued to a witness "to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises..."

d. What is the procedure for obtaining a deposition subpoena?

Under the UFDA, a party must file the same notice of deposition that would be used in the trial state and then serve the witness with a subpoena under the law of the trial state. If a motion to compel is necessary, it must be filed in the discovery state (the deponent's home court). Other states require that a notice of deposition be shown to a clerk or judge in the discovery state, after which a subpoena will automatically issue. Still other states require a letter rogatory requesting the trial state to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the discovery state to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.

e. What is the procedure for serving a deposition subpoena?

The UFDA provides that the witness "may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state." The UIIPA provides that methods of service includes service "in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction." State rules usually follow the procedure of the UFDA and UIIPA.

f. Which jurisdiction has power to enforce or quash a subpoena?

Most states give the discovery state power to issue, refuse to issue, or quash a subpoena.

g. Where can the deponent be deposed?

Some states limit the place where a deposition can be taken to the discovery state, and some limit it to the deponent's home county. The UFDA and UIIPA are silent on this issue.

h. What witness fees are required?

A few states require the payment of witness fees. While most states are silent on the issue, it is probably assumed that the witness fee rules generally existing in the discovery state apply. These usually include fees and mileage, and are usually required to be paid at the time the witness testifies.

i. Which jurisdiction's discovery procedure applies?

A significant issue is whether the trial state's or discovery state's discovery procedure controls, and on what issues. The general Restatement rule is that the forum state's (the discovery state's) procedure applies. The UIIPA, as well as many states, provides that the discovery state can use the procedure of either the trial or discovery state, with a presumption for the procedure of the discovery state. Some states reverse this presumption, while others are unclear, and still others are silent on the issue.

Another significant issue is whether the trial state's or discovery state's courts can issue protective orders. Both states have interests: the trial state's courts have an interest in protecting witnesses and litigants from improper practices, and the discovery state's courts have an obvious interest in protecting its residents from unreasonable and overly burdensome discovery requests. Most states expressly or implicitly allow the discovery state's courts to issue protective orders.

j. Which jurisdiction's evidence law applies?

Evidentiary disputes usually center on relevance and privilege issues. Most states indicate that the discovery state should rule on all relevance issues. Other states indicate that relevance

issues should be resolved before a subpoena issues, which would necessarily mean that such issues be decided by the trial state. If the discovery state makes such determinations, it is unclear which state's evidence law should apply (if there is a difference).

Perhaps the most difficult issues are whether the trial state or discovery state should determine issues of privilege, and which state's privilege law will apply. Here both jurisdictions have important interests: the trial state has an interest in obtaining all information relevant to the lawsuit consistent with its laws, while the discovery state has an interest in protecting its residents from intrusive foreign laws. The Restatement (Second) Conflict of Laws provides that the state which has the "most significant relationship" to the communication at issue applies its laws. The issue is further compounded by the general rule that once the privilege is waived, it is generally waived. If the deponent does not object at the deposition and testifies about privileged communications, the privilege will usually be waived.

### 3. This act

A uniform act needs to set forth a procedure that can be easily and efficiently followed, that

has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents. And it should be patterned after Rule 45 of the FRCP, which appears to be universally admired by civil litigators for its simplicity and efficiency.

The Drafting Committee believes that the proposed uniform act meets these requirements, should be supported by the various constituencies that have an interest in how interstate discovery is conducted in state courts, and should be adopted by most of the states. The act is simple and efficient: it establishes a simple clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena. The act has minimal judicial oversight: it eliminates the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. The act is cost effective: it eliminates the need to obtain local counsel in the discovery state to obtain an enforceable subpoena. And the act is fair to deponents: it provides that motions brought to enforce, quash, or modify a subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws.

**13-90.5-101. Short title.** This article may be cited as the "Uniform Interstate Depositions and Discovery Act".

**Source: L. 2008:** Entire article added, p. 196, § 1, effective August 5.

**13-90.5-102. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Foreign jurisdiction" means a state other than this state.
- (2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.
- (3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.
- (4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.
- (5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:
  - (a) Attend and give testimony at a deposition;
  - (b) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or
  - (c) Permit inspection of premises under the control of the person.

**Source: L. 2008:** Entire article added, p. 196, § 1, effective August 5.

## OFFICIAL COMMENT

This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico,

the United States Virgin Islands, and the territories of the United States. The committee decided



not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

**13-90.5-103. Issuance of subpoena.** (1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to the district court for the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this section does not constitute an appearance in the courts of this state.

(2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(3) A subpoena under subsection (2) of this section must:

(a) Incorporate the terms used in the foreign subpoena; and

(b) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

**Source: L. 2008:** Entire article added, p. 197, § 1, effective August 5.

#### OFFICIAL COMMENT

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee concluded that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistance to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term "Presented" to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Florida (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Florida county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The

The term "Subpoena" does not include a subpoena for the inspection of a person (subsection (3)(C) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

lawyer will then prepare a Florida subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who will take the completed and executed Kansas subpoena and the completed but not yet executed Florida subpoena to the clerk's office in Florida. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that the Florida subpoena is being sought pursuant to Florida statute \_\_\_\_ (citing the appropriate statute or rule and quoting Sec. 3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical Florida subpoena ("issue" includes signing, stamping, and assigning a case or docket number). The process server (or other agent of the party) will pay any necessary filing fees, and then serve the Florida subpoena on the deponent in accordance with Florida law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be is-

sued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the

names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

**13-90.5-104. Service of subpoena.** A subpoena issued by a clerk of court under section 13-90.5-103 must be served in compliance with section 13-90-115, rule 45 of the Colorado rules of civil procedure, and any other applicable statutes or rules of this state.

**Source: L. 2008:** Entire article added, p. 197, § 1, effective August 5.

**13-90.5-105. Deposition, production, and inspection.** Section 13-90-112, rule 37 of the Colorado rules of civil procedure, and any other applicable statutes or rules of this state apply to subpoenas issued under section 13-90.5-103.

**Source: L. 2008:** Entire article added, p. 197, § 1, effective August 5.

#### OFFICIAL COMMENT

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that

the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

The committee believes that the fee, if any, for issuing a subpoena should be sufficient to cover only the actual transaction costs, or should be the same as the fee for local deposition subpoenas.

**13-90.5-106. Application to court.** An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under section 13-90.5-103 must comply with the rules or statutes of this state and be submitted to the district court for the county in which discovery is to be conducted.

**Source: L. 2008:** Entire article added, p. 197, § 1, effective August 5.

#### OFFICIAL COMMENT

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must com-

ply with the law of the discovery state. Those laws include the discovery state's procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in



protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in the discovery state.

The term “modify” a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state.

Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state.

If a party makes or responds to an application to enforce, quash, or modify a subpoena in the discovery state, the lawyer making or responding to the application must comply with the discovery state’s rules governing lawyers appearing in its courts. This act does not change existing state rules governing out-of-state lawyers appearing in its courts. (See Model Rule 5.5 and state rules governing the unauthorized practice of law.)

**13-90.5-107. Uniformity of application and construction.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source: L. 2008:** Entire article added, p. 197, § 1, effective August 5.

ARTICLE 91

Office of the Child’s Representative

**Cross references:** For the legislative declaration contained in the 2000 act enacting this article, see section 2 of chapter 366, Session Laws of Colorado 2000.

**Law reviews:** For article, “Office of the Child’s Representative: Representation of Children as a Legal Specialty”, see 35 Colo. Law. 63 (May 2006).

13-91-101.	Short title.		guardian ad litem programs
13-91-102.	Legislative declaration.		- CASA programs.
13-91-103.	Definitions.	13-91-106.	Guardian ad litem fund -
13-91-104.	Office of the child’s representative - board - qualifications of director.		court-appointed special advocate (CASA) fund - created.
13-91-105.	Duties of the office of the child’s representative -	13-91-107.	Repeal of article. (Repealed)

**13-91-101. Short title.** This article shall be known and may be cited as the “Office of the Child’s Representative Act”.

**Source: L. 2000:** Entire article added, p. 1766, § 1, effective July 1.

**13-91-102. Legislative declaration.** (1) (a) The general assembly hereby finds that the legal representation of and non-legal advocacy on behalf of children is a critical element in giving children a voice in the Colorado court system. The general assembly further finds that the representation of children is unique in that children often have no resources with which to retain the services of an attorney or advocate, they are unable to efficiently provide or communicate to such an attorney or advocate the information needed to effectively serve the best interests or desires of that child, and they lack the ability and understanding to effectively evaluate and, if necessary, complain about the quality of representation they receive. Accordingly, the general assembly finds that the representation of children neces-

sitates significant expertise as well as a substantial investment in time and fiscal resources. The general assembly finds that, to date, the state has been sporadic, at best, in the provision of qualified services and financial resources to this disadvantaged and voiceless population.

(b) Accordingly, the general assembly hereby determines and declares that it is in the best interests of the children of the state of Colorado, in order to reduce needless expenditures, establish enhanced funding resources, and improve the quality of representation and advocacy provided to children in the Colorado court system, that an office of the child's representative be established in the state judicial department.

(2) It is the intent of the general assembly that an office of the child's representative shall be established pursuant to this article and operational over the course of a two-year period. It is further the intent of the general assembly that a board and a director of the office shall be appointed as specified in section 13-91-104 and that the operational structure of the office shall be established during fiscal year 2000-01. The costs associated with the establishment of the office, including the associated FTE, shall be paid for by a transfer from the state judicial, trial courts, mandated costs line item. In addition, it is the intent of the general assembly that, for fiscal year 2001-02 and fiscal years thereafter, an appropriation shall be made to the office of the child's representative in the state judicial department for the purpose of payment of all financial obligations previously covered by the judicial department, trial courts, mandated costs line item relating to the provision of those legal services to children that are addressed in this article.

**Source: L. 2000:** Entire article added, p. 1766, § 1, effective July 1.

**13-91-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Child" means a person under eighteen years of age.

(2) "Contract entity" means a nonprofit entity with which the state judicial department may contract for the coordination and support of CASA activities in the state of Colorado.

(3) "Court-appointed special advocate" or "CASA volunteer" means a trained volunteer appointed by the court pursuant to the provisions of part 2 of article 1 of title 19, C.R.S., section 14-10-116, C.R.S., or title 15, C.R.S., in a judicial district to aid the court by providing independent and objective information, as directed by the court, regarding children involved in actions brought pursuant to section 14-10-116, C.R.S., or title 15 or 19, C.R.S.

(4) "Guardian ad litem" or "GAL" means a person appointed by a court to act in the best interests of a child involved in a proceeding under title 19, C.R.S., or the "School Attendance Law of 1963", set forth in article 33 of title 22, C.R.S., and who, if appointed to represent a child in a dependency or neglect proceeding pursuant to article 3 of title 19, C.R.S., shall be an attorney-at-law licensed to practice in Colorado.

(5) "Local CASA program" means a CASA program established pursuant to part 2 of article 1 of title 19, C.R.S.

(6) "Representative of a child" means an attorney appointed by a court pursuant to section 14-10-116, C.R.S., to represent the best interests of a minor or dependent child.

**Source: L. 2000:** Entire article added, p. 1767, § 1, effective July 1. **L. 2003:** (3) amended, p. 753, § 1, effective March 25.

**13-91-104. Office of the child's representative - board - qualifications of director.**

(1) The office of the child's representative is hereby created and established as an agency of the judicial department of state government. It shall be the responsibility of the office of the child's representative to work cooperatively with local judicial districts, attorneys, and any contract entity in order to form a partnership between those entities and persons and the state for the purpose of ensuring the provision of uniform, high-quality legal representation and non-legal advocacy to children involved in judicial proceedings in Colorado.

(2) (a) The Colorado supreme court shall appoint a nine-member child's representative board, referred to in this article as the "board". No more than five members of the board shall be from the same political party. The members of the board shall be representative of



each of the congressional districts in the state. Three members of the board shall be attorneys admitted to practice law in this state who have experience in representing children as guardians ad litem or as legal representatives of children. Three members of the board shall be citizens of Colorado not admitted to practice law in this state, who shall have experience at advocating for children in the court system. Three members of the board shall be citizens of the state who are not attorneys and who have not served as CASA volunteers or child and family investigators.

(b) Members of the board shall serve for terms of four years; except that, of the members first appointed, five shall serve for terms of two years. Vacancies on the board shall be filled by the supreme court for the remainder of any unexpired term. In making appointments to the board, the supreme court shall consider place of residence, gender, race, and ethnic background. The supreme court shall establish procedures for the operation of the board.

(c) Members of the board shall serve without compensation but shall be reimbursed for actual and reasonable expenses incurred in the performance of their duties.

(d) Any expenses incurred for the board shall be paid from the general operating budget of the office of the child's representative.

(3) The board shall have the following responsibilities:

(a) (I) To appoint, and discharge for cause, a person to serve as the director of the office of the child's representative, referred to in this section as the "director".

(II) The director shall have been licensed to practice law in this state for at least five years prior to appointment and shall be familiar with the unique demands of representing a child in the court system. The director shall devote his or her full time to the performance of his or her duties and shall not engage in the private practice of law.

(III) The compensation of the director shall be fixed by the general assembly and may not be reduced during the term of the director's appointment.

(b) To fill any vacancy in the directorship for the remainder of the unexpired term;

(c) To work cooperatively with the director to provide governance to the office of the child's representative, to provide fiscal oversight of the general operating budget of the office of the child's representative, to participate in funding decisions relating to the provision of GAL, CASA, and representative of the child services throughout the state, and to assist with the duties of the office of the child's representative concerning GAL and CASA training, as needed.

**Source:** L. 2000: Entire article added, p. 1768, § 1, effective July 1. L. 2002: (2)(a) amended, p. 944, § 3, effective August 7. L. 2003: (2)(a) amended, p. 753, § 2, effective March 25. L. 2005: (2)(a) amended, p. 962, § 8, effective July 1.

**Cross references:** For the legislative declarations contained in the 2005 act amending subsection (2)(a), see sections 1 and 3 of chapter 244, Session Laws of Colorado 2005.

**13-91-105. Duties of the office of the child's representative - guardian ad litem programs - CASA programs.** (1) In addition to any responsibilities assigned to it by the chief justice, the office of the child's representative shall:

(a) Enhance the provision of GAL services in Colorado by:

(I) Ensuring the provision and availability of high-quality, accessible training throughout the state for persons seeking to serve as guardians ad litem as well as to judges and magistrates who regularly hear matters involving children and families;

(II) Making recommendations to the chief justice concerning the establishment, by rule or chief justice directive, of the minimum training requirements that an attorney seeking to serve as a guardian ad litem shall meet;

(III) Making recommendations to the chief justice concerning the establishment, by rule or chief justice directive, of standards to which attorneys serving as guardians ad litem shall be held, including but not limited to minimum practice standards, which standards shall include:

(A) Incorporation of the federal guidelines for persons serving as guardians ad litem as set forth in the federal department of health and human services' "Adoption 2002"

guidelines and incorporation of the guidelines for guardians ad litem adopted by the Colorado bar association in 1993;

(B) Minimum duties of guardians ad litem in representing children involved in judicial proceedings;

(C) Minimum responsibilities of guardians ad litem in representing children involved in judicial proceedings; and

(D) A determination of an appropriate maximum-caseload limitation for persons serving as guardians ad litem;

(IV) Overseeing the practice of guardians ad litem to ensure compliance with all relevant statutes, orders, rules, directives, policies, and procedures;

(V) Working cooperatively with the chief judge in each judicial district or group of judicial districts to jointly establish a local body to oversee the provision of guardian ad litem services in that judicial district or districts, which oversight bodies would operate and report directly to the director concerning the practice of guardians ad litem in that judicial district or districts pursuant to oversight procedures established by the office of the child's representative;

(VI) Establishing fair and realistic state rates by which to compensate state-appointed guardians ad litem, which will take into consideration the caseload limitations placed on guardians ad litem and which will be sufficient to attract and retain high-quality, experienced attorneys to serve as guardians ad litem;

(VII) Seeking to enhance existing funding sources for the provision of high-quality guardian ad litem services in Colorado;

(VIII) Studying the availability of or developing new funding sources for the provision of guardian ad litem services in Colorado, including but not limited to, long-term pooling of funds programs;

(IX) Accepting grants, gifts, donations, and other nongovernmental contributions to be used to fund the work of the office of the child's representative relating to guardians ad litem. Such grants, gifts, donations, and other nongovernmental contributions shall be credited to the guardian ad litem fund, created in section 13-91-106 (1). Moneys in such fund shall be subject to annual appropriation by the general assembly for the purposes of this paragraph (a) and for the purposes of enhancing the provision of guardian ad litem services in Colorado; and

(X) Effective July 1, 2001, allocating moneys appropriated to the office of the child's representative in the state judicial department for the provision of GAL services;

(b) Enhance the CASA program in Colorado by:

(I) Working cooperatively with the contract entity to ensure the development of local CASA programs in each judicial district or in adjacent judicial districts;

(II) Seeking to enhance existing funding sources and to develop private-public partnership funding for the provision of high-quality, volunteer local CASA programs in each judicial district or in adjacent judicial districts;

(III) Studying the availability of or developing new funding sources for CASA programs, including but not limited to long-term pooling of funds programs;

(IV) Effective July 1, 2001, allocating moneys appropriated to the state judicial department for CASA programs to local CASA programs based upon recommendations made by the contract entity;

(V) Working cooperatively with the contract entity to ensure the provision and availability of high-quality, accessible training in locations of the state where CASA programs have been established for the benefit of persons seeking to serve as CASA volunteers as well as for judges and magistrates who regularly hear matters involving children and families;

(VI) Serving as a resource to the contract entity; and

(VII) Accepting grants, gifts, donations, and other nongovernmental contributions to be used to fund the work of the office of the child's representative relating to CASA programs. Such grants, gifts, donations, and other nongovernmental contributions shall be credited to the court-appointed special advocate (CASA) fund created in section 13-91-106 (2). Moneys in such fund shall be subject to annual appropriation by the general assembly for the purposes of this paragraph (b) and for the purposes of the local CASA programs.



(c) Enhance the provision of services in Colorado by attorneys appointed to serve as legal representatives of children pursuant to section 14-10-116, C.R.S., and attorneys appointed to serve as child and family investigators pursuant to section 14-10-116.5, C.R.S., when the costs of such appointments are borne by the state, by:

(I) Ensuring the provision and availability of high-quality, accessible training throughout the state for attorneys seeking to serve as legal representatives of children, and attorneys seeking to serve as child and family investigators, as well as to judges and magistrates who regularly hear domestic matters under article 10 of title 14, C.R.S.;

(II) Making recommendations to the chief justice concerning the establishment, by rule or chief justice directive, of the minimum training requirements that an attorney seeking to serve as a legal representative of a child and an attorney seeking to serve as a child and family investigator shall meet;

(III) Making recommendations to the chief justice concerning the establishment, by rule or chief justice directive, of standards to which attorneys serving as legal representatives of children and attorneys serving as child and family investigators shall be held;

(IV) Overseeing the practice of legal representatives of children appointed pursuant to section 14-10-116, C.R.S., and overseeing the practice of attorneys serving as child and family investigators appointed pursuant to section 14-10-116.5, C.R.S., to ensure compliance with all relevant statutes, orders, rules, directives, policies, and procedures;

(V) Seeking to enhance existing funding sources for and studying the availability of or developing new funding sources for the provision of services by attorneys serving as court-appointed legal representatives of children and attorneys serving as court-appointed child and family investigators;

(VI) Effective July 1, 2001, allocating moneys appropriated to the office of the child's representative in the state judicial department for the provision of services by attorneys serving as court-appointed legal representatives of children and attorneys serving as court-appointed child and family investigators;

(d) Enforce, as appropriate, the provisions of this section;

(e) Work cooperatively with the judicial districts to establish pilot programs designed to enhance the quality of child representatives at the local level;

(f) Develop measurement instruments designed to assess and document the effectiveness of various models of representation and the outcomes achieved by representatives and advocates for children, including collaborative models with local CASA programs;

(g) (Deleted by amendment, L. 2009, (SB 09-048), ch. 120, p. 500, § 1, effective August 5, 2009.)

(h) Cause a program review and outcome-based evaluation of the performance of the office of the child's representative to be conducted annually to determine whether the office is effectively and efficiently meeting the goals of improving child and family well-being and the duties set forth in this section, the reports for which shall be submitted to the members of the general assembly and the state court administrator's office, together with the reports specified in paragraph (i) of this subsection (1); and

(i) Report the activities of the office of the child's representative to the members of the general assembly and to the state court administrator's office, together with the reports specified in paragraph (h) of this subsection (1), on or before September 1, 2001, and on or before September 1 of each year thereafter.

**Source:** L. 2000: Entire article added, p. 1769, § 1, effective July 1. L. 2003: (1)(b)(VII) amended, p. 754, § 3, effective March 25. L. 2005: (1)(c) amended, p. 961, § 5, effective July 1. L. 2009: (1)(g), (1)(h), and (1)(i) amended, (SB 09-048), ch. 120, p. 500, § 1, effective August 5.

**Cross references:** For the legislative declarations contained in the 2005 act amending subsection (1)(c), see sections 1 and 3 of chapter 244, Session Laws of Colorado 2005.

**13-91-106. Guardian ad litem fund - court-appointed special advocate (CASA) fund - created.** (1) (a) There is hereby created in the state treasury the guardian ad litem fund, referred to in this subsection (1) as the "fund". The fund shall consist of such general

fund moneys as may be appropriated thereto by the general assembly and any moneys received pursuant to section 13-91-105 (1) (a) (IX). The moneys in the fund shall be subject to annual appropriation by the general assembly to the state judicial department for allocation to the office of the child's representative for the purposes of funding the work of the office of the child's representative relating to the provision of guardian ad litem services and for the provision of guardian ad litem services in Colorado. All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any moneys not appropriated shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

(b) Notwithstanding any provision of paragraph (a) of this subsection (1) to the contrary, on April 20, 2009, the state treasurer shall transfer the balance of moneys in the fund to the general fund.

(2) There is hereby created in the state treasury the court-appointed special advocate (CASA) fund referred to in this subsection (2) as the "fund". The fund shall consist of such general fund moneys as may be appropriated thereto by the general assembly and any moneys received pursuant to section 13-91-105 (1) (b) (VII). The moneys in the fund shall be subject to annual appropriation by the general assembly to the state judicial department for allocation to the office of the child's representative for the purposes of funding the CASA programs established in each judicial district, or in adjacent judicial districts, pursuant to part 2 of article 1 of title 19, C.R.S., and the work of the office of the child's representative relating to the enhancement of CASA programs. All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any moneys not appropriated shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

**Source: L. 2000:** Entire article added, p. 1772, § 1, effective July 1. **L. 2003:** (2) amended, p. 754, § 4, effective March 25. **L. 2009:** (1) amended, (SB 09-208), ch. 149, p. 620, § 11, effective April 20.

### **13-91-107. Repeal of article. (Repealed)**

**Source: L. 2000:** Entire article added, p. 1773, § 1, effective July 1. **L. 2010:** Entire section repealed, (SB 10-043), ch. 145, p. 492, § 1, effective April 20.





## **TITLE 14**

# **DOMESTIC MATTERS**



WILEY

EXPERIMENTAL

# TITLE 14

## DOMESTIC MATTERS

**Cross references:** For the "Colorado Children's Code", see title 19.

### ADOPTION - ADULTS

- Art. 1. Adoption of Adults, 14-1-101.

### MARRIAGE AND RIGHTS OF MARRIED WOMEN

- Art. 2. Marriage and Rights of Married Women, 14-2-101 to 14-2-310.

### DOMESTIC ABUSE

- Art. 4. Domestic Abuse, 14-4-101 to 14-4-107.

### DESERTION AND NONSUPPORT

- Art. 5. Uniform Interstate Family Support Act, 14-5-101 to 14-5-1007.  
Art. 6. Nonsupport, 14-6-101 to 14-6-113.  
Art. 7. Parent and Child, 14-7-101 to 14-7-105.

### DISSOLUTION OF MARRIAGE - PARENTAL RESPONSIBILITIES

- Art. 10. Uniform Dissolution of Marriage Act, 14-10-101 to 14-10-133.  
Art. 10.5. Parenting Time Enforcement Act, 14-10.5-101 to 14-10.5-104.  
Art. 11. Actions Originating in Other Jurisdictions, 14-11-101.  
Art. 12. Marriage Counseling, 14-12-101 to 14-12-106.  
Art. 13. Uniform Child-custody Jurisdiction and Enforcement Act, 14-13-101 to 14-13-403.  
Art. 13.5. Uniform Child Abduction Prevention Act, 14-13.5-101 to 14-13.5-112.

### CHILD SUPPORT

- Art. 14. Child Support Enforcement Procedures, 14-14-101 to 14-14-113.

### ADOPTION - ADULTS

#### ARTICLE 1

#### Adoption of Adults

14-1-101. Adoption of adults.

**14-1-101. Adoption of adults.** (1) Any person desiring to adopt an adult as heir at law shall file his petition therefor in the juvenile court of the county of his residence or the county of the residence of the person sought to be adopted, and thereupon summons shall issue the same as provided in the Colorado rules of civil procedure and be served on the person sought to be adopted. Such person shall file in the court a written answer to the petition within the time required by the summons and shall either consent to such adoption or deny or disclaim all desire to be adopted by such person.

(2) Upon the filing, by the person sought to be adopted, of a disclaimer of all desire to become the heir at law of the petitioner, the petition shall be dismissed by the court, but upon the filing of a consent to such adoption, whether by the person sought to be adopted



or by a legally qualified conservator or other representative if such person is non compos mentis at the time, the prayer of the petition shall be granted, and a decree of adoption shall be rendered and entered by the court declaring such person the heir at law of the petitioner and entitled to inherit from the petitioner any property in all respects as if such adopted person had been the petitioner's child born in lawful wedlock, and such decree may or may not change the name of such adopted person, as the court rendering the decree may deem advisable; and such decree or a certified copy thereof may be used as primary evidence in any court establishing the status of the person so adopted.

(3) Any action for adoption pursuant to this section shall follow the same procedure insofar as practicable as provided in part 2 of article 5 of title 19, C.R.S., concerning the adoption of children.

**Source:** L. 67: p. 1055, § 1. C.R.S. 1963: § 4-2-1. L. 87: (3) amended, p. 815, § 14, effective October 1.

## ANNOTATION

**Law reviews.** For note, "The Right of Inheritance of Adopted Children in Colorado", see 23 Rocky Mt. L. Rev. 191 (1950). For note, "Adoption and Intestacy in Colorado", see 26 Rocky Mt. L. Rev. 65 (1953). For article, "The Adoption of Children in Colorado", see 37 Dicta 100 (1960).

**Annotator's note.** Since § 14-1-101 is similar to repealed § 4-1-13, CRS 53, a relevant case construing that provision has been included in the annotations to this section.

**The primary purpose of this section is expressed in the first sentence:** "Any person desiring to adopt a person over 21 years of age as heir-at-law ....". *Martin v. Cuellar*, 131 Colo. 117, 279 P.2d 843 (1955).

**The name of the person adopted under this section need not be changed.** *Martin v. Cuellar*, 131 Colo. 117, 279 P.2d 843 (1955).

**No obligation whatsoever is placed upon the person adopted with respect to the adoptive parent, and he is granted no rights whatever, other than the acquisition of an heir-at-law, who may or may not even bear his name.** *Martin v. Cuellar*, 131 Colo. 117, 279 P.2d 843 (1955).

**This section is merely a means of giving effect to a personal transaction mutually agreeable between two adults.** *Martin v. Cuellar*, 131 Colo. 117, 279 P.2d 843 (1955).

**No rights of the natural parents of the person adopted are taken from them, or even mentioned, where the purpose of the adoption is, to acquire an adult "heir-at-law".** *Martin v. Cuellar*, 131 Colo. 117, 279 P.2d 843 (1955).

**Certainly the rights of the natural parents of such person so adopted may not be lost in a proceeding of which they receive no notice, and there is no requirement of service of notice upon them.** *Martin v. Cuellar*, 131 Colo. 117, 279 P.2d 843 (1955).

**The effect of an adult adoption and a child adoption are different.** A person adopts an adult to make such person his or her intestate heir. *Matter of Trust created by Belgard*, 829 P.2d 457 (Colo. App. 1991).

**This section requires the trial court to grant an adult adoption** when there is valid service and the adoptee consents to such adoption. There is no additional requirement that there be a minimum age differential between the adoptor and the adoptee nor is adoption precluded based upon the prior relationship of the parties. *In re P.A.L. von R.*, 5 P.3d 390 (Colo. App. 2000).

**It does not violate public policy of state to permit a person to adopt his or her own adult sibling.** *In re P.A.L. von R.*, 5 P.3d 390 (Colo. App. 2000).

**Where one over the age of 21 years is adopted as an heir-at-law by another person, such adoptive parent is without legal status to maintain action under the wrongful death statute for the death of such adopted person.** *Martin v. Cuellar*, 131 Colo. 117, 279 P.2d 843 (1955).

**Considering the circumstances at the time the trust was executed and the settlor's reasonable expectations, the phrase "persons legally adopted" was held to include adopted children only, not adults.** The court held that the respondent was using the adult adoption statute to entitle his wife to a remainder of the trust estate, contrary to the settlor's intent as set forth in the instrument. *Matter of Trust created by Belgard*, 829 P.2d 457 (Colo. App. 1991).

**The general assembly's desire to place adopted and natural children on par with one another does not extend to permit adult adoptions for the purpose of giving them an interest in property already specifically designated.** Such an adoption decree did not have the power to affect the disposition of such interests, it only granted the right to inherit through intestacy. *Matter of Trust created by Belgard*, 829 P.2d 457 (Colo. App. 1991).

**Adult adoption proceedings in juvenile court are confidential.** *In re W.D.A. v. City & County of Denver*, 632 P.2d 582 (Colo. 1981).

Section 19-4-104 (1) (now § 19-5-215), relating to confidentiality of records, applies to

adult adoption proceedings under this section. In re W.D.A. v. City & County of Denver, 632 P.2d 582 (Colo. 1981).

## MARRIAGE AND RIGHTS OF MARRIED WOMEN

### ARTICLE 2

#### Marriage and Rights of Married Women

##### PART 1

##### UNIFORM MARRIAGE ACT

- 14-2-101. Short title.
- 14-2-102. Purposes - rules of construction.
- 14-2-103. Uniformity of application and construction.
- 14-2-104. Formalities.
- 14-2-105. Marriage license and marriage certificate.
- 14-2-106. License to marry.
- 14-2-107. When licenses to marry issued - validity.
- 14-2-108. Judicial approval.
- 14-2-109. Solemnization and registration.
- 14-2-109.5. Common law marriage - age restrictions.
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### PART 1

#### UNIFORM MARRIAGE ACT

**Editor's note:** This part 1 was numbered as article 1 of chapter 90, C.R.S. 1963. The provisions of this part 1 were repealed and reenacted in 1973, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 1 prior to 1973, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**Annotator's note.** For legality of common-law marriages in this state, see *Graham v. Graham*, 130 Colo. 225, 274 P.2d 605 (1954).

**14-2-101. Short title.** This part 1 shall be known and may be cited as the "Uniform Marriage Act".

**Source:** L. 73: R&RE, p. 1016, § 1. C.R.S. 1963: § 90-1-1.



## ANNOTATION

**Law reviews.** For article, "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For article, "One Year Review of Domestic Relations", see 34 Dicta 108 (1957). For comment, "Adoptive Sibling Marriage in Colorado: *Israel v. Allen*", see 51 U. Colo. L. Rev. 135 (1979). For article, "Effects of Reconciliation on Separation Agree-

ments in Colorado", see 51 U. Colo. L. Rev. 399 (1980). For article, "Cohabitation Agreements in Colorado", see 15 Colo. Law. 979 (1986). For article, "Common Law Marriage in Colorado", see 16 Colo. Law. 252 (1987). For article, "Defending Against a Common Law Marriage Claim", see 34 Colo. Law. 69 (March 2005).

**14-2-102. Purposes - rules of construction.** (1) This part 1 shall be liberally construed and applied to promote its underlying purposes.

(2) Its underlying purposes are:

- (a) To strengthen and preserve the integrity of marriage and to safeguard meaningful family relationships;
- (b) To provide adequate procedures for the solemnization and registration of marriage.

**Source:** L. 73: R&RE, p. 1016, § 1. C.R.S. 1963: § 90-1-2.

## ANNOTATION

**Law reviews.** For comment, "Adoptive Sibling Marriage in Colorado: *Israel v. Allen*", see 51 U. Colo. L. Rev. 135 (1979).

**There is no doubt that the public policy of Colorado favors marriage.** *Lewis v. Colo. Nat'l Bank*, 652 P.2d 1106 (Colo. App. 1982).

**But policy will not void a forfeiture-on-remarriage trust provision.** A forfeiture-on-remarriage provision in a trust is not void on public policy grounds as a restraint on marriage.

*Lewis v. Colo. Nat'l Bank*, 652 P.2d 1106 (Colo. App. 1982).

The policy of the law favoring marriage is without sufficient vigor to overcome the policy in support of effectuating a settlor's intention. *Lewis v. Colo. Nat'l Bank*, 652 P.2d 1106 (Colo. App. 1982).

**Applied in** *Israel v. Allen*, 195 Colo. 263, 577 P.2d 762 (1978).

**14-2-103. Uniformity of application and construction.** This part 1 shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this part 1 among those states which enact it.

**Source:** L. 73: R&RE, p. 1016, § 1. C.R.S. 1963: § 90-1-3.

**14-2-104. Formalities.** (1) Except as otherwise provided in subsection (3) of this section, a marriage is valid in this state if:

- (a) It is licensed, solemnized, and registered as provided in this part 1; and
- (b) It is only between one man and one woman.

(2) Notwithstanding the provisions of section 14-2-112, any marriage contracted within or outside this state that does not satisfy paragraph (b) of subsection (1) of this section shall not be recognized as valid in this state.

(3) Nothing in this section shall be deemed to repeal or render invalid any otherwise valid common law marriage between one man and one woman:

- (a) Entered into prior to September 1, 2006; or
- (b) Entered into on or after September 1, 2006, that complies with section 14-2-109.5.

**Source:** L. 73: R&RE, p. 1016, § 1. C.R.S. 1963: § 90-1-4. L. 2000: Entire section amended, p. 1054, § 1, effective May 26. L. 2006, 1st Ex. Sess.: (3) amended, p. 9, § 1, effective July 18.

**Cross references:** For the constitutional provisions stating that marriage is between one man and one woman, see section 31 of article II of the state constitution.

## ANNOTATION

**Common law, not the provisions of the Uniform Marriage Act, governs the existence of a common law marriage.** In re J.M.H., 143 P.3d 1116 (Colo. App. 2006).

**14-2-105. Marriage license and marriage certificate.** (1) The executive director of the department of public health and environment shall prescribe the form for an application for a marriage license, which shall include the following information:

(a) Name, sex, address, social security number, date and place of birth of each party to the proposed marriage; and for such purpose proof of date of birth may be by a birth certificate, a driver's license, or other comparable evidence;

(b) If either party has previously been married, such party's married name and the date, place, and court in which the marriage was dissolved or declared invalid or the date and place of death of the former spouse;

(c) Name and address of the parents or guardian of each party;

(d) Whether the parties are related to each other and, if so, their relationship, or, if the parties are currently married to each other, a statement to that effect.

(2) The executive director of the department of public health and environment shall prescribe the forms for the marriage license, the marriage certificate, and the consent to marriage.

**Source:** L. 73: R&RE, p. 1016, § 1. C.R.S. 1963: § 90-1-5. L. 93: (1)(b) and (1)(d) amended, p. 437, § 1, effective July 1. L. 94: IP(1) and (2) amended, p. 2731, § 347, effective July 1.

**Cross references:** For the legislative declaration contained in the 1994 act amending the introductory portion to subsection (1) and subsection (2), see section 1 of chapter 345, Session Laws of Colorado 1994.

**14-2-106. License to marry.** (1) (a) When a marriage application has been completed and signed by both parties to a prospective marriage and at least one party has appeared before the county clerk and recorder and has paid the marriage license fee of seven dollars, a fee of twenty dollars to be transmitted by the county clerk and recorder to the state treasurer and credited by the treasurer to the Colorado domestic abuse program fund created in section 39-22-802 (1), C.R.S., and an additional amount established pursuant to section 25-2-121, C.R.S., such amount to be credited to the vital statistics records cash fund pursuant to section 25-2-121, C.R.S., the county clerk shall issue a license to marry and a marriage certificate form upon being furnished:

(I) Satisfactory proof that each party to the marriage will have attained the age of eighteen years at the time the marriage license becomes effective; or, if over the age of sixteen years but has not attained the age of eighteen years, has the consent of both parents or guardian or, if the parents are not living together, the parent who has legal custody or decision-making responsibility concerning such matters or with whom the child is living or judicial approval, as provided in section 14-2-108; or, if under the age of sixteen years, has both the consent to the marriage of both parents or guardian or, if the parents are not living together, the parent who has legal custody or decision-making responsibility concerning such matters or with whom the child is living and judicial approval, as provided in section 14-2-108; and

(II) Satisfactory proof that the marriage is not prohibited, as provided in section 14-2-110.

(III) Repealed.

(b) Violation of paragraph (a) (I) of this subsection (1) shall make the marriage voidable.

(c) (Deleted by amendment, L. 2000, p. 1571, § 8, effective July 1, 2000.)

(2) Repealed.



**Source:** **L. 73:** R&RE, p. 1017, § 1. **C.R.S. 1963:** § 90-1-6. **L. 75:** (2)(a) amended, p. 583, § 1, effective April 10. **L. 79:** (2)(a), (2)(b), and (2)(d) R&RE, p. 635, § 1, effective July 1. **L. 84:** (1)(a)(III) amended, p. 1118, § 9, effective June 7; IP(1)(a) amended, p. 742, § 1, effective July 1. **L. 86:** (1)(a)(III) amended, p. 711, § 1, effective July 1; (2)(a), (2)(b), (2)(d), (2)(f), and (2)(g) amended and (2)(h) added, p. 711, § 1, effective July 1. **L. 89:** IP(1)(a) amended and (1)(c) added, p. 936, § 2, effective July 1. **L. 93:** (1)(c) amended, p. 927, § 4, effective May 28. **L. 98:** (1)(a)(I) amended, p. 1394, § 30, effective February 1, 1999. **L. 2000:** IP(1)(a) and (1)(c) amended, p. 1571, § 8, effective July 1. **L. 2009:** IP(1)(a) amended, (SB 09-068), ch. 264, p. 1211, § 5, effective July 1.

**Editor's note:** Subsection (1)(a)(III)(B) provided for the repeal of subsection (1)(a)(III), effective July 1, 1989. (See L. 86, p. 711.) Subsection (2)(h) provided for the repeal of subsection (2), effective July 1, 1989. (See L. 86, p. 711.)

### ANNOTATION

**Law reviews.** For article, "Common Law Marriage in Colorado", see 16 Colo. Law. 252 (1987).

**A failure to obtain the blood test (now rubella immunity documentation) does not**

**invalidate a marriage**, since § 14-2-113 provides for penalties only in the event of violation. *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961) (decided under repealed § 90-1-6, CRS 53).

**14-2-107. When licenses to marry issued - validity.** Licenses to marry shall be issued by the county clerk and recorder only during the hours that the office of the county clerk and recorder is open as prescribed by law and at no other time, and such licenses shall show the exact date and hour of their issue. A license shall not be valid for use outside the state of Colorado. Within the state, such licenses shall not be valid for more than thirty-five days after the date of issue. If any license to marry is not used within thirty-five days, it is void and shall be returned to the county clerk and recorder for cancellation.

**Source:** **L. 73:** R&RE, p. 1018, § 1. **C.R.S. 1963:** § 90-1-7. **L. 75:** Entire section amended, p. 583, § 2, effective April 10. **L. 93:** Entire section amended, p. 437, § 2, effective July 1. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 829, § 22, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**14-2-108. Judicial approval.** (1) The juvenile court, as defined in section 19-1-103 (17), C.R.S., after a reasonable effort has been made to notify the parents or guardian of each underage party, may order the county clerk and recorder to issue a marriage license and a marriage certificate form:

(a) To a party aged sixteen or seventeen years who has no parent or guardian, or who has no parent capable of consenting to his marriage, or whose parent or guardian has not consented to his marriage; or

(b) To a party under the age of sixteen years who has the consent to his or her marriage of both parents, if capable of giving consent, or his or her guardian or, if the parents are not living together, the parent who has legal custody or decision-making responsibility concerning such matters or with whom the child is living.

(2) A license shall be ordered to be issued under subsection (1) of this section only if the court finds that the underage party is capable of assuming the responsibilities of marriage and the marriage would serve his best interests. Pregnancy alone does not establish that the best interests of the party would be served.

(3) The district court or the juvenile court, as the case may be, shall authorize performance of a marriage by proxy upon the showing required by the provisions on solemnization, being section 14-2-109.

**Source:** L. 73: R&RE, p. 1018, § 1. C.R.S. 1963: § 90-1-8. L. 87: IP(1) amended, p. 815, § 15, effective October 1. L. 98: (1)(b) amended, p. 1394, § 31, effective February 1, 1999.

#### ANNOTATION

**Law reviews.** For comment, "Adoptive Sibling Marriage in Colorado: *Israel v. Allen*", see 51 U. Colo. L. Rev. 135 (1979).

**14-2-109. Solemnization and registration.** (1) A marriage may be solemnized by a judge of a court, by a court magistrate, by a retired judge of a court, by a public official whose powers include solemnization of marriages, by the parties to the marriage, or in accordance with any mode of solemnization recognized by any religious denomination or Indian nation or tribe. Either the person solemnizing the marriage or, if no individual acting alone solemnized the marriage, a party to the marriage shall complete the marriage certificate form and forward it to the county clerk and recorder within sixty-three days after the solemnization. Any person who fails to forward the marriage certificate to the county clerk and recorder as required by this section shall be required to pay a late fee in an amount of not less than twenty dollars. An additional five-dollar late fee may be assessed for each additional day of failure to comply with the forwarding requirements of this subsection (1) up to a maximum of fifty dollars. For purposes of determining whether a late fee shall be assessed pursuant to this subsection (1), the date of forwarding shall be deemed to be the date of postmark.

(2) If a party to a marriage is unable to be present at the solemnization, such party may authorize in writing a third person to act as such party's proxy. If the person solemnizing the marriage is satisfied that the absent party is unable to be present and has consented to the marriage, such person may solemnize the marriage by proxy. If such person is not satisfied, the parties may petition the district court for an order permitting the marriage to be solemnized by proxy.

(3) Upon receipt of the marriage certificate, the county clerk and recorder shall register the marriage.

**Source:** L. 73: R&RE, p. 1019, § 1. C.R.S. 1963: § 90-1-9. L. 79: (1) amended, p. 637, § 1, effective May 25. L. 89: (1) amended, p. 781, § 1, effective April 4. L. 91: (1) amended, p. 359, § 19, effective April 9. L. 93: Entire section amended, p. 438, § 3, effective July 1. L. 2012: (1) amended, (SB 12-175), ch. 208, p. 829, § 23, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

#### ANNOTATION

**Law reviews.** For article, "The Validity in Colorado of Marriages by Proxy", see 20 Dicta 283 (1943).

**14-2-109.5. Common law marriage - age restrictions.** (1) A common law marriage entered into on or after September 1, 2006, shall not be recognized as a valid marriage in this state unless, at the time the common law marriage is entered into:

- (a) Each party is eighteen years of age or older; and
  - (b) The marriage is not prohibited, as provided in section 14-2-110.
- (2) Notwithstanding the provisions of section 14-2-112, a common law marriage



contracted within or outside this state on or after September 1, 2006, that does not satisfy the requirements specified in subsection (1) of this section shall not be recognized as valid in this state.

**Source:** L. 2006, 1st Ex. Sess.: Entire section added, p. 9, § 2, effective July 18.

**14-2-110. Prohibited marriages.** (1) The following marriages are prohibited:

(a) A marriage entered into prior to the dissolution of an earlier marriage of one of the parties, except a currently valid marriage between the parties;

(b) A marriage between an ancestor and a descendant or between a brother and a sister, whether the relationship is by the half or the whole blood;

(c) A marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established customs of aboriginal cultures.

(2) Children born of a prohibited marriage are legitimate.

**Source:** L. 73: R&RE, p. 1019, § 1. C.R.S. 1963: § 90-1-10. L. 78: (1)(b) amended, p. 262, § 47, effective May 23. L. 93: (1)(a) amended, p. 438, § 4, effective July 1.

**Cross references:** For criminal penalties for the offense of bigamy, see § 18-6-201; for criminal penalties for the offense of incest, see § 18-6-301.

## ANNOTATION

**Law reviews.** For note, "The Serbonian Bog of Miscegenation", see 21 Rocky Mt. L. Rev. 425 (1949). For article, "The Incestuous Marriage — Relic of the Past", see 36 U. Colo. L. Rev. 473 (1964). For comment, "Adoptive Sibling Marriage in Colorado: *Israel v. Allen*", see 51 U. Colo. L. Rev. 135 (1979). For article, "Same Sex Marriages: Should the CBA Take a Position," see 25 Colo. Law. 7 (April 1996).

**Putative spouse entitled to legal spouse's right to workmen's compensation.** While it is true that a marriage entered into prior to dissolution of a previous marriage is prohibited in Colorado, an innocent party to such a marriage is not deprived of the rights conferred upon a legal spouse. As a putative spouse, upon the other person's death, she acquires the legal spouse's right to workmen's compensation. *Williams v. Fireman's Fund Ins. Co.*, 670 P.2d 453 (Colo. App. 1983).

**A common law marriage cannot be found where decedent knew that plaintiff was legally married to someone not the decedent at the time the decedent died** despite anything decedent may have said regarding an intention to marry plaintiff and plaintiff's acquisition of a retroactive divorce after decedent died. The court will not speculate as to what the decedent might have intended regarding marriage had he been aware of the removal of the legal disability during his lifetime. *Crandell v. Resley*, 804 P.2d 272 (Colo. App. 1990).

**Belief by parties that they had entered into a "religious" or "celestial" marriage does not establish putative spouse status** if parties were aware that plaintiff was still legally married to someone else at the time of the "celestial" marriage. *Combs v. Tibbitts*, 148 P.3d 430 (Colo. App. 2006).

**14-2-111. Putative spouse.** Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. Children born of putative spouses are legitimate. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited under section 14-2-110, declared invalid, or otherwise terminated by court action. If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.

**Source:** L. 73: R&RE, p. 1019, § 1. C.R.S. 1963: § 90-1-11.

## ANNOTATION

**Knowledge that one is married to another person negates good faith belief required of putative spouse.** *People v. McGuire*, 751 P.2d 1011 (Colo. App. 1987).

**Putative spouse entitled to legal spouse's right to workmen's compensation.** While it is true that a marriage entered into prior to dissolution of a previous marriage is prohibited in Colorado, an innocent party to such a marriage is not deprived of the rights conferred upon a legal spouse. As a putative spouse, upon the other person's death, she acquires the legal spouse's right to workmen's compensation. *Williams v. Fireman's Fund Ins. Co.*, 670 P.2d 453 (Colo. App. 1983).

**A common law marriage cannot be found where decedent knew that plaintiff was le-**

**gally married to someone not the decedent at the time the decedent died** despite anything decedent may have said regarding an intention to marry plaintiff and plaintiff's acquisition of a retroactive divorce after decedent died. The court will not speculate as to what the decedent might have intended regarding marriage had he been aware of the removal of the legal disability during his lifetime. *Crandell v. Resley*, 804 P.2d 272 (Colo. App. 1990).

**Belief by parties that they had entered into a "religious" or "celestial" marriage does not establish putative spouse status if parties were aware that plaintiff was still legally married to someone else at the time of the "celestial" marriage.** *Combs v. Tibbitts*, 148 P.3d 430 (Colo. App. 2006).

**14-2-112. Application.** All marriages contracted within this state prior to January 1, 1974, or outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state.

**Source:** L. 73: R&RE, p. 1020, § 1. C.R.S. 1963: § 90-1-12.

## ANNOTATION

**Law reviews.** For note, "Some Marriages in Colorado Governed by Customs of Mexico", see 1 Rocky Mt. L. Rev. 151 (1929). For note, "Jurisdiction to Annul a Marriage Celebrated Without the Forum", see 26 Rocky Mt. L. Rev. 57 (1953).

**A marriage contracted in another jurisdiction, and valid under its laws, is valid in**

**Colorado.** *Payne v. Payne*, 121 Colo. 212, 214 P.2d 495 (1950); *Spencer v. People in Interest of Spencer*, 133 Colo. 196, 292 P.2d 971 (1956) (decided under repealed § 90-1-5, CRS 53 and CSA, C. 107, § 4).

**14-2-113. Violation - penalty.** Except as provided in section 14-2-109 (1), any person who knowingly violates any provision of this part 1 is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars.

**Source:** L. 73: R&RE, p. 1020, § 1. C.R.S. 1963: § 90-1-13.

## PART 2

## RIGHTS OF MARRIED WOMEN

**14-2-201. Married woman's own property.** The property, real and personal, which any woman in this state owns at the time of her marriage, and the rents, issues, profits, and proceeds thereof, and any real, personal, or mixed property which comes to her by descent, devise, or bequest, or the gift of any person except her husband, including presents or gifts from her husband, such as jewelry, silver, tableware, watches, money, and wearing apparel, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for his debts.

**Source:** R.S. p. 454, § 1. G.L. § 1747. G.S. § 2266. R.S. 08: § 4181. C.L. § 5576. CSA: C. 108, § 1. CRS 53: § 90-2-1. C.R.S. 1963: § 90-2-1.



## ANNOTATION

- I. General Consideration.
- II. Rights of Married Women at Common Law.
- III. Statutory Rights of Married Women.
  - A. In General.
  - B. Under This Section.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Joint Tenancy in Colorado", see 26 Dicta 313 (1949). For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988).

**This act is an enabling statute and must be liberally construed** to effectuate the purposes of its enactment. *Wells v. Caywood*, 3 Colo. 487 (1877).

**Under such construction, controversies respecting the status of married women have practically disappeared from our jurisprudence.** *Williams v. Williams*, 20 Colo. 51, 37 P. 614 (1894).

**The wife is placed upon precisely the same footing with a femme sole.** *Scott v. Mills*, 7 Colo. App. 155, 42 P. 1021 (1895).

### II. RIGHTS OF MARRIED WOMEN AT COMMON LAW.

**Under the common law, the wife was absolutely under the control of her husband, and without his consent she could neither act or contract with reference to any right of property.** *Daniels v. Benedict*, 97 F. 367 (8th Cir. 1899).

**During marriage the legal existence of the woman was suspended, or incorporated and consolidated with that of her husband.** *Daniels v. Benedict*, 97 F. 367 (8th Cir. 1899).

**Whatever property belonged to her while single, or came to her while covert, passed absolutely to her husband, or fell under his domain.** *Daniels v. Benedict*, 97 F. 367 (8th Cir. 1899).

**Moreover, she could possess nothing to her separate use, she could alienate nothing during her life, she could bequeath nothing at her death, she could make no contract, and she could bring no suit.** *Daniels v. Benedict*, 97 F. 367 (8th Cir. 1899).

**The wife's identity was completely merged in that of her husband.** *Schuler v. Henry*, 42 Colo. 367, 94 P. 360 (1908).

**With but few limitations, he had the control of her person, her property, her children, her labor.** *Schuler v. Henry*, 42 Colo. 367, 94 P. 360 (1908).

**Under the common law of England, from which estates by entireties sprang, husband and wife in legal contemplation constituted but one person, and they were merged by marriage**

**into one legal entity or personality, and plurality of persons was not recognized.** *Whyman v. Johnston*, 62 Colo. 461, 163 P. 76 (1917).

**She could neither sue nor be sued.** *Whyman v. Johnston*, 62 Colo. 461, 163 P. 76 (1917).

**The common-law fiction that husband and wife are one does not exist in Colorado.** *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935).

**Separateness of spouses is clearly established by Colorado's Equal Rights Amendment, § 29 of art. II, Colo. Const., and by this article.** *Commercial Union Ins. Co. v. State Farm Fire & Cas. Co.*, 546 F. Supp. 543 (D. Colo. 1982).

**At common law, in the absence of evidence to show the separate ownership of the wife, the law presumed that the property was owned by the husband.** *Allen v. Eldridge*, 1 Colo. 287 (1871).

### III. STATUTORY RIGHTS OF MARRIED WOMEN.

#### A. In General.

**By sundry legislative acts, dating from an early period, the disabilities of coverture have been gradually removed.** *Williams v. Williams*, 20 Colo. 51, 37 P. 614 (1894).

**The wife in Colorado was emancipated from the condition of thralldom in which she was placed at common law.** *Wells v. Caywood*, 3 Colo. 487 (1877).

**The wife in Colorado is the wife under this act, and not the wife at common law, and by this act must her rights be determined, the common law affecting her rights having been swept away.** *Schuler v. Henry*, 42 Colo. 367, 94 P. 360 (1908).

**This act removed every disability which coverture had formerly imposed upon married women, so far as their separate property and earnings are concerned.** *Tuttle v. Shutts*, 43 Colo. 534, 96 P. 260 (1908); *Hedlund v. Hedlund*, 87 Colo. 607, 290 P. 285 (1930).

**This act places the married woman upon precisely the same footing with a femme sole, as to all matters relating to her separate property and earnings, and she may make contracts, perform labor and services on her own account, sue and be sued with reference to her separate property, business, and earnings, as if she were sole.** *Tuttle v. Shutts*, 43 Colo. 534, 96 P. 260 (1908); *Hedlund v. Hedlund*, 87 Colo. 607, 290 P. 285 (1930).

**Furthermore, an attempt to apply both the common law and the statutory law must end in failure.** *Stramann v. Scheeren*, 7 Colo. App. 1, 42 P. 191 (1883).

**Also, under this section when considered with the other sections of this part of article 2 of title 14, it has been uniformly held that**

contracts and conveyances between husband and wife are presumptively valid and effectual, without proof aliunde of their equity or justice. *Wells v. Caywood*, 3 Colo. 487 (1877); *Coon v. Rigden*, 4 Colo. 275 (1878); *O'Connell v. Taney*, 16 Colo. 353, 27 P. 888 (1891); *Kellogg v. Kellogg*, 21 Colo. 181, 40 P. 358 (1895); *Daniels v. Benedict*, 97 F. 367 (8th Cir. 1899).

**Courts can only carefully scrutinize transactions between husband and wife to see that they are not collusive**, and in fraud of the rights of others, and then apply to them the same rules and legal principles that control in dealing with others. *Stramann v. Scheeren*, 7 Colo. App. 1, 42 P. 191 (1895).

**Husbands and wives are equal under the law in respect to the conjugal affection and society which each owes to the other.** *Williams v. Williams*, 20 Colo. 51, 37 P. 614 (1894).

**Gifts made by the husband, while sick, to the wife, were set aside at the suit of the executors of the husband's estate** after his death, because of the undue influence exercised by the latter over the former in procuring the same. *Meldrum v. Meldrum*, 15 Colo. 478, 24 P. 1083 (1890).

**It was held that a deed procured by the fraud of the wife to be made to a third party for her benefit would be set aside in equity** *Meldrum v. Meldrum*, 15 Colo. 478, 24 P. 1083 (1890).

#### B. Under This Section.

**Under this section the wife holds an absolute legal estate** as free from the common-law rights of her husband as if she were unmarried. *Palmer v. Hanna*, 6 Colo. 55 (1881).

**For the wife's separate estate when she has no husband**, see *Palmer v. Hanna*, 6 Colo. 55 (1881).

**14-2-202. Married woman may sue and be sued.** Any woman, while married, may sue and be sued, in all matters having relation to her property, person, or reputation, in the same manner as if she were sole.

**Source:** R.S. p. 455, § 3. G.L. § 1749. G.S. § 2268. R.S. 08: § 4182. C.L. § 5577. CSA: C. 108, § 2. CRS 53: § 90-2-2. C.R.S. 1963: § 90-2-2.

**Cross references:** For the rule of civil procedure authorizing married women to sue as if sole, see C.R.C.P. 17(b).

#### ANNOTATION

**Law reviews.** For article, "Damages Recoverable for Injuries to A Spouse in Colorado", see 28 Dicta 291 (1951).

**Until 1874 married women were under disability and could not sue or be sued** except in matters relating to their separate estates. *Schuler v. Henry*, 42 Colo. 367, 94 P. 360, (1908).

**Since this section confers upon the wife capacity to take and dispose of real property free from any restraint**, the reason of the common-law rule has ceased to exist. *Wells v. Caywood*, 3 Colo. 487 (1877); *Whyman v. Johnston*, 62 Colo. 461, 163 P. 76 (1917).

**This section provides that any gift of money from the husband shall be the sole and separate property of the wife**, and not subject to the disposal of the husband or his creditors. *Woodruff v. Clarke*, 128 Colo. 387, 262 P.2d 737 (1953).

**Where the husband owned city lots and the wife had money which she desired to invest**, and under mutual agreement the lots were improved with her money, it was held that she had an equitable interest in the property which could be asserted against her husband. *Stramann v. Scheeren*, 7 Colo. App. 1, 42 P. 191 (1895).

**Where the husband acquires and pays for real property, and causes his wife's name to be inserted in the deed as one of the grantees therein**, there is a presumption that he intended it as a gift or advancement, and the burden of showing otherwise is upon him who asserts it. *Woodruff v. Clarke*, 128 Colo. 387, 262 P.2d 737 (1953).

**There can be no doubt of the power of a husband to dispose absolutely of his property during his life**, independently of the concurrence, and exonerated from the claim of his wife, provided the transaction is not merely colorable, and is unattended with circumstances indicative of fraud upon the rights of the wife. *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698 (1967).

**If the disposition of the husband be bona fide, and no right is reserved to him**, though made to defeat the right of the wife, it will be good against her. *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698 (1967).

**The statute up to that time also provided that when judgment was rendered against the husband and wife for the tort of the wife**, execution should first be levied on the lands of the wife, if she had any. *Schuler v. Henry*, 42 Colo. 367, 94 P. 360 (1908).

**This section contains the provision which**



emancipates married women from many of the disabilities imposed by the common law, and the decisions of the courts lay emphasis on the wife's independence of her husband in that she is guaranteed a remedy against ill persons, including her husband, for every personal injury she may sustain. *Giggey v. Gallagher Transp. Co.*, 101 Colo. 258, 72 P.2d 1100 (1937).

**There is no exception as to the person the wife may sue.** *Rains v. Rains*, 97 Colo. 19, 24, 46 P.2d 740 (1935).

In view of the broad, liberal provisions of the constitution and statutes of this state, and the liberal construction thereof adopted by the courts of this state, the supreme court of Colorado was unwilling to follow the decisions of courts that held that a wife had no right to sue her husband for a personal injury caused by him. *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935).

**This section admits a married woman to the courts upon the same terms as if she were sole**, and for this reason, if for no other, she cannot claim indulgence on the ground of coverture. *Mills v. Angela*, 1 Colo. 334 (1871).

**The married woman is not like an infant who is incapable of acting for himself**, and is compelled to rely upon a guardian ad litem, who may be careless or unfaithful. *Mills v. Angela*, 1 Colo. 334 (1871).

**The law clothes her with power to manage her own affairs**, and she ought to accept the

responsibility which attends upon free agency. *Mills v. Angela*, 1 Colo. 334 (1871).

**She is under no disability in respect to the time or manner of putting in her defense to an action brought against her.** *Mills v. Angela*, 1 Colo. 334 (1871).

**To enable a wife to join with her husband in an action upon an undertaking**, the engagement must have been with her distinctly and unquestionably. *Allen v. Eldridge*, 1 Colo. 287 (1871).

**The wife may maintain an action for damages against one who wrongfully induces and procures her husband to abandon her or send her away.** *Williams v. Williams*, 20 Colo. 51, 37 P. 614 (1894).

**A husband has a right to maintain an action against his wife to recover property belonging to him.** *Hedlund v. Hedlund*, 87 Colo. 607, 290 P. 285 (1930).

**So diverse are the rights and interests, the duties, obligations, and disabilities of husband and wife now**, that it would be most unreasonable to hold him still liable for the torts committed by her without his presence and without his consent or approbation. *Schuler v. Henry*, 42 Colo. 367, 94 P. 360 (1908).

**The Uniform Marriage Act neither expressly nor impliedly creates a private cause of action.** *Weizmann v. Kirkland and Ellis*, 732 F. Supp. 1540 (D. Colo. 1990).

**14-2-203. Rights in her separate business.** Any married woman may carry on any trade or business and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property and may be used and invested by her in her own name. Her property acquired by trade, business, and services and the proceeds thereof may be taken on any execution against her.

**Source:** R.S. p. 455, § 6. G.L. § 1752. G.S. § 2271. R.S. 08: § 4183. C.L. § 5578. CSA: C. 108, § 3. CRS 53: § 90-2-3. C.R.S. 1963: § 90-2-3.

#### ANNOTATION

Modern legal theory and statute have placed women on an equal footing with men regarding their rights to hold and manage property. *Thompson v. Thompson*, 30 Colo. App. 57, 489 P.2d 1062 (1971).

**The wife is still to perform the usual and ordinary household duties.** *Denver & R. G. R. v. Young*, 30 Colo. 349, 70 P. 688 (1902).

**For such household services, she is not entitled to any monetary compensation from her husband.** *Denver & R. G. R. v. Young*, 30 Colo. 349, 70 P. 688 (1902).

**In an action by a married woman, living at the time with her husband, for damages for personal injuries alleged to have been caused by the negligence of defendant**, she is not entitled to recover damages to compensate her for her inability to perform ordinary household du-

ties. *Denver & R. G. R. v. Young*, 30 Colo. 349, 70 P. 688 (1902).

**A contract between the husband and wife, by which the wife reserves to herself the earnings of her labor performed for her husband**, in matters apart from the domestic duties of the wife pertaining strictly to the household and the family, may be entered into by the wife as if she were sole, and for this reason such contract cannot be held to be against public policy. *Tuttle v. Shutts*, 43 Colo. 534, 96 P. 260 (1908).

**Contracts between a husband and his wife are not presumptively void.** *Daniels v. Benedict*, 97 F. 367 (8th Cir. 1899).

**Since some contracts between parties in fiduciary relations to each other are valid, and some are voidable or void**, and some contracts between strangers are valid, and some

are void, no definite conclusion can be drawn as to the validity or invalidity of a contract from the fact that the parties to it occupied a fiduciary relation to each other. *Daniels v. Benedict*, 97 F. 367 (8th Cir. 1899).

**A promissory note given by a married woman and her husband, for property purchased by her as a sole trader, is valid in law, and the amount of such note may be recovered against the husband and wife in an action of assumpsit.** *Barnes v. De France*, 2 Colo. 294 (1874).

**Since under this section the rights of the wife to manage and control her individual property are well established,** the relation of debtor and creditor may exist between husband and wife as fully as if both were sole, and the wife may deal with the husband as with a stranger, and in case of the insolvency of the husband, he may pay the wife to the exclusion of other creditors, but the existence of the individ-

ual property and the bona fides of the debt must, in other cases, be fully established. *Knapp v. Day*, 4 Colo. App. 21, 34 P. 1008 (1893).

**Under this section a husband is deprived of all interest in the labor of his wife rendered to third persons,** and a married woman may maintain an action in her own name to recover her earnings. *Allen v. Eldridge*, 1 Colo. 287 (1871).

**It may be contended that the words "on her sole and separate account", in the first clause of this section** restrict the woman's right to cases in which she declares her intention to appropriate the proceeds of her labor to her own use. But there is little room for such construction, because it must be presumed that every one who labors for hire is seeking his own personal emolument, for men do not sow that others may reap, and the highest claim to the fruits of labor is vested in him who performs it, and none other need be asserted. *Allen v. Eldridge*, 1 Colo. 287 (1871).

**14-2-204. Not to affect marriage settlements.** Nothing in sections 14-2-201 to 14-2-206 shall invalidate any marriage settlement or contract.

**Source:** R.S. p. 455, § 7. G.L. § 1753. G.S. § 2272. R.S. 08: § 4184. C.L. § 5579. CSA: C. 108, § 4. CRS 53: § 90-2-4. C.R.S. 1963: § 90-2-4.

**14-2-205. Wife's land subject to judgment.** When any woman against whom liability exists marries and has or acquires lands, judgment on such liability may be rendered against her and her husband jointly, to be levied on such lands only.

**Source:** R.S. p. 455, § 10. G.L. § 1756. G.S. § 2275. R.S. 08: § 4187. C.L. § 5582. CSA: C. 108, § 7. CRS 53: § 90-2-7. C.R.S. 1963: § 90-2-7.

**14-2-206. Husband cannot convey wife's lands.** The separate deed of the husband shall convey no interest in the wife's lands.

**Source:** R.S. p. 455, § 12. G.L. § 1757. G.S. § 2276. R.S. 08: § 4188. C.L. § 5583. CSA: C. 108, § 8. CRS 53: § 90-2-8. C.R.S. 1963: § 90-2-8.

**14-2-207. Wife may convey lands as if sole.** Any woman, while married, may bargain, sell, and convey her real and personal property and enter into any contract in reference to the same as if she were sole.

**Source:** R.S. p. 455, § 2. L. 1874: p. 185, § 1. G.L. § 1759. G.S. § 2278. R.S. 08: § 4190. C.L. § 5585. CSA: C. 108, § 10. CRS 53: § 90-2-9. C.R.S. 1963: § 90-2-9.

#### ANNOTATION

**At common law, a married woman could convey her estate only by fine and recovery.** *Keller v. Klopfer*, 3 Colo. 132 (1876).

**Under the early law, it was provided that to convey her lands a married woman should unite with her husband** in making the conveyance, that she should acknowledge the same,

separate and apart from her husband, that the officer hearing the acknowledgment should certify that the same was made upon examination separate, apart from, and out of the presence of her husband, and that the contents, meaning, and effect of such deed were by the officer fully explained to the wife. *Keller v. Klopfer*, 3 Colo.



132 (1876); *Nippel v. Hammond*, 4 Colo. 211 (1878); *Knight v. Lawrence*, 19 Colo. 425, 36 P. 242 (1894).

**Under present law, the married woman is in law deemed capable of managing her own affairs**, and she has the power as well as the right to convey her real estate without let or hindrance from any one, and she requires no protection, and she suffers no restraints, in such matters. *Knight v. Lawrence*, 19 Colo. 425, 36 P. 242 (1894); *Wells v. Caywood*, 3 Colo. 487 (1877); *Colo. Cent. R. R. v. Allen*, 13 Colo. 229, 22 P. 605 (1889).

**It was the intention to clothe her with all the rights of a femme sole.** *Scott v. Mills*, 7 Colo. App. 155, 42 P. 1021 (1895).

**The wife may make conveyance directly to her husband** and the removal in respect to the wife of a disability that is mutual, and springing

from the same source, removes it also as to the husband, and the husband may, acting in his own right, convey directly to the wife. *Wells v. Caywood*, 3 Colo. 487 (1877); *O'Connell v. Taney*, 16 Colo. 353, 27 P. 888 (1891); *Rose v. Otis*, 18 Colo. 59, 31 P. 493 (1892); *Kellogg v. Kellogg*, 21 Colo. 181, 40 P. 358 (1895); *Scott v. Mills*, 7 Colo. App. 155, 42 P. 1021 (1895); *Stramann v. Scheeren*, 7 Colo. App. 1, 42 P. 191 (1895); *Tuttle v. Shutts*, 43 Colo. 534, 96 P. 260 (1908).

**In the nature of things and in the legislative mind**, the husband and wife both possess the character of a householder and head of a family, at least to the extent to enable either of them owning the home they occupy to designate it as a homestead. *McPhee v. O'Rourke*, 10 Colo. 301, 15 P. 420 (1887).

**14-2-208. Wife may contract.** Any woman, while married, may contract debts in her own name and upon her own credit, and may execute promissory notes, bonds, bills of exchange, and other instruments in writing, and may enter into any contract the same as if she were sole; and, in all cases where any suit or other legal proceedings are instituted against her and any judgment, decree, or order therein is rendered or pronounced against her, the same may be enforced by execution or other process against her the same as if she were sole.

**Source:** L. 1874: p. 185, § 3. G.L. § 1761. G.S. § 2280. R.S. 08: § 4191. C.L. § 5586. CSA: C. 108, § 11. CRS 53: § 90-2-10. C.R.S. 1963: § 90-2-10.

#### ANNOTATION

**At common law a married woman, though living apart from her husband**, could not make a binding contract except for necessities or for the benefit of her separate estate. *Ferrand v. Beshoar*, 9 Colo. 291, 12 P. 196 (1886).

**In equity, before the statutes of 1872 and 1874, the written contract of a married woman, for the benefit of other persons**, was not a charge upon her separate estate unless it contained an express provision to that effect. *Ferrand v. Beshoar*, 9 Colo. 291, 12 P. 196 (1886).

**By the act of 1861, to protest the rights of married women, a wife could make contracts respecting her separate business and estate**, but beyond these limits her contracts were governed by the common law and were therefore

void, and she could not warrant her husband's title to realty, or covenant for his act or default in any respect whatever. *Holladay v. Dailey*, 1 Colo. 460 (1872).

**In an action on contract against a married woman, a plea of coverture, without more, is not sufficient in law as a defense.** *Rose v. Otis*, 18 Colo. 59, 31 P. 493 (1892).

**Where the husband was joined as a codefendant with his wife in the district court, he not being a party to the contract sued upon**, and no relief having been demanded against him in the complaint, it was held that upon default judgment should have been entered against the wife alone. *Wilbur v. Maynard*, 6 Colo. 483 (1883).

**14-2-209. Loss of consortium.** In all actions for a tort by a married woman, she shall have the same right to recover for loss of consortium of her husband as is afforded husbands in like actions.

**Source:** L. 61: p. 560, § 1. CRS 53: § 90-2-11. C.R.S. 1963: § 90-2-11.

## ANNOTATION

While it was true that because of the married women's acts, married women could successfully maintain actions for interference with their rights to consortium which arose from intentional, malicious, or direct action by an outsider, nevertheless, the prevailing opinion and great weight of authority denied such an action to a married woman for indirect, remote, or consequential loss, and thus, a married woman had no right to recover for the loss of consortium alone occasioned by the negligent acts of third persons. *Giggey v. Gallagher Transp. Co.*, 101 Colo. 258, 72 P.2d 1100 (1937) (decided prior to earliest source of this section, L. 61, p. 560, § 1); *Franzen v. Zimmerman*, 127 Colo. 381, 256 P.2d 897 (1953).

With the enactment of this section the rule denying a wife the right to sue for loss of consortium resulting from injuries inflicted upon her husband changed. *Crouch v. West*, 29 Colo. App. 72, 477 P.2d 805 (1970).

At the time of the enactment of this statute, the right of a husband to recover for loss of consortium due to injuries inflicted upon his wife had not been denied or restricted by any later or higher authority. *Crouch v. West*, 29 Colo. App. 72, 477 P.2d 805 (1970).

The general assembly intended to confer such right upon the wife, and to confer it upon her as a separate right similar to that held by married men. *Crouch v. West*, 29 Colo. App. 72, 477 P.2d 805 (1970).

There may in such situations have been but one wrong, but from it sprang two separate and distinct rights of action, one in the husband and the other in the wife. *Crouch v. West*, 29 Colo. App. 72, 477 P.2d 805 (1970).

Their actions are wholly distinct and separate from each other, and since there is no privity between them in the connection involved, and adjudication in one could not properly be res judicata in the other. *Crouch v. West*, 29 Colo. App. 72, 477 P.2d 805 (1970).

Since the claim of the wife is her own right and is a right which is separate from the claims of her husband, it could have been and was validly separated from the pretrial settlement of the husband's claim for his personal injuries. *Crouch v. West*, 29 Colo. App. 72, 477 P.2d 805 (1970).

Recovery for loss between tort and time of death. Plaintiff bringing an action individually, as widow of the decedent, may recover for "loss of consortium" between the time the tort occurred and the date of decedent's death. *Hernandez v. United States*, 383 F. Supp. 168 (D. Colo. 1974).

Loss not within former limits of wrongful death statute. Loss of consortium is an independent category, not to be included in those damages formerly limited under the wrongful death statute. *Hernandez v. United States*, 383 F. Supp. 168 (D. Colo. 1974).

**14-2-210. Domicile - sex or marriage not a ban.** The right of any person to become a resident domiciled in the state of Colorado shall not be denied or abridged because of sex or marital status, and the common law rule that the domicile of a married woman is that of her husband shall no longer be in effect in this state.

Source: L. 69: p. 824, § 1. C.R.S. 1963: § 90-2-12. L. 73: p. 1022, § 1.

## PART 3

## COLORADO MARITAL AGREEMENT ACT

**Law reviews:** For article, "Marital Agreements", see 18 Colo. Law. 31, (1989); for article, "Update on Ethics and Malpractice Avoidance in Family Law — Parts I and II", see 19 Colo. Law. 465 and 647 (1990); for article, "An Historical Perspective on Marital Agreements", see 20 Colo. Law. 467 (1991); for article, "Prenuptial Agreements and the Dead Man's Statute", see 23 Colo. Law. 357 (1994); for article, "Beware of the Trap — Marital Agreements and ERISA Benefits", see 23 Colo. Law. 577 (1994); for article, "Marital Agreements and the Colorado Marital Agreement Act", see 32 Colo. Law. 59 (August 2003); for article, "Prenuptial Agreements and Retirement Plan Assets", see 33 Colo. Law. 43 (February 2004); for article, "Marital Agreements in Colorado", see 36 Colo. Law. 53 (February 2007).

**14-2-301. Short title.** This part 3 shall be known and may be cited as the "Colorado Marital Agreement Act".

Source: L. 86: Entire part added, p. 713, § 1, effective July 1.



**14-2-302. Definitions.** As used in this part 3, unless the context otherwise requires:

(1) "Marital agreement" means an agreement either between prospective spouses made in contemplation of marriage or between present spouses, but only if signed by both parties prior to the filing of an action for dissolution of marriage or for legal separation.

(2) "Party" means any person who has entered into a marital agreement.

(3) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

**Source:** L. 86: Entire part added, p. 713, § 1, effective July 1.

#### ANNOTATION

The requirement of subsection (1) that present spouses sign a marital agreement prior to the filing of a dissolution action is based on public policy considerations that seek to safeguard the interests of a spouse involved in the emotionally stressful circumstances of a dissolution action. In re Lafaye, 89 P.3d 455 (Colo. App. 2003).

Agreement entered into between parties eight days prior to commencement of an action for dissolution in Sweden constitutes a marital agreement. Matter of C.G.G., 946 P.2d 603 (Colo. App. 1997).

Where agreement was entered into two days prior to mailing Mexican divorce papers and two months before the filing of a Colorado petition for dissolution of marriage, but executed in contemplation of a dissolution of marriage, it must be considered a separation

agreement. In re Bisque, 31 P.3d 175 (Colo. App. 2001).

**Post-nuptial agreement not enforceable** under the plain language of the act because it was signed by husband and wife during the pendency of the prior dissolution action. In re Lafaye, 89 P.3d 455 (Colo. App. 2003).

**Giving effect to a nunc pro tunc dismissal of a dissolution of marriage action would be contrary to the public policy of the Colorado Marital Agreement Act** where not only did the parties sign a post-nuptial agreement while a dissolution action was pending, but counsel had admonished the parties not to sign the agreement until that action had actually been dismissed. By the time counsel signed the stipulation for dismissal, the parties' attempted reconciliation had failed. In re Lafaye, 89 P.3d 455 (Colo. App. 2003).

**14-2-303. Formalities.** A marital agreement shall be in writing and signed by both parties and is enforceable without consideration.

**Source:** L. 86: Entire part added, p. 713, § 1, effective July 1.

**14-2-304. Content.** (1) Parties may contract with respect to:

(a) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(b) The acquisition, disposition, management, and control of any property;

(c) The disposition of property upon separation of the parties, dissolution of the marriage, death of either party, or the occurrence or nonoccurrence of any other event;

(d) The determination, modification, or elimination of spousal maintenance;

(e) The making of a will, trust, or other arrangement to carry out the provisions of the marital agreement;

(f) The ownership rights in and disposition of the death benefit from a life insurance policy;

(g) The rights and obligations in benefits available or to be available under an employee benefit or retirement plan, except to the extent federal law prevents a binding agreement with respect to such rights and obligations;

(h) The choice of law governing the construction of the agreement; and

(i) Any other matter, including the personal rights or obligations of either party, not in violation of public policy or any statute imposing a criminal penalty.

(2) Unless the marital agreement provides to the contrary, a waiver of "all rights upon death" (or equivalent language) in the property or estate of a present or prospective spouse is:

(a) A waiver of all rights to the elective share, exempt property, family allowance, and homestead exemption of the waiving party in the property of the other;

(b) A waiver of the statutory priority of the waiving party to serve as personal representative, executor, or administrator of the estate of the other; and

(c) A renunciation and disclaimer by the waiving party of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of the provisions of any will executed before the marital agreement. Provisions of a will executed before the marital agreement are given effect as if the waiving party:

(I) Disclaimed all interests passing to him or her under the will; and

(II) Became disqualified to serve as personal representative, executor, administrator, or trustee.

(2.3) Unless the marital agreement provides to the contrary, a revocation of "all benefits passing upon death to the relatives of my spouse" (or equivalent language) is a revocation of all benefits that would otherwise pass upon death to the relatives of the spouse from the revoking party by virtue of the provisions of any will executed before the writing. Provisions of a will executed before the writing are given effect as if the relatives:

(a) Disclaimed all interests passing to them under the will; and

(b) Became disqualified to serve as personal representative, executor, administrator, or trustee.

(2.5) For purposes of this section, "relative" of an individual's spouse means a person who is related to the spouse by blood, adoption, or affinity and who, if the individual and the individual's spouse were divorced, would not be related to the individual by blood, adoption, or affinity.

(3) A marital agreement may not adversely affect the right of a child to child support.

**Source:** L. 86: Entire part added, p. 713, § 1, effective July 1. L. 96: (2) amended and (2.3) and (2.5) added, p. 653, § 2, effective July 1.

#### ANNOTATION

General assembly did not intend to preclude courts from reviewing waivers of attorney fees in marital agreements for unconscionability at the time of enforcement. Trial court may review a waiver of attorney fees in a marital agreement for unconscionability at the time of dissolution, because an unconscionable waiver violates the public policy interest behind protecting spouses and thus is not a valid contract term under this section. In re Ikeler, 161 P.3d 663 (Colo. 2007).

Trial court was required to enforce and, if necessary, interpret the child support provision of a foreign marital agreement entered into in Sweden and identifying Sweden under a choice of law provision of such agreement, even though the agreement had not been incorporated into a Swedish order. Matter of C.G.G., 946 P.2d 603 (Colo. App. 1997).

**14-2-305. Effective date of agreement.** A marital agreement becomes effective upon marriage, if signed by both parties prior to marriage, or upon the signatures of both parties, if signed after marriage.

**Source:** L. 86: Entire part added, p. 714, § 1, effective July 1.

**14-2-306. Amendment - revocation.** After a marital agreement becomes effective, it may be amended or revoked only by a written agreement signed by both parties. The amended agreement or revocation is enforceable without consideration.

**Source:** L. 86: Entire part added, p. 714, § 1, effective July 1.

**14-2-307. Enforcement.** (1) A marital agreement or amendment thereto or revocation thereof is not enforceable if the party against whom enforcement is sought proves that:

(a) Such party did not execute the agreement, amendment, or revocation voluntarily; or



(b) Before execution of the agreement, amendment, or revocation, such party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party.

(2) A marital agreement or amendment thereto or revocation thereof that is otherwise enforceable after applying the provisions of subsection (1) of this section is nevertheless unenforceable insofar, but only insofar, as the provisions of such agreement, amendment, or revocation relate to the determination, modification, or elimination of spousal maintenance and such provisions are unconscionable at the time of enforcement of such provisions. The issue of unconscionability shall be decided by the court as a matter of law.

(3) A marital agreement or amendment thereto or revocation thereof that is otherwise enforceable shall not be unenforceable because by the terms of such agreement, amendment, or revocation the rights or obligations, or both, of one or both parties change or expire because of the passage of time or the occurrence or nonoccurrence of any other event.

**Source:** L. 86: Entire part added, p. 714, § 1, effective July 1.

### ANNOTATION

**Annotator's note.** For cases dealing with the validity of marital agreements prior to the enactment of this part 3, see the annotations to §§ 14-10-112 and 14-10-113.

**A trial court must find that the maintenance provisions of an otherwise valid antenuptial agreement are unconscionable at the time a divorce decree is entered in order to award maintenance to a party.** In re Dechant, 867 P.2d 193 (Colo. App. 1993) (decided under law in effect prior to amendment effective July 1, 1986).

In determining unconscionability, the terms "appropriate employment" and "reasonable needs" are not to be interpreted so narrowly as to require a spouse to establish that he or she lacks the minimum resources to sustain life. In re Dechant, 867 P.2d 193 (Colo. App. 1993) (decided under law in effect prior to amendment effective July 1, 1986).

**Trial court may review a waiver of attorney fees in a marital agreement for unconscionability at the time of dissolution,** because an unconscionable waiver violates the public policy interest behind protecting spouses and thus is not a valid contract term under § 14-2-304. In re Ikeler, 161 P.3d 663 (Colo. 2007).

**Standards for determining unconscionability.** Generally, an agreement under this section is unconscionable if it is not fair, reasonable, and just. In re Christen, 899 P.2d 339 (Colo. App. 1995).

Speculation about possible future events, such as unemployment, disability, and remarriage, do not indicate that the agreement is at present unconscionable. In re Christen, 899 P.2d 339 (Colo. App. 1995).

When the parties enter into an agreement that provides for maintenance to be paid year-to-year in an amount calculated in accordance with a formula agreed upon by the parties and accepted as not unconscionable by the court, the trial

court acts within its discretion in not setting forth an exact amount of maintenance in its decree of dissolution and permanent orders. In re Christen, 899 P.2d 339 (Colo. App. 1995).

**In order for agreement for binding Rabbinical arbitration to be enforceable,** it must be conscionable and must be entered into by the parties voluntarily after full disclosure. In re Popack, 998 P.2d 464 (Colo. App. 2000).

**Waiver of attorney fee provision** in an antenuptial agreement is voidable on the grounds of unconscionability. In re Dechant, 867 P.2d 193 (Colo. App. 1993) (decided under law in effect prior to amendment effective July 1, 1986).

**Marital agreement need not be approved by the court nor a complete agreement** as to the disposition of all of the parties' property to be enforceable. In re Goldin, 923 P.2d 376 (Colo. App. 1996).

**But marital agreement must contain a fair and reasonable disclosure of property and financial obligations of the party seeking to enforce it,** and prenuptial agreement that was blank at the time wife signed it was unenforceable by husband. In re Seewald, 22 P.3d 580 (Colo. App. 2001).

**Agreement entered into just prior to marriage and a subsequent agreement entered into just prior to filing petition for dissolution** were correctly considered not to be enforceable agreements under the Colorado Marital Agreement Act. Trial court correctly determined that the premarital agreement was not an enforceable premarital agreement because the parties were not contemplating marriage when they entered into it. Similarly, the later agreement was not an enforceable marital agreement because it was signed after wife petitioned for dissolution of marriage and because the parties were not on an equal emotional or economic footing. In re Green, 169 P.3d 202 (Colo. App. 2007).

**14-2-308. Invalid marriage.** If the marriage of the parties is declared to be invalid, the marital agreement is enforceable only to the extent necessary to avoid an inequitable result.

**Source:** L. 86: Entire part added, p. 715, § 1, effective July 1.

**14-2-309. Limitations of actions.** Any statute of limitations applicable to an action asserting a claim for relief under a marital agreement is tolled during the marriage of the parties. However, equitable defenses limiting the time for enforcement, including laches or estoppel, are available to either party.

**Source:** L. 86: Entire part added, p. 715, § 1, effective July 1.

**14-2-310. Effective date - applicability.** (1) Except as provided in subsection (2) of this section, this part 3 shall take effect July 1, 1986, and shall apply only to marital agreements that become effective on or after said date. All such marital agreements entered into prior to July 1, 1986, shall be governed by the laws then in effect.

(2) The provisions of the amendments to section 14-2-304 (2), as contained in House Bill 96-1342, shall take effect July 1, 1996, and shall apply only to marital agreements which become effective on or after July 1, 1996.

**Source:** L. 86: Entire part added, p. 715, § 1, effective July 1. L. 96: Entire section amended, p. 654, § 3, effective July 1.

## DOMESTIC ABUSE

### ARTICLE 4

#### Domestic Abuse

**Cross references:** For the “Child Protection Act of 1987”, see part 3 of article 3 of title 19; for jurisdiction of county and district courts to issue orders to prevent domestic abuse, see § 13-14-102; for provisions relating to domestic abuse programs, see article 7.5 of title 26.

14-4-101.	Definitions. (Repealed)		protection orders. (Repealed)
14-4-102.	Restraining orders to prevent domestic abuse. (Repealed)	14-4-105.	Violations of orders.
14-4-103.	Emergency protection orders. (Repealed)	14-4-106.	Venue. (Repealed)
14-4-104.	Duties of peace officers - enforcement of emergency	14-4-107.	Family violence justice fund - creation - grants from fund.

#### 14-4-101. Definitions. (Repealed)

**Source:** L. 82: Entire article added, p. 299, § 1, effective April 23. L. 89: (2) amended, p. 783, § 1, effective April 19. L. 95: (2) amended, p. 513, § 1, effective July 1. L. 2004: Entire section repealed, p. 554, § 5, effective July 1.

#### 14-4-102. Restraining orders to prevent domestic abuse. (Repealed)

**Source:** L. 82: Entire article added, p. 299, § 1, effective April 23. L. 89: Entire section R&RE, p. 783, § 2, effective April 19. L. 91: (1) and (5) amended, p. 743, § 5, effective April 4; (7.5) added, p. 420, § 4, effective May 31. L. 93: (2)(d)(II) and (7.5) amended, pp. 576, 1725, §§ 3, 2, effective July 1. L. 94: (2), (6), (7.5)(b), and (8) amended, p. 933, § 1, effective July 1; (2)(d)(II), (4), and (7) amended and (7.5)(c), (13), and (14) added, p. 2031, §§ 8, 9, effective July 1; (5), (9), and (10) amended and (15) added, p. 2007, § 2, effective January 1, 1995. L. 95: (14) amended, pp. 513, 568, §§ 2, 5, effective July 1. L. 96: (14)



amended, p. 1688, § 17, effective January 1, 1997. **L. 98:** (1) and (5) amended, p. 244, § 3, effective April 13. **L. 99:** Entire section repealed, p. 501, § 6, effective July 1.

#### **14-4-103. Emergency protection orders. (Repealed)**

**Source:** **L. 82:** Entire article added, p. 300, § 1, effective April 23. **L. 83:** (3)(a) amended, p. 640, § 1, effective April 29. **L. 89:** (3)(a) and (4) amended, p. 785, § 3, effective April 19. **L. 91:** (4) amended, p. 239, § 1, effective July 1. **L. 96:** (5) amended, p. 1840, § 1, effective July 1. **L. 99:** (4) amended, p. 501, § 7, effective July 1. **L. 2003:** (4) amended, p. 1010, § 12, effective July 1. **L. 2004:** Entire section repealed, p. 554, § 5, effective July 1.

#### **14-4-104. Duties of peace officers - enforcement of emergency protection orders. (Repealed)**

**Source:** **L. 82:** Entire article added, p. 301, § 1, effective April 23. **L. 85:** Entire section R&RE, p. 585, § 1, effective March 10. **L. 89:** Entire section amended, p. 785, § 4, effective April 19. **L. 91:** (1) amended, p. 420, § 5, effective May 31. **L. 92:** Entire section amended, p. 293, § 3, effective April 23; entire section amended, p. 175, § 1, effective July 1. **L. 94:** Entire section amended, p. 2033, § 10, effective July 1; entire section amended, p. 2007, § 3, effective January 1, 1995. **L. 99:** Entire section amended, p. 502, § 8, effective July 1. **L. 2004:** Entire section repealed, p. 554, § 5, effective July 1.

**14-4-105. Violations of orders.** A person failing to comply with any order of the court issued pursuant to this article shall be found in contempt of court and, in addition, may be punished as provided in section 18-6-803.5, C.R.S.

**Source:** **L. 82:** Entire article added, p. 301, § 1, effective April 23. **L. 91:** Entire section amended, p. 419, § 2, effective May 31.

#### **ANNOTATION**

**Law reviews.** For article, "Legislative Activities in Family Law", see 11 Colo. Law. 1560 (1982).

#### **14-4-106. Venue. (Repealed)**

**Source:** **L. 95:** Entire section added, p. 569, § 7, effective July 1. **L. 2010:** Entire section repealed, (HB 10-1422), ch. 419, p. 2069, § 24, effective August 11.

**14-4-107. Family violence justice fund - creation - grants from fund.** (1) There is hereby established in the state treasury the family violence justice fund, hereafter referred to as the "fund". Pursuant to subsection (3) of this section, the state court administrator is authorized to make grants from the fund directly to qualifying organizations providing civil legal services to indigent residents of the state of Colorado.

(2) Grants from the fund shall be used to fund qualifying organizations to provide legal advice, representation, and advocacy for and on behalf of indigent clients who are victims of family violence. Moneys from the fund may be provided for services that include, but are not limited to:

(a) The provision of direct legal representation to victims of family violence in resolving their civil legal matters and removing impediments to the elimination of family violence. Such representation may include, but need not be limited to, representation in any protection order proceeding, action for dissolution of marriage, legal separation, or declaration of invalidity of marriage, paternity action, child custody action, proceeding to establish or enforce child support, administrative hearings, or any other judicial actions in

which family violence is an issue or in which legal representation is necessary to protect the interests of a victim of family violence.

(b) The provision of clinics designed to educate and assist indigent victims of family violence in the proceedings set forth in paragraph (a) of this subsection (2);

(c) The provision of legal information and advice to victims of family violence, referrals to appropriate persons or agencies, and the provision of emergency assistance in appropriate cases by telephone, electronic communication, or other appropriate means.

(3) A qualifying organization seeking to receive a grant from the fund shall submit an application each year to the state court administrator on a form provided by such administrator. The application form shall request any information which the administrator may need in determining the qualifications of the organization for receipt of a grant. Commencing July 1, 1999, and quarterly thereafter, the state court administrator shall distribute grants from the fund, subject to available appropriations, to a qualifying organization for each county or city and county based upon the following formula:

(a) The total moneys shall be disbursed in proportion to the number of persons living below the poverty line in each county or city and county as determined by the most recent census published by the bureau of the census of the United States department of commerce.

(b) If there is more than one qualifying organization within a county or city and county, the proportionate share of the fund for such county or city and county disbursed to each such qualifying organization shall be allocated in proportion to the number of indigent family violence clients served by each qualifying organization or its predecessor in the preceding year.

(4) (a) In addition to any appropriation from the general fund, the state court administrator is authorized to accept on behalf of the state any funds, grants, gifts, or donations from any private or public source for the purpose of implementing this section. All private and public funds received through grants, gifts, or donations shall be transmitted to the state treasurer who shall credit the same to the family violence justice fund.

(b) The moneys in the fund shall be subject to annual appropriation by the general assembly for the direct and indirect costs associated with the administration of this section. The state court administrator of the judicial department, subject to annual appropriation by the general assembly, is authorized to expend moneys appropriated to the department from the fund to qualifying organizations for the purposes described in this section; except that the amount expended for indirect costs associated with the administration of this section shall not exceed three percent of the moneys appropriated to the fund in any fiscal year. All investment earnings derived from the deposit and investment of the moneys in the fund shall be credited to the fund. Any moneys not appropriated shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

(4.5) Notwithstanding any other provision of this section, the state court administrator shall apply the moneys generated from fees collected pursuant to section 13-32-101 (1) (a) and (1) (b), C.R.S., and transferred pursuant to section 13-32-101 (5) (a) (X) and (5) (b) (II), C.R.S., to grants to qualifying organizations that provide services described in subsection (2) of this section for or on behalf of indigent persons or their families who are married, separated, or divorced.

(5) For purposes of this section:

(a) "Administrator" means the state court administrator in the state judicial department.

(b) "Family violence" has the same meaning as "domestic abuse" as set forth in section 13-14-101 (2), C.R.S.

(c) "Fund" means the family violence justice fund.

(d) "Indigent" means a person whose income does not exceed one hundred twenty-five percent of the current federal poverty guidelines determined annually by the United States department of health and human services.

(e) "Protection order" has the same meaning as set forth in section 18-6-803.7 (1) (a.5), C.R.S.

(f) "Qualifying organization" means an organization that:

(I) Provides full service civil legal services to indigent clients;

(II) Is based in Colorado;



- (III) Is exempt from taxation pursuant to section 501 (c) (3) of the Internal Revenue Code; and
- (IV) Obtains more than thirty-three percent of its funding from sources other than grants from the fund.

**Source:** **L. 99:** Entire section added, p. 1178, § 5, effective June 2. **L. 2003:** (2)(a) and (5)(e) amended, p. 1010, § 13, effective July 1. **L. 2004:** (5)(b) amended, p. 554, § 9, effective July 1. **L. 2009:** (4.5) added, (SB 09-068), ch. 264, p. 1211, § 6, effective July 1. **L. 2010:** (3)(a) amended, (HB 10-1422), ch. 419, p. 2069, § 25, effective August 11. **L. 2011:** (4.5) amended, (HB 11-1303), ch. 264, p. 1153, § 22, effective August 10.

**Editor’s note:** In 2003, subsection (5)(e), as enacted in 1999, was relettered on revision as (5)(f), and subsection (5)(f), as enacted in 1999 and as amended by House Bill 03-1117, was relettered on revision as (5)(e) to put the defined terms in alphabetical order. (For House Bill 03-1117, see L. 2003, p. 1010.)

**DESERTION AND NONSUPPORT**

**ARTICLE 5**

**Uniform Interstate Family  
Support Act**

**Editor’s note:** (1) This article was numbered as article 2 of chapter 43, C.R.S. 1963. The provisions of this article were repealed and reenacted in 1993, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1993, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers prior to 1993 are shown in editor’s notes following those sections that were relocated.

(2) The numbering used in this article conforms to the numbering used in the National Uniform Act and may not parallel the numbering found elsewhere in Colorado Revised Statutes.

**Law reviews:** For article, “The Colorado Uniform Interstate Family Support Act”, see 23 Colo. Law. 2535 (November 1994); for article, “Interstate Family Law Jurisdiction: Simplifying Complex Questions”, see 31 Colo. Law. 77 (September 2002); for article, “Colorado’s Uniform Interstate Family Support Act: 2004 Changes and Clarifications”, see 33 Colo. Law. 99 (November 2004).

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PART 5

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PART 6

REGISTRATION, ENFORCEMENT, AND MODIFICATION OF SUPPORT ORDER

PART A. REGISTRATION AND ENFORCEMENT OF SUPPORT ORDER

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COLORADO IMPLEMENTATION  
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14-5-901. Uniformity of application and construction.

14-5-902. Short title - repeal. (Repealed)

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## PART 1

## GENERAL PROVISIONS

**Editor's note:** (1) This article was repealed and reenacted in 1993, and this part 1 was subsequently amended with relocations in 2003, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 1 prior to 2003, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following the article heading. Former C.R.S. section numbers prior to 2003 are shown in editor's notes following those sections that were relocated.

(2) In 1961, this article was enacted as the Uniform Reciprocal Enforcement of Support Act. It was replaced by the Revised Uniform Reciprocal Enforcement of Support Act in 1971, which repealed and reenacted the act and was in effect until 1993 when it was repealed and reenacted into the Uniform Interstate Family Support Act as it existed until 2003 when the article was amended. For the Uniform Reciprocal Enforcement of Support Act, see article 2 of chapter 43, C.R.S. 1963 (L. 61, p. 356). For the Revised Uniform Reciprocal Enforcement of Support Act, see article 2 of chapter 43, C.R.S. 1963 or article 5 of title 14, C.R.S. 1973 (L. 71, p. 515).

**14-5-101. Short title.** This article shall be known and may be cited as the "Uniform Interstate Family Support Act".

**Source: L. 2003:** Entire part amended with relocations, p. 1241, § 2, effective July 1, 2004.

**Editor's note:** In 2003, the former § 14-5-101 was relocated to § 14-5-102.

**14-5-102. Definitions.** In this article:

(1) "Child" means an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent.

(2) "Child support order" means a support order for a child, including a child who has attained the age of majority under the law of the issuing state.

(3) "Duty of support" means an obligation imposed or imposable by law to provide support for a child, spouse, or former spouse, including an unsatisfied obligation to provide support.

(4) "Home state" means the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period.

(5) "Income" includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under the law of this state.

(6) "Income-withholding order" means an order or other legal process directed to an obligor's employer or other debtor, as defined by the income-withholding law of this state, to withhold support from the income of the obligor.

(7) "Initiating state" means a state from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding state under this article or a law or procedure substantially similar to this article.

(8) "Initiating tribunal" means the authorized tribunal in an initiating state.

- (9) "Issuing state" means the state in which a tribunal issues a support order or renders a judgment determining parentage.
- (10) "Issuing tribunal" means the tribunal that issues a support order or renders a judgment determining parentage.
- (11) "Law" includes decisional and statutory law and rules and regulations having the force of law.
- (12) "Obligee" means:
- (A) An individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered;
- (B) A state or political subdivision to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee; or
- (C) An individual seeking a judgment determining parentage of the individual's child.
- (13) "Obligor" means an individual, or the estate of a decedent:
- (A) Who owes or is alleged to owe a duty of support;
- (B) Who is alleged but has not been adjudicated to be a parent of a child; or
- (C) Who is liable under a support order.
- (14) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.
- (15) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (16) "Register" means to file a support order or judgment determining parentage in the appropriate location for the filing of foreign support orders.
- (17) "Registering tribunal" means a tribunal in which a support order is registered.
- (18) "Responding state" means a state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state under this article or a law or procedure substantially similar to this article.
- (19) "Responding tribunal" means the authorized tribunal in a responding state.
- (20) "Spousal-support order" means a support order for a spouse or former spouse of the obligor.
- (21) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes:
- (A) An Indian tribe; and
- (B) A foreign country or political subdivision that:
- (i) Has been declared to be a foreign reciprocating country or political subdivision under federal law;
- (ii) Has established a reciprocal arrangement for child support with this state as provided in section 14-5-308; or
- (iii) Has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this article.
- (22) "Support enforcement agency" means a public official or agency authorized to seek:
- (A) Enforcement of support orders or laws relating to the duty of support;
- (B) Establishment or modification of child support;
- (C) Determination of parentage;
- (D) Location of obligors or their assets; or
- (E) Determination of the controlling child support order.
- (23) "Support order" means a judgment, decree, order, or directive, whether temporary, final, or subject to modification, issued by a tribunal, for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, or reimbursement, and may include related costs and fees, interest, income withholding, attorney's fees, and other relief.



(24) "Tribunal" means a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage.

**Source:** L. 2003: Entire part amended with relocations, p. 1241, § 2, effective July 1, 2004.

**Editor's note:** In 2003, this section was formerly numbered as § 14-5-101, and the former § 14-5-102 was relocated to § 14-5-103.

#### ANNOTATION

**Annotator's note:** Since § 14-5-102 is similar to § 14-5-101 as it existed prior to the 2003 amendment to part 2 of article 5 of title 14, which resulted in the relocation of provisions, relevant cases construing that provision have been included in the annotations to this section.

**Applied** in *Gruber v. Wallner*, 198 Colo. 235, 598 P.2d 135 (1979); *People ex rel. Meveren v. District Court*, 638 P.2d 1371 (Colo. 1982); *Dewar v. LeNard*, 653 P.2d 82 (Colo. App. 1982).

**14-5-103. Tribunals of this state.** The court and the administrative agency are the tribunals of this state.

**Source:** L. 2003: Entire part amended with relocations, p. 1243, § 2, effective July 1, 2004.

**Editor's note:** In 2003, this section was formerly numbered as § 14-5-102, and the former § 14-5-103 was relocated to § 14-5-104.

**14-5-104. Remedies cumulative.** (a) Remedies provided by this article are cumulative and do not affect the availability of remedies under other law, including the recognition of a support order of a foreign country or political subdivision on the basis of comity.

(b) This article does not:

(1) Provide the exclusive method of establishing or enforcing a support order under the laws of this state; or

(2) Grant a tribunal of this state jurisdiction to render judgment or issue an order relating to child custody or visitation in a proceeding under this article.

**Source:** L. 2003: Entire part amended with relocations, p. 1243, § 2, effective July 1, 2004.

**Editor's note:** In 2003, this section was formerly numbered as § 14-5-103.

#### ANNOTATION

**Annotator's note.** Since § 14-5-104 is similar to § 14-5-103 as it existed prior to the 2003 amendment to part 2 of article 5 of title 14, which resulted in the relocation of provisions, to § 14-5-104 as it existed prior to the 1993 repeal and reenactment of this article, and to repealed 43-2-3, C.R.S. 1963, and 43-2-3, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Since the enactment of the uniform act in Colorado, there are now two distinct courses of action which a demanding state may take with respect to one who does not carry out his obligations of support to his family, namely: (1) Extradition on a criminal charge of nonsupport,

and (2) the initiation of civil proceedings under the uniform act. *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

**Either or both courses may be pursued**, and the election lies wholly within the demanding state and the obligee. *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

**The time to raise a defense is when there is an attempt to punish under both the criminal and the civil proceedings.** *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

**If a trial court in its discretion believes that proper support can be assured without applying the statute**, it is free to do so. *Jackson v. Jackson*, 157 Colo. 564, 404 P.2d 281 (1965).

The jurisdiction of the district court of Adams county, which arose from the filing and disposition of the divorce action did not preclude the district court of the city and county of Denver from proceeding pursuant to the uniform act when the mother and children had moved to Nevada. The question of support of minor children is a question which can be litigated separate and apart from divorce proceedings. *Scheer v. District Court*, 147 Colo. 265, 363 P.2d 1059 (1961).

**Equitable doctrine of unclean hands will not relieve father of his duty to support his child** under this article. *Kansas State Dept. of Soc. & Rehabilitation Servs. v. Henderson*, 620 P.2d 60 (Colo. App. 1980).

**Rights and duties under marriage dissolution decree unaffected by court's support order.** A support order by a Colorado court, as the responding court in a proceeding under this article, does not affect the parties' rights and duties under a dissolution of marriage decree. *Kansas State Dept. of Soc. & Rehabilitation Servs. v. Henderson*, 620 P.2d 60 (Colo. App. 1980); *In re Enewold*, 709 P.2d 1385 (Colo. App. 1985).

**In a proceeding for the dissolution of marriage in which no personal service in the state of Colorado had been made upon the husband**, the trial court could not issue an award of child support and order that it should supersede any award for child support which the wife had obtained through this article. *Offerman v. Alexander*, 185 Colo. 383, 524 P.2d 1082 (1974).

**Fact that post-dissolution matter was filed under the Uniform Dissolution of Marriage Act did not give the court a proper basis for exercising jurisdiction as to child support** where wife's only contact with Colorado was her granting of consent for the child to reside in this state with his father. *In re Zinke*, 967 P.2d 210 (Colo. App. 1998).

**Mother is free to pursue remedies for child support collection available pursuant to §§ 19-6-101 and 26-13-105.** Father's argument that support must be established pursuant to this act because the mother and children are nonresidents of Colorado is invalid. *People ex rel. A.K.*, 72 P.3d 402 (Colo. App. 2003).

**Applied** in *County of Clearwater v. Petrash*, 198 Colo. 231, 598 P.2d 138 (1979); *Rohrer v. Kane*, 198 Colo. App. 231, 609 P.2d 1121 (1980).

## PART 2

### JURISDICTION

**14-5-201. Bases for jurisdiction over nonresident.** (a) In a proceeding to establish or enforce a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

- (1) The individual is personally served with a summons within this state;
- (2) The individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
- (3) The individual resided with the child in this state;
- (4) The individual resided in this state and provided prenatal expenses or support for the child;
- (5) The child resides in this state as a result of the acts or directives of the individual;
- (6) The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse; or
- (7) There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

(b) The bases of personal jurisdiction set forth in subsection (a) of this section or in any other law of this state may not be used to acquire personal jurisdiction for a tribunal of the state to modify a child support order of another state unless the requirements of section 14-5-611 or 14-5-615 are met.

**Source: L. 93:** Entire article R&RE, p. 1584, § 1, effective January 1, 1995. **L. 2003:** Entire section amended, p. 1244, § 3, effective July 1, 2004.



## ANNOTATION

This section was adopted to extend long-arm jurisdiction as far as constitutionally permissible, but without establishing “child-state jurisdiction” under which the support duty and child’s location, alone, would provide the jurisdictional nexus for a support order. In re Malwitz, 81 P.3d 1076 (Colo. App. 2003), rev’d on other grounds, 99 P.3d 56 (Colo. 2004).

**Nonresident father’s out-of-state abuse and harassment satisfies subsection (5).** Father’s domestic abuse against mother in Texas and awareness that mother’s family ties were in Colorado and mother might move to Colorado

with child to escape the abuse were sufficient to constitute “acts or directives” within the meaning of subsection (5). In re Malwitz, 99 P.3d 56 (Colo. 2004).

**Trial court’s exercise of personal jurisdiction over nonresident father whose abuse and harassment of mother in Texas caused mother and child to flee to Colorado and seek public assistance was consistent with due process.** In re Malwitz, 99 P.3d 56 (Colo. 2004).

**Applied in** In re Haddad, 93 P.3d 617 (Colo. App. 2004).

**14-5-202. Duration of personal jurisdiction.** Personal jurisdiction acquired by a tribunal of this state in a proceeding under this article or other law of this state relating to a support order continues as long as a tribunal of this state has continuing, exclusive jurisdiction to modify its order or continuing jurisdiction to enforce its order as provided by sections 14-5-205, 14-5-206, and 14-5-211.

**Source:** L. 93: Entire article R&RE, p. 1584, § 1, effective January 1, 1995. L. 97: Entire section amended, p. 534, § 2, effective July 1. L. 2003: Entire section amended, p. 1244, § 4, effective July 1, 2004.

**14-5-203. Initiating and responding tribunals of this state.** Under this article, a tribunal of this state may serve as an initiating tribunal to forward proceedings to another state and as a responding tribunal for proceedings initiated in another state.

**Source:** L. 93: Entire article R&RE, p. 1585, § 1, effective January 1, 1995.

**14-5-204. Simultaneous proceedings in another state.** (a) A tribunal of this state may exercise jurisdiction to establish a support order if the petition or comparable pleading is filed after a petition or comparable pleading is filed in another state only if:

(1) The petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;

(2) The contesting party timely challenges the exercise of jurisdiction in the other state; and

(3) If relevant, this state is the home state of the child.

(b) A tribunal of this state may not exercise jurisdiction to establish a support order if the petition or comparable pleading is filed before a petition or comparable pleading is filed in another state if:

(1) The petition or comparable pleading in the other state is filed before the expiration of the time allowed in this state for filing a responsive pleading challenging the exercise of jurisdiction by this state;

(2) The contesting party timely challenges the exercise of jurisdiction in this state; and

(3) If relevant, the other state is the home state of the child.

**Source:** L. 93: Entire article R&RE, p. 1585, § 1, effective January 1, 1995.

**14-5-205. Continuing, exclusive jurisdiction to modify child support order.** (a) A tribunal of this state that has issued a child support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order and:

(1) At the time of the filing of a request for modification, this state is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(2) Even if this state is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order.

(b) A tribunal of this state that has issued a child support order consistent with the law of this state may not exercise continuing, exclusive jurisdiction to modify the order if:

(1) All of the parties who are individuals file consent in a record with the tribunal of this state that a tribunal of another state that has jurisdiction over at least one of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction; or

(2) Its order is not the controlling order.

(c) If a tribunal of another state has issued a child support order pursuant to the "Uniform Interstate Family Support Act", or a law substantially similar to that act, which modifies a child support order of a tribunal of this state, tribunals of this state shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state.

(d) A tribunal of this state that lacks continuing, exclusive jurisdiction to modify a child support order may serve as an initiating tribunal to request a tribunal of another state to modify a support order issued in that state.

(e) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

(f) (Deleted by amendment, L. 2003, p. 1245, § 5, effective July 1, 2004.)

**Source:** L. 93: Entire article R&RE, p. 1585, § 1, effective January 1, 1995. L. 97: (a)(2), (b), IP(c), and (d) amended, p. 534, § 3, effective July 1. L. 2003: Entire section amended, p. 1245, § 5, effective July 1, 2004.

**14-5-206. Continuing jurisdiction to enforce child support order.** (a) A tribunal of this state that has issued a child support order consistent with the law of this state may serve as an initiating tribunal to request a tribunal of another state to enforce:

(1) The order if the order is the controlling order and has not been modified by a tribunal of another state that assumed jurisdiction pursuant to the "Uniform Interstate Family Support Act"; or

(2) A money judgment for arrears of support and interest on the order accrued before a determination that an order of another state is the controlling order.

(b) A tribunal of this state having continuing jurisdiction over a support order may act as a responding tribunal to enforce the order.

(c) (Deleted by amendment, L. 2003, p. 1246, § 6, effective July 1, 2004.)

**Source:** L. 93: Entire article R&RE, p. 1586, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1246, § 6, effective July 1, 2004.

**14-5-207. Determination of controlling child support order.** (a) If a proceeding is brought under this article and only one tribunal has issued a child support order, the order of that tribunal controls and must be so recognized.

(b) If a proceeding is brought under this article, and two or more child support orders have been issued by tribunals of this state or another state with regard to the same obligor and same child, a tribunal of this state having personal jurisdiction over both the obligor and individual obligee shall apply the following rules and by order shall determine which order controls:

(1) If only one of the tribunals would have continuing, exclusive jurisdiction under this article, the order of that tribunal controls and must be so recognized.

(2) If more than one of the tribunals would have continuing, exclusive jurisdiction under this article:

(A) An order issued by a tribunal in the current home state of the child controls; but



(B) If an order has not been issued in the current home state of the child, the order most recently issued controls.

(3) If none of the tribunals would have continuing, exclusive jurisdiction under this article, the tribunal of this state shall issue a child support order which controls.

(c) If two or more child support orders have been issued for the same obligor and same child, upon request of a party who is an individual or a support enforcement agency, a tribunal of this state having personal jurisdiction over both the obligor and the obligee who is an individual shall determine which order controls under subsection (b) of this section. The request may be filed with a registration for enforcement or registration for modification pursuant to part 6 of this article, or may be filed as a separate proceeding.

(d) A request to determine which is the controlling order shall be accompanied by a copy of every child support order in effect and the applicable record of payments. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.

(e) The tribunal that issued the controlling order under subsection (a), (b), or (c) of this section has continuing jurisdiction to the extent provided in section 14-5-205 or 14-5-206.

(f) A tribunal of this state that determines by order which is the controlling order under subsection (b) (1), (b) (2), or (c) of this section, or that issues a new controlling order under subsection (b) (3) of this section, shall state in that order:

(1) The basis upon which the tribunal made its determination;

(2) The amount of prospective support, if any; and

(3) The total amount of consolidated arrears and accrued interest, if any, under all of the orders after all payments made are credited as provided by section 14-5-209.

(g) Within thirty days after issuance of an order determining which is the controlling order, the party obtaining the order shall file a certified copy of it in each tribunal that issued or registered an earlier order of child support. A party or support enforcement agency obtaining the order that fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order.

(h) An order that has been determined to be the controlling order, or a judgment for consolidated arrears of support and interest, if any, made pursuant to this section shall be recognized in proceedings under this article.

**Source:** L. 93: Entire article R&RE, p. 1587, § 1, effective January 1, 1995. L. 97: Entire section amended, p. 535, § 4, effective July 1. L. 2003: Entire section amended, p. 1246, § 7, effective July 1, 2004.

#### ANNOTATION

**A court of this state must recognize the continuing, exclusive jurisdiction of a tribunal of another state that has issued a child support order** pursuant to law substantially similar to the Uniform Interstate Family Support Act. In re Zinke, 967 P.2d 210 (Colo. App. 1998).

**The issuing tribunal retains continuing, exclusive jurisdiction over its order** as long as one of the individual parties or the child contin-

ues to reside in the issuing state. In re Zinke, 967 P.2d 210 (Colo. App. 1998); In re Hillstrom, 126 P.3d 315 (Colo. App. 2005).

The issuing tribunal has continuing, exclusive jurisdiction over its order unless each party consents in writing to a court of another state assuming continuing, exclusive jurisdiction to modify the order. In re Hillstrom, 126 P.3d 315 (Colo. App. 2005).

**14-5-208. Child support orders for two or more obligees.** In responding to registrations or petitions for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which was issued by a tribunal of another state, a tribunal of this state shall enforce those orders in the same manner as if the orders had been issued by a tribunal of this state.

**Source:** L. 93: Entire article R&RE, p. 1587, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1248, § 8, effective July 1, 2004.

**14-5-209. Credit for payment.** A tribunal of this state shall credit amounts collected for a particular period pursuant to any child support order against the amounts owed for the same period under any other child support order for support of the same child issued by a tribunal of this or another state.

**Source:** L. 93: Entire article R&RE, p. 1588, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1248, § 9, effective July 1, 2004.

**14-5-210. Application of article to nonresident subject to personal jurisdiction.** A tribunal of this state exercising personal jurisdiction over a nonresident in a proceeding under this article, under other law of this state relating to a support order, or recognizing a support order of a foreign country or political subdivision on the basis of comity may receive evidence from another state pursuant to section 14-5-316, communicate with a tribunal of another state pursuant to section 14-5-317, and obtain discovery through a tribunal of another state pursuant to section 14-5-318. In all other respects, parts 3 to 7 of this article do not apply and the tribunal shall apply the procedural and substantive law of this state.

**Source:** L. 2003: Entire section added, p. 1248, § 10, effective July 1, 2004.

**14-5-211. Continuing, exclusive jurisdiction to modify spousal-support order.** (a) A tribunal of this state issuing a spousal-support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal-support order throughout the existence of the support obligation.

(b) A tribunal of this state may not modify a spousal-support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state.

(c) A tribunal of this state that has continuing, exclusive jurisdiction over a spousal-support order may serve as:

(1) An initiating tribunal to request a tribunal of another state to enforce the spousal-support order issued in this state; or

(2) A responding tribunal to enforce or modify its own spousal-support order.

**Source:** L. 2003: Entire section added, p. 1248, § 10, effective July 1, 2004.

### PART 3

#### CIVIL PROVISIONS OF GENERAL APPLICATION

**14-5-301. Proceedings under article.** (a) Except as otherwise provided in this article, this part 3 applies to all proceedings under this article.

(b) An individual petitioner or a support enforcement agency may initiate a proceeding authorized under this article by filing a petition in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state which has or can obtain personal jurisdiction over the respondent.

(c) (Deleted by amendment, L. 2003, p. 1249, § 11, effective July 1, 2004.)

**Source:** L. 93: Entire article R&RE, p. 1588, § 1, effective January 1, 1995. L. 94: (b)(1) amended, p. 1547, § 26, effective January 1, 1995. L. 96: (b)(1) amended, p. 593, § 4, effective July 1. L. 97: (b)(1) amended, p. 536, § 5, effective July 1. L. 2003: Entire section amended, p. 1249, § 11, effective July 1, 2004.

**14-5-302. Proceeding by minor parent.** A minor parent, or a guardian or other legal representative of a minor parent, may maintain a proceeding on behalf of or for the benefit of the minor's child.



**Source:** L. 93: Entire article R&RE, p. 1588, § 1, effective January 1, 1995.

**Editor's note:** This section is similar to former § 14-5-114 as it existed prior to 1993.

**14-5-303. Application of law of this state.** Except as otherwise provided in this article, a responding tribunal of this state shall:-

(1) Apply the procedural and substantive law generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings; and

(2) Determine the duty of support and the amount payable in accordance with the law and support guidelines of this state.

**Source:** L. 93: Entire article R&RE, p. 1589, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1250, § 12, effective July 1, 2004.

**14-5-304. Duties of initiating tribunal.** (a) Upon the filing of a petition authorized by this article, an initiating tribunal of this state shall forward the petition and its accompanying documents:

(1) To the responding tribunal or appropriate support enforcement agency in the responding state; or

(2) If the identity of the responding tribunal is unknown, to the state information agency of the responding state with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) If requested by the responding tribunal, a tribunal of this state shall issue a certificate or other document and make findings required by the law of the responding state. If the responding state is a foreign country or political subdivision, upon request the tribunal shall specify the amount of support sought, convert that amount into the equivalent amount in the foreign currency under applicable official or market exchange rate as publicly reported, and provide any other documents necessary to satisfy the requirements of the responding state.

**Source:** L. 93: Entire article R&RE, p. 1589, § 1, effective January 1, 1995. L. 97: Entire section amended, p. 537, § 6, effective July 1. L. 2003: Entire section amended, p. 1250, § 13, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-115 as it existed prior to 1993.

**14-5-305. Duties and powers of responding tribunal.** (a) When a responding tribunal of this state receives a petition or comparable pleading from an initiating tribunal or directly pursuant to section 14-5-301 (b), it shall cause the petition or pleading to be filed and notify the petitioner where and when it was filed.

(b) A responding tribunal of this state, to the extent not prohibited by other law, may do one or more of the following:

(1) Issue or enforce a support order, modify a child support order, determine the controlling child support order, or determine parentage;

(2) Order an obligor to comply with a support order, specifying the amount and the manner of compliance;

(3) Order income withholding;

(4) Determine the amount of any arrearages, and specify a method of payment;

(5) Enforce orders by civil or criminal contempt, or both;

(6) Set aside property for satisfaction of the support order;

(7) Place liens and order execution on the obligor's property;

(8) Order an obligor to keep the tribunal informed of the obligor's current residential address, telephone number, employer, address of employment, and telephone number at the place of employment;

(9) Issue a bench warrant for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the bench warrant in any local and state computer systems for criminal warrants;

(10) Order the obligor to seek appropriate employment by specified methods;

(11) Award reasonable attorney's fees and other fees and costs; and

(12) Grant any other available remedy.

(c) A responding tribunal of this state shall include in a support order issued under this article, or in the documents accompanying the order, the calculations on which the support order is based.

(d) A responding tribunal of this state may not condition the payment of a support order issued under this article upon compliance by a party with provisions for visitation.

(e) If a responding tribunal of this state issues an order under this article, the tribunal shall send a copy of the order to the petitioner and the respondent and to the initiating tribunal, if any.

(f) If requested to enforce a support order, arrears, or judgment or modify a support order stated in a foreign currency, a responding tribunal of this state shall convert the amount stated in the foreign currency to the equivalent amount in dollars under the applicable official or market exchange rate as publicly reported.

**Source:** L. 93: Entire article R&RE, p. 1589, § 1, effective January 1, 1995. L. 97: (a) and (e) amended, p. 537, § 7, effective July 1. L. 2003: (a), IP(b), and (b)(1) amended and (f) added, p. 1251, § 14, effective July 1, 2004.

**Editor's note:** This section is similar to former §§ 14-5-119, 14-5-120, and 14-5-127, as they existed prior to 1993.

#### ANNOTATION

**Reference to the Uniform Parentage Act in the Colorado Uniform Interstate Family Support Act** simply establishes a method to determine parentage. Therefore the trial court erred in concluding that it had jurisdiction to enter orders granting parenting time. In *Interest of R.L.H.*, 942 P.2d 1386 (Colo. App. 1997).

**An order requiring one party to repay or reimburse the other party for overpaid child support qualifies as a "reimbursement"**, thus district court had subject matter jurisdiction to issue an order regarding overpayments. In *re Haddad*, 93 P.3d 617 (Colo. App. 2004).

**14-5-306. Inappropriate tribunal.** If a petition or comparable pleading is received by an inappropriate tribunal of this state, the tribunal shall forward the pleading and accompanying documents to an appropriate tribunal in this state or another state and notify the petitioner where and when the pleading was sent.

**Source:** L. 93: Entire article R&RE, p. 1590, § 1, effective January 1, 1995. L. 97: Entire section amended, p. 537, § 8, effective July 1. L. 2003: Entire section amended, p. 1251, § 15, effective July 1, 2004.

**14-5-307. Duties of support enforcement agency.** (a) A support enforcement agency of this state, upon request, shall provide services to a petitioner in a proceeding under this article.

(b) A support enforcement agency of this state that is providing services to the petitioner shall:

(1) Take all steps necessary to enable an appropriate tribunal in this state or another state to obtain jurisdiction over the respondent;

(2) Request an appropriate tribunal to set a date, time, and place for a hearing;

(3) Make a reasonable effort to obtain all relevant information, including information as to income and property of the parties;

(4) Within two days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written notice in a record from an initiating, responding, or registering tribunal, send a copy of the notice to the petitioner;



(5) Within two days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written communication in a record from the respondent or the respondent's attorney, send a copy of the communication to the petitioner; and

(6) Notify the petitioner if jurisdiction over the respondent cannot be obtained.

(c) A support enforcement agency of this state that requests registration of a child support order in this state for enforcement or for modification shall make reasonable efforts:

(1) To ensure that the order to be registered is the controlling order; or

(2) If two or more child support orders exist and the identity of the controlling order has not been determined, to ensure that a request for such a determination is made in a tribunal having jurisdiction to do so.

(d) A support enforcement agency of this state that requests registration and enforcement of a support order, arrears, or judgment stated in a foreign currency shall convert the amounts stated in the foreign currency into the equivalent amounts in dollars under the applicable official or market exchange rate as publicly reported.

(e) A support enforcement agency of this state shall issue or request a tribunal of this state to issue a child support order and an income-withholding order that redirect payment of current support, arrears, and interest if requested to do so by a support enforcement agency of another state pursuant to section 14-5-319 of the "Uniform Interstate Family Support Act".

(f) This article does not create or negate a relationship of attorney and client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency.

**Source:** L. 93: Entire article R&RE, p. 1590, § 1, effective January 1, 1995. L. 97: (b)(4) and (b)(5) amended, p. 537, § 9, effective July 1. L. 2003: Entire section amended, p. 1251, § 16, effective July 1, 2004.

**14-5-308. Duty of attorney general.** (a) If the attorney general determines that the support enforcement agency is neglecting or refusing to provide services to an individual, the attorney general may order the agency to perform its duties under this article or may provide those services directly to the individual.

(b) The attorney general may determine that a foreign country or political subdivision has established a reciprocal arrangement for child support with this state and take appropriate action for notification of the determination.

**Source:** L. 93: Entire article R&RE, p. 1591, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1252, § 17, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-113 as it existed prior to 1993.

**14-5-309. Private counsel.** An individual may employ private counsel to represent the individual in proceedings authorized by this article.

**Source:** L. 93: Entire article R&RE, p. 1591, § 1, effective January 1, 1995.

**14-5-310. Duties of state information agency.** (a) The state department of human services is the state information agency under this article.

(b) The state information agency shall:

(1) Compile and maintain a current list, including addresses, of the tribunals in this state which have jurisdiction under this article and any support enforcement agencies in this state and transmit a copy to the state information agency of every other state;

(2) Maintain a register of names and addresses of tribunals and support enforcement agencies received from other states;

(3) Forward to the appropriate tribunal in the county in this state in which the obligee who is an individual or the obligor resides, or in which the obligor's property is believed

to be located, all documents concerning a proceeding under this article received from an initiating tribunal or the state information agency of the initiating state; and

(4) Obtain information concerning the location of the obligor and the obligor's property within this state not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers, and examination of governmental records, including, to the extent not prohibited by other law, those relating to real property, vital statistics, law enforcement, taxation, motor vehicles, driver's licenses, and social security.

**Source:** L. 93: Entire article R&RE, p. 1591, § 1, effective January 1, 1995. L. 94: (a) amended, p. 2644, § 102, effective July 1. L. 2003: (b)(2) and (b)(3) amended, p. 1252, § 18, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-118 as it existed prior to 1993.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (a), see section 1 of chapter 345, Session Laws of Colorado 1994.

**14-5-311. Pleadings and accompanying documents.** (a) In a proceeding under this article, a petitioner seeking to establish a support order, to determine parentage, or to register and modify a support order of another state must file a petition. Unless otherwise ordered under section 14-5-312, the petition or accompanying documents must provide, so far as known, the name, residential address, and social security numbers of the obligor and the obligee or the parent and alleged parent, and the name, sex, residential address, social security number, and date of birth of each child for whose benefit support is sought or whose parentage is to be determined. Unless filed at the time of registration, the petition must be accompanied by a copy of any support order known to have been issued by another tribunal. The petition may include any other information that may assist in locating or identifying the respondent.

(b) The petition must specify the relief sought. The petition and accompanying documents must conform substantially with the requirements imposed by the forms mandated by federal law for use in cases filed by a support enforcement agency.

**Source:** L. 93: Entire article R&RE, p. 1592, § 1, effective January 1, 1995. L. 97: (a) amended, p. 538, § 10, effective July 1. L. 2003: (a) amended, p. 1253, § 19, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-112 as it existed prior to 1993.

**14-5-312. Nondisclosure of information in exceptional circumstances.** If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of specific identifying information, that information shall be sealed and may not be disclosed to the other party or the public. After a hearing in which a tribunal takes into consideration the health, safety, or liberty of the party or child, the tribunal may order disclosure of information that the tribunal determines to be in the interest of justice.

**Source:** L. 93: Entire article R&RE, p. 1592, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1253, § 20, effective July 1, 2004.

**14-5-313. Costs and fees.** (a) The petitioner may not be required to pay a filing fee or other costs.

(b) If an obligee prevails, a responding tribunal may assess against an obligor filing fees, reasonable attorney's fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the



initiating or the responding state, except as provided by other law. Attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs, and expenses.

(c) The tribunal shall order the payment of costs and reasonable attorney's fees if it determines that a hearing was requested primarily for delay. In a proceeding under part 6 of this article, a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change.

**Source:** L. 93: Entire article R&RE, p. 1592, § 1, effective January 1, 1995. L. 2003: (c) amended, p. 1253, § 21, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-116 as it existed prior to 1993.

**14-5-314. Limited immunity of petitioner.** (a) Participation by a petitioner in a proceeding under this article before a responding tribunal, whether in person, by private attorney, or through services provided by the support enforcement agency, does not confer personal jurisdiction over the petitioner in another proceeding.

(b) A petitioner is not amenable to service of civil process while physically present in this state to participate in a proceeding under this article.

(c) The immunity granted by this section does not extend to civil litigation based on acts unrelated to a proceeding under this article committed by a party while physically present in this state to participate in the proceeding.

**Source:** L. 93: Entire article R&RE, p. 1593, § 1, effective January 1, 1995. L. 2003: (a) and (c) amended, p. 1254, § 22, effective July 1, 2004.

#### ANNOTATION

While a petition for relief under UIFSA limits the jurisdiction of the tribunal to the boundaries of the support proceeding, a claim of overpayment of child support is still within the boundaries of the proceeding. In re Haddad, 93 P.3d 617 (Colo. App. 2004).

**Section 14-5-607 (b) conferred personal jurisdiction** over another state's child support enforcement agency that continued to collect withholdings from plaintiff's wages under the Uniform Interstate Family Support Act (UIFSA), contrary to a previous Colorado court order vacating the other state's judgment upon which the wage assignment was based. *Vogan v. County of San Diego*, 193 P.3d 336 (Colo. App. 2008).

While this section protects a petitioner participating in a UIFSA proceeding before a responding tribunal from being subject to personal jurisdiction in another proceeding, the statute does not prevent the Colorado court from the continued exercise of subject matter

and personal jurisdiction to enforce its prior order. There are no due process concerns where another state availed itself of the provisions of UIFSA to reach plaintiff's earnings in Colorado. Section 14-5-607 (b) allows a court to enter "other appropriate orders", including orders related to plaintiff's claims for injunctive relief and restitution based upon defendant's continued collection of child support under the voided order. *Vogan v. County of San Diego*, 193 P.3d 336 (Colo. App. 2008).

Although this section does not confer personal jurisdiction over plaintiff's civil theft claim with respect to defendant's collection of child support despite the voided wage assignment, the Colorado long-arm statute confers jurisdiction where plaintiff was harmed by defendant's tortious acts within this state and where the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice. *Vogan v. County of San Diego*, 193 P.3d 336 (Colo. App. 2008).

**14-5-315. Nonparentage as defense.** A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this article.

**Source:** L. 93: Entire article R&RE, p. 1593, § 1, effective January 1, 1995.

**Editor's note:** This section is similar to former § 14-5-128 as it existed prior to 1993.

## ANNOTATION

**Annotator's note:** Since § 14-5-315 is similar to § 14-5-128 as it existed prior to the 1993 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Determination of paternity in divorce or annulment action.** The parentage of a child is not an issue necessarily decided in a divorce or annulment action. However, where, as a part of a divorce action, the court hears evidence, makes a child support order, and by necessary implication has determined the paternity of the

child, this determination is *res judicata* at least between the spouses. *McNeece v. McNeece*, 39 Colo. App. 160, 562 P.2d 767 (1977).

**Applicability of doctrine of *res judicata*.** Failure to raise the defense of nonpaternity during dissolution proceedings bars a presumed father from collaterally attacking the determination of paternity implicitly supporting award of child support incident to such dissolution proceedings brought under URESA. *State ex. rel. Daniels v. Daniels*, 817 P.2d 632 (Colo. App. 1991).

**14-5-316. Special rules of evidence and procedure.** (a) The physical presence of a nonresident party who is an individual in a tribunal of this state is not required for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage.

(b) An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing in another state.

(c) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it, and is admissible to show whether payments were made.

(d) Copies of bills for testing for parentage, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least ten days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary.

(e) Documentary evidence transmitted from another state to a tribunal of this state by telephone, telecopier, or other means that do not provide an original record may not be excluded from evidence on an objection based on the means of transmission.

(f) In a proceeding under this article, a tribunal of this state shall permit a party or witness residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. A tribunal of this state shall cooperate with tribunals of other states in designating an appropriate location for the deposition or testimony.

(g) If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

(h) A privilege against disclosure of communications between spouses does not apply in a proceeding under this article.

(i) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this article.

(j) A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child.

**Source:** L. 93: Entire article R&RE, p. 1593, § 1, effective January 1, 1995. L. 2003: (a), (b), (e), and (f) amended and (j) added, p. 1254, § 23, effective July 1, 2004.

**Editor's note:** This section is similar to former §§ 14-5-121 and 14-5-124, as they existed prior to 1993.

**Cross references:** For privileged evidence of husband and wife generally, see §§ 13-90-107 and 13-90-108.



## ANNOTATION

**Annotator's note:** Since § 14-5-316 is similar to §§ 14-5-121 and 14-5-124 as they existed prior to the 1993 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

**Full faith and credit must be given to another state's final order for arrearages entered under RUESA, § 14-5-101 et seq.** In re Sabala, 802 P.2d 1163 (Colo. App. 1990).

**Child support installment under California decree became an enforceable judgment in Colorado** where husband made support payments in amounts less than the amount ordered by such decree. In re Barone, 895 P.2d 1075 (Colo. App. 1994).

**The doctrine of equitable estoppel may properly be applied to afford relief from accrued arrearages in child support** if the party asserting the claim demonstrates reasonable reliance, to the party's detriment, upon the acts or representations of the other person, and lack of knowledge or convenient means of knowing the facts. In re Dennin and Lohf, 811 P.2d 449 (Colo. App. 1991).

**Eventual and belated compliance with a prior support order may be a defense to an**

**action**, but each case must be decided on its own facts and circumstances. Jackson v. Jackson, 157 Colo. 564, 404 P.2d 281 (1965).

**It may be a defense if the trial court chooses not to enter an order** under the action brought pursuant to the uniform act. Jackson v. Jackson, 157 Colo. 564, 404 P.2d 281 (1965).

**Where denial of continuance not prejudicial.** Where the trial court has before it the affidavits filed in the initiating state, as well as the deposition of the absent obligee, and the obligor has declined the court's offer to provide a subpoena duces tecum in conjunction with letters rogatory so the obligor could obtain financial documents from the obligee, there is no prejudice resulting from the trial court's denial of the obligor's request for a continuance. Rohrer v. Kane, 44 Colo. App. 85, 609 P.2d 1121 (1980).

**Child's right to support is unaffected by misconduct of his parents**, and when a court conditions the disbursement of child support payments upon the custodial parent's complying with visitation orders, the court errs as a matter of law. People ex rel. Meverer v. District Court, 638 P.2d 1371 (Colo. 1982).

**Applied** in Dewar v. LeNard, 653 P.2d 82 (Colo. App. 1982).

**14-5-317. Communications between tribunals.** A tribunal of this state may communicate with a tribunal of another state or foreign country or political subdivision in a record, or by telephone or other means, to obtain information concerning the laws, the legal effect of a judgment, decree, or order of that tribunal, and the status of a proceeding in the other state or foreign country or political subdivision. A tribunal of this state may furnish similar information by similar means to a tribunal of another state or foreign country or political subdivision.

**Source:** L. 93: Entire article R&RE, p. 1594, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1254, § 24, effective July 1, 2004.

**14-5-318. Assistance with discovery.** A tribunal of this state may:

- (1) Request a tribunal of another state to assist in obtaining discovery; and
- (2) Upon request, compel a person over whom it has jurisdiction to respond to a discovery order issued by a tribunal of another state.

**Source:** L. 93: Entire article R&RE, p. 1594, § 1, effective January 1, 1995.

**14-5-319. Receipt and disbursement of payments.** (a) A support enforcement agency or tribunal of this state shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The agency or tribunal shall furnish to a requesting party or tribunal of another state a certified statement by the custodian of the record of the amounts and dates of all payments received.

(b) If neither the obligor, nor the obligee who is an individual, nor the child resides in this state, upon request from the support enforcement agency of this state or another state, the support enforcement agency of this state or a tribunal of this state shall:

- (1) Direct that the support payment be made to the support enforcement agency in the state in which the obligee is receiving services; and

(2) Issue and send to the obligor's employer a conforming income-withholding order or an administrative notice of change of payee, reflecting the redirected payments.

(c) The support enforcement agency of this state receiving redirected payments from another state pursuant to a law similar to subsection (b) of this section shall furnish to a requesting party or tribunal of the other state a certified statement by the custodian of the record of the amount and dates of all payments received.

**Source:** L. 93: Entire article R&RE, p. 1594, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1255, § 25, effective July 1, 2004.

## PART 4

### ESTABLISHMENT OF SUPPORT ORDER

**14-5-401. Petition to establish support order.** (a) If a support order entitled to recognition under this article has not been issued, a responding tribunal of this state may issue a support order if:

- (1) The individual seeking the order resides in another state; or
- (2) The support enforcement agency seeking the order is located in another state.
- (b) The tribunal may issue a temporary child support order if the tribunal determines that such an order is appropriate and the individual ordered to pay is:
  - (1) A presumed father of the child;
  - (2) Petitioning to have his paternity adjudicated;
  - (3) Identified as the father of the child through genetic testing;
  - (4) An alleged father who has declined to submit to genetic testing;
  - (5) Shown by clear and convincing evidence to be the father of the child;
  - (6) An acknowledged father as provided by section 19-4-105 (1) (e), C.R.S.;
  - (7) The mother of the child; or
  - (8) An individual who has been ordered to pay child support in a previous proceeding and the order has not been reversed or vacated.

(c) Upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to section 14-5-305.

**Source:** L. 93: Entire article R&RE, p. 1594, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1255, § 26, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-105 as it existed prior to 1993.

## ANNOTATION

**Annotator's note:** Since § 14-5-401 is similar to § 14-5-105 as it existed prior to the 1993 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**No independent duty of support.** This article does not create an independent duty of support but only a means of enforcing a duty arising

out of either a foreign support order or the law of the state where the obligor resides. *Com. of Pennsylvania v. Barta*, 790 P.2d 895 (Colo. App. 1990).

**Applied** in *County of Clearwater v. Petrash*, 41 Colo. App. 143, 589 P.2d 1370 (1978), *aff'd* in part and *rev'd* on other grounds, 198 Colo. 231, 598 P.2d 138 (1979).

## PART 5

### ENFORCEMENT OF ORDER OF ANOTHER STATE WITHOUT REGISTRATION

**Editor's note:** This article was repealed and reenacted in 1993, and this part 5 was subsequently amended with relocations in 1997, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 5 prior to 1997, consult the Colorado statutory



research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following the article heading. Former C.R.S. section numbers prior to 1997 are shown in editor's notes following those sections that were relocated.

**14-5-501. Employer's receipt of income-withholding order of another state.** An income-withholding order issued in another state may be sent by or on behalf of the obligee, or by the support enforcement agency, to the person defined as the obligor's employer under the income-withholding law of this state without first filing a petition or comparable pleading or registering the order with a tribunal of this state.

**Source:** **L. 97:** Entire part amended with relocations, p. 538, § 11, effective July 1; entire section amended, p. 1263, § 5, effective July 1. **L. 2000:** Entire section amended, p. 1709, § 4, effective July 1. **L. 2003:** Entire section amended, p. 1256, § 27, effective July 1, 2004.

**Editor's note:** This section was formerly numbered as § 14-5-501 IP(a), and the other provisions of former § 14-5-501 were relocated to § 14-5-502 in 1997.

**Cross references:** For the legislative declaration contained in the 1997 act amending this section, see section 1 of chapter 236, Session Laws of Colorado 1997.

**14-5-502. Employer's compliance with income-withholding order of another state.** (a) Upon receipt of an income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of this state.

(c) Except as otherwise provided in subsection (d) of this section and section 14-5-503 the employer shall withhold and distribute the funds as directed in the withholding order by complying with terms of the order which specify:

(1) The duration and amount of periodic payments of current child support, stated as a sum certain;

(2) The person designated to receive payments and the address to which the payments are to be forwarded;

(3) Medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;

(4) The amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and

(5) The amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

(d) An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:

(1) The employer's fee for processing an income-withholding order;

(2) The maximum amount permitted to be withheld from the obligor's income; and

(3) The times within which the employer must implement the withholding order and forward the child support payment.

**Source:** **L. 97:** Entire part amended with relocations, p. 539, § 11, effective July 1; (b) amended, p. 1264, § 6, effective July 1. **L. 98:** (b) amended, p. 753, § 1, effective July 1. **L. 2000:** (b) amended, p. 1709, § 5, effective July 1. **L. 2003:** (c)(2) amended, p. 1256, § 28, effective July 1, 2004.

**Editor's note:** This section was formerly numbered as § 14-5-501 (a)(2), (a)(1), and (a)(3), and the former § 14-5-502 was relocated to § 14-5-507.

**Cross references:** For the legislative declaration contained in the 1997 act amending subsection (b), see section 1 of chapter 236, Session Laws of Colorado 1997.

**14-5-503. Employer's compliance with two or more income-withholding orders.** If an obligor's employer receives two or more income-withholding orders with respect to the earnings of the same obligor, the employer satisfies the terms of the orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating income withheld for two or more child support obligees.

**Source:** L. 97: Entire part amended with relocations, p. 540, § 11, effective July 1.  
L. 2003: Entire section amended, p. 1256, § 29, effective July 1, 2004.

**14-5-504. Immunity from civil liability.** An employer who complies with an income-withholding order issued in another state in accordance with this article is not subject to civil liability to an individual or agency with regard to the employer's withholding of child support from the obligor's income.

**Source:** L. 97: Entire part amended with relocations, p. 540, § 11, effective July 1.

**14-5-505. Penalties for noncompliance.** An employer who willfully fails to comply with an income-withholding order issued by another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this state.

**Source:** L. 97: Entire part amended with relocations, p. 540, § 11, effective July 1.

**14-5-506. Contest by obligor.** (a) An obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in this state by registering the order in a tribunal of this state and filing a contest to that order as provided in part 6 of this article, or otherwise contesting the order in the same manner as if the order had been issued by a tribunal of this state.

(b) The obligor shall give notice of the contest to:

- (1) A support enforcement agency providing services to the obligee;
- (2) Each employer that has directly received an income-withholding order relating to the obligor; and
- (3) The person designated to receive payments in the income-withholding order or if no person is designated, to the obligee.

**Source:** L. 97: Entire part amended with relocations, p. 540, § 11, effective July 1.  
L. 2003: Entire section amended, p. 1256, § 30, effective July 1, 2004.

**14-5-507. Administrative enforcement of orders.** (a) A party or support enforcement agency seeking to enforce a support order or an income-withholding order, or both, issued by a tribunal of another state may send the documents required for registering the order to a support enforcement agency of this state.

(b) Upon receipt of the documents, the support enforcement agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of this state to enforce a support order or an income-withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency shall register the order pursuant to this article.

**Source:** L. 97: Entire part amended with relocations, p. 540, § 11, effective July 1.  
L. 2003: (a) amended, p. 1257, § 31, effective July 1, 2004.

**Editor's note:** This section was formerly numbered as § 14-5-502.



## PART 6

REGISTRATION, ENFORCEMENT, AND MODIFICATION  
OF SUPPORT ORDER

## PART A. REGISTRATION AND ENFORCEMENT OF SUPPORT ORDER

**14-5-601. Registration of order for enforcement.** A support order or income-withholding order issued by a tribunal of another state may be registered in this state for enforcement.

**Source:** L. 93: Entire article R&RE, p. 1596, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1257, § 32, effective July 1, 2004.

## ANNOTATION

**A district court in a RURESA action may not enter a judgment for child support arrearages under the original decree in another state** unless the petitioning party proceeds under the alternative registration of a foreign

support order provisions of §§ 14-5-137 to 14-5-141. *Henry v. Knight*, 746 P.2d 1375 (Colo. App. 1987) (decided under former § 14-5-137 as it existed prior to the 1993 repeal and reenactment of this article).

**14-5-602. Procedure to register order for enforcement.** (a) A support order or income-withholding order of another state may be registered in this state by sending the following records and information to the appropriate tribunal in this state:

- (1) A letter of transmittal to the tribunal requesting registration and enforcement;
  - (2) Two copies, including one certified copy, of the order to be registered, including any modification of the order;
  - (3) A sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
  - (4) The name of the obligor and, if known:
    - (A) The obligor's address and social security number;
    - (B) The name and address of the obligor's employer and any other source of income of the obligor; and
  - (C) A description and the location of property of the obligor in this state not exempt from execution; and
  - (5) Except as otherwise provided in section 14-5-312, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.
- (b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as a foreign judgment, together with one copy of the documents and information, regardless of their form.

(c) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this state may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought.

- (d) If two or more orders are in effect, the person requesting registration shall:
- (1) Furnish to the tribunal a copy of every support order asserted to be in effect in addition to the documents specified in this section;
  - (2) Specify the order alleged to be the controlling order, if any; and
  - (3) Specify the amount of consolidated arrears, if any.
- (e) A request for a determination of which is the controlling order may be filed separately or with a request for registration and enforcement or for registration and modification. The person requesting registration shall give notice of the request to each party whose rights may be affected by the determination.

**Source:** L. 93: Entire article R&RE, p. 1596, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1257, § 33, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-140 as it existed prior to 1993.

**14-5-603. Effect of registration for enforcement.** (a) A support order or income-withholding order issued in another state is registered when the order is filed in the registering tribunal of this state.

(b) A registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state.

(c) Except as otherwise provided in this part 6, a tribunal of this state shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

**Source:** L. 93: Entire article R&RE, p. 1597, § 1, effective January 1, 1995.

**Editor's note:** This section is similar to former § 14-5-141 as it existed prior to 1993.

#### ANNOTATION

**Annotator's note:** Since § 14-5-603 is similar to § 14-5-141 as it existed prior to the 1993 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Procedures and defenses available.** When a complaining party registers a foreign support

order in the responding state, the procedures and defenses available thereafter are those applicable to an action to enforce a foreign money judgment. In re McMahan, 660 P.2d 515 (Colo. App. 1983).

**Applied** in Malmgren v. Malmgren, 628 P.2d 164 (Colo. App. 1981).

**14-5-604. Choice of law.** (a) Except as otherwise provided in subsection (d) of this section, the law of the issuing state governs:

(1) The nature, extent, amount, and duration of current payments under a registered support order;

(2) The computation and payment of arrearages and accrual of interest on the arrearages under the support order; and

(3) The existence and satisfaction of other obligations under the support order.

(b) In a proceeding for arrearages under a registered support order, the statute of limitation of this state or of the issuing state, whichever is longer, applies.

(c) A responding tribunal of this state shall apply the procedures and remedies of this state to enforce current support and to collect arrearages and interest due on a support order of another state registered in this state.

(d) After a tribunal of this or another state determines which is the controlling order and issues an order consolidating arrearages, if any, a tribunal of this state shall prospectively apply the law of the state issuing the controlling order, including its law on interest on arrearages, on current and future support, and on consolidated arrearages.

**Source:** L. 93: Entire article R&RE, p. 1597, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1258, § 34, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-108 as it existed prior to 1993.

#### ANNOTATION

**Annotator's note:** Since § 14-5-604 is similar to § 14-5-108 as it existed prior to the 1993 repeal and reenactment of this article and to repealed § 43-2-7, C.R.S. 1963, relevant cases construing this provision have been included in this section.

**Specific adoption of the choice of law provision under the Uniform Interstate Family Support Act by both Colorado and Texas overrides application of the general borrowing limitations statute set forth in § 13-80-**

**110.** In re Morris, 32 P.3d 625 (Colo. App. 2001).

**The duty of support under this article** is that imposed under the laws of the state where the obligor parent is or was present for the period during which support is sought. Ross v. Thomas, 753 P.2d 783 (Colo. App. 1987).

**The validity of orders to furnish support and reimbursement** are predicated upon a duty to support. Aguilar v. Holcomb, 155 Colo. 530, 395 P.2d 998 (1964).



**An order by the California court that the defendant owes a duty of support to the children residing in California was not enforceable in Colorado.** The question as to whether defendant had a duty to support the children, whom it was alleged were his, a fact put in issue upon which there was no proof, must have been determined according to the laws of the state of Colorado. *Aguilar v. Holcomb*, 155 Colo. 530, 395 P.2d 998 (1964).

**The trial court could not find a duty of support on the defendant because it does not have any jurisdiction to determine paternity as a part of the proceedings under the uniform act.** *Aguilar v. Holcomb*, 155 Colo. 530, 395 P.2d 998 (1964).

**Termination of support liability for Colorado resident.** Where the obligor resides in Colorado, he is bound by Colorado law on the issue of when liability for support terminates. *McDonald v. McDonald*, 634 P.2d 1031 (Colo. App. 1981); *Napolitano v. Napolitano*, 732 P.2d 245 (Colo. App. 1987).

**Application of changed circumstances standard proper.** Court properly applied Colorado changed circumstances standard in § 14-10-122 to Colorado resident in action pursuant to Colorado support order rather than conducting new hearing for separate support order. *People in Interest of Whittington v. Low*, 761 P.2d 274 (Colo. App. 1988) (decided under law in effect prior to enactment of § 14-10-115 (17)).

**No independent duty of support.** This article does not create an independent duty of support but only a means of enforcing a duty arising out of either a foreign support order or the law of the state where the obligor resides. *Com. of Pennsylvania v. Barta*, 790 P.2d 895 (Colo. App. 1990).

**Applied in** *County of Clearwater v. Petrash*, 41 Colo. App. 143, 589 P.2d 1370 (1978), *aff'd* in part and *rev'd* on other grounds, 198 Colo. 231, 598 P.2d 138 (1979); *Gruber v. Wallner*, 198 Colo. 235, 598 P.2d 135 (1979).

## PART B. CONTEST OF VALIDITY OR ENFORCEMENT

**14-5-605. Notice of registration of order.** (a) When a support order or income-withholding order issued in another state is registered, the registering tribunal shall notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) A notice must inform the nonregistering party:

(1) That a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this state;

(2) That a hearing to contest the validity or enforcement of the registered order must be requested within twenty days after notice;

(3) That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages; and

(4) Of the amount of any alleged arrearages.

(c) If the registering party asserts that two or more orders are in effect, a notice must also:

(1) Identify the two or more orders and the order alleged by the registering person to be the controlling order and the consolidated arrearages, if any;

(2) Notify the nonregistering party of the right to a determination of which is the controlling order;

(3) State that the procedures provided in subsection (b) of this section apply to the determination of which is the controlling order; and

(4) State that failure to contest the validity or enforcement of the order alleged to be the controlling order in a timely manner may result in confirmation that the order is the controlling order.

(d) Upon registration of an income-withholding order for enforcement, the registering tribunal shall notify the obligor's employer pursuant to the income-withholding law of this state.

**Source:** L. 93: Entire article R&RE, p. 1597, § 1, effective January 1, 1995. L. 97: (a) and (b)(2) amended, p. 540, § 12, effective July 1. L. 2003: (b) and (c) amended and (d) added, p. 1259, § 35, effective July 1, 2004.

**14-5-606. Procedure to contest validity or enforcement of registered order.** (a) A nonregistering party seeking to contest the validity or enforcement of a registered order in

this state shall request a hearing within twenty days after notice of the registration. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrearages pursuant to section 14-5-607.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law.

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing.

**Source:** L. 93: Entire article R&RE, p. 1598, § 1, effective January 1, 1995. L. 97: (a) and (c) amended, p. 541, § 13, effective July 1. L. 2003: (a) amended, p. 1260, § 36, effective July 1, 2004.

**14-5-607. Contest of registration or enforcement.** (a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

- (1) The issuing tribunal lacked personal jurisdiction over the contesting party;
- (2) The order was obtained by fraud;
- (3) The order has been vacated, suspended, or modified by a later order;
- (4) The issuing tribunal has stayed the order pending appeal;
- (5) There is a defense under the law of this state to the remedy sought;
- (6) Full or partial payment has been made;
- (7) The statute of limitation under section 14-5-604 precludes enforcement of some or all of the alleged arrearages; or
- (8) The alleged controlling order is not the controlling order.

(b) If a party presents evidence establishing a full or partial defense under subsection (a) of this section, a tribunal may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this state.

(c) If the contesting party does not establish a defense under subsection (a) of this section to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

**Source:** L. 93: Entire article R&RE, p. 1598, § 1, effective January 1, 1995. L. 2003: (a)(6) and (a)(7) amended and (a)(8) added, p. 1260, § 37, effective July 1, 2004.

#### ANNOTATION

**Agreement between parents that was not approved by a court does not constitute a defense to registration under subsection (a)(3).** People ex. rel. State of Wyo. v. Stout, 969 P.2d 819 (Colo. App. 1998).

**Subsection (b) conferred personal jurisdiction** over another state's child support enforce-

ment agency that continued to collect withholdings from plaintiff's wages under the Uniform Interstate Family Support Act, contrary to a previous Colorado court order vacating the other state's judgment upon which the wage assignment was based. Vogan v. County of San Diego, 193 P.3d 336 (Colo. App. 2008).

**14-5-608. Confirmed order.** Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

**Source:** L. 93: Entire article R&RE, p. 1599, § 1, effective January 1, 1995.



PART C. REGISTRATION AND MODIFICATION  
OF CHILD SUPPORT ORDER

**14-5-609. Procedure to register child support order of another state for modification.** A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another state shall register that order in this state in the same manner provided in part A of this part 6 if the order has not been registered. A petition for modification may be filed at the same time as a request for registration, or later. The pleading must specify the grounds for modification.

**Source:** L. 93: Entire article R&RE, p. 1599, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1260, § 38, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-110 as it existed prior to 1993.

ANNOTATION

**Annotator's note:** Since § 14-5-609 is similar to § 14-5-110 as it existed prior to the 1993 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Full faith and credit must be given to another state's final order for arrearages entered under RURESA, § 14-5-101 et seq.** In re Sabala, 802 P.2d 1163 (Colo. App. 1990).

**The doctrine of equitable estoppel may properly be applied to afford relief from accrued arrearages in child support** if the party asserting the claim demonstrates reasonable reliance, to the party's detriment, upon the acts or representations of the other person, and lack of knowledge or convenient means of knowing the facts. In re Dennin and Lohf, 811 P.2d 449 (Colo. App. 1991).

**14-5-610. Effect of registration for modification.** A tribunal of this state may enforce a child support order of another state registered for purposes of modification, in the same manner as if the order had been issued by a tribunal of this state, but the registered order may be modified only if the requirements of section 14-5-611, 14-5-613, or 14-5-615 have been met.

**Source:** L. 93: Entire article R&RE, p. 1599, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1260, § 39, effective July 1, 2004.

**14-5-611. Modification of child support order of another state.** (a) If section 14-5-613 does not apply, except as otherwise provided in section 14-5-615, upon petition a tribunal of this state may modify a child support order issued in another state which order is registered in this state if, after notice and hearing, the tribunal finds that:

(1) The following requirements are met:

(A) Neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;

(B) A petitioner who is a nonresident of this state seeks modification; and

(C) The respondent is subject to the personal jurisdiction of the tribunal of this state; or

(2) This state is the state of residence of the child or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.

(b) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.

(c) Except as otherwise provided in section 14-5-615, a tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state, including the duration of the obligation of support. If two or more tribunals have issued child support orders for the same obligor and same child, the order that controls

and must be so recognized under section 14-5-207 establishes the aspects of the support order which are nonmodifiable.

(d) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.

(e) On issuance of an order by a tribunal of this state modifying a child support order issued in another state, the tribunal of this state becomes the tribunal having continuing, exclusive jurisdiction.

**Source:** L. 93: Entire article R&RE, p. 1599, § 1, effective January 1, 1995. L. 97: Entire section amended, p. 541, § 14, effective July 1. L. 2003: Entire section amended, p. 1260, § 40, effective July 1, 2004.

#### ANNOTATION

**Court is authorized to modify a child support order that was issued in another state and is registered in this state if:** (1) The child, individual obligee, and the obligor do not reside in the issuing state; (2) the petitioning party

seeking modification is a nonresident of this state; and (3) the respondent is subject to the personal jurisdiction of the tribunal of this state. In re Zinke, 967 P.2d 210 (Colo. App. 1998).

**14-5-612. Recognition of order modified in another state.** If a child support order issued by a tribunal of this state is modified by a tribunal of another state which assumed jurisdiction pursuant to the "Uniform Interstate Family Support Act", a tribunal of this state:

(1) May enforce its order that was modified only as to arrears and interest accruing before the modification;

(2) May provide appropriate relief for violations of its order which occurred before the effective date of the modification; and

(3) Shall recognize the modifying order of the other state, upon registration, for the purpose of enforcement.

(4) (Deleted by amendment, L. 2003, p. 1261, § 41, effective July 1, 2004.)

**Source:** L. 93: Entire article R&RE, p. 1600, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1261, § 41, effective July 1, 2004.

**Editor's note:** This section is similar to former § 14-5-110 as it existed prior to 1993.

#### ANNOTATION

**Annotator's note:** Since § 14-5-612 is similar to § 14-5-110 as it existed prior to the 1993 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Full faith and credit must be given to another state's final order for arrearages entered under RURESA, § 14-5-101 et seq.** In re Sabala, 802 P.2d 1163 (Colo. App. 1990).

**The doctrine of equitable estoppel may properly be applied to afford relief from accrued arrearages in child support** if the party asserting the claim demonstrates reasonable reliance, to the party's detriment, upon the acts or representations of the other person, and lack of knowledge or convenient means of knowing the facts. In re Dennin and Lohf, 811 P.2d 449 (Colo. App. 1991).

**14-5-613. Jurisdiction to modify child support order of another state when individual parties reside in this state.** (a) If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order.

(b) A tribunal of this state exercising jurisdiction under this section shall apply the



provisions of parts 1 and 2 of this article, this part 6, and the procedural and substantive law of this state to the proceeding for enforcement or modification. Parts 3, 4, 5, 7, and 8 of this article do not apply.

**Source: L. 97:** Entire section added, p. 542, § 15, effective July 1.

**14-5-614. Notice to issuing tribunal of modification.** Within thirty days after issuance of a modified child support order, the party obtaining the modification shall file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order, and in each tribunal in which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction.

**Source: L. 97:** Entire section added, p. 542, § 15, effective July 1.

**14-5-615. Jurisdiction to modify child support order of foreign country or political subdivision.** (a) If a foreign country or political subdivision that is a state will not or may not modify its child support order pursuant to its laws, a tribunal of this state may assume jurisdiction to modify the child support order and bind all individuals subject to the personal jurisdiction of the tribunal whether or not the consent to modification of a child support order otherwise required of the individual pursuant to section 14-5-611 has been given or whether the individual seeking modification is a resident of this state or of the foreign country or political subdivision.

(b) An order issued pursuant to this section is the controlling order.

**Source: L. 2003:** Entire section added, p. 1262, § 42, effective July 1, 2004.

## PART 7

### DETERMINATION OF PARENTAGE

**14-5-701. Proceeding to determine parentage.** (a) A court of this state authorized to determine parentage of a child may serve as a responding tribunal in a proceeding to determine parentage brought under this article or a law or procedure substantially similar to this article.

(b) (Deleted by amendment, L. 2003, p. 1262, § 43, effective July 1, 2004.)

**Source: L. 93:** Entire article R&RE, p. 1600, § 1, effective January 1, 1995. **L. 97:** (a) amended, p. 543, § 16, effective July 1. **L. 2003:** Entire section amended, p. 1262, § 43, effective July 1, 2004.

## PART 8

### INTERSTATE RENDITION

**Cross references:** For extradition procedures generally, see article 19 of title 16.

**14-5-801. Grounds for rendition.** (a) For purposes of this part 8, "governor" includes an individual performing the functions of governor or the executive authority of a state covered by this article.

(b) The governor of this state may:

(1) Demand that the governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to provide for the support of an obligee; or

(2) On the demand of the governor of another state, surrender an individual found in this state who is charged criminally in the other state with having failed to provide for the support of an obligee.

(c) A provision for extradition of individuals not inconsistent with this article applies to the demand even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled therefrom.

**Source:** L. 93: Entire article R&RE, p. 1601, § 1, effective January 1, 1995. L. 2003: (b)(2) amended, p. 1262, § 44, effective July 1, 2004.

**14-5-802. Conditions of rendition.** (a) Before making a demand that the governor of another state surrender an individual charged criminally in this state with having failed to provide for the support of an obligee, the governor of this state may require a prosecutor of this state to demonstrate that at least sixty days previously the obligee had initiated proceedings for support pursuant to this article or that the proceeding would be of no avail.

(b) If, under this article or a law substantially similar to this article, the governor of another state makes a demand that the governor of this state surrender an individual charged criminally in that state with having failed to provide for the support of a child or other individual to whom a duty of support is owed, the governor may require a prosecutor to investigate the demand and report whether a proceeding for support has been initiated or would be effective. If it appears that a proceeding would be effective but has not been initiated, the governor may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the governor may decline to honor the demand. If the petitioner prevails and the individual whose rendition is demanded is subject to a support order, the governor may decline to honor the demand if the individual is complying with the support order.

**Source:** L. 93: Entire article R&RE, p. 1601, § 1, effective January 1, 1995. L. 2003: (a) and (b) amended, p. 1263, § 45, effective July 1, 2004.

## PART 9

### MISCELLANEOUS PROVISIONS

**14-5-901. Uniformity of application and construction.** In applying and construing this article, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source:** L. 93: Entire article R&RE, p. 1602, § 1, effective January 1, 1995. L. 2003: Entire section amended, p. 1263, § 46, effective July 1, 2004.

#### **14-5-902. Short title - repeal. (Repealed)**

**Source:** L. 93: Entire article R&RE, p. 1602, § 1, effective January 1, 1995. L. 2003: (b) added by revision, pp. 1263, 1275, §§ 47, 72.

**Editor's note:** (1) This section was similar to former § 14-5-101 as it existed prior to 1993.

(2) Subsection (b) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 1263, 1275.)

**14-5-903. Severability clause.** If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

**Source:** L. 93: Entire article R&RE, p. 1602, § 1, effective January 1, 1995.



## PART 10

## COLORADO IMPLEMENTATION PROVISIONS

**14-5-1001. Venue. (Repealed)**

**Source:** L. 93: Entire article R&RE, p. 1602, § 1, effective January 1, 1995. L. 98: Entire section repealed, p. 753, § 2, effective July 1.

**Editor's note:** This section was amended by House Bill 98-1183. Those amendments will not become effective because of the repeal of the section by Senate Bill 98-139.

**14-5-1002. Jurisdiction by arrest. (Repealed)**

**Source:** L. 93: Entire article R&RE, p. 1602, § 1, effective January 1, 1995. L. 98: Entire section repealed, p. 754, § 3, effective July 1.

**14-5-1003. Duty of officials of this state as responding state. (Repealed)**

**Source:** L. 93: Entire article R&RE, p. 1603, § 1, effective January 1, 1995. L. 98: Entire section repealed, p. 754, § 4, effective July 1.

**14-5-1004. Proceedings not to be stayed. (Repealed)**

**Source:** L. 93: Entire article R&RE, p. 1603, § 1, effective January 1, 1995. L. 96: Entire section repealed, p. 593, § 5, effective July 1.

**14-5-1005. Declaration of reciprocity - repeal. (Repealed)**

**Source:** L. 93: Entire article R&RE, p. 1603, § 1, effective January 1, 1995. L. 2003: (b) added by revision, pp. 1263, 1275, §§ 48, 72.

**Editor's note:** (1) This section was similar to former § 14-5-144 as it existed prior to 1993.

(2) Subsection (b) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 1263, 1275.)

**14-5-1006. Interstate central registry - duties as the responding and initiating state - repeal. (Repealed)**

**Source:** L. 93: Entire article R&RE, p. 1604, § 1, effective January 1, 1995. L. 94: (1) amended, p. 2644, § 103, effective July 1. L. 2003: (3) added by revision, pp. 1264, 1275, §§ 49, 72.

**Editor's note:** Subsection (3) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 1264, 1275.)

**14-5-1007. Enforcement of interstate income withholding. (Repealed)**

**Source:** L. 94: Entire section added, p. 1547, § 27, effective January 1, 1995. L. 96: (4) and (5)(a) amended, p. 593, § 6, effective July 1. L. 97: (2)(e)(I) amended, p. 1264, § 7, effective July 1. L. 98: Entire section repealed, p. 754, § 5, effective July 1.

## ARTICLE 6

## Nonsupport

14-6-101.	Nonsupport of spouse and children - penalty.	14-6-108.	Citizenship - residence.
14-6-102.	Suspension of sentence. (Repealed)	14-6-109.	Forfeiture of bond - disposition of fines.
14-6-103.	Extradition.	14-6-110.	Joint liability for family expenses.
14-6-104.	Jurisdiction.	14-6-111.	Legislative declaration.
14-6-105.	Spouse competent witness.	14-6-112.	Procedures by clerk. (Repealed)
14-6-106.	Venue.	14-6-113.	Remedies additional to those now existing.
14-6-107.	Venue - home or school of child.		

**14-6-101. Nonsupport of spouse and children - penalty.** (1) Any person who willfully neglects, fails, or refuses to provide reasonable support and maintenance for his spouse or for his children under eighteen years of age, whether natural, adopted, or whose parentage has been judicially determined, or who willfully fails, refuses, or neglects to provide proper care, food, and clothing in case of sickness for his spouse or such children or any such children being legally the inmates of a state or county home or school for children in this state, or who willfully fails or refuses to pay to a trustee, who may be appointed by the court to receive such payment, or to the board of control of such home or school the reasonable cost of keeping such children in said home, or any person, being the father or mother of children under eighteen years of age, who leaves such children with intent to abandon such children, or any man who willfully neglects, fails, or refuses to provide proper care, food, and clothing to the mother of his child during childbirth and attendant illness is guilty of a class 5 felony. It shall be an affirmative defense, as defined in section 18-1-407, C.R.S., to a prosecution under this section that owing to physical incapacity or other good cause the defendant is unable to furnish the support, care, and maintenance required by this section. No child shall be deemed to lack proper care for the sole reason that he is being provided remedial treatment in accordance with section 19-3-103, C.R.S.

(2) Repealed.

**Source:** L. 11: p. 527, § 1. C.L. § 5566. CSA: C. 83, § 1. CRS 53: § 43-1-1. L. 55: p. 287, § 1. C.R.S. 1963: § 43-1-1. L. 73: p. 547, § 1. L. 81: (1) amended, p. 901, § 1, effective May 27. L. 87: (1) amended, p. 815, § 16, effective October 1. L. 92: (2) repealed, p. 396, § 1, effective June 3; (1) amended, p. 202, § 7, effective August 1.

## ANNOTATION

- I. General Consideration.
- II. Elements of Offense and Excuses for Failure to Support.
- III. Pleading and Practice.

## I. GENERAL CONSIDERATION.

**Law reviews.** For an article on "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For article on "The Problem of Compelling Fathers to Support Their Dependent Children", see 27 Dicta 442 (1950). For article, "A Lawyer's Advice to the Unmarried Mother", see 31 Dicta 112 (1954). For article, "Highlights of the 1955 Colorado Legislative Session — Domestic Relations", see 28 Rocky Mt. L. Rev. 66 (1955). For article,

"Highlights of the 1955 Legislative Session — Criminal Law and Procedure", see 28 Rocky Mt. L. Rev. 69 (1955). For note, "Enforcement of Support Duties in Colorado", see 33 Rocky Mt. L. Rev. 70 (1960). For note, "Aid to Families with Dependent Children — A Study of Welfare Assistance", see 44 Den. L.J. 102 (1967).

**Annotator's note.** Cases relevant to § 14-6-101 decided prior to its earliest source, L. 11, p. 527, § 1, have been included in the annotations to this section.

**This article was held not to violate § 1 of art. V, Colo. Const.** *Pearman v. People*, 64 Colo. 26, 170 P. 192 (1917); *Wamsley v. People*, 64 Colo. 521, 173 P. 425 (1918).

**This section does not violate § 12 of art. II, Colo. Const.,** prohibiting imprisonment for



debt. *Martin v. People*, 69 Colo. 60, 168 P. 1171 (1917); *People v. Elliott*, 186 Colo. 65, 525 P.2d 457 (1974).

**Purpose.** The felony nonsupport statute is designed to promote and protect the health and welfare of minor children and to prevent such children from becoming wards of the state. *People v. Elliott*, 186 Colo. 65, 525 P.2d 457 (1974).

**This article does not change the law as to the civil liability of the husband to furnish his wife reasonable support;** it just provides a penalty in case he fails to do so, unless excused by physical incapacity or other good cause *Poole v. People*, 24 Colo. 510, 52 P. 1025 (1898).

**Duty to support spouse ceases when marriage is dissolved** unless an order of maintenance is entered in connection with the dissolution decree. *Com. of Pennsylvania v. Barta*, 790 P.2d 895 (Colo. App. 1990).

**The nonsupport statutes such as this have been regarded only as enforcing, and not as creating,** a duty on the part of husbands and fathers with reference to the support of wives and children. *Kilpatrick v. People*, 64 Colo. 209, 170 P. 956 (1918).

**It simply makes the willful neglect of a duty theretofore existing a felony.** *People v. Driscoll*, 72 Colo. 115, 209 P. 869 (1922).

**The supreme court was fortified in limiting the court's authority to require security for the payment of alimony** by reason of the fact that with respect to orders for the payment of sums required for the support and maintenance and education of the minor children of the parties, the general assembly had enacted this section which made it a felony for a husband to neglect, fail or refuse to provide reasonable support and maintenance for his minor children under the age of 16 years. *Brown v. Brown*, 131 Colo. 467, 283 P.2d 951 (1955).

**Therefore a father who neglects to discharge his natural, as well as his statutory, duty to his children** "shall be deemed guilty of a felony", and may be imprisoned for so doing unless he provides a bond conditioned upon the support of such children. *Brown v. Brown*, 131 Colo. 467, 283 P.2d 951 (1955).

**Formerly, the primary obligation for the support of a minor child rested upon its father,** and the fact that the mother was self-supporting did not serve to relieve the father of his obligation. *McQuade v. McQuade*, 145 Colo. 218, 358 P.2d 470 (1960).

**Obligation of mother now equal to that of father.** The general assembly in 1973 reassessed the relative responsibilities of the parents with regard to support of their children and imposed an obligation on the mother equal to that of the father. *People v. Elliott*, 186 Colo. 65, 525 P.2d 457 (1974).

**Changing legislative view of role and capabilities of mother.** This enlargement of the

scope of protection for minor children suggests a legislative view that the role of the mother has expanded beyond the domestic sphere to which it had been relegated and that the economic abilities and opportunities of the parents are more nearly on a parity concerning their capability of providing support for their children. *People v. Elliott*, 186 Colo. 65, 525 P.2d 457 (1974).

**Since the father is under a legal duty or obligation to support his child** in an adequate manner, resort to the courts may be had to enforce compliance, and such action is not made nonmaintainable because of statutory proceedings relating to the support of children in divorce, separate maintenance and annulment actions nor because of the statute relating to dependent and neglected children. *McQuade v. McQuade*, 145 Colo. 218, 358 P.2d 470 (1960).

**The inherent right to support belongs to the child, and there exists no reason to hinge the enforcement of such right** upon the existence or nonexistence of statutory right in the mother to obtain a divorce or separate maintenance, or upon a statute designed for children neglected by both parents. *McQuade v. McQuade*, 145 Colo. 218, 358 P.2d 470 (1960).

**The rights of the child exist independent of the rights of the mother,** and are enforceable in equity in the absence of a statute providing for relief in the express circumstances. *McQuade v. McQuade*, 145 Colo. 218, 358 P.2d 470 (1960).

**A dismissal of complaints seeking divorce and separate maintenance** is not res judicata concerning the right of a minor child to compel adequate support by his father. *McQuade v. McQuade*, 145 Colo. 218, 358 P.2d 470 (1960).

**An alleged father of an illegitimate child, in any case where such child is under 16 years of age,** may be prosecuted for failure to support it, without having been adjudged, in some prior proceeding, to be such father. *Ortega v. Portales*, 134 Colo. 537, 307 P.2d 193 (1957).

**This section contains the provision that any man who shall willfully refuse to support his legitimate or illegitimate child** under 16 years of age shall be deemed guilty of a felony. *Ortega v. Portales*, 134 Colo. 537, 307 P.2d 193 (1957).

**No provision of the bastardy act has any bearing upon a prosecution under this section.** *Wamsley v. People*, 64 Colo. 521, 173 P. 425 (1918).

**The gravamen of the offense is not the fathering of the illegitimate child,** but the failure to make provision for his support if and when it becomes a dependent child under the statute. *Ortega v. Portales*, 134 Colo. 537, 307 P.2d 193 (1957).

**This section does not attempt to punish the father for begetting or neglecting to support the child before the section took effect,** but requires a defendant, as the father of a child, to contribute to his support and maintenance, thus

relieving the mother or others upon whom the burden may chance to fall. *Ortega v. Portales*, 134 Colo. 537, 307 P.2d 193 (1957).

**The parent cannot be released of his duty to support the child by contract with anyone**, but the fact that he entered into a contract and thereby made provisions for such support may have an important bearing upon the issue as to whether his neglect was willful or not. *Laws v. People*, 59 Colo. 562, 151 P. 433 (1915).

**Although a bastardy prosecution under one statute is barred because not brought in time**, an action may still be maintained under another statute for failure to support an illegitimate child. *Ortega v. Portales*, 134 Colo. 537, 307 P.2d 193 (1957).

## II. ELEMENTS OF OFFENSE AND EXCUSES FOR FAILURE TO SUPPORT.

**"Support and maintenance" are of much broader import than "food, clothing, and shelter"**, and may include many things besides food and clothing, and shelter. *Campbell v. People*, 42 Colo. 228, 94 P. 256 (1908).

**Construed as applying to the duty of the husband when the wife is sick**, the "food, clothing, and shelter" are properly connected, and it seems to have been the intention of the general assembly to require the husband, whatever provision he may have made for his wife and minor children while they were well, that he furnish, not money, with which they may provide for their own comfort, but in the case of their sickness that he must, at his peril, provide them with proper food, clothing, shelter, and care. *Campbell v. People*, 42 Colo. 228, 94 P. 256 (1908).

**An information alleging that defendant "did willfully fail, refuse, and neglect to provide proper food, clothing, and shelter, and care in case of sickness for his wife"**, was fatally defective, in that it failed to allege that defendant's wife was sick at the time it was charged he failed to provide for her. *Campbell v. People*, 42 Colo. 228, 94 P. 256 (1908).

**The term "willfully" is defined as intentionally done without just cause, excuse or justification after notice and request for support.** *People v. Green*, 178 Colo. 77, 495 P.2d 549 (1972).

**To be willful the neglect must have occurred while defendant knew, or ought to have known, that the need existed.** *Laws v. People*, 59 Colo. 562, 151 P. 433 (1915).

**Where willful neglect to support minor children is an element of an offense under this section**, it is proper for a court to instruct the jury on intent. *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**Because this section provides that the willful neglect, failure or refusal to provide reasonable support for a minor child or children**

**is an element of the offense**, therefore intent is material in a case, and it is proper for a court to so instruct the jury. *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**Every person mentally capable of knowing right from wrong in relation to his acts is presumed to intend to do that which he does do**, and to intend the natural and probable consequences of his act, and it is for a jury to determine the fact as to a defendant's intent, which may be shown by direct or by circumstantial evidence. *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**Intent is an act or a purpose of the mind rarely discoverable except by the acts of a person, and is manifested** by the circumstances connected with the perpetration of an offense, and the sound mind and discretion of the accused. *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**The people sustained their burden of establishing that defendant willfully failed to provide the required child support** when they showed that for a period of time he earned more than \$400 per month and yet made no support payments. *Gallegos v. People*, 161 Colo. 158, 420 P.2d 409 (1966).

**A willful failure where the defendant is earning a salary has been defined**, as intentionally done "without just cause, excuse or justification" after notice and request for support. *Gallegos v. People*, 161 Colo. 158, 420 P.2d 409 (1966).

**That part of this section which states that a defendant is guilty of nonsupport when he willfully fails to provide that required support** "unless it shall appear that owing to physical incapacity or other good cause he is unable to furnish the support, care, and maintenance herein required", is not a true exception. *Gallegos v. People*, 161 Colo. 158, 420 P.2d 409 (1966).

**This is so because of the use of the term "willfully" in the first part of the section**, and the supreme court holds that the word "willfully" is synonymous with the statutory expression which begins "unless it shall appear" *Gallegos v. People*, 161 Colo. 158, 420 P.2d 409 (1966).

**This renders the later clause surplusage since "willfully" necessarily implies lack of just cause, excuse or justification**; thus, allegation of the willful (or felonious) nature of the act is all that is required. *Gallegos v. People*, 161 Colo. 158, 420 P.2d 409 (1966).

**Good cause is defined as a substantial or legal cause as distinguished from an assumed or imaginary pretense.** *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**The question of good cause is properly for the jury.** *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957); *Silcott v. People*, 177 Colo. 451, 492 P.2d 70 (1971).



**Evidence that a father is capable of earning, and did earn good wages during a period of four months, is sufficient** to show that his neglect to support minor children is not due to good cause. *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**The fact that a defendant has other demands upon his income, including support of a new family, does not constitute good cause for failure to support minor children.** *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**A father's testimony that he has been in financial straits since the separation from his wife is not an excuse or good cause.** *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**In a prosecution of a husband for failure to support his wife, he was not relieved from such support on account of the financial means of the wife.** *Poole v. People*, 24 Colo. 510, 52 P. 1025 (1898).

**It was immaterial that the wife had means of her own, such means not having been obtained from the husband.** *Poole v. People*, 24 Colo. 510, 52 P. 1025 (1898).

**If it had been established that the wife left the defendant without an adequate excuse, refused without reasonable grounds to return to him, and he offered and was willing to support her if she returned, he could not be convicted of willful nonsupport of his wife.** *Kilpatrick v. People*, 64 Colo. 209, 170 P. 956 (1918).

**The act of 1893, providing that any person living in this state who shall willfully neglect to provide support for his wife may be adjudged guilty of misdemeanor, did not affect the general powers of a court of equity to entertain suits to compel a husband to pay alimony consistent with his condition in life, and reasonable for the maintenance of his wife or his family or both.** *Dye v. Dye*, 9 Colo. App. 320, 48 P. 313 (1897).

**An allowance of temporary alimony to the wife in an action brought by her for divorce is not admissible evidence against the husband in a prosecution for nonsupport.** *Kilpatrick v. People*, 64 Colo. 209, 170 P. 956 (1918).

**One acquitted of sexual intercourse with an unmarried female under 18 years of age is not liable to prosecution under this section for failure to support the illegitimate child alleged to be the fruit of the same illicit intercourse averred in the first information.** *Reil v. People*, 62 Colo. 567, 164 P. 315 (1917).

**Under this section the father of an illegitimate child under 16 years of age may be prosecuted for his failure to support it, without any prior adjudication of the paternity and this whether the child were begotten before or after the enactment of the statute.** *Pearman v. People*, 64 Colo. 26, 170 P. 192 (1917); *Wamsley v. People*, 64 Colo. 521, 173 P. 425 (1918).

**Where, in a prosecution under this section, the child in question was not born in wedlock, the prosecution has the burden of showing parentage.** *Martin v. People*, 60 Colo. 575, 155 P. 318 (1916).

**The accused is entitled to deny that the child is his, and though a marriage with the mother is shown, he must be permitted to put in evidence that at the time of such marriage the woman was the wife of another, and to exclude the evidence is error.** *Martin v. People*, 60 Colo. 575, 155 P. 318 (1916).

**A decree of divorce which commits the child to the custody of the mother, and is silent as to the child's support, does not relieve the father of his duty.** *Desch v. Desch*, 55 Colo. 79, 132 P. 60 (1913).

**A divorced wife may, in an original action, recover of the father a reasonable sum for necessities furnished by her for a child's support, after such decree, the recovery being commensurate with his means and station in life.** *Desch v. Desch*, 55 Colo. 79, 132 P. 60 (1913).

### III. PLEADING AND PRACTICE.

**The word "feloniously" when used in an indictment or information has been held by the supreme court to be equivalent to the word "willfully", and its use satisfies the requirements of pleading the essential elements of the crime, though it is much better form to follow the precise statutory wording.** *Gallegos v. People*, 161 Colo. 158, 420 P.2d 409 (1966).

**Where an information filed with a justice of the peace on January 18, 1897, charging a party with failure to support his wife alleged the time of the offense as "on or about the 19th day of September, and continuously since, A. D. 1897", it was held, that from the language employed charging the time when the offense was committed, it is fairly inferable that it was at a date prior to the filing of the information, and although it might have been successfully attacked at the proper time, by a motion on account of form, or ambiguity, it is too late to raise that question after trial.** *Poole v. People*, 24 Colo. 510, 52 P. 1025 (1898).

**In a prosecution under this section for failure to support an illegitimate child, it is not necessary to prove that the child is in need of support.** *Trujillo v. People*, 122 Colo. 436, 222 P.2d 775 (1950).

**It was permissible to introduce into evidence the register of a hotel where the complainant testified she and defendant had stayed overnight, where the defendant acknowledged signatures in the register as his own.** *Trujillo v. People*, 122 Colo. 436, 222 P.2d 775 (1950).

**The trial court's action in excluding a letter written by the complainant to defendant's witness was not prejudicial to the defendant where**

the effect of the whole letter was to entreat the witness to tell the truth, if he did testify. *Trujillo v. People*, 122 Colo. 436, 222 P.2d 775 (1950).

Where the complainant denied having had sex relations with anyone other than the defendant, and the defense put on four witnesses to testify to her alleged promiscuity, it was not error for the complainant to testify in rebuttal of the testimony of the four witnesses. *Trujillo v. People*, 122 Colo. 436, 222 P.2d 775 (1950).

In such a prosecution, the state must prove its case beyond a reasonable doubt, and it was not error for the trial court to refuse defendant's instruction which stated that the state had to prove its case simply by a preponderance of the evidence. *Trujillo v. People*, 122 Colo. 436, 222 P.2d 775 (1950).

It was permissible to allow the doctor who attended complainant during her confinement to refresh his memory from a birth certificate which he made at the time even though the certificate was obtained from the local registrar of vital statistics. *Trujillo v. People*, 122 Colo.

436, 222 P.2d 775 (1950).

Where there was judgment that defendant pay a certain sum monthly, etc., until the further order of the court, "and execute a bond in the sum, etc., for the faithful performance, etc., and upon failure, to be transported to the penitentiary to be there kept in close confinement at hard labor for three months", it was held a sufficient compliance with the statute. *Poor v. People*, 67 Colo. 60, 185 P. 467 (1919).

**In a prosecution for willful failure to support minor children, evidence of a pending criminal case against a defendant**, elicited on cross examination of defendant and within the scope of his direct examination, is not prejudicial. *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**Failure of the father to inquire as to the needs of the child was held, in view of the circumstances, insufficient to convict him of willful neglect.** *Laws v. People*, 59 Colo. 562, 151 P. 433 (1915).

#### **14-6-102. Suspension of sentence. (Repealed)**

**Source:** L. 11: p. 528, § 2. C.L. § 5567. CSA: C. 83, § 2. CRS 53: § 43-1-2. C.R.S. 1963: § 43-1-2. L. 73: p. 548, § 2. L. 92: Entire section repealed, p. 396, § 2, effective June 3.

**14-6-103. Extradition.** It is the duty of the district attorney or other proper officer, in any such case where the defendant is beyond the state of Colorado, to take all necessary and proper steps and proceedings to extradite such defendant and to obtain a requisition from the governor of the state of Colorado to the governor of the state in which such defendant may be found in order to secure his return from such state to the jurisdiction in which the case is being prosecuted. Extradition under this article shall be governed in accordance with the provisions of article 19 of title 16, C.R.S.

**Source:** L. 11: p. 529, § 3. C.L. § 5568. CSA: C. 83, § 3. CRS 53: § 43-1-3. C.R.S. 1963: § 43-1-3. L. 92: Entire section amended, p. 397, § 3, effective June 3.

**Cross references:** For extradition procedures generally, see article 19 of title 16.

**14-6-104. Jurisdiction.** Courts of record in this state shall have jurisdiction under this article as provided in this section, and a complaint or information for the violation of this article may be filed in any court of record by the prosecuting attorney or other appropriate agency or before the county court of the county in which such offense defined in section 14-6-101 is committed.

**Source:** L. 11: p. 529, § 4. C.L. § 5569. CSA: C. 83, § 4. CRS 53: § 43-1-4. L. 61: p. 352, § 1. C.R.S. 1963: § 43-1-4. L. 64: p. 246, § 115. L. 92: Entire section amended, p. 397, § 4, effective June 3.

#### **ANNOTATION**

**Law reviews.** For article, "One Year Review of Criminal Law and Procedure", see 36 *Dicta* 34 (1959).

**The juvenile court is a court of record, and, under this section has jurisdiction of an information for the nonsupport of the wife of**



the accused. *Smith v. People*, 64 Colo. 290, 170 P. 959 (1918).

**county court in nonsupport cases.** *Tucker v. People*, 136 Colo. 581, 319 P.2d 983 (1957).

**This section also confers jurisdiction on the**

**14-6-105. Spouse competent witness.** In all proceedings or prosecutions under this article, a wife or husband shall be a competent witness against his spouse with or without his consent.

**Source:** L. 11: p. 530, § 5. C.L. § 5570. CSA: C. 83, § 5. CRS 53: § 43-1-5. C.R.S. 1963: § 43-1-5. L. 73: p. 548, § 3.

**14-6-106. Venue.** If the offense charged is desertion or abandonment or neglect or refusal to provide such children or spouse with the necessary and proper home, care, food, and clothing, as provided in section 14-6-101, the offense shall be held to have been committed in any county of this state in which such children or spouse may be at the time such complaint is made.

**Source:** L. 11: p. 531, § 7. C.L. § 5571. CSA: C. 83, § 6. CRS 53: § 43-1-6. C.R.S. 1963: § 43-1-6. L. 73: p. 548, § 4.

**14-6-107. Venue - home or school of child.** If the offense charged is the neglect or refusal to pay to the trustees of a child's home or school or the trustee who may be appointed by the court to receive such payment the reasonable cost of keeping such child, the offense shall be held to have been committed in the county where the child's home or school may be situated.

**Source:** L. 11: p. 531, § 8. C.L. § 5572. CSA: C. 83, § 7. CRS 53: § 43-1-7. C.R.S. 1963: § 43-1-7.

**14-6-108. Citizenship - residence.** Citizenship or residence once acquired in this state by any parent of any legitimate or illegitimate child living in this state shall be deemed for all the purposes of this article to continue until such child has arrived at the age of sixteen years, so long as said child continues to live in this state. In case of prosecution under this article for the violation of any of the provisions of this article, such citizenship or residence shall likewise be deemed to continue so long as such spouse or parent resides in this state and is entitled to the support or maintenance provided for in section 14-6-101.

**Source:** L. 11: p. 531, § 9. C.L. § 5573. CSA: C. 83, § 8. CRS 53: § 43-1-8. C.R.S. 1963: § 43-1-8. L. 73: p. 548, § 5.

#### ANNOTATION

**Annotator's note.** A case relevant to § 14-6-108 decided prior to its earliest source, L. 11, p. 531, § 9, has been included in the annotations to this section.

**In a prosecution for the failure of a husband to support his wife, it is not necessary to allege in the information** that the defendant is a resident of the state. *Poole v. People*, 24 Colo. 510, 52 P. 1025 (1898).

**Nonresidents are excepted from the operation of this section**, but it is not necessary to negate the exceptions because if the defendant was a nonresident, that was a matter of defense. *Poole v. People*, 24 Colo. 510, 52 P. 1025 (1898).

**14-6-109. Forfeiture of bond - disposition of fines.** (1) In accordance with the laws of this state, bond shall be set by the court. Pursuant to subsection (2) of this section, where the defendant has been released upon deposit of cash, stocks, or bonds, or upon surety bond secured by property, if the defendant fails to appear in accordance with the primary

condition of the bond, the court shall declare a forfeiture. Notice of the order of forfeiture shall be mailed immediately by the court to the defendant and sureties, if any, at last known address. If the defendant does not appear and surrender to the court having jurisdiction within thirty days from the date of the forfeiture, or within that period satisfy the court that appearance and surrender by the defendant is impossible and without the defendant's fault, the court shall enter judgment against the defendant and the sureties, if any, for the amount of the bail and costs of the court proceedings.

(2) Any moneys collected or paid upon any such execution or in any case upon said bond shall be turned over to the clerk of the court in which the bond is given to be applied to the child support obligation, including where the obligation is assigned to the department of human services pursuant to section 26-2-111 (3), C.R.S.

**Source:** L. 11: p. 531, § 10. C.L. § 5574. CSA: C. 83, § 9. CRS 53: § 43-1-9. C.R.S. 1963: § 43-1-9. L. 73: p. 549, § 6. L. 92: Entire section amended, p. 398, § 5, effective June 3. L. 94: (2) amended, p. 2644, § 104, effective July 1. L. 97: (1) amended, p. 561, § 4, effective July 1; (2) amended, p. 1240, § 36, effective July 1.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (2), see section 1 of chapter 345, Session Laws of Colorado 1994.

**14-6-110. Joint liability for family expenses.** The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

**Source:** L. 1891: p. 238, § 1. R.S. 08: § 3021. C.L. § 5575. CSA: C. 83, § 10. CRS 53: § 43-1-10. C.R.S. 1963: § 43-1-10.

#### ANNOTATION

**Law reviews.** For comment on *Wall v. Crawford*, appearing below, see 11 Rocky Mt. L. Rev. 207 (1939). For article, "The Seller of One Mink Coat v. Pvt. Johnnie Doe", see 29 Dicta 148 (1952). For article, "One Year Review of Torts", see 38 Dicta 93 (1961). For comment on *Nitzel v. Colorado Indus. Bank*, appearing below, see 34 Rocky Mt. L. Rev. 240 (1962). For article, "The Big, Bad D's: Debts and Death in Divorce - Part I", see 25 Colo. Law. 57, (July 1996).

**This section has not the effect to relieve the father of the duty to support his minor child**, so far as the child is incapable of self-support, even though, upon divorce, the child is committed to the mother, and the decree makes no provision for its support. *Desch v. Desch*, 55 Colo. 79, 132 P. 60 (1913).

**This section was not given a retroactive effect** so as to cover contracts made before its passage. *Kelly v. Canon*, 6 Colo. App. 465, 41 P. 833 (1895).

**Where the wife lives apart from the husband, with the children, the liability of the husband for clothing furnished to the children** without his authority, depends upon common-law principles, and this section regarding family expenses has no application. *O'Brien v. Galley-Stockton Shoe Co.*, 65 Colo. 70, 173 P. 544 (1918).

**The duties of the wife, as wife, form the consideration for the husband's liability for her maintenance**, and if she is guilty of offenses against the marital relation that entitles her husband to a divorce, and by reason thereof they do not live together, her contracts for necessities will not bind the unoffending husband. *Denver Dry Goods Co. v. Jester*, 60 Colo. 290, 152 P. 903 (1915).

**Where the parties were not living together as a family in fact, at the time the goods were sold**, it is conceded that this section, relative to family expenses has no application. *Denver Dry Goods Co. v. Jester*, 60 Colo. 290, 152 P. 903 (1915).

**Before this section can be invoked, a primary obligation upon either the husband or the wife**, for the debt sought to be charged against them, must be established. *Parker v. Joslin Dry Goods Co.*, 52 Colo. 238, 120 P. 1042 (1911).

**In the absence of fraud between the husband and a family creditor, debts for family expenses**, though contracted by the husband, bind the property of both husband and wife; agreements of the husband concerning such expenses are binding upon both; the cause of action accrues against both at the maturity of a note given for such expenses, not at the time the debt was contracted; renewal of the note by the



husband alone does not discharge the lien; and the statute of limitations does not run in favor of either from the maturity of the first note, but of the new one. *Wall v. Crawford*, 103 Colo. 66, 82 P.2d 749 (1938).

**A wife can be compelled to pay an indebtedness for something of which the family, or some one or more of its members, has had the actual benefit since it was incurred for family expenses.** *Straight v. McKay*, 15 Colo. App. 60, 60 P. 1106 (1900).

**Either husband or wife may incur indebtedness for the family expenses, and for such indebtedness either or both will be liable.** *Straight v. McKay*, 15 Colo. App. 60, 60 P. 1106 (1900).

**Outside of the expenses of the family and the education of the children, neither can impose an obligation upon the other.** *Straight v. McKay*, 15 Colo. App. 60, 60 P. 1106 (1900).

**What should be included in the term, "family expenses", must be determined by the facts and circumstances of each case, subject to the limitation, that an article or articles must have been purchased for, and used in or by, the family, or some member thereof.** *Houck v. La Junta Hdwe. Co.*, 50 Colo. 228, 114 P. 645 (1911).

**A buggy purchased by the husband, while living with the wife, and which is used not only by the husband, but by the members of the family, while they are so living together, is a family expense for which the wife is liable.** *Houck v. La Junta Hdwe. Co.*, 50 Colo. 228, 114 P. 645 (1911).

**Food and clothing are family expenses, and so are luxuries purchased for the use of the family, because such expenses are not confined to necessities, but to be family expenses they must be for things received by the family, or some member of the family.** *Straight v. McKay*, 15 Colo. App. 60, 60 P. 1106 (1900).

**The expenses of procuring a team of horses used on the family farm is a family expense.** *Wall v. Crawford*, 103 Colo. 66, 82 P.2d 749 (1938).

**The rent of a house which the family does not occupy is not a family expense.** *Straight v. McKay*, 15 Colo. App. 60, 60 P. 1106 (1900).

**Applicability of family expense doctrine.** Under the family expense doctrine, furniture,

which is used by and purchased for the family would be an obligation of the husband of the debtor even though he was not the contracting party, while personal property to be used by the debtor alone does not seem to be a family expense. In re *Stanton-Rieger*, 25 Bankr. 650 (Bankr. D. Colo. 1982).

**Goods sold to the husband on the sole credit of a third person are not a charge upon the family, though consumed in the family.** *Parker v. Joslin Dry Goods Co.*, 52 Colo. 238, 120 P. 1042 (1911).

**Under this section the goods of the wife are chargeable with the lien equally with those of the husband.** *McDonnell v. Solomon*, 64 Colo. 226, 170 P. 951 (1918).

**Funeral expenses come within the purview of this section.** *Espinoza v. Gurule*, 144 Colo. 381, 356 P.2d 891 (1960).

**Where plaintiffs become obligated for funeral expenses of their deceased son under this section, such obligation being imposed upon them by the wrongful act of defendant, they are entitled to recover such expenses in an action at law.** *Espinoza v. Gurule*, 144 Colo. 381, 356 P.2d 891 (1960).

**The fact that petitioner may not be legally liable for his wife's necessities under this section has no application to the homestead provisions, their purpose, and effect.** *Haas v. De Laney*, 165 F. Supp. 488 (D. Colo. 1958).

**Where at the time of filing the homestead entry and at the time of bankruptcy, a bankrupt was the head of a family, he was therefore entitled to claim a homestead exemption even though his wife had been absent at the time of filing for more than four years, and no family existed so as to make the bankrupt liable for the wife's expenses under the provisions of this section.** *Haas v. De Laney*, 165 F. Supp. 488 (D. Colo. 1958).

**Where a counterclaim on the note as a holder in due course was limited by the provisions thereof, it could not be asserted as a claim against the husband as a family expense as there was no evidence in the record showing that the husband legally assumed or agreed to pay the indebtedness, and he could not be held liable.** *Nitzel v. Colo. Indus. Bank*, 145 Colo. 215, 358 P.2d 31 (1960).

**14-6-111. Legislative declaration.** It is hereby declared to be the policy of the state of Colorado that, in order to promote the life, health, property, and public welfare of this state, it is necessary to establish procedures to assist in the collection of child support, maintenance where combined with child support, and maintenance.

**Source:** L. 61: p. 354, § 1. CRS 53: § 43-1-11. C.R.S. 1963: § 43-1-11. L. 87: Entire section amended, p. 593, § 16, effective July 10.

ANNOTATION

**Law reviews.** For article, “One Year Review of Domestic Relations”, see 39 Dicta 102 (1962).

**14-6-112. Procedures by clerk. (Repealed)**

**Source:** L. 61: p. 354, § 2. CRS 53: § 43-1-12. C.R.S. 1963: § 43-1-12. L. 72: p. 558, § 14. L. 92: Entire section repealed, p. 399, § 6, effective June 3.

**14-6-113. Remedies additional to those now existing.** The remedies provided in this article are in addition to and not in substitution for any other remedies.

**Source:** L. 61: p. 355, § 3. CRS 53: § 43-1-13. C.R.S. 1963: § 43-1-13.

ARTICLE 7

Parent and Child

**Cross references:** For support proceedings, see article 6 of title 19; for the “Uniform Interstate Family Support Act”, see article 5 of this title; for the “Colorado Children’s Code”, see title 19.

14-7-101.	Commitment of child - parent liable for support.	14-7-104.	to report actions. Application of article.
14-7-102.	Action by state or county for support of child.	14-7-105.	Recovery for child support debt. (Repealed)
14-7-103.	District and county attorneys		

**14-7-101. Commitment of child - parent liable for support.** The commitment of any child, under any law of this state, to any state institution shall not relieve the parents or legal guardian of such child from responsibility for the support of the child. It is the duty of any court committing any child to any state institution or any private institution where such child is kept at the expense of the county or state, at the time of the commitment, to forthwith notify the district attorney, if a state expense, and the county attorney, if a county expense, of the name and address of such parents and such other information as may be adduced at any hearing of such case concerning the financial responsibility of the parents to care for such child. In order to obtain such information, any court committing any child, at the time of commitment or at any convenient time to be designated by the court, is authorized to require the attendance of the parents or legal guardian upon such court to be examined under oath concerning the property, possessions, and financial responsibility of such parents or legal guardian.

**Source:** L. 05: p. 295, § 1. R.S. 08: § 4739. C.L. § 5587. CSA: C. 121, § 1. CRS 53: § 43-3-1. C.R.S. 1963: § 43-3-1.

ANNOTATION

**The fathering of an illegitimate child in and of itself is not a “tortious act”** in regard to the long arm statute. In re People, 30 Colo. App. 603, 498 P.2d 1166 (1972).

**14-7-102. Action by state or county for support of child.** The state of Colorado or the county, as the case may be, at whose expense such child is kept shall be entitled to recover from the parent, legal guardian, or other person responsible for the support of such child such sum for the care, support, and maintenance of the child as may be reasonable therefor, and in no case shall such sum be less than the per capita monthly or yearly amount of expense in the institution in which the child is confined or the actual expense incurred by



the state or county for the care and maintenance of such child. Any action or proceeding by the state or county against any parent shall be conducted in accordance with the procedure in civil cases. In case any action is maintained by the state, it shall be brought in the name of the people of the state of Colorado, and any moneys recovered in any action shall be paid to the state treasurer and credited to the particular fund for the benefit of the institution having the custody and care of such child. If an action is maintained by the county in cases where the county pays the expense of the care and maintenance of such child, such action shall be in the name of the board of county commissioners of such county or other body performing the functions of a board of county commissioners, and any amount collected in any such action shall be paid to the county treasurer of such county. When such action is prosecuted to a final judgment and judgment is rendered in favor of the people of the state of Colorado or the board of county commissioners of the county prosecuting such action, as the case may be, an execution may issue against the property of the defendant as in other civil cases.

**Source:** L. 05: p. 295, § 2. R.S. 08: § 4740. C.L. § 5588. CSA: C. 121, § 2. CRS 53: § 43-3-2. C.R.S. 1963: § 43-3-2.

#### ANNOTATION

**This section expressly commands complete parental reimbursement of the actual expense incurred by the county** for the care and maintenance of the child, does not condition the parents' obligation on their financial ability to pay, and embodies a legislative policy that the parents shoulder the entire financial burden of the child's placement. M.S. v. People, 812 P.2d 632 (Colo. 1991).

**The language of §§ 19-1-115 (4)(d) and 26-5-102 conflicts with this section** since those sections speak in terms of the parents' ability to pay and this section imposes absolute liability without regard for the parents financial condition. M.S. v. People, 812 P.2d 632 (Colo. 1991).

**Sections 19-1-115 (4)(d) and 26-5-102 are specific provisions concerning dependency and neglect adjudications** and, with regard to the parental support obligation, control over this section. M.S. v. People, 812 P.2d 632 (Colo. 1991).

**Once child has been adjudicated dependent or neglected and placed pursuant to § 19-1-115, the responsibility to reimburse state for costs for residential care is governed by § 19-1-115 (4)(d), not this section.** People ex rel. B.S.M., 251 P.3d 511 (Colo. App. 2010).

**14-7-103. District and county attorneys to report actions.** On or before December 1 of each year, it shall be the duty of the district attorney and the county attorney to make a written report to the governor of the state, stating the number of reports, provided for in section 14-7-101, received from the courts of the county or state and the nature and result of any action directed in this article by such officers respectively to recover from such parents the expenses of the care and maintenance of such children. If no action has been taken, such report shall detail the reason for the failure of the officer to take action. It is the duty of the county commissioners to pay any court costs or other expenses necessary for the prosecution of any suit provided for in this article. Nothing in this article shall be construed to repeal any law of this state concerning the responsibility of parents to support their children, or providing for the punishment of parents or other persons responsible for the delinquency or dependency of children, or providing for the punishment of any parents for the nonsupport of their children; and nothing in such law shall prevent proceedings under this article in any proper case.

**Source:** L. 05: p. 296, § 3. R.S. 08: § 4741. C.L. § 5589. CSA: C. 121, § 3. CRS 53: § 43-3-3. C.R.S. 1963: § 43-3-3.

**14-7-104. Application of article.** This article shall not apply to liability for the support of children admitted, committed, or transferred to any public institution of this state supervised by the department of human services for the care, support, maintenance, education, or treatment of persons with mental illness or who are mentally deficient.

**Source:** **L. 64:** p. 492, § 4. **C.R.S. 1963:** § 43-3-5. **L. 94:** Entire section amended, p. 2644, § 105, effective July 1. **L. 2006:** Entire section amended, p. 1396, § 39, effective August 7.

**Cross references:** For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994.

**14-7-105. Recovery for child support debt. (Repealed)**

**Source:** **L. 79:** Entire section added, p. 638, § 3, effective June 7. **L. 81:** Entire section repealed, p. 910, § 4, effective June 8.

**DISSOLUTION OF MARRIAGE - PARENTAL RESPONSIBILITIES**

**ARTICLE 10**

**Uniform Dissolution of Marriage Act**

**Editor’s note:** (1) This article was numbered as article 1 of chapter 46, C.R.S. 1963. The provisions of this article were repealed and reenacted in 1971, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1971, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

(2) For the legality of common-law marriages in this state, see *Graham v. Graham*, 130 Colo. 225, 274 P.2d 605 (1954).

**Law reviews:** For article, “Divorce Mediation: A Financial Perspective”, see 13 Colo. Law. 1650 (1984); for article, “Tax Consequences of Dissolution of Marriage Under the 1984 Tax Reform Act — Parts I and II”, see 13 Colo. Law. 2012 and 2222 (1984); for article, “Dramatic Divorce Taxation Changes”, see 13 Colo. Law. 2038 (1984); for article, “The Civil Service Retirement Spouse Equity Act of 1984”, see 14 Colo. Law. 1413 (1985); for article, “Joinder of Claims and Counterclaims in Cases Under the Uniform Dissolution of Marriage Act”, see 15 Colo. Law. 1818 (1986); for article, “Cohabitation Agreements in Colorado”, see 15 Colo. Law. 979 (1986); for article, “Common Law Marriage in Colorado”, see 16 Colo. Law. 252 (1987); for article, “Child Support Obligations After Death of the Supporting Parent”, see 16 Colo. Law. 790 (1987); for article, “Ownership of Personal Property Accumulated During a Marriage”, see 17 Colo. Law. 623 (1988); for article, “Dissolution of Marriage and Estate Planning Issues”, see 18 Colo. Law. 439 (1989); for article, “ADR: Explanations, Examples and Effective Use”, see 18 Colo. Law. 843 (1989); for article, “Divorce and Family Mediation: Must it be Confidential?”, see 18 Colo. Law. 925 (1989); for article, “Update on Ethics and Malpractice Avoidance in Family Law — Parts I and II”, see 19 Colo. Law. 465 and 647 (1990); for article, “Annulments in Colorado”, see 22 Colo. Law. 2249 (1993); for article, “Property Division in Dissolution: Partnership Versus Needs Analysis”, see 23 Colo. Law. 2115 (1994); for article, “Protecting a Disabled Client in a Dissolution of Marriage Action”, see 24 Colo. Law. 795 (1995); for casenote, “Inappropriate Application of the Best Interests of the Child Standard Leads to Worst Case Scenario: *In re C.C.R.S.*”, see 68 U. Colo. L. Rev. 259 (1997); for article, “Interstate Family Law Jurisdiction: Simplifying Complex Questions”, see 31 Colo. Law. 77 (September 2002); for article, “Marital Agreements in Colorado”, see 36 Colo. Law. 53 (February 2007).

14-10-101.	Short title.		fenses - automatic, temporary injunction - enforcement.
14-10-102.	Purposes - rules of construction.		
14-10-103.	Definitions and interpretation of terms.	14-10-107.5.	Entry of appearance to establish support.
14-10-104.	Uniformity of application and construction.	14-10-107.7.	Required notice of involvement with department of human services.
14-10-104.5.	Legislative declaration.		
14-10-105.	Application of Colorado rules of civil procedure.	14-10-107.8.	Required notice of prior restraining, civil protection, or emergency protection orders to prevent domestic abuse - petitions for dissolution of marriage or legal separation.
14-10-106.	Dissolution of marriage - legal separation.		
14-10-107.	Commencement - pleadings - abolition of existing de-		



14-10-108.	Temporary orders in a dissolution case.		sibility for a child by grandparents.
14-10-109.	Enforcement of protection orders.	14-10-123.4.	Rights of children in matters relating to parental responsibilities.
14-10-110.	Irretrievable breakdown.		
14-10-111.	Declaration of invalidity.	14-10-123.5.	Joint custody. (Repealed)
14-10-112.	Separation agreement.	14-10-123.6.	Required notice of prior restraining orders to prevent domestic abuse - proceedings concerning parental responsibilities relating to a child - resources for family services.
14-10-113.	Disposition of property.		
14-10-114.	Maintenance.		
14-10-115.	Child support guidelines - purpose - definitions - determination of income - schedule of basic child support obligations - adjustments to basic child support - additional guidelines - child support commission.	14-10-123.7.	Parental education - legislative declaration.
		14-10-123.8.	Access to records.
		14-10-124.	Best interests of child.
		14-10-125.	Temporary orders.
14-10-116.	Appointment in domestic relations cases - representation of child's best interests - legal representative of the child - disclosure.	14-10-126.	Interviews.
		14-10-127.	Evaluation and reports - disclosure.
		14-10-128.	Hearings.
14-10-116.5.	Appointment in domestic relations cases - child and family investigator - disclosure.	14-10-128.1.	Appointment of parenting coordinator - disclosure.
		14-10-128.3.	Appointment of decision-maker - disclosure.
14-10-117.	Payment of maintenance or child support.	14-10-128.5.	Appointment of arbitrator - de novo hearing of award.
14-10-118.	Enforcement of orders.	14-10-129.	Modification of parenting time.
14-10-119.	Attorney's fees.	14-10-129.5.	Disputes concerning parenting time.
14-10-120.	Decree.	14-10-130.	Judicial supervision.
14-10-120.3.	Dissolution of marriage or legal separation upon affidavit - requirements.	14-10-131.	Modification of custody or decision-making responsibility.
14-10-120.5.	Petition - fee - assessment - displaced homemakers fund.	14-10-131.3.	Modification of the allocation of parental responsibilities and parenting time based upon military service - legislative declaration - definitions.
14-10-121.	Independence of provisions of decree or temporary order.		
14-10-122.	Modification and termination of provisions for maintenance, support, and property disposition - automatic lien.	14-10-131.5.	Joint custody modification - termination. (Repealed)
14-10-123.	Commencement of proceedings concerning allocation of parental responsibilities - jurisdiction - automatic temporary injunction - enforcement.	14-10-131.7.	Designation of custody for the purpose of other state and federal statutes.
		14-10-131.8.	Construction of 1999 revisions.
		14-10-132.	Affidavit practice.
14-10-123.3.	Requests for parental respon-	14-10-133.	Effective date - applicability.

**14-10-101. Short title.** This article shall be known and may be cited as the "Uniform Dissolution of Marriage Act".

**Source:** L. 71: R&RE, p. 520, § 1. C.R.S. 1963: § 46-1-1.

#### ANNOTATION

**Law reviews.** For note, "The Extraterritorial Validity of Colorado Divorces", see 7 Rocky Mt. L. Rev. 271 (1935). For article, "Divorce — Stalemate", see 16 Dicta 107 (1939). For article,

"What Divorce Statutes Are Now in Effect in Colorado?", see 21 Dicta 68 (1944). For article, "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For

article, "Workmen's Compensation, Attorneys and Family Law", see 31 Dicta 1 (1954). For article, "A Proposal for Some Modest Changes in Divorce and Annulment Laws", see 26 Rocky Mt. L. Rev. 221 (1954). For article, "Colorado's New Divorce Law", see 35 Dicta 219 (1958). For note, "The New Colorado Divorce Statute", see 31 Rocky Mt. L. Rev. 207 (1959). For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969). For article, "Divorce Policy and Divorce Reform", see 42 U. Colo. L. Rev. 403 (1971). For article, "Effects of Reconciliation on Separation Agreements in Colo-

rado", see 51 U. Colo. L. Rev. 399 (1980). For article, "Mediation of Contested Child Custody Disputes", see 11 Colo. Law. 336 (1982). For article, "Colorado: Now a Community Property State?", see 25 Colo. Law. 55 (May 1996). For article, "Blending Spousal Tort Claims and Colorado Divorce Actions", see 25 Colo. Law. 57 (May 1996).

**Act applicable regardless of date marriage began.** Regardless of the date the marriage began, if the dissolution of marriage occurs after the effective date of this article, the parties are subject to all provisions of the uniform act. In re Lester, 647 P.2d 688 (Colo. App. 1982).

**14-10-102. Purposes - rules of construction.** (1) This article shall be liberally construed and applied to promote its underlying purposes.

(2) Its underlying purposes are:

(a) To promote the amicable settlement of disputes that have arisen between parties to a marriage;

(b) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; and

(c) To make the law of legal dissolution of marriage more effective for dealing with the realities of matrimonial experience by making an irretrievable breakdown of the marriage relationship the sole basis for its dissolution.

**Source:** L. 71: R&RE, p. 520, § 1. C.R.S. 1963: § 46-1-2.

#### ANNOTATION

Every state as a sovereign has rightful and legitimate concern in marital status of those persons who are domiciled within the state. *Viernes v. District Court*, 181 Colo. 284, 509 P.2d 306 (1973).

**Marriage is favored over less formalized relationships.** The state of Colorado has an interest in marriage, and marriage is favored over less formalized relationships which exist without the benefit of marriage. In re *Newman v. Newman*, 653 P.2d 728 (Colo. 1982).

**Temporary support orders further purpose of article** to mitigate potential harm to spouses and their children caused by the process of legal dissolution of marriage by maintaining status quo pending final disposition of dissolution proceeding. In re *Price*, 727 P.2d 1073 (Colo. 1986).

**Joinder of interspousal tort claims with marriage dissolution proceedings precluded.** Marriage dissolution action cannot be joined with an interspousal claim sounding in tort since this section encourages the amicable settlement of disputes between parties to a marriage. *Simmons v. Simmons*, 773 P.2d 602 (Colo. App. 1988); In re *Lewis*, 66 P.3d 204 (Colo. App. 2003).

**Dissolution court lacks jurisdiction to determine whether a parent should be removed**

**as custodian of a Uniform Gift to Minors Act account.** This issue may be considered instead by a district court that obtains jurisdiction over the account in a separate civil proceeding. In re *Ludwig*, 122 P.3d 1056 (Colo. App. 2005).

**This act provides separate sections that govern the different elements of a dissolution order,** specifically property disposition, maintenance, child support, and attorney fees. The court is required to make separate orders regarding these elements based on separate considerations, and may not commingle one element with another. In re *Huff*, 834 P.2d 244 (Colo. 1992).

**The public policies to be furthered under this act include dividing of assets equitably and mitigating the harm to spouses and children.** These policies take precedence over any contract arguments that may be raised by either spouse. Thus, the trial court was correct in refusing husband's indemnification argument and in interpreting the divorce decree as requiring the husband to compensate the wife for the fair market value of business property apportioned to her in the equitable distribution. In re *Plesich*, 881 P.2d 379 (Colo. App. 1994).



**14-10-103. Definitions and interpretation of terms.** (1) As used in this article, unless the context otherwise requires, the term “decree” includes the term “judgment”; and, for the purposes of the tax laws of the state of Colorado or of any other jurisdiction, the term “maintenance” includes the term “alimony”.

(2) Whenever any law of this state refers to or mentions divorce, annulment, or separate maintenance, said law shall be interpreted as if the words dissolution of marriage, declaration of invalidity of marriage, and legal separation, respectively, were substituted therefor.

(3) On and after July 1, 1993, the term “visitation” has been changed to “parenting time”. It is not the intent of the general assembly to modify or change the meaning of the term “visitation” nor to alter the legal rights of a parent with respect to the child as a result of changing the term “visitation” to “parenting time”.

(4) On and after February 1, 1999, the term “custody” and related terms such as “custodial” and “custodian” have been changed to “parental responsibilities”. It is not the intent of the general assembly to modify or change the meaning of the term “custody” nor to alter the legal rights of any custodial parent with respect to the child as a result of changing the term “custody” to “parental responsibilities”.

**Source:** L. 71: R&RE, p. 520, § 1. C.R.S. 1963: § 46-1-4. L. 72: p. 595, § 73. L. 73: p. 552, § 1. L. 93: (3) added, p. 576, § 5, effective July 1. L. 98: (3) amended and (4) added, p. 1376, § 1, effective February 1, 1999.

**Cross references:** For the legislative declaration contained in the 1993 act enacting subsection (3), see section 1 of chapter 165, Session Laws of Colorado 1993.

**14-10-104. Uniformity of application and construction.** (1) This article shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact it.

(2) The term “irretrievable breakdown” shall be construed as being similar to other terms having a like import in the law of other jurisdictions adopting this or a similar law.

**Source:** L. 71: R&RE, p. 520, § 1. C.R.S. 1963: § 46-1-3.

#### ANNOTATION

**Applied** in *In re Parsons*, 30 P.3d 868 (Colo. App. 2001).

**14-10-104.5. Legislative declaration.** The general assembly recognizes that it is in the best interests of the parties to a marriage in which a dissolution has been granted and in which there are children of the marriage for the parties to be able to resolve disputes that arise subsequent to the dissolution in an amicable and fair manner. The general assembly further recognizes that, in most cases, it is in the best interests of the children of the marriage to have a relationship with both parents and that, in most cases, it is the parents’ right to have a relationship with their children. The general assembly emphasizes that one of the underlying purposes of this article is to mitigate the potential harm to the spouses and their children and the relationships between the parents and their children caused by the process of legal dissolution of marriage. The general assembly recognizes that when a marriage in which children are involved is dissolved both parties either agree to or are subject to orders which contain certain obligations and commitments. The general assembly declares that the honoring and enforcing of those obligations and commitments made by both parties is necessary to maintaining a relationship that is in the best interest of the children of the marriage. In recognition thereof the general assembly hereby declares that both parties should honor and fulfill all of the obligations and commitments made between the parties and ordered by the court.

**Source:** **L. 88:** Entire section added, p. 633, § 8, effective July 1. **L. 98:** Entire section amended, p. 1376, § 2, effective February 1, 1999.

### ANNOTATION

**The state has a public interest in mitigating the potential harm to children caused by the dissolution of marriage.** Thus, a parent has no privacy interest in the process by which child support obligations are determined because support levels are not purely private determinations but serve a public function and are subject to court approval. *Stillman v. State*, 87 P.3d 200 (Colo. App. 2003).

Furthermore, the child support guidelines do not infringe upon a fundamental right. *Stillman v. State*, 87 P.3d 200 (Colo. App. 2003).

Nor do the child support guidelines discriminate against a suspect class or significantly

interfere with a fundamental right. *Stillman v. State*, 87 P.3d 200 (Colo. App. 2003).

**The state has a legitimate interest in requiring divorced or separated parents to provide child support based on the parties' combined gross incomes.** *Stillman v. State*, 87 P.3d 200 (Colo. App. 2003).

**Intent of act requires enforcement of child support agreement even though it does not specify a dollar amount.** To allow otherwise would be to allow father to unilaterally terminate child support obligation without first obtaining an order of modification. *In re Meisner*, 807 P.2d 1205 (Colo. App. 1990).

**14-10-105. Application of Colorado rules of civil procedure.** (1) The Colorado rules of civil procedure apply to all proceedings under this article, except as otherwise specifically provided in this article.

(2) A proceeding for dissolution of marriage, legal separation, or declaration of invalidity of marriage shall be entitled "In re the Marriage of ..... and .....". A proceeding for the allocation of parental responsibilities or a support proceeding shall be entitled "In re the (Parental responsibilities concerning) (Support of) .....".

(3) The initial pleading in all proceedings under this article shall be denominated a petition. A responsive pleading shall be denominated a response. Other pleadings and all pleadings in other matters under this article shall be denominated as provided in the Colorado rules of civil procedure.

**Source:** **L. 71:** R&RE, p. 521, § 1. **C.R.S. 1963:** § 46-1-5. **L. 98:** (2) amended, p. 1395, § 33, effective February 1, 1999.

### ANNOTATION

**Annotator's note.** Since § 14-10-105 is similar to repealed § 46-1-2, C.R.S. 1963, and CSA, C. 56, § 3, relevant cases construing those provisions have been included in the annotations to this section.

**The rules of civil procedure**, where the divorce statutes are silent as to any method of procedure, govern. *Myers v. Myers*, 110 Colo. 412, 135 P.2d 235 (1943); *Holman v. Holman*, 114 Colo. 437, 165 P.2d 1015 (1946).

The rules of civil procedure apply to a divorce action, unless a contrary rule appears in the divorce statutes. *Bacher v. District Court*, 186 Colo. 314, 527 P.2d 56 (1974).

Service of notice in proceedings under this article is governed by the rules of civil procedure. *In re Henne*, 620 P.2d 62 (Colo. App. 1980).

**On the question of venue in divorce actions**, C.R.C.P. 98(c) is controlling, notwithstanding this article concerning divorce actions and kindred matters. *People ex rel. Stanko v. Routt County Court*, 110 Colo. 428, 135 P.2d

232 (1943); *Brownell v. District Court ex rel. County of Larimer*, 670 P.2d 762 (Colo. 1983).

For the purpose of the venue requirements in C.R.C.P. 98, the petitioner and respondent in a dissolution of marriage proceeding are the equivalent of a plaintiff and defendant, respectively. *Brownell v. District Court ex rel. County of Larimer*, 670 P.2d 762 (Colo. 1983).

There is no specific venue statute which would override the rules of civil procedure. *Bacher v. District Court*, 186 Colo. 314, 527 P.2d 56 (1974).

**The rules of procedure do not govern procedure and practice** in actions in divorce where they may conflict with the procedure and practice provided by the applicable statutes. *Moats v. Moats*, 168 Colo. 120, 450 P.2d 64 (1969).

**There is no exception in this section which dispenses with the necessity of filing a motion for a new trial**, or which permits the court in the exercise of its discretion to dispense with such a motion. *In re Franks*, 189 Colo. 499, 542 P.2d 845 (1975).



**Order under C.R.C.P. 54(b) authorized.**

This section, providing that the Colorado rules of civil procedure apply to dissolution proceedings except as “otherwise specifically provided in the act”, and § 14-10-120, providing that a decree of dissolution of marriage is “final” when entered, subject to the right of appeal, authorize the trial court to enter an order pursuant to C.R.C.P. 54(b) making the decree final for purposes of appeal. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

**Appealability of decree on entry of such order.** Upon the entry of an order under

C.R.C.P. 54(b) a decree of dissolution of marriage may be appealed prior to entry of permanent orders on the issues of child custody, support, and division of property. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

**Applied** in Hubbard v. District Court, 192 Colo. 98, 556 P.2d 478 (1976); Menne v. Menne, 194 Colo. 304, 572 P.2d 472 (1977); In re Femmer, 39 Colo. App. 277, 568 P.2d 81 (1977); In re Gallegos, 41 Colo. App. 116, 580 P.2d 838 (1978); M & G Engines v. Mroch, 631 P.2d 1177 (Colo. App. 1981); In re Boyd, 643 P.2d 804 (Colo. App. 1982).

**14-10-106. Dissolution of marriage - legal separation.** (1) (a) The district court shall enter a decree of dissolution of marriage or a decree of legal separation when:

(I) The court finds that one of the parties has been domiciled in this state for ninety-one days next preceding the commencement of the proceeding;

(II) The court finds that the marriage is irretrievably broken; and

(III) The court finds that ninety-one days or more have elapsed since it acquired jurisdiction over the respondent either as the result of process pursuant to rule 4 of the Colorado rules of civil procedure or as the result of the act of the respondent in joining as copetitioner in the petition or in entering an appearance in any other manner.

(b) In connection with every decree of dissolution of marriage or decree of legal separation and to the extent of its jurisdiction to do so, the court shall consider, approve, or allocate parental responsibilities with respect to any child of the marriage, the support of any child of the marriage who is entitled to support, the maintenance of either spouse, and the disposition of property; but the entry of a decree with respect to parental responsibilities, support, maintenance, or disposition of property may be deferred by the court until after the entry of the decree of dissolution of marriage or the decree of legal separation upon a finding that a deferral is in the best interests of the parties.

(c) In a proceeding to dissolve a marriage or in a proceeding for legal separation or in a proceeding for declaration of invalidity, the court is deemed to have made an adjudication of the parentage of a child of the marriage if the court acts under circumstances that satisfy the jurisdictional requirements of section 14-5-201 and the final order:

(I) Expressly identifies a child as a “child of the marriage”, “issue of the marriage”, or similar words indicating that the husband is the father of the child; or

(II) Provides for support of the child by the husband unless paternity is specifically disclaimed in the order.

(d) Paternity is not adjudicated for a child not mentioned in the final order.

(2) If a party requests a decree of legal separation rather than a decree of dissolution of marriage, the court shall grant the decree in that form unless the other party objects.

**Source:** L. 71: R&RE, p. 521, § 1. C.R.S. 1963: § 46-1-6. L. 73: p. 552, § 2. L. 77: (1)(a)(I) and (1)(a)(II) amended and (1)(a)(III) added, p. 823, § 1, effective June 1. L. 98: (1)(b) amended, p. 1395, § 34, effective February 1, 1999. L. 2003: (1)(c) and (1)(d) added, p. 1264, § 50, effective July 1. L. 2012: IP(1)(a) and (1)(b) amended, (HB12-1233), ch. 52, p. 187, § 1, effective July 1; (1)(a)(I) and (1)(a)(III) amended, (SB 12-175), ch. 208, p. 830, § 24, effective July 1.

**Editor’s note:** (1) Section 3 of chapter 52, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (1)(a) and subsection (1)(b) applies to petitions for legal separation filed on or after July 1, 2012.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1)(a)(I) and (1)(a)(III) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

- I. General Consideration.
- II. Domicile or Residency Required.
- III. District Court's Jurisdiction.

**I. GENERAL CONSIDERATION.**

**Law reviews.** For article on residence of plaintiff in divorce action, see 25 Dicta 110 (1948). For article, "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For comment on *People v. District Court*, appearing below, see 31 Dicta 118 (1954). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Domestic Relations", see 37 Dicta 55 (1960). For article, "One Year Review of Domestic Relations", see 40 Den. L. Ctr. J. 115 (1963). For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987).

**Annotator's note.** Since § 14-10-106 is similar to repealed §§ 46-1-2 and 46-1-3, C.R.S. 1963, §§ 46-1-2 and 46-1-3, CRS 53, CSA, C. 56, §§ 6 and 8, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**An action for divorce is of a purely personal nature.** *Morris v. Propst*, 98 Colo. 213, 55 P.2d 944 (1936); *Wood v. Parkerson*, 163 Colo. 271, 430 P.2d 467 (1967).

**The power of the court in such an action to issue decrees** relative to alimony, to exonerate the wife's estate from the husband's claims, and to make orders relative to the care and custody of the children is merely incidental to the primary object of changing the status or relation of the parties to each other. *Wood v. Parkerson*, 163 Colo. 271, 430 P.2d 467 (1967).

**Such actions, in the absence of a statute providing to the contrary, abate absolutely upon the death of either party** before judgment, and cannot be revived in the name of or against the representatives of the deceased party. *Wood v. Parkerson*, 163 Colo. 271, 430 P.2d 467 (1967).

**Masters should not be appointed as a routine matter in divorce cases** where the issues are not complex and the facts are not complicated. *Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972).

**The trial court may, for good cause shown, allow an extension of time within which to file an answer** in a divorce action, even though the original time within which to file has expired. *Reap v. Reap*, 142 Colo. 354, 350 P.2d 1063 (1960).

**Not abuse to refuse continuance when party could not appear.** It is not an abuse of discretion for the court to refuse to grant a continuance at a hearing as to the question of

dissolution of the marriage, where the wife could not appear at the hearing. *In re Lester*, 647 P.2d 688 (Colo. App. 1982).

**Deferring property division.** A specific finding that it is in the best interest of the parties to defer the property division is required to prevent unwarranted delays in dividing property in dissolution of marriage cases. That purpose is complied with when the parties are given time limits within which to submit their proposals for the property division. *In re Rose*, 40 Colo. App. 176, 574 P.2d 112 (1977).

**II. DOMICILE OR RESIDENCY REQUIRED.**

**Domicile is keystone for jurisdiction** to determine the marital status, and domicile of one of the parties to the divorce action is required. *Viernes v. District Court*, 181 Colo. 284, 509 P.2d 306 (1973).

**Jurisdiction cannot be conferred by consent; lack of residence cannot be waived.** *Watson v. Watson*, 135 Colo. 296, 310 P.2d 554 (1957); *McMillion v. McMillion*, 31 Colo. 33, 497 P.2d 331 (1972).

**Actual bona fide residence is essential** and must be established with some degree of certainty. *Watson v. Watson*, 135 Colo. 296, 310 P.2d 554 (1957).

**Unless the residence required by this section is in some manner shown,** the court is without jurisdiction. *People ex rel. Plunkett v. District Court*, 127 Colo. 483, 258 P.2d 483 (1953).

**When bona fide residence in a county is not established,** the court is under a mandatory duty to refuse to hear or grant any motions whatever in an action, and its dismissal must follow. *People ex rel. Plunkett v. District Court*, 127 Colo. 483, 258 P.2d 483 (1953).

**Under statutes pertaining to jurisdiction in divorce proceedings, the word "residence" is synonymous with the legal meaning of the word "domicile,"** and a person's domicile, once established, continues until he acquires legal residence or domicile elsewhere. *McMillion v. McMillion*, 31 Colo. App. 33, 497 P.2d 331 (1972).

**Residence requires domicile.** Residence for the purposes of divorce jurisdiction has always required and continues to require domicile. *Viernes v. District Court*, 181 Colo. 284, 509 P.2d 306 (1973).

**Where husband's residency was established by an earlier proceeding as being in Colorado,** that determination is *res judicata* and creates a presumption that he is still a resident, absent a showing that a new residency has been established. *McMillion v. McMillion*, 31 Colo. App. 33, 497 P.2d 331 (1972).



**Where jurisdictional facts are admitted in pleadings, decree is not void for failing to recite them.** *Jones v. Jones*, 71 Colo. 420, 207 P. 596 (1922).

**Failure to allege 90-day residence immediately prior to proceeding is not fatal.** Section 14-10-107 does not require that a petition for dissolution of marriage contain an allegation that the residency period includes the 90 days immediately prior to the commencement of the proceeding, and petitioner's failure to make her allegation in the words of this section was not a fatal defect. *In re Alper*, 33 Colo. App. 225, 517 P.2d 404 (1973).

**Purpose of residency requirements was to prevent nonresidents from establishing temporary residence to obtain divorce.** *Cairnes v. Cairnes*, 29 Colo. 260, 68 P. 233 (1902); *Sedgwick v. Sedgwick*, 50 Colo. 164, 114 P. 488 (1911).

**An alien who made this state his home, in good faith, and had no residence elsewhere, was a citizen within the meaning of the former statute.** *Sedgwick v. Sedgwick*, 50 Colo. 164, 114 P. 488 (1911).

**Where no witness testified to plaintiff's residence, in answer to any direct question, but in effect it appeared that he had resided here for many years prior to the institution of his action, it was held a compliance with the statute.** *Sedgwick v. Sedgwick*, 50 Colo. 164, 114 P. 488 (1911).

**Where plaintiff alleged and proved more than a year's residence in Colorado before the commencement of the action, but defendant at the time of filing his cross complaint had resided in Colorado less than one year, the allegations of plaintiff's complaint vested the court with jurisdiction of plaintiff and the subject matter.** *Harms v. Harms*, 120 Colo. 212, 209 P.2d 552 (1949).

**Where prior to the trial plaintiff had registered to vote in Colorado, his automobile was registered in Colorado, he had a Colorado driver's license, and for several months prior to trial he has been engaged in part-time civilian employment in Colorado Springs in a field in which he intended to continue on his retirement, and plaintiff had for four years been present in Colorado in military service, the foregoing facts, formed a sound basis for the finding of the trial judge that the court had jurisdiction based on residence.** *Mulhollen v. Mulhollen*, 145 Colo. 479, 358 P.2d 887 (1961).

**Merely presence in state as member of armed forces insufficient to confer jurisdiction but after 90 days domicile may be established. A serviceman may establish a Colorado domicile to support jurisdiction for a Colorado court to grant a decree of dissolution of marriage after he has been stationed in Colorado for 90 days.** *Viernes v. District Court*, 181 Colo. 284, 509 P.2d 306 (1973).

### III. DISTRICT COURT'S JURISDICTION.

**The district courts are invested by the statute with jurisdiction in this class of actions.** *Pleyte v. Pleyte*, 1 Colo. App. 70, 28 P. 23 (1891).

**Only a final decree of divorce in a foreign state constitutes a bar to a divorce action in Colorado.** *In re Quay*, 647 P.2d 693 (Colo. App. 1982).

**Formerly, where a complaint alleged that the parties were residents of the state of Colorado, and that defendant had been guilty of acts of mental cruelty committed within the state of Colorado, and prayed for divorce alleging sufficient facts to give the court jurisdiction.** *Raygor v. Raygor*, 29 Colo. App. 453, 485 P.2d 930 (1971).

**Service by publication insufficient for jurisdiction in custody issue.** Service by publication pursuant to the uniform act is not sufficient to vest a trial court with jurisdiction to resolve a custody issue. *In re Blair*, 42 Colo. App. 270, 592 P.2d 1354 (1979).

**A trial court which in fact lacks jurisdiction over the subject matter cannot acquire jurisdiction even though the parties expressly or impliedly consent thereto.** *Triebelhorn v. Turzanski*, 149 Colo. 558, 370 P.2d 757 (1962).

**The jurisdiction of the district court of Adams county, arising from the filing and disposition of the divorce action would not preclude the district court of the city and county of Denver from proceeding pursuant to the reciprocal support act when the mother and children had moved to Nevada.** *Scheer v. District Court*, 147 Colo. 265, 363 P.2d 1059 (1961).

**A district court is without jurisdiction to hear a divorce action involving two members of a reservation Indian tribe.** *Whyte v. District Court*, 140 Colo. 334, 346 P.2d 1012 (1959), cert. denied, 363 U.S. 829, 80 S. Ct. 1600, 4 L. Ed.2d 1524 (1960).

**Where the trial court had jurisdiction to divide property at the time of entry of a final decree of divorce, but did not do so, nor then reserve the matter for further consideration, it lost jurisdiction to thereafter make a valid division of such property.** *Triebelhorn v. Turzanski*, 149 Colo. 558, 370 P.2d 757 (1962); *Kelley v. Kelley*, 161 Colo. 486, 423 P.2d 315 (1967).

**Trial court, which had personal jurisdiction over husband but lacked the authority to divide the husband's military pension as marital property, did not retain jurisdiction to divide the pension at a later date. Even though final decree provided that trial court had continuing jurisdiction over the action and that the wife would remain entitled to any and all military benefits, the court did not have the authority to divide military pension as a result of subsequent case law declaring such pensions to be**

marital property. Language in final decree refers only to the court's continuing authority to divide property as such court had on the date of the final decree. In *Re Booker*, 833 P.2d 734 (Colo. 1992).

**Federal act specifying whether the court has jurisdiction over a military member's pension** preempts state rules of procedure governing jurisdiction. In *Re Booker*, 833 P.2d 734 (Colo. 1992).

**Jurisdiction retained until all matters resolved.** A district court which properly acquires jurisdiction of the parties and subject matter in a dissolution action retains that jurisdiction until all matters arising out of the litigation are resolved. *Gonzales v. District Court*, 629 P.2d 1074 (Colo. 1981).

**Jurisdiction does not extend to resolution of all financial issues.** Jurisdiction to grant a divorce does not automatically include the right to resolve all financial issues between the parties to the marriage. *Viernes v. District Court*, 181 Colo. 284, 509 P.2d 306 (1973).

**The dissolution court has jurisdiction to grant relief but only in equity** and not at law. Tort claims concerning property that was the subject of the dissolution court may not be joined into an otherwise equitable dissolution proceeding. In *re Mockelmann*, 121 P.3d 335 (Colo. App. 2005).

**Where it appears from a record and from the conduct of counsel that the parties agreed that a court would defer determination of permanent alimony**, property settlement, and related matters until after the entry of a final decree. *Rodgers v. Rodgers*, 137 Colo. 74, 323 P.2d 892 (1958).

**Although, resumption of marital relations by the parties to a divorce action affords good grounds for a dismissal thereof**, it does not serve to divest the court of jurisdiction. *Stockham v. Stockham*, 145 Colo. 376, 358 P.2d 1026 (1961).

**Husband's motion to abate and reduce child support** amounted to consent to the court's personal jurisdiction. In *Re Booker*, 833 P.2d 734 (Colo. 1992).

**Purported father found to have transacted business in state.** Purported father's sending of letter agreeing to pay support that father knew would be relied upon by Colorado authorities for purpose of determining eligibility for public assistance constituted transacting business in this state conferring personal jurisdiction over him pursuant to § 13-1-124. In *re Parental Responsibilities of H.Z.G.*, 77 P.3d 848 (Colo. App. 2003).

**Decree of dissolution entered after a spouse's death** is void for lack of jurisdiction, and the dissolution action is abated. In *Re Connell*, 870 P.2d 632 (Colo. App. 1994).

**This section mandates that bifurcation of dissolution proceedings** may occur only if the district court finds that "such a deferral is necessary in the best interest of the parties" and should only be considered in exceptional cases. *Estate of Burford v. Burford*, 935 P.2d 943 (Colo. 1997).

**A decree of dissolution when entered by the district court is final** to dissolve the marriage even when the district court refuses to certify the decree as a final judgment appealable under C.R.C.P. 54 (b). *Estate of Burford v. Burford*, 935 P.2d 943 (Colo. 1997).

**14-10-107. Commencement - pleadings - abolition of existing defenses - automatic, temporary injunction - enforcement.** (1) All proceedings under this article shall be commenced in the manner provided by the Colorado rules of civil procedure.

(2) The petition in a proceeding for dissolution of marriage or legal separation shall allege that the marriage is irretrievably broken and shall set forth:

- (a) The residence of each party and the length of residence in this state;
- (b) The date and place of the marriage;
- (c) The date on which the parties separated;
- (d) The names, ages, and addresses of any living children of the marriage and whether the wife is pregnant;
- (e) Any arrangements as to the allocation of parental responsibilities with respect to the children of the marriage and support of the children and the maintenance of a spouse;
- (f) The relief sought; and
- (g) A written acknowledgment by the petitioner and the co-petitioner, if any, that he or she has received a copy of, has read, and understands the terms of the automatic temporary injunction required by paragraph (b) of subsection (4) of this section.

(2.5) Upon the filing of a petition for dissolution of marriage or legal separation pursuant to this article, each party shall provide to the court, in the manner prescribed by the court, his or her social security number and the social security number of each child named in the petition pursuant to paragraph (d) of subsection (2) of this section.

(3) Either or both parties to the marriage may initiate the proceeding. In addition, a legal guardian, with court approval pursuant to section 15-14-315.5, C.R.S., or a conser-



vator, with court approval pursuant to section 15-14-425.5, C.R.S., may initiate the proceeding. If a legal guardian or conservator initiates the proceeding, the legal guardian or conservator shall receive notice in the same manner as the parties to the proceeding.

(4) (a) Upon the commencement of a proceeding by one of the parties, or by a legal guardian or conservator of one of the parties, the other party shall be personally served in the manner provided by the Colorado rules of civil procedure, and he or she may file a response in accordance with such rules; except that, upon motion verified by the oath of the party commencing the proceeding or of someone in his or her behalf for an order of publication stating the facts authorizing such service, and showing the efforts, if any, that have been made to obtain personal service within this state, and giving the address or last-known address of each person to be served or stating that his or her address and last-known address are unknown, the court shall hear the motion *ex parte* and, if satisfied that due diligence has been used to obtain personal service within this state or that efforts to obtain the same would have been to no avail, shall order one publication of a consolidated notice in a newspaper published or having general circulation in the county in which the proceeding is filed, notwithstanding the provisions of article 70 of title 24, C.R.S. A consolidated notice shall be published at least once during a calendar month and shall list the proceedings filed subsequent to those named in the previously published consolidated notice, stating as to each proceeding the names of the parties, the action number, the nature of the action, that a copy of the petition and summons may be obtained from the clerk of the court during regular business hours, and that default judgment may be entered against that party upon whom service is made by such notice if he or she fails to appear or file a response within thirty-five days after the date of publication. Costs of publication of a consolidated notice may be assessed *pro rata* to each of the proceedings named in the notice; except that, if a party is indigent or otherwise unable to pay such publication costs, the costs shall be paid by the court from funds appropriated for the purpose. Service shall be complete upon such publication, and a response or appearance by the party served by publication under this subsection (4) shall be made within thirty-five days thereafter, or default judgment may be entered. No later than the day of publication, the clerk of the court shall also post for thirty-five consecutive days a copy of the process on a bulletin board in his or her office, and shall mail a copy of the process to the other party at his or her last-known address, and shall place in the file of the proceeding his or her certificate of posting and mailing. Proof of publication of the consolidated notice shall be by placing in the file a copy of the affidavit of publication, certified by the clerk of the court to be a true and correct copy of the original affidavit on file in the clerk's office.

(b) (I) Upon the filing of a petition for dissolution of marriage or legal separation by the petitioner or copetitioner or by a legal guardian or conservator on behalf of one of the parties and upon personal service of the petition and summons on the respondent or upon waiver and acceptance of service by the respondent, a temporary injunction shall be in effect against both parties until the final decree is entered or the petition is dismissed or until further order of the court:

(A) Restraining both parties from transferring, encumbering, concealing, or in any way disposing of, without the consent of the other party or an order of the court, any marital property, except in the usual course of business or for the necessities of life and requiring each party to notify the other party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the injunction is in effect;

(B) Enjoining both parties from molesting or disturbing the peace of the other party;

(C) Restraining both parties from removing the minor child or children of the parties, if any, from the state without the consent of the other party or an order of the court; and

(D) Restraining both parties, without at least fourteen days' advance notification and the written consent of the other party or an order of the court, from canceling, modifying, terminating, or allowing to lapse for nonpayment of premiums, any policy of health insurance, homeowner's or renter's insurance, or automobile insurance that provides coverage to either of the parties or the minor children or any policy of life insurance that names either of the parties or the minor children as a beneficiary.

(II) The provisions of the injunction shall be printed upon the summons and the petition and the injunction shall become an order of the court upon fulfillment of the requirements

of subparagraph (I) of this paragraph (b). However, nothing in this paragraph (b) shall preclude either party from applying to the court for further temporary orders, an expanded temporary injunction, or modification or revocation under section 14-10-108.

(III) The summons shall contain the following advisements:

(A) That a request for genetic tests shall not prejudice the requesting party in matters concerning allocation of parental responsibilities pursuant to section 14-10-124 (1.5); and

(B) That, if genetic tests are not obtained prior to a legal establishment of paternity and submitted into evidence prior to the entry of the legal final decree of dissolution, the genetic tests may not be allowed into evidence at a later date.

(4.1) With regard to the automatic, temporary injunction that becomes effective in accordance with paragraph (b) of subsection (4) of this section when a petition for dissolution of marriage or legal separation is filed and served, whenever there is exhibited by the respondent to any duly authorized peace officer as described in section 16-2.5-101, C.R.S., a copy of the petition and summons duly filed and issued pursuant to this section, or, in the case of the petitioner, a copy of the petition and summons duly filed and issued pursuant to this section, together with a certified copy of the affidavit of service of process or a certified copy of the waiver and acceptance of service, and the peace officer has cause to believe that a violation of that part of the automatic, temporary injunction which enjoins both parties from molesting the other party has occurred, such peace officer shall use every reasonable means to enforce that part of the injunction against the petitioner or respondent. A peace officer shall not be held civilly or criminally liable for his or her action pursuant to this subsection (4.1) if the action is in good faith and without malice.

(5) Defenses to divorce and legal separation existing prior to January 1, 1972, including but not limited to condonation, connivance, collusion, recrimination, insanity, and lapse of time, are hereby abolished.

(6) All issues raised by these proceedings shall be resolved by the court sitting without a jury.

**Source:** L. 71: R&RE, p. 521, § 1. C.R.S. 1963: § 46-1-7. L. 72: p. 296, § 1. L. 83: (4) amended, p. 641, § 1, effective July 1. L. 86: (4.1) added, p. 716, § 1, effective April 29. L. 87: (4.1) amended, p. 1578, § 21, effective July 10. L. 98: (2)(e) amended, p. 1395, § 35, effective February 1, 1999. L. 99: (2)(g) and (4)(b)(I)(D) added and (4)(b)(I)(B), (4)(b)(I)(C), and (4)(b)(II) amended, p. 1059, §§ 1, 2, effective June 1; (3), (4)(a), and IP(4)(b)(I) amended, p. 465, § 3, effective July 1. L. 2000: (3) amended, p. 1833, § 7, effective January 1, 2001. L. 2003: (4.1) amended, p. 1621, § 34, effective August 6. L. 2005: (4)(b)(III) added, p. 377, § 1, effective January 1, 2006. L. 2011: (2.5) added, (SB 11-123), ch. 46, p. 118, § 2, effective August 10. L. 2012: (4)(a) amended, (SB 12-175), ch. 208, p. 830, § 25, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (4)(a) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

- I. General Consideration.
- II. Commencement of the Proceeding.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Expediting Court Procedure", see 10 Dicta 113 (1933). For an article on divorce, see 16 Dicta 107 (1939). For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945). For article, "The Doctrine of Recrimination in Divorce Pro-

ceedings", see 21 Rocky Mt. L. Rev. 407 (1949). For article, "Forms Committee Presents Standard Pleading Samples to be Used in Divorce Litigation", see 29 Dicta 94 (1952). For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959). For comment on Reed v. Reed, appearing below, see 31 Rocky Mt. L. Rev. 240 (1959). For article, "Legislative Update", see 12 Colo. Law. 1257 (1983). For article, "Recovering the Parentally Kidnapped Child", see 12 Colo. Law. 1798



(1983). For article, "Injunctive Remedies for Interpersonal Violence", see 18 Colo. Law. 1743 (1989).

**Annotator's note.** Cases relevant to § 14-10-107 decided prior to its earliest source, L. 71, p. 521, § 1, have been included in the annotations to this section.

**A court having properly acquired jurisdiction over the subject matter and parties to a divorce action**, including minor children, is not at liberty to thereafter divest itself of such jurisdiction to the prejudice of interested parties. *Cartier v. Cartier*, 94 Colo. 157, 28 P.2d 1010 (1934).

**In divorce proceedings, the parties are the husband and wife**, and the jurisdiction of the divorce court is exercised as between husband and wife. *Ross v. Ross*, 89 Colo. 536, 5 P.2d 246 (1931).

**There are, in reality, three parties to every divorce action:** The plaintiff, the defendant, and the state. *Reed v. Reed*, 138 Colo. 74, 329 P.2d 633 (1958).

**A wife or husband may well be entitled to a divorce**, but whether or not she or he will exercise that right is optional with her or him. *Faith v. Faith*, 128 Colo. 483, 261 P.2d 225 (1953).

**The policy of the court should be to discourage, rather than encourage, divorces.** *Faith v. Faith*, 128 Colo. 483, 261 P.2d 225 (1953).

**When a plaintiff moves to dismiss a divorce action**, it is the duty of a trial court to dismiss the case. *McClanahan v. County Court*, 136 Colo. 426, 318 P.2d 599 (1957).

**The court cannot compel one to take a divorce when he does not desire to have one.** *Faith v. Faith*, 128 Colo. 483, 261 P.2d 225 (1953).

**Due process notice and hearing requirements met.** The basic requirements of the due process clause of our constitution are that no person be deprived of valuable rights without adequate notice and opportunity for hearing, and the divorce statute does make provision for such notice and hearing before the termination of the marriage. *In re Franks*, 189 Colo. 499, 542 P.2d 845 (1975).

**Action for dissolution of marriage is proceeding in rem.** *In re Ramsey*, 34 Colo. App. 338, 526 P.2d 319 (1974).

**Scope of court's jurisdiction over nonresident respondent is established by this section.** *In re Ramsey*, 34 Colo. App. 338, 526 P.2d 319 (1974).

**Service by publication insufficient for jurisdiction in custody issue.** Service by publication pursuant to the uniform act is not sufficient to vest a trial court with jurisdiction to resolve a custody issue. *In re Blair*, 42 Colo. App. 270, 592 P.2d 1354 (1979).

**Default judgment would be proper after a member of the armed services entered an appearance and asserted cross claims.** Federal Soldiers' and Sailors' Civil Relief Act is to protect members of the military from having default judgments entered against them without their notice of the pendency of the action. It does not prevent entry of such a judgment when there has been notice of the pendency of the action and the member has had adequate time to defend the action. *In re Custody of Nugent*, 955 P.2d 584 (Colo. App. 1997).

**In an action for divorce it is sufficient compliance with the rules of civil procedure** if a court makes findings on the material and ultimate facts. *Lininger v. Lininger*, 138 Colo. 338, 333 P.2d 625 (1958).

**Maintenance must be requested in petition.** Under the uniform act, maintenance must be requested in the petition for dissolution. *In re Boyd*, 643 P.2d 804 (Colo. App. 1982).

**All the provisions of the code which are applicable shall control** in the trial and disposition of divorce cases, except as otherwise provided in the divorce act itself, either expressly or by necessary implication. *Eickhoff v. Eickhoff*, 27 Colo. 380, 61 P. 225 (1900); *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902).

**The former defense of condonation was in the nature of confession and avoidance.** *Cochran v. Cochran*, 164 Colo. 99, 432 P.2d 752 (1967).

**Condoned adultery was not a bar to a divorce**, because it was not a ground for divorce. *Jones v. Jones*, 71 Colo. 420, 207 P. 596 (1922).

**If there was any collusion or fraud between the parties**, the court would see to it that a decree for divorce is not entered. *Reed v. Reed*, 138 Colo. 74, 329 P.2d 633 (1958).

**Where each party was at fault, a court could not grant relief to either party.** *Morgan v. Morgan*, 139 Colo. 545, 340 P.2d 1060 (1959).

**Formerly, the defendant in an action for divorce could set up any matter** by way of cross-complaint that would defeat the plaintiff's action. *Cupples v. Cupples*, 33 Colo. 449, 80 P. 1039 (1905).

**It was not necessary, in order to entitle the defendant to set up matters** by way of cross-complaint, in bar of the plaintiff's action, that the defendant was seeking a divorce. *Cupples v. Cupples*, 33 Colo. 449, 80 P. 1039 (1905).

**Where a cross-complaint, defective because it omitted a jurisdictional averment** so that no divorce could be awarded thereon to the defendant, must have been investigated, and could serve to defeat the action. *Cupples v. Cupples*, 33 Colo. 449, 80 P. 1039 (1905); *Garver v. Garver*, 52 Colo. 227, 121 P. 165 (1911).

**Decedent's naming of her brother as the payable-on-death beneficiary of her accounts and joint accounts of her and her husband did not amount to an encumbrance of marital property.** Estate of Westfall v. Westfall, 942 P.2d 1227 (Colo. App. 1996).

**Changing accounts from multi-party to sole accounts before divorce did not affect the other spouse's rights** since the accounts remained part of the marital estate and either party had a legal right to deplete the joint accounts. Estate of Westfall v. Westfall, 942 P.2d 1227 (Colo. App. 1996).

**It was error to receive a verdict which failed to respond to counter charge of violation of marital duties pleaded in answer.** Garver v. Garver, 52 Colo. 227, 121 P. 165 (1911).

## II. COMMENCEMENT OF THE PROCEEDING.

**Domicile in the state is alone sufficient to bring an absent defendant in a divorce action** within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. In re Petition of Kraudel v. Benner, 148 Colo. 525, 366 P.2d 667 (1961).

**Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service** provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied. In re Petition of Kraudel v. Benner, 148 Colo. 525, 366 P.2d 667 (1961).

**Fraud relative to service by publication** operates to void a divorce decree. In re Wilson, 653 P.2d 85 (Colo. App. 1982).

**A decree of divorce based upon constructive service is void** unless the record shows a strict compliance with all the statutory requirements. Roberts v. Roberts, 3 Colo. App. 6, 31 P. 941 (1892).

**The record must show a compliance with the statute respecting the mailing of a copy of the summons to the defendant to justify the entry of a judgment.** Roberts v. Roberts, 3 Colo. App. 6, 31 P. 941 (1892).

**Parole proof that the defendant had actual knowledge of the pendency of the action** was not considered on the hearing of his motion to set aside the judgment, because of the failure to mail him a copy of the summons, as required by law. Roberts v. Roberts, 3 Colo. App. 6, 31 P. 941 (1892).

**Where upon a service of a summons in a divorce suit in which the defendant, if served within the county in which the action was**

**pending,** was required to appear and answer the complaint within 20 days thereafter, the court was not authorized to proceed to a judgment if defendant failed to comply with such command, for it was in direct conflict with the mandatory provision which gives a defendant 30 days to appear and answer in such circumstances. Mottschall v. Mottschall, 31 Colo. 260, 72 P. 1053 (1903).

**Where plaintiff had removed her child to a foreign country, a motion by her attorney for leave to withdraw as her counsel was properly denied,** since such withdrawal would make service of process impossible and deprive the trial court of authority to make proper orders. Holland v. Holland, 150 Colo. 442, 373 P.2d 523 (1962).

**Failure to allege 90-day residency immediately prior to proceeding not fatal.** This section does not require that a petition for dissolution of marriage contain an allegation that the residency period includes the 90 days immediately prior to the commencement of the proceeding, and petitioner's failure to make her allegation in the words of § 14-10-106 was not a fatal defect. In re Alper, 33 Colo. App. 225, 517 P.2d 404 (1973).

**Theory of mutual mistake not waived by failure to raise issue in reply to petition.** In a dispute over a separation agreement, a theory of mutual mistake is not waived by failure to raise the issue in the reply to the petition for dissolution of marriage, since no reply is required and averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided. In re Deines, 44 Colo. App. 98, 608 P.2d 375 (1980).

**Withdrawal of marital property after dissolution proceeding commenced.** In determining the total value of the marital property, trial court did not err in including the \$45,000 husband, had withdrawn from the fund after the dissolution proceeding had commenced since husband, who had not obtained an order of the court or consent of his wife before using the money, failed to show that the withdrawal was done either in the usual course of business or was for the necessities of life. In re Meisner, 715 P.2d 1273 (Colo. App. 1985).

**Trial court properly credited husband with the amount of funds existing prior to wife's sale of stock shares** when wife cashed out shares after entry of the automatic temporary injunction. Wife's argument that the parties routinely cashed out shares to meet living expenses was rejected by the court as a rationale for not including the amount she cashed out in the division of marital shares, since the prior sales of stock took place inconsistently and was not used as income on a monthly basis. In re Huston, 967 P.2d 181 (Colo. App. 1998).



**14-10-107.5. Entry of appearance to establish support.** (1) The attorney for the county department of social services may file an entry of appearance on behalf of the department in any proceeding for dissolution of marriage or legal separation under this article for purposes of establishing, modifying, and enforcing child support and medical support if any party is receiving support enforcement services pursuant to section 26-13-106, C.R.S., and for purposes of establishing and enforcing reimbursement of payments for temporary assistance to needy families.

(2) The county department of social services, upon the filing of the entry of appearance described in subsection (1) of this section or upon the filing of a legal pleading to establish, modify, or enforce the support obligation, shall be from that date forward, without leave or order of court, a third-party intervenor in the action for the purposes outlined in subsection (1) of this section without the necessity of filing a motion to intervene.

**Source:** L. 89: Entire section added, p. 792, § 13, effective July 1. L. 90: Entire section amended, p. 889, § 8, effective July 1. L. 2007: (1) amended, p. 1648, § 1, effective May 31.

**14-10-107.7. Required notice of involvement with department of human services.** When filing a petition for dissolution of marriage or legal separation, a petition in support or proceedings for the allocation of parental responsibilities with respect to the children of the marriage, or any other matter pursuant to this article with the court, if the parties have joint legal responsibility for a child for whom the petition seeks an order of child support, the parties shall be required to indicate on a form prepared by the court whether or not the parties or the dependent children of the parties have received within the last five years or are currently receiving benefits or public assistance from either the state department of human services or county department of social services. If the parties indicate that they have received such benefits or assistance, the court shall inform the appropriate delegate child support enforcement unit so that the unit can determine whether any support enforcement services are required. There shall be no penalty for failure to report as specified in this section.

**Source:** L. 92: Entire section added, p. 202, § 8, effective August 1. L. 93: Entire section amended, p. 1558, § 6, effective September 1. L. 94: Entire section amended, p. 2644, § 106, effective July 1. L. 98: Entire section amended, p. 1396, § 36, effective February 1, 1999.

**Cross references:** For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994.

**14-10-107.8. Required notice of prior restraining, civil protection, or emergency protection orders to prevent domestic abuse - petitions for dissolution of marriage or legal separation.** (1) When filing a petition for dissolution of marriage or legal separation pursuant to this article, the filing party shall have a duty to disclose to the court the existence of any prior temporary or permanent restraining orders and civil protection orders to prevent domestic abuse issued pursuant to article 14 of title 13, C.R.S., any mandatory restraining order and protection orders issued pursuant to section 18-1-1001, C.R.S., and any emergency protection orders issued pursuant to section 13-14-103, C.R.S., entered against either party by any court within two years prior to the filing of the petition of dissolution of marriage or legal separation. The disclosure required pursuant to this section shall address the subject matter of the previous restraining, civil protection, or emergency protection orders, including the case number and jurisdiction issuing such orders.

(2) After the filing of the petition, the court shall advise the parties concerning domestic violence services and potential financial resources that may be available and shall strongly encourage the parties to obtain such services for their children, in appropriate cases. If the parties' children participate in such services, the court shall apportion the costs of such services between the parties as it deems appropriate.

(3) The parties to a domestic relations petition filed pursuant to this article shall receive information concerning domestic violence services and potential financial resources that may be available.

**Source:** L. 95: Entire section added, p. 83, § 1, effective July 1. L. 99: Entire section amended, p. 502, § 9, effective July 1. L. 2001: Entire section amended, p. 978, § 1, effective August 8. L. 2004: (1) amended, p. 554, § 10, effective July 1. L. 2005: (1) amended, p. 764, § 22, effective June 1.

**14-10-108. Temporary orders in a dissolution case.** (1) In a proceeding for dissolution of marriage, legal separation, the allocation of parental responsibilities, or declaration of invalidity of marriage or a proceeding for disposition of property, maintenance, or support following dissolution of the marriage, either party may move for temporary payment of debts, use of property, maintenance, parental responsibilities, support of a child of the marriage entitled to support, or payment of attorney fees. The motion may be supported by an affidavit setting forth the factual basis for the motion and the amounts requested.

(1.5) The court may consider the allocation of parental responsibilities in accordance with the best interests of the child, with particular reference to the factors specified in section 14-10-124 (1.5).

(2) As a part of a motion of such temporary orders or by an independent motion accompanied by an affidavit, either party may request the court to issue a temporary order:

(a) Restraining any party from transferring, encumbering, concealing, or in any way disposing of any property, except in the usual course of business or for the necessities of life, and, if so restrained, requiring him to notify the moving party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the order is issued;

(b) Enjoining a party from molesting or disturbing the peace of the other party or of any child;

(c) Excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result.

(2.3) and (2.5) (Deleted by amendment, L. 2004, p. 553, § 4, effective July 1, 2004.)

(3) A party to an action filed pursuant to this article may seek, and the court may issue, a temporary or permanent protection order pursuant to the provisions of section 13-14-102, C.R.S.

(4) (Deleted by amendment, L. 2004, p. 553, § 4, effective July 1, 2004.)

(5) A temporary order or temporary injunction:

(a) Does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding;

(b) May be revoked or modified prior to final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under section 14-10-122; and

(c) Terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution or legal separation is voluntarily dismissed.

(6) (Deleted by amendment, L. 2004, p. 553, § 4, effective July 1, 2004.)

(7) At the time a protection order is requested pursuant to section 13-14-102, C.R.S., the court shall inquire about, and the requesting party and such party's attorney shall have an independent duty to disclose, knowledge such party and such party's attorney may have concerning the existence of any prior protection orders or restraining orders of any court addressing in whole or in part the subject matter of the requested protection order.

**Source:** L. 71: R&RE, p. 522, § 1. C.R.S. 1963: § 46-1-8. L. 73: pp. 553, 555, §§ 3, 12. L. 81: (6) added, p. 903, § 1, effective May 13. L. 83: (1) amended, p. 644, § 1, effective April 26; (1.5) added, p. 645, § 1, effective June 10. L. 87: (1.5) amended, p. 575, § 4, effective July 1. L. 94: (2.5) and (7) added and (3) amended, p. 2008, § 4, effective January 1, 1995. L. 98: (2.3) added and (3) amended, p. 245, § 4, effective April 13; (1)



and (2.5) amended, p. 1396, § 37, effective February 1, 1999. **L. 99:** (2.3) amended, p. 501, § 4, effective July 1. **L. 2000:** (1.5) amended, p. 1844, § 24, effective August 2. **L. 2003:** (2.3), (2.5), (3), (6), and (7) amended, p. 1010, § 14, effective July 1. **L. 2004:** IP(2), (2.3), (2.5), (3), (4), (6), and (7) amended, p. 553, § 4, effective July 1.

## ANNOTATION

- I. General Consideration.
- II. Temporary Orders.
- III. Temporary Injunctions.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Legislative Update", see 12 Colo. Law. 1257 (1983).

**Annotator's note.** Since § 14-10-108 is similar to repealed § 46-1-5, C.R.S. 1963, § 46-1-5, CRS 53, CSA, C. 56, § 8, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**The general rule is that courts of equity should and will in a proper case enjoin a party to a divorce or separate maintenance action from proceeding in an annulment suit in a foreign jurisdiction.** Hayutin v. Hayutin, 152 Colo. 261, 381 P.2d 272 (1963).

**Evidence of extreme circumstances necessitating sale of co-owned property.** If there is evidence of extreme circumstances that co-owned property needs to be sold to preserve equities therein, a court may decree a sale of the property prior to a final determination of the merits of the dissolution action. In re Gavend, 781 P.2d 161 (Colo. App. 1989).

**Permanent orders that substantially reduce the amount of parenting time originally specified in the temporary orders are not subject to the endangerment standard but rather the best interests of the child standard.** In re Fickling, 100 P.3d 571 (Colo. App. 2004).

**Best interest standard, and not the endangerment standard, was properly applied to award father residential care despite mother's award of temporary custody, where awarding father residential custody of the children was not abuse of discretion and record supported findings.** In re Monteil, 960 P.2d 717 (Colo. App. 1998).

**Applied in** In re Westlake, 674 P.2d 1386 (Colo. App. 1983).

### II. TEMPORARY ORDERS.

**Law reviews.** For article, "Attorney Fees at Temporary Orders: Reality or Illusion?", see 24 Colo. Law. 2185 (1995).

**An order granting a temporary change of custody following an ex parte hearing with no notice to the mother denied her due process where no evidence was presented and no finding was made that irreparable injury would result if**

**no order were issued until the time for responding had elapsed.** Olson v. Priest, 193 Colo. 222, 564 P.2d 122 (1977).

**Court lost jurisdiction to enforce order.** When an order dismissing a marriage dissolution action was signed, the court was divested of any further jurisdiction in that action and had no jurisdiction to hold husband in contempt for failing to pay support required by temporary order which was entered in that action. Hill v. District Court, 189 Colo. 356, 540 P.2d 1079 (1975).

**The purpose of temporary alimony is to allow a wife to live in her accustomed manner during pendency of the action and to provide her with means to properly litigate the controversy, and is not definitive of her entitlement to support under permanent orders.** Bieler v. Bieler, 130 Colo. 17, 272 P.2d 636 (1954); MacReynolds v. MacReynolds, 29 Colo. App. 267, 482 P.2d 407 (1971).

**If she possesses independent means sufficient for these purposes the allowances should not be granted;** however, she is not required first to impair the capital of her separate estate. Bieler v. Bieler, 130 Colo. 17, 272 P.2d 636 (1954).

**The allowance of temporary alimony is dependent upon the existence of the marriage relation, and all necessary facts to establish such relation must be made to appear at least prima facie before such allowance is made by the court, but where a prima facie case is established alimony should be awarded.** Eickhoff v. Eickhoff, 29 Colo. 295, 68 P. 237 (1902).

**In an action for divorce where it is clear upon the admitted facts that the marriage alleged in the complaint is void in law, or where the preponderance of the evidence tends to show that there was never a marriage in fact, temporary alimony should not be awarded, and if awarded will be set aside on review.** Eickhoff v. Eickhoff, 29 Colo. 295, 68 P. 237 (1902).

**It appears that in a divorce proceeding, the right to apply for alimony pendente lite is dependent upon the previous filing of a complaint for a divorce, and then the application may be made to, and acted upon, by the court in term time, or by the judge in vacation.** Eickhoff v. Eickhoff, 14 Colo. App. 127, 59 P. 411 (1899).

**The allowance to be made for temporary alimony, attorney fees, and suit money is within the sound discretion of the trial court, and unless that discretion has been abused the order of allowance will not be disturbed on**

review. *Cairnes v. Cairnes*, 29 Colo. 260, 68 P. 233 (1902); *Miller v. Miller*, 79 Colo. 609, 247 P. 567 (1926).

**In a divorce suit where the wife was in indigent circumstances** and the husband was a man of large means, an allowance of \$50 per month as temporary alimony, \$250 attorney fees, and \$25 suit money was not excessive, and was not an abuse of discretion by the trial court. *Eickhoff v. Eickhoff*, 29 Colo. 295, 68 P. 237 (1902).

**In determining the amount of temporary alimony to be allowed, the ability of the husband** is an element to be considered, and the same element must necessarily be taken into consideration in fixing the amount of permanent alimony. *Fahey v. Fahey*, 43 Colo. 354, 96 P. 251 (1908).

**If the evidence as to the ability of the husband to pay temporary alimony** in a divorce action is conflicting, the order of the trial court based thereon is not reviewable. *Miller v. Miller*, 79 Colo. 609, 247 P. 567 (1926).

**An award of temporary alimony may be modified by the supreme court.** *Miller v. Miller*, 79 Colo. 609, 247 P. 567 (1926).

**No appeal from temporary orders that have terminated due to entry of permanent orders.** *In re Jaeger*, 883 P.2d 577 (Colo. App. 1994).

**Temporary alimony awarded a wife cannot be modified except upon motion and sufficient showing** in support thereof; thus, where no motion was made respecting the alimony, it was an abuse of discretion for the court to suspend the order for temporary alimony at a hearing on a citation for the husband to show cause why he was not in contempt of court for failure to pay alimony *Wright v. Wright*, 122 Colo. 179, 220 P.2d 881 (1950).

**The question whether an order for temporary alimony should be modified is also within the discretion of the court.** *Miller v. Miller*, 79 Colo. 609, 247 P. 567 (1926).

**Orders resolving child support issue are final.** In dissolution proceedings, orders which resolve the issue of child support, even on a temporary basis, are final for purposes of review. *In re Henne*, 620 P.2d 62 (Colo. App. 1980).

**"Final decree", as used in subsection (5)(c), is not limited to a final decree of dissolution,** but may also include a final order concerning child support. *In re Price*, 727 P.2d 1073 (Colo. 1986); *In re Nussbeck*, 899 P.2d 347 (Colo. App. 1995), rev'd on other grounds, 974 P.2d 493 (Colo. 1999).

Where court continued determination of permanent child support to time subsequent to entry of decree of dissolution, temporary child support order was not terminated on date of dissolution by virtue of statute terminating temporary order or temporary injunction when final decree

is entered. *In re Price*, 727 P.2d. 1073 (Colo. 1986).

Temporary orders as to maintenance are reviewable as a final judgment even if there has not been a final judgment in the form of a decree of dissolution. *In re Nussbeck*, 899 P.2d 347 (Colo. App. 1995), rev'd on other grounds, 974 P.2d 493 (Colo. 1999).

If the decree of dissolution leaves the issue of maintenance to be resolved later, an order of temporary maintenance is not terminated on the date of dissolution by virtue of subsection (5)(c). When possible, however, at the time the decree is entered, the court should set a definite date for consideration of permanent orders concerning maintenance. *In re Nussbeck*, 899 P.2d 347 (Colo. App. 1995), rev'd on other grounds, 974 P.2d 493 (Colo. 1999).

**A request for a temporary award includes attorney fees** and related litigation expenses. *In re Mockelmann*, 944 P.2d 670 (Colo. App. 1997).

**An award of attorney fees is a final judgment subject to appellate review** as it establishes a financial right and obligation of the parties until the entry of permanent orders. A temporary award of attorney fees is based upon the same underlying premise as a temporary award of maintenance or child support in that it concerns the immediate financial need of the party to whom the attorney fees are awarded. *In re Mockelmann*, 944 P.2d 670 (Colo. App. 1997).

**The duty to pay maintenance is independent and is not limited or specifically tied to the entry of a decree of dissolution.** To allow a party to terminate his or her maintenance payments when a decree of dissolution is entered that is mute on the issue of maintenance would disturb the status quo, frustrate a central purpose of the statute, and allow evasion of an important stabilizing aspect of the dissolution process. *In re Nussbeck*, 899 P.2d 347 (Colo. App. 1995), rev'd on other grounds, 974 P.2d 493 (Colo. 1999).

**Where a husband, plaintiff in a divorce suit, is unable to make reasonable provision for his wife** during the pendency of the suit, the suit should be abated until he is able to do so. *Cairnes v. Cairnes*, 29 Colo. 260, 68 P. 233 (1902).

**Where a wife, defendant in a divorce suit, is a nonresident of the state and desires to come to Colorado to defend the suit,** she should be given an opportunity to do so and the plaintiff should be required to deposit in court a sufficient sum to pay to the state the expenses of the wife which shall be paid to her upon her arrival, within a reasonable time, with such additional sum as may be necessary to properly defend the suit. *Cairnes v. Cairnes*, 29 Colo. 260, 68 P. 233 (1902).



Where a trial court denies motions of both parties with respect to temporary alimony pending trial on the merits, a writ of error to review such action is premature. *Hizel v. Hizel*, 132 Colo. 379, 288 P.2d 354 (1955).

Since temporary orders are not in any way res judicata as to matters properly the subject of permanent order, a showing of change of circumstances is not an essential element for the trial court's consideration in its establishment of permanent alimony. *MacReynolds v. MacReynolds*, 29 Colo. App. 267, 482 P.2d 407 (1971).

Temporary orders do not grant "parenting time rights", as that term is specified in § 14-10-129 (1)(b)(I), but simply provide for parenting time pending a final determination of permanent orders. In re *Fickling*, 100 P.3d 571 (Colo. App. 2004).

Temporary orders are not determinative of the permanent orders regarding allocation of parental responsibility or other matters. In re *Lawson*, 608 P.2d 378 (Colo. App. 1980); In re *Fickling*, 100 P.3d 571 (Colo. App. 2004).

There is no enforceable temporary order where the claim for spousal maintenance is based on a referee's recommendation and where the transcript is not signed and no separate order of the court is entered. In re *Burke*, 680 P.2d 1338 (Colo. App. 1984).

Formerly, an execution was authorized on an order for temporary alimony. *Daniels v. Daniels*, 9 Colo. 133, 10 P. 657 (1886); *Paul v. Marty*, 72 Colo. 399, 211 P. 667 (1922).

The temporary order of the "Beth Din", or its adoption in a prior proceeding for legal separation that was later dismissed, has no legal effect in a subsequent proceeding for dissolution of marriage between the same parties. In re *Popack*, 998 P.2d 464 (Colo. App. 2000).

Applying the intent of the *Indian Child Welfare Act of 1978*, court determined that trial court improperly found that mother had abandoned child for the purpose of granting a temporary allocation of parental responsibilities to caregiver. Although mother had signed document granting caregiver guardianship, the document did not suggest the placement was to be

permanent, and the mother remained in continued contact with child. A parent's placement of a child in the care of another, even if prolonged, does not constitute abandonment if the parent remains in contact and demonstrates an intent to maintain the relationship. In re *S.M.J.C.*, 262 P.3d 955 (Colo. App. 2011).

### III. TEMPORARY INJUNCTIONS.

Restraining orders should not be issued in divorce actions except in circumstances of actual emergency, and where it is clearly established that grounds exist for granting such extraordinary remedy. *Simpson v. Simpson*, 151 Colo. 88, 376 P.2d 55 (1962).

It is an unusual situation in which an order on one spouse to refrain from transferring property is inadequate to afford needed protection to the other who seeks to maintain the status quo pending a hearing on notice. *Simpson v. Simpson*, 151 Colo. 88, 376 P.2d 55 (1962).

The right of the husband in a divorce action to manage his property and carry on his business in due course is fundamental and should not be interfered with or suspended by the issuance of ex parte restraining orders without notice upon persons with whom he transacts business, except upon a clear showing of emergency and a need therefor. *Simpson v. Simpson*, 151 Colo. 88, 376 P.2d 55 (1962).

The practice of bringing in third parties as defendants in a divorce action and issuing restraining orders against them without notice is not to be encouraged, it being only under extraordinary circumstances that such persons engaged in legitimate business transactions with one of the parties to the divorce action and not involved in their marital difficulties may be restrained or enjoined from continuing business activities with one of the spouses involved. *Simpson v. Simpson*, 151 Colo. 88, 376 P.2d 55 (1962).

Any reasons justifying permanent injunctive relief in dissolution of marriage proceeding must arise from factors independent of those with which the trial court is empowered to deal in a dissolution proceeding. In re *Davis*, 44 Colo. App. 355, 618 P.2d 692 (1980).

**14-10-109. Enforcement of protection orders.** The duties of peace officers enforcing orders issued pursuant to section 14-10-107 or 14-10-108 shall be in accordance with section 18-6-803.5, C.R.S., and any rules adopted by the Colorado supreme court pursuant to said section.

**Source:** L. 71: R&RE, p. 523, § 1. C.R.S. 1963: § 46-1-9. L. 92: Entire section amended, p. 176, § 2, effective July 1. L. 94: Entire section amended, p. 2009, § 5, effective January 1, 1995.

**Cross references:** For civil contempt, see C.R.C.P. 107.

**14-10-110. Irretrievable breakdown.** (1) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken or one

of the parties has so stated and the other has not denied it, there is a presumption of such fact, and, unless controverted by evidence, the court shall, after hearing, make a finding that the marriage is irretrievably broken.

(2) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall:

(a) Make a finding whether the marriage is irretrievably broken; or

(b) Continue the matter for further hearing not less than thirty-five days nor more than sixty-three days later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. At the adjourned hearing, the court shall make a finding whether the marriage is irretrievably broken.

**Source:** L. 71: R&RE, p. 523, § 1. C.R.S. 1963: § 46-1-10. L. 2012: (2)(b) amended, (SB 12-175), ch. 208, p. 831, § 26, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2)(b) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For marriage counseling, see article 12 of this title.

## ANNOTATION

**Law reviews.** For article, "Is Residence of the Plaintiff, in Colorado, Necessary to Support a Divorce Action Based on Cruelty Within the State, If Defendant Is a Resident of Colorado?", see 24 Dicta 110 (1947). For article, "When the State Had an Interest in Marriage: Colorado's Divorce Acts, 1861-1917", see 16 Colo. Law. 1627 (1987).

**Annotator's note.** Some of the cases appearing under § 14-10-110 were decided under repealed § 46-1-1, C.R.S. 1963, § 46-1-1, CRS 53, CSA, C. 56, § 1, and laws antecedent thereto, which specifically enumerated the grounds for divorce.

**Marriage is a contract** between the parties, but it is distinguishable from the ordinary civil contract. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**Marriage is the subject of a more immediate interest to the state** than is the ordinary contract. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**Marriage is not a "contract" within the meaning of the contract clause of the constitution.** In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**General assembly control of marriage is constitutional.** Since marriage is not a contract within the meaning of the constitutional contract clause, the general assembly has broad control over it, the reasonable exercise of which will not run afoul of the constitutional protection of contracts. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**In attempting to increase availability of divorces to estranged spouses, the general assembly recognized that public policy does**

not encourage keeping two people together once the legitimate objects of matrimony have ceased to exist. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**Decree not automatic.** Although the dissolution of marriage statute was intended as a "no-fault" divorce act, the actual granting of the decree is not automatic or perfunctory under all circumstances. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**Court's discretion to continue case sufficient safeguard against hastiness.** The general assembly declined to include in the Colorado act, which is modeled on the uniform dissolution of marriage act, the language of the uniform act allowing the court to order a conciliation conference, and thus, in effect, determined that vesting discretion in the court to continue the case from 30 to 60 days was sufficient safeguard against hasty and insensate decisions. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

**"Irretrievable" breakdown is no more vague or incapable of definition than "became impotent through immoral conduct",** has been "extremely and repeatedly cruel", or being an "habitual drunkard", all of which constituted, under the prior Colorado statute, grounds for divorce. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**A finding of irretrievable breakdown is one of fact** and, where the allegation of the petition is denied, it must be proven as any other essential element of the cause of action. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

Where the parties do not agree as to the breakdown of the marriage, it is imperative for the court to weigh all the evidence and make its



own independent determination of that fact. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

The issue of whether a marriage has been irretrievably broken is a question of fact to be resolved upon consideration of the facts and circumstances of each case, and the factors underlying that determination will necessarily vary from case to case. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

**Finding of irretrievable breakdown must be proved when denied.** While the dissolution of marriage act did eliminate all the former defenses to divorce in this state, it did not eliminate the necessity of proving an irretrievable breakdown where that basic allegation is denied in the pleadings. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**No requirement that valid goals of marriage must be unattainable.** There is no requirement that for the marriage to be beyond redemption, substantial proportion of legitimate objectives of a marriage must be no longer attainable by the parties. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

Elucidating valid goals of marriage which must be either lost or beyond accomplishment before the marriage can be classified as irretrievably broken would constitute an amendment to the act, and that power is reserved exclusively for the general assembly. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

**The parentage of a child is not an issue in a divorce or annulment action between the parents.** Devereaux v. Devereaux, 144 Colo. 31, 354 P.2d 1015 (1960).

**Formerly, before a court could enter its findings in favor of a defendant,** it must have necessarily found that the defendant had not been guilty of a violation of the marriage contract. Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958).

**In a divorce action where a defendant pleaded grounds for divorce by way of counterclaim,** the issue was the guilt or innocence of the parties on the grounds alleged against each other, and findings by a trial court that plaintiff was entitled to a divorce was necessarily a finding against the defendant on the issues. Schleiger v. Schleiger, 137 Colo. 279 324 P.2d 370 (1958).

**Formerly, the grounds for divorce in this state** were purely statutory. Pleyte v. Pleyte, 1 Colo. App. 70, 28 P. 23 (1891); Redington v. Redington, 2 Colo. App. 8, 29 P. 811 (1892); Githens v. Githens, 78 Colo. 102, 239 P. 1023 (1925).

**For the former ground for divorce, adultery,** see Redington v. Redington, 2 Colo. App. 8, 29 P. 811 (1892); Harding v. Harding, 36 Colo. 106, 85 P. 423 (1906); Jones v. Jones, 71 Colo. 420, 207 P. 596 (1922).

**For the former ground for divorce, desertion,** see Stein v. Stein, 5 Colo. 55 (1879); Calvert v. Calvert, 15 Colo. 390, 24 P. 1043 (1890); Johnson v. Johnson, 22 Colo. 20, 43 P. 130, 55 Am. St. R. 113 (1895); Hobbs v. Hobbs, 72 Colo. 190, 210 P. 398 (1922); Oates v. Oates, 72 Colo. 195, 210 P. 325 (1922); Mulhollen v. Mulhollen, 145 Colo. 479, 358 P.2d 887 (1961).

**For the former ground for divorce, cruelty,** see Sylvis v. Sylvis, 11 Colo. 319, 17 P. 912 (1888); Gilpin v. Gilpin, 12 Colo. 504, 21 P. 612 (1889); Williams v. Williams, 1 Colo. App. 281, 28 P. 726 (1892); Geisseman v. Geisseman, 34 Colo. 481, 83 P. 635 (1905); Harding v. Harding, 36 Colo. 106, 85 P. 423 (1906); Sedgwick v. Sedgwick, 50 Colo. 164, 114 P. 488 (1911); Shaff v. Shaff, 72 Colo. 184, 210 P. 400 (1922); Miller v. Miller, 90 Colo. 428, 9 P.2d 616 (1932); Hilburger v. Hilburger, 110 Colo. 409, 135 P.2d 138 (1943); Harms v. Harms, 120 Colo. 212, 209 P.2d 552 (1949); Mentzer v. Mentzer, 120 Colo. 412, 209 P.2d 920 (1949); Carroll v. Carroll, 135 Colo. 379, 311 P.2d 709 (1957); Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958); Reed v. Reed, 138 Colo. 74, 329 P.2d 633 (1958); Lininger v. Lininger, 138 Colo. 338, 333 P.2d 625 (1958); Poos v. Poos, 145 Colo. 334, 359 P.2d 3 (1961); Harvey v. Harvey, 150 Colo. 449, 373 P.2d 304 (1962); Cochran v. Cochran, 164 Colo. 99, 432 P.2d 752 (1967); Moats v. Moats, 168 Colo. 120, 450 P.2d 64 (1969).

**For the former ground for divorce, non-support by the husband,** see Rogers v. Rogers, 57 Colo. 132, 140 P. 193 (1914).

**Applied in** In re Erickson, 43 Colo. App. 319, 602 P.2d 909 (1979); In re Lester, 647 P.2d 688 (Colo. App. 1982).

**14-10-111. Declaration of invalidity.** (1) The district court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances:

(a) A party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs, or other incapacitating substances.

(b) A party lacked the physical capacity to consummate the marriage by sexual intercourse, and the other party did not at the time the marriage was solemnized know of the incapacity.

(c) A party was under the age as provided by law and did not have the consent of his parents or guardian or judicial approval as provided by law.

(d) One party entered into the marriage in reliance upon a fraudulent act or representation of the other party, which fraudulent act or representation goes to the essence of the marriage.

(e) One or both parties entered into the marriage under duress exercised by the other party or a third party, whether or not such other party knew of such exercise of duress.

(f) One or both parties entered into the marriage as a jest or dare.

(g) The marriage is prohibited by law, including the following:

(I) A marriage entered into prior to the dissolution of an earlier marriage of one of the parties;

(II) A marriage between an ancestor and a descendant or between a brother and a sister, whether the relationship is by the half or the whole blood;

(III) A marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established customs of aboriginal cultures;

(IV) A marriage which was void by the law of the place where such marriage was contracted.

(2) A declaration of invalidity under subsection (1) of this section may be sought by any of the following persons and shall be commenced within the times specified, but in no event may a declaration of invalidity be sought after the death of either party to the marriage, except as provided in subsection (3) of this section:

(a) For the reasons set forth in either subsection (1) (a), (1) (d), (1) (e), or (1) (f) of this section, by either party to the marriage who was aggrieved by the conditions or by the legal representative of the party who lacked capacity to consent no later than six months after the petitioner obtained knowledge of the described condition;

(b) For the reason set forth in subsection (1) (b) of this section, by either party no later than one year after the petitioner obtained knowledge of the described condition;

(c) For the reason set forth in subsection (1) (c) of this section, by the underage party, his parent, or his guardian, if such action for declaration of invalidity of marriage is commenced within twenty-four months of the date the marriage was entered into.

(3) A declaration of invalidity, for the reason set forth in subsection (1) (g) of this section, may be sought by either party; by the legal spouse in case of bigamous, polygamous, or incestuous marriages; by the appropriate state official; or by a child of either party at any time prior to the death of either party or prior to the final settlement of the estate of either party and the discharge of the personal representative, executor, or administrator of the estate or prior to six months after an estate is closed under section 15-12-1204, C.R.S.

(4) Children born of a marriage declared invalid are legitimate.

(5) Marriages declared invalid under this section shall be so declared as of the date of the marriage.

(6) The provisions of this article relating to the property rights of spouses, maintenance, and support of and the allocation of parental responsibilities with respect to the children on dissolution of marriage are applicable to decrees of invalidity of marriage.

(7) No decree shall be entered unless one of the parties has been domiciled in this state for thirty days next preceding the commencement of the proceeding or unless the marriage has been contracted in this state.

**Source:** L. 71: R&RE, p. 523, § 1. C.R.S. 1963: § 46-1-11. L. 73: pp. 553, 1647, §§ 4, 5, 6. L. 80: (1)(g)(II) amended, p. 794, § 47, effective June 5. L. 98: (6) amended, p. 1397, § 38, effective February 1, 1999.

**Cross references:** For the effect of a declaration of invalidity on marital agreements, see § 14-2-308.



## ANNOTATION

- I. General Consideration.
- II. The Invalidity of Marriage Proceeding.
- III. Mental Incapacity to Consent to Marriage.
- IV. Legitimacy of Children.
- V. Conflict of Laws.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For note, "The Presumption of Death and a Second Marriage", see 27 Dicta 414 (1950). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For note, "Jurisdiction to Annul a Marriage Celebrated Without the Forum", see 26 Rocky Mt. L. Rev. 57 (1953). For article, "One Year Review of Domestic Relations", see 35 Dicta 36 (1958). For article, "Choice of the Applicable Law in Colorado", see 35 Dicta 162 (1958). For article, "One Year Review of Domestic Relations", see 39 Dicta 102 (1962). For article, "The Incestuous Marriage — Relic of the Past", see 36 U. Colo. L. Rev. 473 (1964). For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969).

**Annotator's note.** Since § 14-10-111 is similar to repealed § 46-3-1 et seq., CRS 53, and CSA, C. 56, §§ 33 through 38, relevant cases construing those provisions have been included in the annotations to this section.

**There is a wide distinction between a conventional annulment proceeding and a conventional action for divorce.** An annulment proceeding is one in which the validity of a marriage is challenged from its inception on the ground that one or both of the parties was underage, on the ground that one or both of the parties was married to another person, on the ground that the proceeding was attended by fraud, or on some other fairly comparable ground. An action for divorce is one in which termination is sought of a valid marriage. *Gainey v. Fleming*, 279 F.2d 56 (10th Cir. 1960).

**For the effect of an invalidity of marriage determination on maintenance payments which were terminated upon remarriage**, see *Torgan v. Torgan*, 159 Colo. 93, 410 P.2d 167 (1966).

**Reestablishment of a support obligation following annulment of a subsequent marriage must be decided on a case-by-case basis**, taking into account the facts and equities of the particular case. *In re Cargill and Rollins*, 843 P.2d 1335 (Colo. 1993).

**The children of the deceased had no standing to challenge the validity of his marriage**

**when it was not prohibited.** *Matter of Estate of Fuller*, 862 P.2d 1037 (Colo. App. 1993).

**Applied in *In re Heinzman***, 198 Colo. 36, 596 P.2d 61 (1979).

### II. THE INVALIDITY OF MARRIAGE PROCEEDING.

**Originally, authority to grant divorces and annul marriages in England was vested solely in the ecclesiastical courts.** This authority terminated around 1870, during the reign of Victoria, at which time a special court was created to hear and decide all divorces and annulments of marriage, but ecclesiastical courts and their authority never became a part of American common law. *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

**An annulment action is a statutory proceeding in which the court exercises equity powers.** *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

**The severance of marital ties, the entry of custodial orders regarding children, the application of equitable principles in divorce and annulment actions, and so forth, are or have aspects of the conventional activities of a court of equity.** *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

**This article provides that in suits for annulment the practice and proceedings shall be in accordance with the rules of civil procedure.** *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

**In the interplay of this section and the rules of civil procedure, there is no trial by jury of an annulment suit as a matter of right.** *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

**A cursory reading of C.R.C.P. 38(a) makes obvious the conclusion that an annulment suit does not come within the meaning of any of the enumerated actions requiring trial by jury unless waived.** *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

**But C.R.C.P. 39(c) provides that in actions not triable by a jury, the court may upon motion or of its own initiative try any issue with an advisory jury, or when statute provides for trial without a jury, the court with the consent of both parties may order a jury trial.** *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

**Proof in an annulment case must be clear and convincing, and the court should so instruct the jury, and the preponderance rule is inapplicable.** *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

**The giving of confusing and incompatible instructions in an annulment action is fatal error.** *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

### III. MENTAL INCAPACITY TO CONSENT TO MARRIAGE.

**Marriages are not easily annulled, and consequently, there must be clear and convincing proof** that such party was mentally incompetent at the time the marriage was entered into. *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

An instruction "that the husband would be incapable of giving voluntary consent if you find that at the time of the marriage ceremony he did not have sufficient mental capacity to understand the nature, obligations, and responsibilities of a marriage contract, and to appreciate the solemnity of the marriage vows" goes beyond the statutory ground for annulment which provides that if "one or both parties were mentally incapable of giving voluntary consent to the marriage", the marriage may be set aside. *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

In an action for annulment of a marriage on the ground of mental incapacity, testimony of a witness to marriage ceremony that she observed plaintiff before, during, and after ceremony, conversed with him, and that in her opinion he was mentally competent, was erroneously rejected, the credibility of such witness being for the jury. *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

Testimony of a psychiatrist who based his opinion on the incompetency of plaintiff, and in part upon the testimony of another witness, was erroneously admitted. *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

An order of adjudication of mental incompetency was properly admitted. *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

Evidence of forgery of a blood test certificate was immaterial and inadmissible, as not tending to prove any of the alleged grounds of annulment. *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

Evidence that wife had applied for driver's license and signed a delinquency tax statement

in former name, subsequent to the alleged marriage, were remote circumstances having no legitimate bearing on the issues and should have been rejected. *Young v. Colo. Nat'l Bank*, 148 Colo. 104, 365 P.2d 701 (1961).

### IV. LEGITIMACY OF CHILDREN.

**A judgment and decree annulling the marriage of the parents does not determine the parentage of a child** conceived prior to the marriage, and is not res judicata in a dependency proceeding to determine the paternity of the child. *Devereaux v. Devereaux*, 144 Colo. 31, 354 P.2d 1015 (1960).

**The parentage of a child is not an issue in an annulment action between the parents.** *Devereaux v. Devereaux*, 144 Colo. 31, 354 P.2d 1015 (1960).

**Subsection (4) refers only to cases where an annulment proceeding is brought.** *Valdez v. Shaw*, 100 Colo. 101, 66 P.2d 325 (1937); *Gainey v. Fleming*, 279 F.2d 56 (10th Cir. 1960).

### V. CONFLICT OF LAWS.

**Marriages being lawful in other states are recognized as lawful and valid in the state of Colorado.** *Spencer v. People in Interest of Spencer*, 133 Colo. 196, 292 P.2d 971 (1956).

**It is the public policy of this state concerning foreign marriages** that such marriages are valid if valid where performed. *Spencer v. People in Interest of Spencer*, 133 Colo. 196, 292 P.2d 971 (1956).

**In an action for annulment, the marriage is held to be valid or void**, according to the statutes in force and effect in the jurisdiction where the same was entered into, and if, according to these statutes, it is found to be valid, it must be so considered in this jurisdiction. *Payne v. Payne*, 121 Colo. 212, 214 P.2d 495 (1950).

**Annulment issued in a foreign jurisdiction** does not prevent Colorado courts from entering orders as to property and maintenance. In re *Dickson*, 983 P.2d 44 (Colo. App. 1998).

**14-10-112. Separation agreement.** (1) To promote the amicable settlement of disputes between the parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the allocation of parental responsibilities, support, and parenting time of their children.

(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except terms providing for the allocation of parental responsibilities, support, and parenting time of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(3) If the court finds the separation agreement unconscionable, the court may request the parties to submit a revised separation agreement, or the court may make orders for the disposition of property, support, and maintenance.



(4) If the court finds that the separation agreement is not unconscionable as to support, maintenance, and property:

(a) Unless the separation agreement provides to the contrary, its terms shall be set forth in the decree of dissolution or legal separation, and the parties shall be ordered to perform them; or

(b) If the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement and shall state that the court has found the terms not unconscionable.

(5) Terms of the agreement set forth in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt, but are no longer enforceable as contract terms.

(6) Except for terms concerning the support, the allocation of decision-making responsibility, or parenting time of children, the decree may expressly preclude or limit modification of terms set forth in the decree if the separation agreement so provides.

**Source:** L. 71: R&RE, p. 525, § 1. C.R.S. 1963: § 46-1-12. L. 93: (1), (2), and (6) amended, p. 576, § 6, effective July 1. L. 98: (1), (2), and (6) amended, p. 1397, § 39, effective February 1, 1999.

**Cross references:** (1) For the "Colorado Marital Agreement Act", see part 3 of article 2 of this title.

(2) For the legislative declaration contained in the 1993 act amending subsections (1), (2), and (6), see section 1 of chapter 165, Session Laws of Colorado 1993.

## ANNOTATION

- I. General Consideration.
- II. Antenuptial Agreements.
- III. Unconscionable Agreements.
- IV. Incorporation of Agreement into Decree.
- V. Modification.
- VI. Enforcement.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Incorporation by Reference of Agreements Made by the Parties in Divorce Decrees", see 21 Rocky Mt. L. Rev. 420 (1949). For note, "The Paradoxical Separation Agreement", see 21 Rocky Mt. L. Rev. 434 (1949). For comment on *Irwin v. Irwin*, appearing below, see 35 U. Colo. L. Rev. 440 (1963). For note, "Effects of Reconciliation on Separation Agreements in Colorado", see 51 U. Colo. L. Rev. 399 (1980). For article, "Pre-Nuptial Agreements Revisited", see 11 Colo. Law. 1882 (1982). For article, "Mediation and the Colorado Lawyer", see 11 Colo. Law. 2315 (1982). For article, "Dischargeability of Dissolution Debts under the Bankruptcy Code", see 13 Colo. Law. 814 (1984). For article, "Domestic Case Update", see 14 Colo. Law. 209 (1985). For article, "Seeking Change in Separation Agreement", see 15 Colo. Law. 806 (1986). For article, "Cohabitation Agreements in Colorado", see 15 Colo. Law. 979 (1986). For article, "Common Law Marriage in Colorado", see 15 Colo. Law. 252 (1987). For article, "Postsecondary Education Expenses after Chalat: Paying College Expenses after Divorce", see 38 Colo. Law. 19 (January 2009).

**Annotator's note.** Although § 14-10-112 enacted in 1971 has no similar provision in previous codes and laws of Colorado, relevant cases decided under repealed §§ 46-1-1 through 46-1-11, C.R.S. 1963, §§ 46-1-1 through 46-1-15, CRS 53, CSA, C. 56, §§ 1 through 32, and laws antecedent thereto have been included in the annotations to this section. (But see *In re Seymour*, 36 Colo. App. 104, 536 P.2d 1172 (1975), concerning the precedential value of such cases.)

**Purpose of the separation agreement** is to enable divorcing parties to reach an amicable out-of-court settlement of their claims to the property of the other. *In re Manzo*, 659 P.2d 669 (Colo. 1983).

**This section does not preclude a stipulated oral separation agreement;** the issue is whether the parties intend to be bound by the terms of an agreement, whether oral or written. *In re Chambers*, 657 P.2d 458 (Colo. App. 1982).

**It has been established that a husband and wife may enter into contracts which settle their differences,** and the trial court, while determining division of property accumulated during the marriage, cannot disregard such a contract where it is free from fraud, collusion, compulsion, or unconscionability. *Magarrell v. Magarrell*, 144 Colo. 228, 355 P.2d 946 (1960); *Irwin v. Irwin*, 150 Colo. 261, 372 P.2d 440 (1962); *Jekot v. Jekot*, 32 Colo. App. 118, 507 P.2d 473 (1973).

**While courts generally adopt stipulations between the parties,** relating to alimony, they

are not bound to do so. *Hobbs v. Hobbs*, 72 Colo. 190, 210 P. 398 (1922).

**The agreement must be in all respects fair, reasonable, and just**, and it must make sufficient provision for the maintenance of the wife according to the status of the parties. *Daniels v. Daniels*, 9 Colo. 133, 10 P. 657 (1886); *Hobbs v. Hobbs*, 72 Colo. 190, 210 P. 398 (1922).

**In agreements of this nature it must be made to appear** that the husband has dealt fairly and equitably with his wife in the transaction. *Hill v. Hill*, 70 Colo. 47, 197 P. 236 (1921); *Hobbs v. Hobbs*, 72 Colo. 190, 210 P. 398 (1922).

**Parents may not by agreement divest the court of continuing jurisdiction over the custodial rights and duties of maintenance of children** during their minority. *Irwin v. Irwin*, 150 Colo. 261, 372 P.2d 440 (1962).

**Legal or equitable lien not created by decree.** Language of dissolution decree which awarded the house to husband and his mother and ordered husband to execute a promissory note in favor of wife to become due upon the occurrence of one of several possible events did not create a legal or equitable lien on the property in favor of wife where the court did not impose any duty on the husband to pay the note from the proceeds resulting from the sale of the property and did not order the husband to execute a deed of trust or other security instrument to secure payment of the note. *Leyden v. Citicorp Indus. Bank*, 762 P.2d 689 (Colo. App. 1988).

**Applied** in *Lowery v. Lowery*, 195 Colo. 86, 575 P.2d 430 (1978); In *re Stedman*, 632 P.2d 1048 (Colo. App. 1981).

## II. ANTENUPTIAL AGREEMENTS.

**Precedential value of prior decisions.** In interpreting the current statute, the courts do not consider that the decisions on separation agreements incorporated in decrees in actions arising under the 1917 act (CRS 53, § 46-1-5) have any precedential value. In *re Seymour*, 36 Colo. App. 104, 536 P.2d 1172 (1975).

**This section is explicitly limited to separation agreements;** antenuptial agreements cannot be challenged as unconscionable under this section. In *re Stokes*, 43 Colo. App. 461, 608 P.2d 824 (1979); In *re Newman v. Newman*, 653 P.2d 728 (Colo. 1982).

**Separation agreements and antenuptial agreements are separate and distinct** legal documents. In *re Newman*, 44 Colo. App. 307, 616 P.2d 982 (1980), *aff'd* in part, *rev'd* on other grounds, 653 P.2d 728 (Colo. 1982).

**While separation agreements contemplate disposition of property interests which mature because of the marriage status**, prenuptial agreements fix the property rights of the parties, regardless of the duration of the marriage. In *re*

*Stokes*, 43 Colo. App. 461, 608 P.2d 824 (1979); In *re Lemoine-Hofmann*, 827 P.2d 587 (Colo. App. 1992).

**Spouses-to-be have right to enter into antenuptial agreements** which contemplate the possibility of dissolution. In *re Newman*, 44 Colo. App. 307, 616 P.2d 982 (1980), *aff'd* in part, *rev'd* on other grounds, 653 P.2d 728 (Colo. 1982).

**Where husband conceded that wife put him through college pursuant to their oral prenuptial agreement**, such agreement is not void pursuant to statute of frauds since oral contracts otherwise unenforceable under § 38-10-101, et seq., may substitute for a writing if there is part performance of the oral contract. In *re Lemoine-Hofmann*, 827 P.2d 587 (Colo. App. 1992).

**Standard for review compared with review of antenuptial agreement.** The standard applied for court review of the division of property in a separation agreement allows the court more discretion than the standard for court review of the division of property in an antenuptial agreement. In *re Manzo*, 659 P.2d 669 (Colo. 1983).

Courts reviewing separation agreements prior to entry of a decree of dissolution need more latitude than is allowed for review of antenuptial agreements because of the public policy concern for safeguarding the interests of a spouse whose consent to the agreement may have been obtained under more emotionally stressful circumstances, especially if that spouse is unrepresented by counsel. In *re Manzo*, 659 P.2d 669 (Colo. 1983).

**Where parties to a divorce action had settled all their differences by agreement, and the only duties of husband are those set forth therein**, there being no authority for the allowance of attorney fees to the wife, the court was without authority to award such fees. *Irwin v. Irwin*, 150 Colo. 261, 372 P.2d 440 (1962); *Newey v. Newey*, 161 Colo. 395, 421 P.2d 464, 422 P.2d 641 (1967).

**The trial court, in determining the pecuniary provision for the wife upon granting a decree of divorce to her**, has no right to disregard a previous agreement free from fraud, collusion, or compulsion, and fair to her, entered into between her and her husband in contemplation of a divorce, settling and adjusting all their property rights, including dower, alimony, and support. *Newey v. Newey*, 161 Colo. 395, 421 P.2d 464, 422 P.2d 641 (1967).

**Where there was a self-operative trust agreement between the parties to a divorce action in settlement of their property rights**, such agreement was binding upon the parties, and the court was without jurisdiction to set it aside, no showing of fraud, duress, or mistake appearing. *Brown v. Brown*, 131 Colo. 467, 283 P.2d 951 (1955).



Formerly, an agreement between husband and wife which provided for alimony or property settlement in contemplation of divorce was presumptively fair, and the burden was on the wife to establish the contrary. *Newey v. Newey*, 161 Colo. 395, 421 P.2d 464, 422 P.2d 641 (1967).

An agreement between present spouses entered into "attendant upon" separation or dissolution must be considered a separation agreement, rather than a marital agreement, even if it was signed prior to filing for dissolution of marriage or legal separation. If an agreement is executed under circumstances accompanying, connected with, or surrounding a contemplated divorce or separation, it is considered a separation agreement. In *re Bisque*, 31 P.3d 175 (Colo. App. 2001); In *re Lafaye*, 89 P.3d 455 (Colo. App. 2003).

Whether an agreement is executed "attendant upon" a contemplated dissolution is a question of fact for the trial court, and the court's findings will not be set aside unless clearly erroneous. In *re Lafaye*, 89 P.3d 455 (Colo. App. 2003).

Termination of a dissolution proceeding as a result of the death of one of the parties did not render the controversy over the antenuptial agreement moot. Even though the death of one spouse mooted the dissolution proceeding, because the antenuptial agreement had a practical legal effect on an ongoing probate proceeding, the trial court was in error when it ruled the agreement invalid. *Schwartz v. Schwartz*, 183 P.3d 552 (Colo. 2008).

### III. UNCONSCIONABLE AGREEMENTS.

The court is not required to approve blindly an agreement it finds unconscionable. In *re Eller*, 38 Colo. App. 74, 552 P.2d 30 (1976).

Provisions of a proposed separation settlement agreement proffered for incorporation into a dissolution decree may be refused as "unconscionable" if the trial court concludes that the agreement is not fair, reasonable, and just. In *re Carney*, 631 P.2d 1173 (Colo. App. 1981).

Court may determine whether written separation agreement accurately expresses intent and agreement of parties and may exercise its equitable powers where necessary before this section becomes applicable. In *re Deines*, 44 Colo. App. 98, 608 P.2d 375 (1980).

Unconscionability has no relevance to testing of custody agreement. In *re Lawson*, 44 Colo. App. 105, 608 P.2d 378 (1980).

In determining whether an agreement is, or has become, unconscionable, the trial court should consider and apply the pertinent criteria set forth in the following sections: This section as to the economic circumstances of the parties;

§ 14-10-113 (1) as to the division of property; § 14-10-114 (1) as to maintenance; and § 14-10-115 (1) as to child support. In *re Lowery*, 39 Colo. App. 413, 568 P.2d 103 (1977), *aff'd*, 195 Colo. 86, 575 P.2d 430 (1978).

**Review of provisions before incorporation into dissolution decree.** Before a court incorporates property division provisions of a separation agreement into a dissolution decree, it should first review the provisions for fraud, overreaching, concealment of assets, or sharp dealing not consistent with the obligations of marital partners to deal fairly with each other, and then look at the economic circumstances of the parties which result from the agreement, including a determination whether under the totality of the circumstances the property disposition is fair, just and reasonable. In *re Manzo*, 659 P.2d 669 (Colo. 1983); In *re Seely*, 689 P.2d 1154 (Colo. App. 1984).

To set aside a property settlement agreement prior to its being incorporated in a dissolution decree, the court need not find that overreaching, inequality of bargaining power, or other elements of fraud are present. Rather, before the agreement is set forth in the decree, a court may set aside as unconscionable any agreement that is not "fair, reasonable and just". In *re Wigner*, 40 Colo. App. 253, 572 P.2d 495 (1977); In *re Thornhill*, 200 P.3d 1083 (Colo. App. 2008), *aff'd in part and rev'd in part on other grounds*, 232 P.3d 782 (Colo. 2010).

**Appellate court was not bound by the determination of the trial court** applying the unconscionability standard set forth in this section to an agreement, inasmuch as the resolution of that issue would be based upon the interpretation of the document and on uncontroverted facts. In *re Lemoine-Hofmann*, 827 P.2d 587 (Colo. App. 1992); In *re Thornhill*, 200 P.3d 1083 (Colo. App. 2008), *aff'd in part and rev'd in part on other grounds*, 232 P.3d 782 (Colo. 2010).

**Provision for support payment increases based on salary increases allowable.** A provision in a separation agreement that the amount of child support payments to be made by husband would increase in proportion to actual increases in husband's salary is allowable and creates no presumption of unconscionability which would violate this section. In *re Pratt*, 651 P.2d 456 (Colo. App. 1982).

**In order for agreement for binding Rabbinical arbitration to be enforceable**, it must be conscionable and must be entered into by the parties voluntarily after full disclosure. In *re Popack*, 998 P.2d 464 (Colo. App. 2000).

**Separation agreement giving wife approximately 91 percent of the marital property** and entered into when husband's emotional state was adversely affected by the circumstances surrounding the execution of the agreement was

unfair. In re Bisque, 31 P.3d 175 (Colo. App. 2001).

**Separation agreement that did not provide wife with interest on her share of husband's business paid out over time was unconscionable.** In the parties' separation agreement, husband agreed to make monthly payments to wife over a 10-year period for payment of her share of the value of the marital business. The agreement did not require the husband to pay interest on the total sum owed to wife or to secure the obligation. The lack of an interest provision in the agreement rendered the entire agreement unconscionable. In re Thornhill, 200 P.3d 1083 (Colo. App. 2008), aff'd in part and rev'd in part on other grounds, 232 P.3d 782 (Colo. 2010).

#### IV. INCORPORATION OF AGREEMENT INTO DECREE.

**Formerly, where the stipulation and property settlement was approved by the courts, but the terms thereof were not set forth in a decree of divorce,** the rights of the parties rested upon a contract, and not upon the decree, and were contractual and not decreed rights and obligations. Murphy v. Murphy, 138 Colo. 516, 335 P.2d 280 (1959); Cawley v. Cawley, 139 Colo. 439, 340 P.2d 122 (1959).

**Formerly, where parties to a divorce action entered into a binding contract settling all their differences,** the obligation of each to the other stemmed from the contract, and relief, if any, must have been based upon the rights of the parties under the contract. Irwin v. Irwin, 150 Colo. 261, 372 P.2d 440 (1962).

**Formerly, where a trial court in a divorce action had no part in determining the property and financial rights of the parties,** other than to approve and confirm an agreement purporting to settle all such financial and property rights, the incorporation of such agreement by references in the interlocutory or final decree in the action did not make the terms of such agreement an order or decree of the court, and was not a determination by the court of the respective rights of the parties, but was their voluntary adjustment of their differences, and unless the terms thereof are adopted by the court and fully and specifically set forth in the order or decree, the rights of the parties rest wholly upon the contract and not upon the decree of the court. Murphy v. Murphy, 138 Colo. 516, 335 P.2d 280 (1959).

**Prior to incorporation in decree, separation agreement is contract.** Prior to its incorporation in a dissolution decree, a separation agreement is a contract between the parties to a marriage. In re Manzo, 659 P.2d 669 (Colo. 1983).

**Subsection (5) is inapplicable where child support provisions of an agreement have not**

**been incorporated into the dissolution decree.** The provisions remain enforceable as contract terms. Williamson v. Williamson, 39 P.3d 1199 (Colo. App. 2001).

**A reference to a separation agreement and an approval thereof by the court is sufficient to make it a part of the decree.** Berglund v. Berglund, 28 Colo. App. 382, 474 P.2d 800 (1970).

**The terms of any agreement must have been fully and specifically set forth in a decree.** Murphy v. Murphy, 138 Colo. 516, 335 P.2d 280 (1959).

**Incorporation by reference allowed.** The wording in subsection (4)(a) that "its terms shall be set forth in the decree" does not prohibit incorporation by reference. In re Seymour, 36 Colo. App. 104, 536 P.2d 1172 (1975).

**When an agreement has been incorporated by reference into the decree, it is as effectively a part thereof** as if recited therein in haec verba. In re Seymour, 36 Colo. App. 104, 536 P.2d 1172 (1975).

So long as it is clear what document is being referred to and that the parties intended for it to be a part of the decree, such incorporation is within the underlying purposes of this section and there is no apparent reason for requiring the recopying of the words into the court order. In re Seymour, 36 Colo. App. 104, 536 P.2d 1172 (1975).

**If an executed agreement for a division of property was not incorporated in or made a part of an interlocutory and final decree of divorce,** and was not reserved for future action, it was not merged in the divorce proceedings. Cawley v. Cawley, 139 Colo. 439 340 P.2d 122 (1959).

**If the property rights and obligations of the parties to a divorce action who had entered into a settlement agreement** were to rest upon the court decree, then any such agreement as to those rights should have been fully and specifically set forth in the decree in order that the duties and rights could be definitely ascertained from the decree itself. Taylor v. Taylor, 147 Colo. 140, 362 P.2d 1027 (1961).

**Failure to attach prior stipulation as to maintenance of no consequence.** Where both parties clearly intended to have a copy of the stipulation regarding maintenance, child support, and division of property, "a part and portion of the decree of dissolution", the absence of any question as to what document is being alluded to, and the agreement by the husband's lawyer, at the hearing for the decree, to the adoption by reference of the stipulation in the earlier separate maintenance case, make the failure to have a copy identified as an exhibit and attached to the decree of no consequence. In re Seymour, 36 Colo. App. 104, 536 P.2d 1172 (1975).



**Incorporation of parties' agreement regarding medical insurance and expenses** into permanent orders was not beyond the trial court's jurisdiction, and father's failure to pay such expenses could constitute contempt. In re Alverson, 981 P.2d 1123 (Colo. App. 1999).

## V. MODIFICATION.

**Formerly, where parties to a divorce action entered into an agreement settling their property rights, which agreement it incorporated in the final decree,** the court was thereafter without jurisdiction — no fraud in procuring the settlement appearing — to modify the terms of the decree concerning such property rights in the absence of consent of the parties. Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955); Magarrell v. Magarrell, 144 Colo. 228, 355 P.2d 946 (1960); Lay v. Lay, 162 Colo. 43, 425 P.2d 704 (1967); Berglund v. Berglund, 28 Colo. App. 382, 474 P.2d 800 (1970); Watson v. Watson, 29 Colo. App. 449, 485 P.2d 919 (1971); Ingels v. Ingels, 29 Colo. App. 585 487 P.2d 812 (1971).

**Modification or revocation of agreement incorporated into decree.** Where the parties' property settlement agreement has been incorporated into the decree of dissolution, it is subject to revocation or modification to the same extent as a property division rendered solely by the court. In re Stroud, 631 P.2d 168 (Colo. 1981).

**Modification of property division provisions.** Once property division provisions of a separation agreement have been incorporated into a dissolution of marriage decree, they may not be set aside or modified unless the conditions of C.R.C.P. 60 are met. In re Seely, 689 P.2d 1154 (Colo. App. 1984); Camack v. Camack, 62 P.3d 1097 (Colo. App. 2002).

**When court has power to modify maintenance.** A trial court has authority to test a settlement agreement on the standard of present unconscionability and for possible modification of maintenance under two circumstances: If the agreement or the decree reserves that power to the trial court, or, if the agreement and the decree are silent on the power to modify. In re Thompson, 640 P.2d 279 (Colo. App. 1982).

The court retained jurisdiction to modify the separation agreement where the agreement specifically provided that the issue of retirement benefits obtained as a result of the husband's military service shall remain open and modifiable. In re Sinkovich, 830 P.2d 1101 (Colo. App. 1992).

**Restriction of court's jurisdiction to modify must be unequivocal.** While subsection (6) permits the parties to restrict the jurisdiction of the court to modify the maintenance terms of a settlement agreement, such a restriction must specifically and unequivocally preclude modifi-

cation. In re Rother, 651 P.2d 457 (Colo. App. 1982).

**Where maintenance provision not modifiable.** Where there was no reservation in the trial court of the power to modify a maintenance provision, the court cannot do so later. In re Thompson, 640 P.2d 279 (Colo. App. 1982).

The waiver of the right to seek modification in and of itself could well be the consideration for a concession in the amount or duration of maintenance, or in the property received by a party. Thus, to permit reconsideration of the amount of maintenance contracted for, without also reopening the property division, would be inequitable. In re Thompson, 640 P.2d 279 (Colo. App. 1982).

**Modification by parties' agreement not reservation to court of power.** The fact that an agreement allows modification by agreement of the parties is not a reservation to the court of the power to modify; rather, it is a limitation on the court's power. In re Thompson, 640 P.2d 279 (Colo. App. 1982).

Only unequivocal language in the terms of the settlement precludes the court from modifying the support provisions. No such language existed where the settlement provided that the period for payment of maintenance could be extended by further order of the court. Aldinger v. Aldinger, 813 P.2d 836 (Colo. App. 1991).

Where the parties' dissolution decree incorporated a separation agreement that stated that the husband's retirement benefits remained open and modifiable, the trial court had the authority to divide the husband's military retirement pension. In re Sinkovich, 830 P.2d 1101 (Colo. App. 1992).

**Modification of agreement permitted upon showing of fraud or overreaching.** Where the terms of a divorce decree specifically preclude modification, without the written consent of the parties, a court can modify the agreement only upon a showing of fraud or overreaching. In re Cohen, 44 Colo. App. 200, 610 P.2d 1092 (1980).

**Where separation agreement and alimony not modifiable.** Where a separation agreement was adopted and incorporated into the decree of divorce, and the agreement did not reserve to the court jurisdiction to modify the terms of the alimony provision, nor did the court in its order adopting and incorporating the agreement into the divorce decree specifically reserve the right to modify the terms thereof, the court cannot later modify the agreement or the alimony provisions. Burleson v. District Court, 196 Colo. 455, 586 P.2d 665 (1978).

**Waiver clause in separation agreement is binding to bar pursuit of further spousal maintenance** since promised maintenance payments were actually made despite technical default regarding the method of payment where wife acquiesced to such manner and there was

no showing of fraud, collusion, or compulsion. In re Vincent, 709 P.2d 959 (Colo. App. 1985).

**Modification of parenting time and the related nonmodification of child support agreement was made an order of court and so constituted an amendment to the original order and therefore are no longer enforceable as contract terms because they were made an order of court.** In re Rosenthal, 903 P.2d 1174 (Colo. App. 1995).

**The promise in a separation agreement to pay postsecondary education expenses, once adopted by the court and incorporated in a decree of dissolution, is no longer enforceable as a contract term.** In re Ludwig, 122 P.3d 1056 (Colo. App. 2005).

## VI. ENFORCEMENT.

**Property lien to enforce agreement.** A court may impose a lien on a party's property in order to enforce an agreement where the party has threatened to dispose of the property and put himself beyond the court's jurisdiction. In re Valley, 633 P.2d 1104 (Colo. App. 1981).

**Separation agreement is incorporated into and superceded by decree and, therefore,**

**governed by remedies available for the enforcement of a judgment.** In re Meisner, 807 P.2d 1205 (Colo. App. 1990).

**Although attorney fees cannot be awarded as a punitive sanction in a contempt proceeding,** attorney fees can be awarded if the case involves an agreement or contract for an award of such fees to the prevailing party. Marital agreements governing the manner in which each party's attorney fees will be paid should be enforced by the trial court, and the determination of which party succeeded or prevailed under a contractual fee-shifting provision is committed to the discretion of the trial court subject to an abuse of discretion standard of review on appeal. In re Sanchez-Vigil, 151 P.3d 621 (Colo. App. 2006).

To be a prevailing party for the purpose of an award of attorney fees pursuant to a contract, the applicant must have succeeded upon a significant issue presented by the litigation and must have achieved some of the benefits sought in the lawsuit. A party need not prevail upon the "central" issue, only upon a significant one. In re Watters, 782 P.2d 1220 (Colo. App. 1989); In re Sanchez-Vigil, 151 P.3d 621 (Colo. App. 2006).

**14-10-113. Disposition of property.** (1) In a proceeding for dissolution of marriage or in a proceeding for legal separation or in a proceeding for disposition of property following the previous dissolution of marriage by a court which at the time of the prior dissolution of the marriage lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, subject to the provisions of subsection (7) of this section, shall set apart to each spouse his or her property and shall divide the marital property, without regard to marital misconduct, in such proportions as the court deems just after considering all relevant factors including:

(a) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;

(b) The value of the property set apart to each spouse;

(c) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse with whom any children reside the majority of the time; and

(d) Any increases or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes.

(2) For purposes of this article only, and subject to the provisions of subsection (7) of this section, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent;

(b) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation; and

(d) Property excluded by valid agreement of the parties.

(3) Subject to the provisions of subsection (7) of this section, all property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property described in this subsection (3) is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.



(4) Subject to the provisions of subsection (7) of this section, an asset of a spouse acquired prior to the marriage or in accordance with subsection (2) (a) or (2) (b) of this section shall be considered as marital property, for purposes of this article only, to the extent that its present value exceeds its value at the time of the marriage or at the time of acquisition if acquired after the marriage.

(5) For purposes of this section only, property shall be valued as of the date of the decree or as of the date of the hearing on disposition of property if such hearing precedes the date of the decree.

(6) (a) (I) Notwithstanding any anti-assignment, anti-alienation, or other provision of law to the contrary, all retirement benefits of any nature for public employees from a plan described in section 401 (a), 403 (b), 414 (d), or 457 of the federal "Internal Revenue Code of 1986", as amended, that is established pursuant to Colorado law shall be, in all actions for dissolution of marriage, legal separation, and declaration of invalidity of marriage, divisible directly by the plan upon written agreement of the parties to such an action pursuant to paragraph (c) of this subsection (6).

(II) The provisions of this subsection (6) shall apply to all dissolution of marriage, legal separation, and declaration of invalidity of marriage actions filed on or after January 1, 1997, and all dissolution of marriage, legal separation, or declaration of invalidity of marriage actions filed prior to January 1, 1997, in which the court did not enter a final property division order concerning the parties' public employee retirement benefits prior to January 1, 1997.

(b) As used in this subsection (6), unless the context otherwise requires:

(I) "Alternate payee" means a party to a dissolution of marriage, legal separation, or declaration of invalidity action who is not the participant of the public employee retirement plan divided or to be divided but who is married to or was married to the participant and who is to receive, is receiving, or has received all or a portion of the participant's retirement benefit by means of a written agreement as described in paragraph (c) of this subsection (6).

(II) "Defined benefit plan" means a retirement plan that is not a defined contribution plan and that usually provides benefits as a percentage of the participant's highest average salary, based on the plan's benefit formula and the participant's age and service credit at the time of retirement.

(III) "Defined contribution plan" means a retirement plan that provides for an individual retirement account for each participant and the benefits of which are based solely on the amount contributed to the participant's account and that includes any income, expenses, gains, losses, or forfeitures of accounts of other participants that may be allocated to the participant's account.

(IV) "Participant" means the person who is an active, inactive, or retired member of the public employee retirement plan.

(c) (I) The parties may enter into a marital agreement pursuant to part 3 of article 2 of this title or a separation agreement pursuant to section 14-10-112 concerning the division of a public employee retirement benefit between the parties pursuant to a written agreement. The parties shall submit such written agreement to the plan administrator within ninety days after entry of the decree and the permanent orders regarding property distribution in a proceeding for dissolution of marriage, legal separation, or declaration of invalidity of marriage.

(II) A written agreement dividing a public employee retirement benefit shall:

(A) Specify the full legal name of the retirement plan or plans to which it applies;

(B) Specify the name, social security number, and last-known mailing address of the participant and the alternate payee as well as the alternate payee's relationship to the participant;

(C) For an agreement concerning a defined benefit plan, specify the distribution method, as described in subparagraph (III) of this paragraph (c), subject, if the plan permits, to benefit adjustments payable at the same time and in the same manner as any benefit adjustments applied to the participant's distribution;

(D) For an agreement concerning a defined contribution plan, specify the alternate payee's portion of the participant's account as a fixed lump-sum amount, or as a percentage, in either case, as of a specified date, from specific accounts of the participant and, unless

the plan adopts rules and regulations pursuant to paragraph (d) of this subsection (6) permitting the plan to retain the alternate payee's portion of the participant's account, require that distribution to the alternate payee be made within one hundred twenty days after a certified court order approving the agreement has been submitted to and received by the plan;

(E) Not provide for payments to the alternate payee or to the participant for which he or she would not otherwise be eligible if there were no dissolution of marriage, legal separation, or declaration of invalidity action pending;

(F) For an agreement concerning a defined benefit plan, not require the plan to pay the alternate payee prior to the date payments commence to the participant or prior to the participant attaining age sixty-five or actual retirement date, whichever date is earlier, or at such later date as the parties may otherwise agree in writing;

(G) For an agreement concerning a defined benefit plan, provide that the alternate payee's rights to payments terminate upon the involuntary termination of benefits payable to the participant or upon the death of the alternate payee, whichever occurs first, unless the parties agree to elect, or have already elected, a benefit option under the plan that provides for a cobeneficiary benefit to the alternate payee;

(H) Provide that the manner of payment shall be in a form or type permissible under the plan. The agreement shall not require through this subsection (6) the payment of a benefit, benefit amount, or distribution option not otherwise set out in the plan document or statute.

(I) Not require the plan to pay benefits that are already required to be paid to another alternate payee or are already subject to an assignment or lien;

(J) Specify that it shall apply to successor plans;

(K) Comply with any rules or procedures promulgated pursuant to paragraph (d) of this subsection (6); and

(L) Specify that, once approved by the court, the order approving the agreement shall be certified by the clerk of the court and submitted to and received by the retirement plan at least thirty days before the plan may make its first payment.

(III) The written agreement between the parties described in subparagraph (II) of this paragraph (c) shall contain only one method or formula to be applied to divide the defined benefit plan. For purposes of sub-subparagraph (C) of subparagraph (II) of this paragraph (c), the parties may select any one of the following methods by which to divide the defined benefit plan:

(A) A fixed monetary amount;

(B) A fixed percentage of the payment to the participant;

(C) The time-rule formula determined by dividing the number of months of service credit acquired under the plan during the marriage as set forth in the court's order by the number of months of service credit in such plan at the time of the participant's retirement as determined by the plan, which quotient shall be multiplied by a percentage specified in the court's order, and the product thereof shall be further multiplied by the amount of the payment to the participant at the date of retirement;

(D) A formula determined by dividing the number of months of service credit acquired under the plan during the marriage as set forth in the court's order by the number of months of service credit in such plan as of the date of the decree as determined by the plan, regardless of when the participant is expected to retire, which quotient shall be multiplied by a percentage specified in the court's order, and the product thereof shall be further multiplied by the amount of the payment the participant would be entitled to receive as if the participant were to retire and receive an unreduced benefit on the date of the decree; or

(E) Any other method or formula mutually agreed upon by the parties that specifies a dollar amount or percentage payable to the alternate payee.

(d) The trustees or the administrator of each retirement plan may promulgate rules or procedures governing the implementation of this subsection (6) with respect to public employee retirement plans that they administer. Such rules or procedures may include the requirement that a standardized form be used by the parties and the court for an order approving the parties' agreement to be effective as well as other provisions consistent with the purpose of this subsection (6).



(e) Compliance with the provisions of this subsection (6) by a public employee retirement plan shall not subject the plan to any portions of the federal "Employee Retirement Income Security Act of 1974", as amended, that do not otherwise affect governmental plans generally. Any plan that reasonably complies with an order approving an agreement entered into pursuant to this subsection (6) shall be relieved of liability for payments made to the parties subject to such order.

(f) A court shall have no jurisdiction to enter an order dividing a public employee retirement benefit except upon written agreement of the parties pursuant to this subsection (6). A court shall have no jurisdiction to modify an order approving a written agreement of the parties dividing a public employee retirement benefit unless the parties have agreed in writing to the modification. A court may retain jurisdiction to supervise the implementation of the order dividing the retirement benefits.

(7) (a) For purposes of subsections (1) to (4) of this section only, except with respect to gifts of nonbusiness tangible personal property, gifts from one spouse to another, whether in trust or not, shall be presumed to be marital property and not separate property. This presumption may be rebutted by clear and convincing evidence.

(b) For purposes of subsections (1) to (4) of this section only, "property" and "an asset of a spouse" shall not include any interest a party may have as an heir at law of a living person or any interest under any donative third party instrument which is amendable or revocable, including but not limited to third-party wills, revocable trusts, life insurance, and retirement benefit instruments, nor shall any such interests be considered as an economic circumstance or other factor.

(c) (I) The provisions of this subsection (7) shall apply to all causes of action filed on or after July 1, 2002. The provisions of this subsection (7) shall also apply to all causes of action filed before said date in which a final property disposition order concerning matters affected by this subsection (7) was not entered prior to July 1, 2002.

(II) For purposes of this paragraph (c), "final property disposition order" means a property disposition order for which the time to appeal has expired or for which all pending appeals have been finally concluded.

**Source:** L. 71: R&RE, p. 525, § 1. C.R.S. 1963: § 46-1-13. L. 73: pp. 553, 555, §§ 6, 7, 12. L. 75: IP(1) amended, p. 210, § 25, effective July 16. L. 96: (6) added, p. 1457, § 1, effective January 1, 1997. L. 97: (6)(a) amended, p. 100, § 1, effective March 24. L. 98: (6)(c)(I) and (6)(c)(II)(C) amended and (6)(c)(III) added, p. 355, § 1, effective August 5; (1)(c) amended, p. 1397, § 40, effective February 1, 1999. L. 99: (6)(c)(I), (6)(c)(II)(L), and (6)(f) amended, p. 46, § 1, effective March 15. L. 2002: (6)(a)(I) amended, p. 138, § 1, effective March 27; IP(1), IP(2), (3), and (4) amended and (7) added, p. 1054, § 1, effective June 1. L. 2004: (6)(a)(I) amended, p. 222, § 5, effective April 1.

**Cross references:** For the federal "Employee Retirement Income Security Act of 1974", see 29 U.S.C. sec. 1001 et seq.

## ANNOTATION

- I. General Consideration.
- II. Division of Property.
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## I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Effects of Reconciliation on Separation Agreements in Colorado", see 51 U. Colo. L. Rev. 399 (1980). For article, "The Economy: Its Effects on Family Law", see 11 Colo. Law. 97 (1982). For article, "Pre-Nuptial Agreements Revisited", see 11 Colo. Law. 1882 (1982). For article, "Marital Property", see 13 Colo. Law. 1209 (1984). For article, "Taxation", which discusses a Tenth Circuit decision dealing with periodic payments as alimony or property settlement, see 61 Den. L.J. 392 (1984). For article, "Domestic Case Update", see 14 Colo. Law. 209 (1985). For article,

"Division of Pension Benefits in Divorce Proceedings", see 14 Colo. Law. 378 (1985). For article, "Cohabitation Agreements in Colorado", see 15 Colo. Law. 979 (1986). For article, "Common Law Marriage in Colorado", see 16 Colo. Law. 252 (1987). For article, "Division of Civil Service Retirement Benefits in Divorce", see 17 Colo. Law. 643 (1988). For article, "Standards for Tracing Marital Property Back to Non-Marital Property", see 17 Colo. Law. 853 (1988). For article, "Determining Benefits for Former Spouses of Military Personnel", see 19 Colo. Law. 1073 (1990). For article, "Classifying Income, Rents, and Profits from Separate Property", see 24 Colo. Law. 1303 (1994). For article, "Marital or Separate Property: An Overview for Practitioners", see 24 Colo. Law. 571 (1995). For article, "Employee Stock Options and Restricted Shares: Determining and Dividing the Marital Property", see 25 Colo. 87 (October 1996). For article, "Valuing Business Goodwill in a Divorce", see 26 Colo. Law. 53 (April 1997). For article, "Establishing Separate Property Through Asset Tracing After Burford", see 28 Colo. Law. 55 (January 1999). For article, "How Income Taxes Affect Property Settlements", see 29 Colo. Law. 55 (January 2000). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (February 2000). For article, "Retirement Benefits in Divorce: Mixing, Matching, and Offsetting", see 29 Colo. Law. 67 (June 2000). For article, "Balanson: Drafting Trust to Deflect the Spousal Creditor", see 30 Colo. Law. 131 (October 2001). For article, "Planning for Community Property in Colorado", see 31 Colo. Law. 79 (June 2002). For article, "Complex Financial Issues in Family Law Cases", see 37 Colo. Law. 53 (October 2008). For article, "Determining When Trusts are Property for the Purpose of Equitable Division", see 39 Colo. Law. 39 (June 2010).

**Annotator's note.** Since § 14-10-113 is similar to repealed § 46-1-5(2), C.R.S. 1963, § 46-1-5, CRS 53, CSA, C. 56, § 8, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Subsection (7)(b) is not unconstitutionally retrospective.** In re Balanson, 107 P.3d 1037 (Colo. App. 2004).

**Uniform Dissolution of Marriage Act provides separate sections that govern the different elements of a dissolution order,** specifically property disposition, maintenance, child support, and attorney fees. The court is required to make separate orders regarding these elements based on separate considerations, and may not commingle one element with another. In re Huff, 834 P.2d 244 (Colo. 1992).

**There is a distinction between maintenance awards and property settlements.** Property divisions are intended to accomplish a just appor-

tionment of marital property over time, whereas maintenance is intended to be a substitute for marital support that can be used, for example, to ease a spouse's transition into the work force and prevent the spouse from becoming dependent on public assistance. In re Wise, 264 B.R. 701 (Bankr. D. Colo. 2001).

Division of property is mandatory under this section, whereas an award of maintenance is discretionary under § 14-10-114. In re Wise, 264 B.R. 701 (Bankr. D. Colo. 2001).

**This statute is a legislative recognition of preexisting Colorado law.** Imel v. United States, 375 F. Supp. 1102 (D. Colo. 1973), aff'd, 523 F.2d 853 (10th Cir. 1975).

**Awarding of attorney fees is discretionary with trial court** and will not be disturbed on review if supported by the evidence. In re Newman, 44 Colo. App. 307, 616 P.2d 982 (1980), aff'd in part and rev'd on other grounds, 653 P.2d 728 (Colo. 1982); In re Kiefer, 738 P.2d 54 (Colo. App. 1987).

**Equitable lien created by decree of dissolution.** Where wife was ordered to quitclaim her undivided one-third interest in the family home to husband and his mother in exchange for a promissory note representing the value of such interest, an equitable lien to prevent unjust enrichment was imposed on the property because repayment of the note was conditioned in part on events involving disposition of the property. Leyden v. Citicorp Indus. Bank, 782 P.2d 6 (Colo. 1989).

**The needs of the children are of paramount importance;** therefore, statutory provisions may not be modified by agreement if to do so would affect the rights of the child whom the statute is designed to protect. In re Miller, 790 P.2d 890 (Colo. App. 1990).

**Attorney fees are not a non-challengeable marital debt under this section.** In re Rieger, 827 P.2d 625 (Colo. App. 1992).

**Partition of marital property pursuant to § 38-28-101 after the entry of the final dissolution decree is permissible,** but the partition order must not conflict with explicit provisions of the decree. Wilson v. Prentiss, 140 P.3d 288 (Colo. App. 2006).

**Applied in** In re Mitchell, 195 Colo. 399, 579 P.2d 613 (1978); Mayer v. District Court, 198 Colo. 199, 597 P.2d 577 (1979); In re Engelman, 43 Colo. App. 531, 605 P.2d 490 (1979); In re Hartford, 44 Colo. App. 303, 612 P.2d 1163 (1980); In re Carney, 631 P.2d 1173 (Colo. 1981); In re Stewart, 632 P.2d 287 (Colo. App. 1981); In re Everhart, 636 P.2d 1321 (Colo. App. 1981); In re Manzo, 659 P.2d 669 (Colo. 1983).

## II. DIVISION OF PROPERTY.

### A. In General.

**Law reviews.** For article, "Property or Ex-pectancy: The Division of Trust Assets at Dis-



solution of Marriage", see 30 Colo. Law. 63 (February 2001). For article, "The Continuing Evolution of Balanson: Trusts as Property in Divorce", see 34 Colo. Law. 79 (June 2005).

**This statute makes property division mandatory.** *Imel v. United States*, 375 F. Supp. 1102 (D. Colo. 1973), *aff'd*, 523 F.2d 853 (10th Cir. 1975); *In re Wise*, 264 B.R. 701 (Bankr. D. Colo. 2001).

Where the trial court has the necessary jurisdiction, over not only the subject matter but the persons as well, it is required to divide the marital property in accordance with this section. *In re Quay*, 647 P.2d 693 (Colo. App. 1982).

**Language of subsection (1)(c) is not mandatory.** *In re Warrington*, 44 Colo. App. 294, 616 P.2d 177 (1980).

**Colorado is not a community property state.** *In re Ellis*, 36 Colo. App. 234, 538 P.2d 1347 (1975), *aff'd*, 191 Colo. 317, 552 P.2d 506 (1976).

**The statutory mandate to distribute property equitably does not require equality.** *In re Warrington*, 44 Colo. App. 294, 616 P.2d 177 (1980); *In re Weiss*, 695 P.2d 778 (Colo. App. 1984); *In re Fenimore*, 782 P.2d 872 (Colo. App. 1989); *In re Bookout*, 833 P.2d 800 (Colo. App. 1991), *cert. denied* 846 P.2d 189 (Colo. 1993); *In re Morehouse*, 121 P.3d 264 (Colo. App. 2005).

The parties need not be accorded equal shares in the marital estate. *In re Boyd*, 643 P.2d 804 (Colo. App. 1982).

It has been held repeatedly that in matters of division of property the trial court is imbued with broad discretion, and that the mandate to distribute property equitably does not require equality. *In re Lodholm*, 35 Colo. App. 411, 536 P.2d 842 (1975).

Facially disproportionate division of property not inequitable where economic circumstances of each spouse were properly considered. *In re Sorensen*, 679 P.2d 612 (Colo. App. 1984).

There is no requirement that the court divide property with precise equality in order to achieve an equitable division. *In re Howard*, 42 Colo. App. 457, 600 P.2d 93 (1979).

Increases in separate property or marital property do not mandate that such property be divided equally, nor does it necessarily preclude the award of substantially all of such property to only one spouse. *In re Wildin*, 39 Colo. App. 189, 563 P.2d 384 (1977).

A trial judge cannot in all circumstances evaluate marital property with razor-sharp exactness so that each party's share has a precise monetary value. *Moss v. Moss*, 190 Colo. 491, 549 P.2d 404 (1976).

The distribution of marital property must be just and equitable, but need not be necessarily equal. *In re McGinnis*, 778 P.2d 281 (Colo. App. 1989); *In re Jaeger*, 883 P.2d 577 (Colo. App. 1994); *In re Goldin*, 923 P.2d 376 (Colo. App.

1996); *In re Stumpf*, 932 P.2d 845 (Colo. App. 1996); *In re Eisenhuth*, 976 P.2d 896 (Colo. App. 1999).

**This section authorizes the trial court to make an equitable and just division of the property of persons involved in divorce proceedings** as that property is shown to exist at the time of the order entered with regard thereto. *Menor v. Menor*, 154 Colo. 475, 391 P.2d 473 (1964).

The dissolution court has jurisdiction to grant relief but only in equity and not at law. Tort claims concerning property that was the subject of the dissolution court may not be joined into an otherwise equitable dissolution proceeding. *In re Mockelmann*, 121 P.3d 335 (Colo. App. 2005).

**Court may not become a surrogate attorney for party who has chosen not to appear before the court in order to reach an equitable division of marital property.** Therefore, trial court did not abuse its discretion in failing to elicit evidence concerning husband's current earnings, the use husband made of funds he withdrew from the joint bank account, or the classification of certain property as separate or marital. *In re Eisenhuth*, 976 P.2d 896 (Colo. App. 1999).

**The public policies to be furthered under this act include dividing of assets equitably and mitigating the harm to spouses and children.** These policies take precedence over any contract arguments that may be raised by either spouse. Thus, the trial court was correct in refusing husband's indemnification argument and in interpreting the divorce decree as requiring the husband to compensate the wife for the fair market value of business property apportioned to her in the equitable distribution. *In re Plesich*, 881 P.2d 379 (Colo. App. 1994).

**It is not objectionable that an exact dollar amount of the husband's contribution to assets cannot be determined from the testimony,** as it is not a prerequisite to a fair and equitable division of property that such distribution be made in exact proportion to contribution of funds. *Thompson v. Thompson*, 30 Colo. App. 57, 489 P.2d 1062 (1971).

**There is no mathematical formula for establishing a just and equitable property settlement,** or alimony, or support. *Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972).

**It is improper for the court to continue a joint or common tenancy between divorced spouses in marital property.** Rather, in dividing the marital property, the court should leave to each party a definable portion of ownership. *In re Paul*, 821 P.2d 925 (Colo. App. 1991).

In dividing marital property, specific findings regarding value of assets are not required as long as basis for decision of trial court is apparent from its findings. *In re Sharp*, 823 P.2d 1387 (Colo. App. 1991).

**This issue of property division in a divorce action is not one of marital fault, but whether the wife is entitled thereto** by reason of having contributed to the accumulation or preservation of the assets sought to be divided, and whether her conduct was such as to justify her sharing in a division of such property. *Liggett v. Liggett*, 152 Colo. 110, 380 P.2d 673 (1963); *Kraus v. Kraus*, 159 Colo. 331, 411 P.2d 240 (1966); *Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972).

**Although marital fault or misconduct may not be considered by the trial court when it is dividing marital assets, economic fault may be considered.** Economic fault comes into play in extreme cases, such as a spouse's dissipation of marital assets in the contemplation of divorce, and it must be strictly confined so as not to circumvent the prohibition against consideration of marital fault. In *re Jorgenson*, 143 P.3d 1169 (Colo. App. 2006).

**Formerly, it was only one of the elements to be taken into consideration, and in the absence of moral delinquency or a complete disregard of the marriage vows, individual fault should not have acted as an obstacle to an equitable division of property.** *Bell v. Bell*, 156 Colo. 513, 400 P.2d 440 (1965); *Schrader v. Schrader*, 156 Colo. 521, 400 P.2d 675 (1965).

**Maintenance and property settlement must be considered together** to achieve just result in dissolution proceedings. If an order dividing property cannot stand, the provision for maintenance must also be set aside to permit the trial court to consider both matters in relation to each other upon remand. In *re Lord*, 626 P.2d 698 (Colo. App. 1980), appeal dismissed, 653 P.2d 385 (Colo. 1982).

**Property division must precede consideration of maintenance.** In *re Jones*, 627 P.2d 248 (Colo. 1981); In *re Wise*, 264 B.R. 701 (Bankr. D. Colo. 2001).

**Fact that the parties waived maintenance has no bearing on the classification of stock shares as marital property;** thus, wife's argument that because the stock purchase was made through a payroll deduction it constituted her compensation and could not be divided as property or considered maintenance, since both parties waived maintenance, was misplaced. In *re Huston*, 967 P.2d 181 (Colo. App. 1998).

**There is a qualitative difference between a maintenance award and a division of property.** A property division is final and non-modifiable absent conditions justifying relief from judgment. In *re Wells*, 833 P.2d 797 (Colo. App. 1991).

**Statutory criteria for dividing property** is general in nature, and the trial court has wide discretion in dividing marital property to accomplish a just result. In *re Jackson*, 698 P.2d 1347 (Colo. 1985).

**Division of property must be based on the situation of the parties at the time of the decree** rather than that at the time of their marriage. *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946); *Stephenson v. Stephenson*, 134 Colo. 96, 299 P.2d 1095 (1956); *Menor v. Menor*, 154 Colo. 475, 391 P.2d 473 (1964).

**Subsection (1)(c) requires the trial court to consider the economic circumstances of the respective spouses at the time of the hearing relating to the division of marital property.** Therefore, the trial court erred as a matter of law in considering the economic circumstances of the parties at the time of the dissolution, rather than at the time of the permanent orders, which occurred in the year following the entry of the dissolution. In *re Burford*, 26 P.3d 550 (Colo. App. 2001).

**Every property division action depends on the particular facts of each case.** *Granato v. Granato*, 130 Colo. 439, 277 P.2d 236 (1954).

**Many factors enter into the determination of what division of property shall be made in the event of a divorce,** among these are the value of the estate to be divided; the financial condition of the parties; the ability of each spouse to earn money; how the property was acquired; the age and status of the parties, and all pertinent facts and circumstances bearing on the question. *Nunemacher v. Nunemacher*, 132 Colo. 300, 287 P.2d 662 (1955); *Brigham v. Brigham*, 141 Colo. 41, 346 P.2d 302 (1959); *Kraus v. Kraus*, 159 Colo. 331, 411 P.2d 240 (1966); *Larrabee v. Larrabee*, 31 Colo. App. 493 504 P.2d 358 (1972).

**Spouse's earning capabilities** are properly part of the "economic circumstances" the court must consider in compliance with subsection (1). In *re Faulkner*, 652 P.2d 572 (Colo. 1982).

**Future social security benefits** may be properly considered as part of the "economic circumstances" the court must consider in compliance with subsection (1). The trial court may not, however, directly distribute marital property to offset the computed value of social security benefits. In *re Morehouse*, 121 P.3d 264 (Colo. App. 2005).

**Contribution to an increase in separate property is an important factor,** but not the sole factor to consider in dividing such property. In *re Wildin*, 39 Colo. App. 189, 563 P.2d 384 (1977).

**Value of husband's interest in corporation considered in determining division of property.** *Moss v. Moss*, 190 Colo. 491, 549 P.2d 404 (1976).

**Factors such as occupational experience, coupled with education, training, and business background** should also be considered in determining what division should be made of property. *Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972).



The award of rights in property to the wife was only another factor in the determination of the interests of the parties in the realty which they owned. *McDonald v. McDonald*, 150 Colo. 492, 374 P.2d 690 (1962).

That the husband had transferred his property to his brother with fraudulent intent, and that it was reasonable to presume that he would not deal fairly, frankly, and openly with his wife and child, were facts properly to be considered by the court in making division of property. *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946).

Where the division of property was not in the nature of alimony or support money for the minor children, but was an equitable division based upon the fact that the wife, during marriage, in addition to the usual household duties, performed services that contributed to the husband's business advantage, a division of property could be ordered in addition to alimony. *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946).

The fact that much of the husband's property came by inheritance did not preclude the court from making an equitable division of property between a husband and a wife who had performed services contributing to her husband's business advantage, but was only one of many facts to be considered by the court. *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946).

Inherited property was formerly not per se excluded from consideration by the court in making a determination of the property rights of the parties. *Santilli v. Santilli*, 169 Colo. 49, 453 P.2d 606 (1969).

Property division could be made even where a wife is not entitled to alimony. *Britt v. Britt*, 137 Colo. 524, 328 P.2d 947 (1958).

It is not a necessary prerequisite that a wife show that she has contributed by funds or efforts to the acquiring of any specific property awarded her. *Britt v. Britt*, 137 Colo. 524, 328 P.2d 947 (1958); *Bell v. Bell*, 156 Colo. 513, 400 P.2d 440 (1965); *Santilli v. Santilli*, 169 Colo. 49, 453 P.2d 606 (1969).

But whether the wife has contributed to or in some manner aided in the accumulation or preservation of the assets sought to be divided must be ascertained. *Kraus v. Kraus*, 159 Colo. 331, 411 P.2d 240 (1966).

Where by her services beyond the usual duties of a homemaker, a wife contributes either funds or services which enable the husband to increase his property holdings, or to preserve those already held, the wife is entitled upon divorce to an equitable award of money or property as may be justified by the circumstances of the parties. *Britt v. Britt*, 137 Colo. 524, 328 P.2d 947 (1958).

The pecuniary resources of the husband were not to be regarded as a basis for a

division of property, which was not the purpose of an allowance for the support of the wife, but they had a bearing upon the condition in life of the parties and thus upon the necessities of the wife, for as had been recognized in considering the liability of a husband for necessities supplied to his wife, the term "necessaries" in this connection was not confined to articles of food or clothing required to sustain life, but had a much broader meaning and included such articles for use by a wife as were suitable to maintain her and the family according to the property and condition in life of her husband. *Vines v. Vines*, 137 Colo. 449, 326 P.2d 662 (1958).

Where a wife advanced \$8,000 from her own funds to her husband to purchase property, a finding that the husband was indebted to the wife in such amount and that she should have had a lien on property to secure repayment thereof, being amply supported by the evidence, was not erroneous. *Flor v. Flor*, 148 Colo. 514, 366 P.2d 664 (1961).

Where a wife in outburst of emotion, damaged or destroyed husband's personal effects, it was not error to award husband value thereof against the wife. *Cohan v. Cohan*, 150 Colo. 249, 372 P.2d 149 (1962).

It was not a prerequisite to a fair and equitable division of property that the wife must show that she had contributed by funds or effort to the acquisition of the specific property awarded to her. *Schrader v. Schrader*, 156 Colo. 521, 400 P.2d 675 (1965).

Where the husband was the owner of a minority stock interest and was not the owner of the home, piercing the corporate veil to determine the true value of an interest in a closely held corporation did not allow for an order that part of the corporation's property should be distributed to or used by a legal stranger, and the wife was not entitled to corporate assets, but to a sum of money, or possibly even shares of stock, based upon the fair value of her husband's interest. *Kalcevic v. Kalcevic*, 156 Colo. 151, 397 P.2d 483 (1964).

A dissolution of a marriage must be effective before any court had power to decree a division of property between a husband and wife. *Ikeler v. Ikeler*, 84 Colo. 429, 271 P. 193 (1928); *McCoy v. McCoy*, 139 Colo. 105, 336 P.2d 302 (1959).

Otherwise, the parties would still be married, and while that status continues there is always the possibility of a termination of the separation, and a court is therefore without power to finally determine the property rights of the parties. *Vines v. Vines*, 137 Colo. 449, 326 P.2d 662 (1958).

This section does not prohibit a hearing on the parties' property settlement before the entry of the divorce decree, but merely provides that at the time of the issuance of the

divorce decree, or thereafter, on application the court may make orders relating to property divisions. *Kalcevic v. Kalcevic*, 156 Colo. 151, 397 P.2d 483 (1964).

**Personal service upon nonresident is not prerequisite to division of property.** In *re Ramsey*, 34 Colo. App. 338, 526 P.2d 319 (1974).

**Jurisdiction over petitioner extends to property in state.** Where petitioner has possession of property located in Colorado, the property being specifically described in the petition as an asset subject to disposition, the court acquires control of the property by virtue of its jurisdiction over petitioner, and the court thereby obtains jurisdiction to determine the appropriate disposition of that property. In *re Ramsey*, 34 Colo. App. 338, 526 P.2d 319 (1974).

Where the trial court has jurisdiction to divide property of the parties by virtue of the fact that the property was located in Colorado, it can properly adjudicate the rights of the parties with respect to property owned by them in Colorado. In *re Wilson*, 653 P.2d 85 (Colo. App. 1982).

**Where trial court had jurisdiction to divide a partnership interest equitably, wife had standing to challenge partnership's valuation of husband's partnership interest and a legally cognizable interest in its value.** In *re Nevarez*, 170 P.3d 808 (Colo. App. 2007).

**The trial court did not exceed its jurisdiction in requiring the husband to execute and deliver deeds conveying his interest in the property to the wife, because although it has generally been held that a divorce court in one state does not have the power directly to affect, by means of its decree, the title to real property situated in another state, where the decree itself does not operate as a conveyance, but was wholly an in personam decree requiring that a party under the court's jurisdiction execute the conveyance, the court did not exceed its jurisdiction.** *Larrabee v. Larrabee*, 31 Colo. App. 493, 504 P.2d 358 (1972).

**"Date of the hearing".** Where the hearing on disposition of property takes more than one day and there is a substantial interval between hearing days, the "date of the hearing" referred to in subsection (5) is the day when the last evidence was presented on this matter. In *re Femmer*, 39 Colo. App. 277, 568 P.2d 81 (1977).

**Where the trial court had jurisdiction to divide property at the time of entry of a final decree of divorce, but did not do so, nor then reserve the matter for further consideration, it lost jurisdiction to thereafter make a valid division of such property.** *Triebelhorn v. Turzanski*, 149 Colo. 558, 370 P.2d 757 (1962).

**Because former § 46-1-5(2), C.R.S. 1963, did not contemplate or authorize the court to exercise continuing supervisory powers over the management of the property subject to division.**

*Larrick v. Larrick*, 30 Colo. App. 327, 491 P.2d 1401 (1971).

**Former § 46-1-5(2), C.R.S. 1963, required that an order dividing the property of the parties to a divorce proceeding be made either at the time the divorce decree was issued, or within such "reasonable time thereafter as may be set by the court at the time of the issuance of said divorce decree".** *Larrick v. Larrick*, 30 Colo. App. 327, 491 P.2d 1401 (1971).

**Where the trial court retained the jurisdiction to award such alimony as may be just upon a proper showing, in no way altered the finality of a portion of the decree which determined the rights and interests of the parties in the real estate.** *McDonald v. McDonald*, 150 Colo. 492, 374 P.2d 690 (1962).

**The trial court retained jurisdiction of the controversy concerning the property settlement between these divorced parties as to matters affecting their property rights following the death of the husband.** *Sarno v. Sarno*, 28 Colo. App. 598, 478 P.2d 711 (1970).

**Trust where wife settlor and sole income beneficiary.** Where wife had established a trust with herself as sole income beneficiary, the court had jurisdiction, in a subsequent divorce action, to order the trustee to make payments from the trust to the husband. In *re Kaladic v. Kaladic*, 41 Colo. App. 419, 589 P.2d 502 (1978).

**The trial court in the absence of agreement between the parties to the divorce action could not, over the objection of the wife, order that her share in the property division be impressed with a trust.** *Ferguson v. Olmsted*, 168 Colo. 374, 451 P.2d 746 (1969).

**Reconsideration of property division to correct error unnecessary absent contest.** When neither party contests a trial court's division of property it is not necessary that the court be able to reconsider the property division in order to correct error in the provisions for maintenance and attorney fees. In *re Jones*, 627 P.2d 248 (Colo. 1981).

**Payment of interest on spouse's equity in house.** The wife may be required to pay interest on the husband's share of the equity in the house which was awarded to the wife, for the period between the dissolution of marriage and payment of the equity. In *re Garcia*, 638 P.2d 848 (Colo. App. 1981).

Interest on portion of sale price of marital residence representing husband's share is to be calculated from date specified in decree that payment of such amount become due, not date of sale. In *re Schutte*, 721 P.2d 160 (Colo. App. 1986).

**Transfer is not taxable event.** When, under this section, a property settlement agreement is entered into providing for a transfer of property from husband to wife in acknowledgment of the wife's contribution to the accumulation of the marital estate, or a decree of the divorce court



requires such transfer because of wife's contributions to the accumulation of the family estate, and the transfer is not made in satisfaction of the husband's obligation for support, the transfer is not a taxable event giving rise to capital gains tax liability for purposes of federal income taxation. *Imel v. United States*, 375 F. Supp. 1102 (D. Colo. 1973), *aff'd*, 523 F.2d 853 (10th Cir. 1975).

**Acts of depletion of marital estate** are relevant considerations in making a division of property and not an imputation of marital misconduct on the part of a spouse. In *re Paulsen*, 677 P.2d 1389 (Colo. App. 1984).

**Spouse may be required to apply future earnings against present marital debts.** Subsection (2)(c) is not violated solely because the award forces the husband to apply future earnings to retire present debts of the marital estate. In *re Faulkner*, 652 P.2d 572 (Colo. 1982).

**A spouse's contribution to the professional education and career of the other spouse must be considered** in the distribution of property pursuant to this section. In *re Speirs*, 956 P.2d 622 (Colo. App. 1997).

#### B. Definition of Property.

**This section does not define "property"** but merely specifies that the "marital property" is to be divided "in such proportions as the court deems just". In *re Ellis*, 36 Colo. App. 234, 538 P.2d 1347 (1975), *aff'd*, 191 Colo. 317, 552 P.2d 506 (1976).

**The legislature intended the term "property" to be broadly inclusive**, as indicated by its use of the qualifying adjective "all" in subsection (2) of this section. In *re Graham*, 194 Colo. 429, 574 P.2d 75 (1977).

**There are necessary limits upon what may be considered "property"**, and the concept as used by the general assembly is other than that usually understood to be embodied within the term. In *re Graham*, 194 Colo. 429, 574 P.2d 75 (1977).

**An insurance policy with no cash surrender value does not represent any asset proper for consideration** on the theory that it is "property" which is subject to equitable division between the parties. *Menor v. Menor*, 154 Colo. 475, 391 P.2d 473 (1964).

**Degree is not property.** Where a spouse provides financial support while the other spouse acquires a degree, the degree is not considered property. In *re Graham*, 194 Colo. 429, 574 P.2d 75 (1977); In *re Olar*, 747 P.2d 676 (Colo. 1987).

At best, education is an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses. In *re Graham*, 38 Colo. App. 130, 555 P.2d 527 (1976), *aff'd*, 194 Colo. 429, 574 P.2d 75 (1978); In *re Olar*, 747 P.2d 676 (Colo. 1987).

And is not subject to division under this section. Although a litigant's education is a factor to be considered, among many others, in arriving at an equitable property division and in determining matters of maintenance and child support, it is not property subject to division under this section. In *re Graham*, 38 Colo. App. 130, 555 P.2d 527 (1976), *aff'd*, 194 Colo. 429, 574 P.2d 75 (1978); In *re Olar*, 747 P.2d 676 (Colo. 1987); In *re Speirs*, 956 P.2d 622 (Colo. App. 1997).

**Husband's beneficial interest in discretionary trust is not "property"** subject to division as such under this section. In *re Rosenblum*, 43 Colo. App. 144, 602 P.2d 892 (1979).

Husband's rights in a discretionary trust are to be considered by the court as any other "economic circumstance" of the husband in determining a just division of the marital property pursuant to subsection (1)(c) and as a "relevant factor" in making an award of maintenance under § 14-10-114 (2). In *re Rosenblum*, 43 Colo. App. 144, 602 P.2d 892 (1979).

**Wife's remainder interest in her grandfather's irrevocable trust was a gift, vested long before her marriage to husband, and was therefore separate property.** In *re Dale*, 87 P.3d 219 (Colo. App. 2003).

**Remainder interests in irrevocable trusts are property for purposes of the disposition of property in dissolution actions.** Such interests may present only a right to future enjoyment and are subject to complete divestment or defeasance, but they are certain, fixed interests subject only to the condition of survivorship and may not be withheld by the trustee in his or her discretion. Thus, they are distinct from interests in a discretionary or revocable trust, which are viewed as mere expectancies. In *re Dale*, 87 P.3d 219 (Colo. App. 2003).

**Wife's interest in family trust constitutes "property" and is not a "mere expectancy"**, despite the fact that wife's father must pay the entire net income from the trust to himself during his lifetime and has the discretion to invade the corpus for his own support, care, and maintenance. Because the trust was created during the marriage, wife's interest constitutes a gift that is excepted from the definition of marital property, but appreciation on wife's interest in the trust during the course of the marriage does constitute marital property. In *re Balanson*, 25 P.3d 28 (Colo. 2001).

**Trial court properly determined that any increase in the value of wife's vested remainder interest in an irrevocable trust during the marriage was marital property subject to division under subsection (4).** In *re Dale*, 87 P.3d 219 (Colo. App. 2003).

**Court found husband's vested remainder interest in his father's trust to be a property interest**, where father possessed the power to revoke the trust during his lifetime but died

without exercising that power. Husband's remainder interest in his father's trust was, therefore, subject to depletion only by exercise of the trustee's right to invade the corpus of the trust for the benefit of husband's mother, which right did not convert husband's vested remainder property interest into a mere expectancy. In re Gorman, 36 P.3d 211 (Colo. App. 2001).

**Court found husband's vested remainder interest in his mother's trust to be a property interest**, even though the mother, still living at the time of the permanent orders, had the power to revoke the trust during her lifetime. The mother's exercise of her right to revoke is a condition subsequent, and unless the event occurs, husband's interest remains vested. In re Gorman, 36 P.3d 211 (Colo. App. 2001).

**The legislative history shows that subsection (7)(b) was adopted to overturn the holding in Gorman** that a vested remainder interest in a revocable or modifiable trust is a property interest subject to division. The legislative history reveals that the general assembly relied upon the plain meaning of "heir at law" and that the statute applies only to remainder interests in trusts that are revocable or amendable and not to remainder interests in irrevocable trusts. In re Dale, 87 P.3d 219 (Colo. App. 2003).

**The term "heir at law" in subsection (7)(b) pertains to any interest or resource a spouse may expect to inherit from his or her parent were the parent to die intestate.** As a practical consequence of that language, the trial court may not consider any such prospective inheritance as either a property interest or as an economic circumstance. By including the phrase "heir at law," the statute thus treats intestate expectancies consistently with interests under a donative third-party instrument that can be revoked or changed. In re Dale, 87 P.3d 219 (Colo. App. 2003).

**Interest in a trust cannot be classified as property until that trust becomes irrevocable under subsection (7)(b).** In re Balanson, 107 P.3d 1037 (Colo. App. 2004).

**A life insurance policy lacking cash surrender value is not "property"** since it has not objective, tangible, or vested value that can be divided. McGovern v. Broadstreet, 720 P.2d 589 (Colo. App. 1985).

**Discretionary trust corpus cannot be considered the separate property of a beneficiary** for purposes of division of property. This is because the beneficiary of such trust has no contractual or enforceable right to income or principal from the trust, cannot force any action by the trustee, cannot assign an interest in the trust, and because such interest cannot be reached by either party's creditors. In re Jones, 812 P.2d 1152 (Colo. 1991).

**When beneficiary has no interest in the corpus, and right to control how the corpus is invested,** the income is a mere gratuity deriving

from the beneficence of the settlors. In re Guinn, 93 P.3d 568 (Colo. App. 2004).

**In the absence of some ownership interest in the corpus itself,** even a mandatory right to unrealized future discretionary allocations of income is an expectancy arising from the largess of the settlors and does not constitute property. In re Guinn, 93 P.3d 568 (Colo. App. 2004).

**Income received by the wife from the discretionary trust during the marriage is properly considered a gift and thus not divisible** pursuant to subsection (2)(a). In re Jones, 812 P.2d 1152 (Colo. 1991).

**Wife's expectancy interest in a discretionary trust should be considered an economic circumstance** pursuant to subsection (1)(c). In re Jones, 812 P.2d 1152 (Colo. 1991).

**Wife's future anticipated interest in German "social security" benefits is an economic circumstance** that can be considered pursuant to subsection (1)(c) in the equitable division of the marital estate. In re Lockwood, 971 P.2d 264 (Colo. App. 1998).

**Trial court did not err in concluding that an irrevocable trust** of which wife was beneficiary but over which wife had no control over the principal or the income and from which wife had no right to demand or request distributions was not marital property but an "economic circumstance" to be considered in arriving at an equitable property division. In re Pooley, 996 P.2d 230 (Colo. App. 1998).

**Vested and matured military retirement pay accrued during all or part of a marriage constitutes marital property subject to equitable distribution in a marriage proceeding.** In re Gallo, 752 P.2d 47 (Colo. 1988).

The key to an equitable distribution is fairness, not mathematical precision. Two possible methods of valuation are the present cash value method and the reserve jurisdiction method. In re Gallo, 752 P.2d 47 (Colo. 1988).

The rule that military retirement pay is marital property subject to equitable distribution in a marriage proceeding should be applied prospectively only. In re Wolford, 789 P.2d 459 (Colo. App. 1989).

**Trial court, which had personal jurisdiction over husband but lacked the authority to divide the husband's military pension as marital property, did not retain jurisdiction** to divide the pension at a later date. Even though final decree provided that trial court had continuing jurisdiction over the action and that the wife would remain entitled to any and all military benefits, the court did not have the authority to divide military pension as a result of subsequent case law declaring such pensions to be marital property. Language in final decree refers only to the court's continuing authority to divide property as such court had on the date of the final decree. In re Booker, 833 P.2d 734 (Colo. 1992).



**Federal act specifying whether the court has jurisdiction over a military member's pension preempts state rules of procedure governing jurisdiction.** In re Booker, 833 P.2d 734 (Colo. 1992).

**Military retirement benefits subject to distribution as marital property in dissolution of marriage cases are limited to disposable retired pay which, under federal law, excludes disability pay.** The exclusion also applies to that portion of a veteran's retirement pay that is computed using the percentage of disability on the date the veteran is placed on the temporary disability retirement list (TDRL). In re Williamson, 205 P.3d 538 (Colo. App. 2009).

**Because husband was not entitled to a longevity retirement at the time he was placed on the TDRL, no portion of his retirement benefit that is based upon his disability status is distributable to wife pursuant to the parties' separation agreement that required the parties to divide the husband's pension equally according to the time rule formula.** In re Williamson, 205 P.3d 538 (Colo. App. 2009).

**In case where service member had attained twenty or more years of service and was eligible for a longevity retirement when placed on the TDRL, an amount equal to the amount of TDRL pay, as calculated based on husband's percentage of disability when he was placed on the TDRL, must be excluded from the marital property.** Any amounts in excess of that amount may be divided as marital property. In re Poland, 264 P.3d 647 (Colo. App. 2011).

**Trial court did not err in its conclusion that military voluntary separation incentive payments constitute marital property subject to distribution.** Compensation that is deferred until after the dissolution of marriage, but fully earned during the marriage, is marital property. In re Shevlin, 903 P.2d 1227 (Colo. App. 1995).

**Cash received during the marriage pursuant to an employment contract which provides for payments in installments in advance of work is cash on hand and therefore marital property subject to division and not future income.** In re Anderson, 811 P.2d 419 (Colo. App. 1990).

**Compensation deferred until after the dissolution, but earned fully during the marriage, is marital property.** Wife's performance award for her performance as an employee during the marriage was marital property, subject to equitable division. In re Huston, 967 P.2d 181 (Colo. App. 1998).

**Although the interest of the policy owner of a life insurance policy constitutes marital property, the interest of the named beneficiary is only an expectancy and vests no present property interest in the beneficiary.** Gorman-English v. Estate of English, 849 P.2d 840 (Colo. App. 1992).

**A life insurance policy lacking cash surrender value is not "property" since it has no**

**objective, tangible, or vested value that can be divided in a dissolution action.** In re Footitt, 903 P.2d 1209 (Colo. App. 1995).

**Spouse's disability pension payments do not constitute marital property and are not subject to distribution in a dissolution of marriage action.** Such a distribution would contravene the legislative intent that only the beneficiary receive the disability benefits. In re Peterson, 870 P.2d 630 (Colo. App. 1994).

**However, income received during the marriage from disability benefits becomes a marital asset when it is commingled with marital funds.** Disability payments themselves are not marital property, but they lose their exempt character when commingled with marital assets. In re Green, 169 P.3d 202 (Colo. App. 2007).

**Public employees' retirement association (PERA) disability benefit prior to age 65 replaces future earnings and does not constitute marital property.** In re Hansen, 62 P.3d 1066 (Colo. App. 2002).

**When disabled employee reaches the age of 65, the portion of PERA benefits attributable to years of service before disability constitutes marital property, and the balance remains separate property.** Regardless of employee's recovery or work status, the benefits, excluding the unearned service credit projected until age 65, are more akin to retirement benefits. In re Hansen, 62 P.3d 1066 (Colo. App. 2002).

**A stock option that is not vested does not constitute property.** Only a vested stock option is "property" subjection to a determination of whether it was granted in consideration of past or future services for purpose of ascertaining its marital or separate nature. In re Huston, 967 P.2d 181 (Colo. App. 1998).

**Employee stock option constitutes property for purposes of dissolution only when employee has enforceable right to options.** Whether the stock option is "vested" is not determinative. When an employee has a presently enforceable right under the contract, the stock option is property and not a mere expectancy, regardless of whether the options are presently exercisable. In re Powell, 220 P.3d 952 (Colo. App. 2009).

**Parents' promise to give property to husband in their will does not make the property marital property.** Any interest in a donative third-party instrument that is amendable or revocable, is not marital property subject to division. In re Schmedeman, 190 P.3d 788 (Colo. App. 2008).

**Wife's objection to husband's valid gift of property during the marriage, absent evidence that gift was made in contemplation of divorce, did not preserve wife's right to have property classified as marital property upon dissolution.** Classification and valuation of marital property takes place upon dissolution. Absent

dissipation, “marital” property that no longer exists cannot be valued. *In re Schmedeman*, 190 P.3d 788 (Colo. App. 2008).

**Gifts made from one spouse to the other** during the course of the marriage cannot be presumed to be gifts, nor do they necessarily constitute marital property. To qualify as a “gift”, a transfer of property must involve a simultaneous intention to make a gift, delivery of the gift, and acceptance of the gift. *In re Balanson*, 25 P.3d 28 (Colo. 2001); *In re Amich*, 192 P.3d 422 (Colo. App. 2007).

**Accrued vacation and sick leave time is not marital property subject to division by the court.** Both the value of the unused leave time and the existence of the unused leave time are uncertain and are more analogous to an employee’s unvested stock options or an interest in a discretionary trust. Trial court erred in valuing husband’s accrued vacation and sick time as part of the marital estate. *In re Cardona*, \_\_\_ P.3d \_\_\_ (Colo. App. 2010).

#### C. Discretion of Court.

**The division of property in a divorce action is a matter within the sound discretion of the trial court**, and its judgment will not be disturbed on review unless it is shown that the division made was an abuse of discretion. *Granato v. Granato*, 130 Colo. 439, 277 P.2d 236 (1954); *Todd v. Todd*, 133 Colo. 1, 291 P.2d 386 (1955); *Britt v. Britt*, 137 Colo. 524, 328 P.2d 947 (1958); *Drake v. Drake*, 138 Colo. 388, 33 P.2d 1038 (1959); *Bell v. Bell*, 150 Colo. 174, 371 P.2d 773 (1962); *Cohan v. Cohan*, 150 Colo. 249, 372 P.2d 149 (1962); *Harvey v. Harvey*, 150 Colo. 449, 373 P.2d 304 (1962); *Liggett v. Liggett*, 152 Colo. 110, 380 P.2d 673 (1963); *Bell v. Bell*, 156 Colo. 513, 400 P.2d 440 (1965); *Larrick v. Larrick*, 30 Colo. App. 327, 491 P.2d 1401 (1971); *Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972); *Jekot v. Jekot*, 32 Colo. App. 118, 507 P.2d 473 (1973); *Rayer v. Rayer*, 32 Colo. App. 400, 512 P.2d 637 (1973); *In re Armbeck*, 33 Colo. App. 260, 518 P.2d 300 (1974); *Harrod v. Harrod*, 34 Colo. App. 172, 526 P.2d 666 (1974); *In re Icke*, 35 Colo. App. 60, 530 P.2d 1001 (1974), *aff’d*, 189 Colo. 319, 540 P.2d 1076 (1975); *Moss v. Moss*, 190 Colo. 491, 549 P.2d 404 (1976); *In re Wildin*, 39 Colo. App. 189, 563 P.2d 384 (1977); *In re Carruthers*, 40 Colo. App. 278, 577 P.2d 773 (1977); *In re Schulke*, 40 Colo. App. 473, 579 P.2d 90, cert. denied, 439 U.S. 861, 99 S. Ct. 181, 56 L. Ed.2d 170 (1978); *In re Howard*, 42 Colo. App. 457, 600 P.2d 93 (1979); *In re Garcia*, 638 P.2d 848 (Colo. App. 1981); *In re Hoffman*, 650 P.2d 1344 (Colo. App. 1982); *In re Faulkner*, 652 P.2d 572 (Colo. 1982); *In re Mann*, 655 P.2d 814 (Colo. 1982); *In re Lester*, 647 P.2d 668 (Colo. App. 1982); *In re Seely*, 689 P.2d 1154 (Colo. App. 1984); *In re Sarvis*, 695 P.2d 772 (Colo.

App. 1984); *In re Hulse*, 727 P.2d 876 (Colo. App. 1986); *In re Price*, 727 P.2d 1073 (Colo. 1986); *In re McGinnis*, 778 P.2d 281 (Colo. App. 1989); *In re Stumpf*, 932 P.2d 845 (Colo. App. 1996); *In re Dale*, 87 P.3d 219 (Colo. App. 2003).

The division of marital property is committed to the sound discretion of the trial court and there is no rigid mathematical formula that the court must adhere to. *In re Graham*, 194 Colo. 429, 574 P.2d 75 (1977).

**Judiciary not to interfere with “division” of property.** Whatever the role of judicial solicitude in the division of property, it will not be permitted to interfere with the statutory command that the property be literally and effectively “divided”. *In re Gehret*, 41 Colo. App. 162, 580 P.2d 1275 (1978).

**Property division hearings are equitable in nature** and trial courts have broad discretion to fashion an equitable division of the parties’ property in a dissolution proceeding. *In re Wells*, 850 P.2d 694 (Colo. 1993).

**Under the authority of this section, the trial court is clearly limited in adjusting and dividing the assets** of the husband and wife as between them alone. *Giambrocco v. Giambrocco*, 161 Colo. 510, 423 P.2d 328 (1967).

**Trial court lacks authority to award marital property to the children** of the marriage or to compel a parent to make such a conveyance. *In re Mohrlang*, 85 P.3d 561 (Colo. App. 2003).

**Under this section authorizing a “division of property” in a divorce action, the court may decree a transfer** from the wife to the husband, in a proper case, even of property which he has conveyed to her. *Ikeler v. Ikeler*, 84 Colo. 429, 271 P. 193 (1928).

**It was proper for the trial court to consider contributions of parties to the increase in or accumulation of assets** by means other than direct contribution of capital. *Thompson v. Thompson*, 30 Colo. App. 57, 489 P.2d 1062 (1971).

**Where the parties to a divorce action agreed to submit the partition of real property issue to the court**, rather than incur the expense of a formal statutory partition proceeding, the court, under its broad powers, could have declined to partition at that point, and, in the absence of a final agreement concerning the property, it could either have sold the property and divided the proceeds, or it could have declared that each party would henceforth be a tenant in common. Either course would have been a fair and equitable division of the property. *Jekot v. Jekot*, 32 Colo. App. 118, 507 P.2d 473 (1973).

**Judicial notice of general economic trends**, such as the inflationary trend since the time of the marriage, was proper in considering the



disposition of property. In re Wildin, 39 Colo. App. 189, 563 P.2d 384 (1977).

**A decree of a trial court permitting a wife to keep her separate inherited property and awarding her a division of property** acquired through the joint efforts of the parties, where no alimony is requested or awarded, does not constitute an abuse of discretion. Green v. Green, 139 Colo. 551, 342 P.2d 659 (1959).

**Where stocks and securities acquired solely by a defendant's mother out of her inheritance, and earnings were held in joint tenancy** with defendant, it was error for the trial court to allot one half of the value thereof to defendant in making a division of property as between husband and wife. Stephenson v. Stephenson, 134 Colo. 96, 299 P.2d 1095 (1956).

**Non-marital disability pension payments** may be considered as an economic circumstance in determining maintenance. In re Peterson, 870 P.2d 630 (Colo. App. 1994).

**In a property settlement proceedings in a divorce action, where the evidence disclosed that the wife had contributed substantially** to the family income over a period of years, which enabled the husband to devote virtually all of his earnings to assisting his mother in preserving a valuable piece of business property, through whom he received a substantial inheritance, which he would not have received but for the wife's efforts and contributions during the period, it was error for the court to fail to take such inheritance into consideration in determining the property settlement between the parties. Lee v. Lee, 133 Colo. 128, 293 P.2d 293 (1956).

**A court order empowering the wife to make the selection of the husband's stocks was erroneous** because the division is a function requiring the exercise of judicial discretion, and the danger in delegating full discretion to the wife was that her selection could work to an unfair advantage for her and a decided detriment to the husband's holdings. Santilli v. Santilli, 169 Colo. 49, 453 P.2d 606 (1969).

**Where properties awarded to the husband were heavily encumbered, and the businesses awarded financially involved,** and in addition he was required to pay off a large indebtedness on property awarded to wife plus substantial support for children, evidence offered was insufficient to support such burdensome order. Bell v. Bell, 150 Colo. 174, 371 P.2d 773 (1962).

**Where under facts disclosed, order of division of property in divorce action was so manifestly unfair, inequitable, and unconscionable** as to amount to an abuse of discretion, it will be ordered vacated and set aside. Bell v. Bell, 150 Colo. 174, 371 P.2d 773 (1962).

**No abuse of discretion.** In and of itself, the award of 35 percent of the marital assets is not an abuse of discretion. In re Lodholm, 35 Colo. App. 411, 536 P.2d 842 (1975).

And although distribution was not equal, it certainly was equitable, and thus well within the court's discretion. In re Gercken, 706 P.2d 809 (Colo. App. 1985).

**Award of interest within trial court's discretion.** Whether interest should be allowed on a promissory note which represents a property division award upon dissolution of marriage is a matter which lies within the discretion of the trial court based on all of attendant circumstances. In re Lucas, 631 P.2d 1175 (Colo. App. 1981).

**Trial court is required to consider the economic circumstances of the spouses** at the time of any hearing relating to the division of marital property. In re Wells, 850 P.2d 694 (Colo. 1993).

**Marital partnership interest made subject to "charging order" pursuant to § 7-60-128** as part of property division is not an abuse of discretion, nor was it error to leave the actual amount recoverable to determination in a separate action, although property division had to be set aside because it could be unconscionable. In re Weiss, 695 P.2d 778 (Colo. App. 1984).

**Where a wife was awarded a final divorce decree without alimony and given control of a jointly owned taxicab business,** it was held that there was ample evidence in the record to support the finding of fact by the trial court that wife did contribute to and was entitled to a one-half interest in the business since it appeared that the operations, continued under her guidance and later under a receiver with her assistance, owed their successful outcome to these efforts. Shreyer v. Shreyer, 112 Colo. 281, 148 P.2d 1003 (1944).

**Award of a share of benefits of husband's vested pension plan through the use of installment payments** when lump-sum distribution at the time of decree was impractical is within the discretion of court. In re Blake, 807 P.2d 1211 (Colo. App. 1990).

**Trial court's use of two different methods to distribute the parties' two pensions,** was within the sound discretion of the trial court. In re Kelm, 912 P.2d 545 (Colo. 1996).

**The trial court did not abuse its discretion in awarding the property and the proceeds therefrom to plaintiff** where evidence showed that he furnished substantially all the purchase money, but allowed title to be taken in his wife's name. Bieber v. Bieber, 112 Colo. 229, 148 P.2d 369 (1944).

**Where the husband asserted the court abused its discretion in awarding the real property to the wife without having first determined its value,** there was no abuse of discretion, because before value becomes important the court must first determine whether the property is subject to division. Larrabee v. Larrabee, 31 Colo. App. 493, 504 P.2d 358 (1972).

Where the husband was on active duty as a petty officer in the Navy during the five year duration of the marriage, and the court found that his participation, if any, in the management of the land given to the wife prior to the marriage was adequately compensated by the income received therefrom, and the court further found that the gift from the wife's mother was intended primarily as a gift to her own children and that the husband was not entitled to retain any interest in the land under the circumstances of this case, the award of the property to the wife, based on these findings was not an abuse of discretion. *Larrabee v. Larrabee*, 31 Colo. App. 493, 504 P.2d 358 (1972).

**Court abused its discretion when it acknowledged the parties' relatively equal contributions to the marriage and marital property, yet awarded the wife only the benefits of the increased value of the property without any responsibilities for its burdens.** Under these circumstances, equity requires that the wife share a part of the debt incurred on the home during the marriage as well as a part of the increase in the home's value. *In re Kiefer*, 738 P.2d 54 (Colo. App. 1987).

It was an abuse of discretion to give the wife ownership of the couple's percentage of a partnership, granting one-third to the husband only upon full or partial distribution and holding the husband responsible for payment of his share of capital calls and any debt related to the partnership interest. *In re Paul*, 821 P.2d 925 (Colo. App. 1991).

**Once initial order is entered, subsequent hearings are not merely corrections of errors committed by the trial court in the first proceeding.** *In re Wells*, 850 P.2d 694 (Colo. 1993).

#### D. Antenuptial Agreements.

**Separation agreements and antenuptial agreements are separate and distinct legal documents.** *In re Newman*, 44 Colo. App. 307, 616 P.2d 982 (1980), *aff'd* in part and *rev'd* on other grounds, 653 P.2d 728 (Colo. 1982).

**Antenuptial contracts may be rescinded or modified by the mutual consent of the parties and whether such a contract has been rescinded by mutual consent is a question of fact.** *In re Young*, 682 P.2d 1233 (Colo. App. 1984).

**Spouses-to-be have right to enter into antenuptial agreements which contemplate the possibility of dissolution.** *In re Newman*, 44 Colo. App. 307, 616 P.2d 982 (1980), *aff'd* in part and *rev'd* on other grounds, 653 P.2d 728 (Colo. 1982).

**Agreement not bar to claim for maintenance unless expressly relinquished.** In the absence of any reference in an antenuptial agreement to a relinquishment of the right to maintenance, the agreement does not bar the

wife's claim for maintenance. *In re Stokes*, 43 Colo. App. 461, 608 P.2d 824 (1979).

**As a general principle, antenuptial agreements will be given effect in this state.** *In re Thompson*, 39 Colo. App. 400, 568 P.2d 98 (1977).

Antenuptial agreements, as a matter of law, do not violate public policy and are not void ab initio in Colorado. *In re Newman*, 653 P.2d 728 (Colo. 1982).

Antenuptial agreements, absent fraud, are binding on the parties according to their terms, and the judiciary cannot relieve the parties from the obligations thereof. *In re Stokes*, 43 Colo. App. 461, 608 P.2d 824 (1979).

**Otherwise legislative provisions control.** When an antenuptial agreement does not provide for the distribution of marital property upon the dissolution of the marriage, then the applicable legislative provisions are controlling. *In re Thompson*, 39 Colo. App. 400, 568 P.2d 98 (1977).

**Section 14-10-112 conscionability review not extended to antenuptial agreements.** The conscionability review of separation agreements, pursuant to § 14-10-112, does not extend to antenuptial agreements. *In re Newman*, 653 P.2d 728 (Colo. 1982).

**Burden of proof is on party seeking to avoid antenuptial contract.** *In re Ingels*, 42 Colo. App. 245, 596 P.2d 1211 (1979); *In re Stokes*, 43 Colo. App. 461, 608 P.2d 824 (1979).

**The burden of proving failure to disclose is upon the party contesting the validity of the antenuptial agreement.** *In re Ross*, 670 P.2d 26 (Colo. App. 1983).

**Failure to provide wife with independent counsel does not render antenuptial agreement void per se.** *In re Ingels*, 42 Colo. App. 245, 596 P.2d 1211 (1979).

**Agreement not set aside solely because bulk of marital assets go to husband.** *In re Ingels*, 42 Colo. App. 245, 596 P.2d 1211 (1979).

**Itemized property list not necessary for agreement.** Where the amount of the husband's assets was not materially misstated, his failure to supply an itemized list was not fatal to the validity of an antenuptial agreement. *In re Stokes*, 43 Colo. App. 461, 608 P.2d 824 (1979).

While it would have been preferable for the trial court to have entered specific values for each item in a property division, reversal was not required where it could determine that the property division made was not an abuse of discretion. *In re Warrington*, 44 Colo. App. 294, 616 P.2d 177 (1980).

**Where antenuptial agreement is unambiguous as to treatment of increases in value of separate property,** the court is required to enforce the agreement according to its terms. *In re Vickers*, 686 P.2d 1370 (Colo. App. 1984).



**Where antenuptial agreement was silent on matter of attorney fees**, the awarding of such fees was controlled by § 14-10-119. In re Newman, 44 Colo. App. 307, 616 P.2d 982 (1980), aff'd in part and rev'd on other grounds, 653 P.2d 728 (Colo. 1982).

**For holding as to enforceability of prenuptial agreement** which conceived disposition of property, see *Franks v. Wilson*, 369 F. Supp. 304 (D. Colo. 1973), appeal dismissed, 415 U.S. 986, 94 S. Ct. 1583, 39 L. Ed.2d 884, reh'g denied, 416 U.S. 975, 94 S. Ct. 2004, 40 L. Ed.2d 565 (1974).

## E. Separate Property.

**Property must be classified as separate or marital.** Under the requirements of this section, it is essential for the court to classify the property of the parties as either separate or marital. In re Wildin, 39 Colo. App. 189, 563 P.2d 384 (1977).

**This section mandates that separate property remain separate**, subject to the narrow exception that any increase in value during marriage is marital property. In re Campbell, 43 Colo. App. 72, 599 P.2d 275 (1979).

**Property acquired by either spouse during the marriage is presumed marital** as is the appreciation in the value of separate property and any income produced by separate assets during the marriage. In re Dale, 87 P.3d 219 (Colo. App. 2003).

**However, the marital property presumption can be overcome by evidence establishing that the property in question was acquired by a method listed in subsection (2)**, which excludes, among other things, property from the marital estate that was acquired in exchange for premarital property. To claim separate ownership successfully under the exchange provision, a spouse must trace the property by proving a series of exchanges back to an original asset. In re Dale, 87 P.3d 219 (Colo. App. 2003).

**Court must determine the separate properties' appreciation in value and the part of the increase that is marital property** and take those values into consideration when determining the property division. In re Martinez, 77 P.3d 827 (Colo. App. 2003).

**In order to obtain status of separate property** under this section, it must appear that the property was acquired prior to marriage with the intent that it become the separate property of husband. In re Altman, 35 Colo. App. 183, 530 P.2d 1012 (1974).

**Property not "separate" because of spouse's lack of interest or concern.** Property titled in the name of one spouse that was acquired during the parties' marriage cannot be considered nonmarital property merely because of a course of conduct by the other spouse

showing a lack of interest or concern for property. In re Heim, 43 Colo. App. 511, 605 P.2d 485 (1979).

**The classification of increases in separate property as marital property is a substantial departure from prior law** wherein such increases were generally classed as separate property. In re Wildin, 39 Colo. App. 189, 563 P.2d 384 (1977).

**When award of increases in separate property to be made.** The award of increases in separate property is to be made after considering all of the factors stated in subsection (1)(a) through (1)(d), and not just contribution. In re Wildin, 39 Colo. App. 189, 563 P.2d 384 (1977); In re Seewald, 22 P.3d 580 (Colo. App. 2001).

**It is proper for a court to consider the depletion of separate property for marital purposes pursuant to subsection (1)(d);** however, the statute does not require that the depletion of separate property for nonmarital purposes be considered and the trial court's failure to make findings as to this factor was harmless error. In re Burford, 26 P.3d 550 (Colo. App. 2001).

**Where court without authority to order sale of home.** Where home was separate property of husband before marriage and after dissolution of marriage, the court was without authority to order sale of home despite fact that increase in the value of home during marriage was marital property. In re Campbell, 43 Colo. App. 72, 599 P.2d 275 (1979).

**Income received by a spouse that is generated from the property of a third party** is not marital property. In re Guinn, 93 P.3d 568 (Colo. App. 2004).

**Money accumulated in pension fund prior to marriage** should be considered "separate property". In re Rogers, 709 P.2d 1383 (Colo. App. 1985).

**Husband's worker's compensation settlement is separate property to the extent it compensates for post-dissolution loss of income or earning capacity.** In re Breckenridge, 973 P.2d 1290 (Colo. App. 1999).

**Insurance proceeds acquired by husband during marriage constituted a gift** and was properly classified as separate property. In re Sharp, 823 P.2d 1387 (Colo. App. 1991).

**Shares of stock owned by husband at the time of the marriage that were later involved in a stock split during the marriage** were properly considered husband's separate property except to the extent the shares appreciated during the marriage. In re Renier, 854 P.2d 1382 (Colo. App. 1993).

**In order for premarital property to retain its separate character, the property must be traceable to specific assets.** In the absence of evidence tracing shares of stock obtained in a stock split during the marriage to the shares husband owned at the time of the marriage, the

additional shares should not have been set apart as husband's separate property where husband combined the additional shares with other shares acquired during the marriage and many of the combined shares were sold. In re Renier, 854 P.2d 1382 (Colo. App. 1993).

**Trial court did not abuse its discretion when** it awarded the wife 50 percent of the husband's disposable retirement pay where the ruling was rationally based on considerations of the wife's marital contributions during the husband's military career and the fact that the wife had no survivor benefits in the event of the husband's death. In re Sinkovich, 830 P.2d 1101 (Colo. App. 1992).

**Trial court erred in setting apart to wife as her separate property the portions of investment traceable to income generated from trust.** In re Footitt, 903 P.2d 1209 (Colo. App. 1995).

**Requiring a party to execute a noncompetitiveness agreement is within court's authority** where agreement is necessary to protect goodwill of business awarded to other party and agreement is otherwise valid under § 8-2-113. In re Fischer, 834 P.2d 270 (Colo. App. 1992).

**Gifts made from one spouse to the other during the course of the marriage cannot be presumed to be gifts, nor do they necessarily constitute marital property.** To qualify as a "gift", a transfer of property must involve a simultaneous intention to make a gift, delivery of the gift, and acceptance of the gift. In re Balanson, 25 P.3d 28 (Colo. 2001); In re Amich, 192 P.3d 422 (Colo. App. 2007).

**To qualify as a gift, a transfer of property must involve a simultaneous intention to make a gift, delivery of the gift, and acceptance of the gift.** That determination hinges fundamentally on the intent and acts of the donor and recipient, which, in turn, are questions of fact for the trial court to resolve. In re Dale, 87 P.3d 219 (Colo. App. 2003).

**Finding that home and car were wife's separate property upheld.** In re Bartolo, 971 P.2d 699 (Colo. App. 1998).

**The portion of husband's railroad retirement benefits that are equivalent to those an employee would have received if covered by the Social Security Act was husband's separate property, not subject to division, and court erred in treating it as marital property along with the portion of the railroad retirement benefits that are supplemental annuities.** In re Zappanti, 80 P.3d 889 (Colo. App. 2003).

**Bailment allowed between spouses.** Subsection (1) does not prohibit a court from assigning liability to one spouse for the loss of separate property belonging to the other spouse upon a finding of negligence on the part of the spouse in possession of the property. In re Amich, 192 P.3d 422 (Colo. App. 2007).

## F. Marital Property.

**The purpose of the division of marital property** is to allocate to each spouse what equitably belongs to him or her. In re Graham, 194 Colo. 429, 574 P.2d 75 (1977).

**Weighing of factors set forth in this section is within the sound discretion of the trial court.** In re Casias, 962 P.2d 999 (Colo. App. 1998).

**The court had the discretion to enter an equitable division of property** where the court had retained jurisdiction and a period had expired for meeting certain conditions set forth in an agreement between the parties and such conditions had not been met. In re Ebel, 874 P.2d 406 (Colo. App. 1993).

**Division gives each party some attributes of ownership.** The efficacy of a division of property in a dissolution of marriage action results from placing in the hands of each party a definable or ascertainable portion of at least some of the attributes of ownership. In re Cehret, 41 Colo. App. 162, 580 P.2d 1275 (1978).

**Right to property division inchoate.** In dissolution of marriage proceedings, a wife may be entitled to a division of the husband's property, and that right, prior to the dissolution action and possibly subject to an exception or two, is completely inchoate. In re Questions Submitted by United States Dist. Court, 184 Colo. 1, 517 P.2d 1331 (1974).

**Property to be transferred is not determined at time of filing.** At the time of the filing of the dissolution of marriage action in which the division of property will be later determined, a vesting takes place, and this interest which has vested is inchoate only in the sense that, prior to the division, the property to be transferred to the wife has not yet been determined. In re Questions Submitted by United States Dist. Court, 184 Colo. 1, 517 P.2d 1331 (1974).

**At time divorce action is filed there vests in wife her interest in property in name of husband.** In re Questions Submitted by United States Dist. Court, 184 Colo. 1, 517 P.2d 1331 (1974).

**Justice requires that the joint accumulations of a husband and wife, or property which was acquired during marriage or added to through the joint efforts of both spouses, should be considered for equitable division on termination of the marriage.** Kalcevic v. Kalcevic, 156 Colo. 151, 397 P.2d 483 (1964).

**Specific circumstances and feelings of each party are appropriate considerations in determining which specific items of property should be sold, or alternatively, distributed to a particular party.** In re Woodrum, 618 P.2d 732 (Colo. App. 1980).

**Highly relevant factor to be considered by court in effecting just division of marital**



**property** is the extent to which the division will promote the objective of providing for each party's financial needs without maintenance. In re Jones, 627 P.2d 248 (Colo. 1981).

**Value of separate property considered.** The court must consider all of the many relevant facets of the situation of the parties, including the value of property set apart to each spouse. In re Lodholm, 35 Colo. App. 411, 536 P.2d 842 (1975).

**Upon remand to redistribute marital property, trial court may consider the economic circumstances of each spouse.** In re Wells, 850 P.2d 694 (Colo. 1993).

**Award of additional \$6,000 for "recreational opportunities" for children was fairly embraced within the factors to be considered by court in dividing the marital property and did not create a separate "recreational fund" for the needs of the children.** In re Jackson, 698 P.2d 1347 (Colo. 1985).

**Contribution of spouse to acquisition of specific property** is not a factor to be considered in determining whether that property is part of the marital estate, but this may be considered in determining the shares allocated to each spouse. In re Carruthers, 40 Colo. App. 278, 577 P.2d 773 (1977).

**Decrease in value of separate property.** Under subsection (1)(d), the court may consider as a relevant factor in dividing marital property the decrease in the value of separate property. In re Talarico, 36 Colo. App. 389, 540 P.2d 1147 (1975).

**When applying subsection (1)(d),** the court must consider an increase in the value of separate property without reference to the fact that the increase has just previously been classified as marital property under subsection (4). The trial court did not err in finding that there was an increase in the value of the husband's separate property during the marriage despite the fact that there was an aggregate decrease in the value of such property. In re Burford, 26 P.3d 550 (Colo. App. 2001).

**Value of retirement account considered.**

The public employees' retirement association's interest of the husband or his estate is not subject to divestment by death or discharge. At some time, he or his estate must receive, at the very minimum, the amount of accumulated deductions in his individual account. His rights have a presently determinable cash surrender value equal to his salary deductions which otherwise would have been available for the use of the parties during the marriage. Even though the husband's interest in the fund is, by its very nature, incapable of division in kind, the value of that interest was properly taken into account in a marital property division. In re Pope, 37 Colo. App. 237, 544 P.2d 639 (1975).

**Because a 401(k) account is a defined contribution plan,** the court must determine the

marital interest; but unlike a defined benefit plan, it need not consider future appreciation. In re Casias, 962 P.2d 999 (Colo. App. 1998).

**When one spouse causes title to be placed jointly with the other spouse, a gift is presumed,** and the burden to show otherwise is upon the donor. In re Moncrief v. Moncrief, 36 Colo. App. 140, 535 P.2d 1137 (1975).

**Transfer during the marriage by one spouse to both spouses is understood to evidence a transfer to the marital estate** in the absence of appropriate evidence that the property was excluded from being marital property by a valid agreement of the parties. The exception from the definition of marital property for any property acquired by gift does not apply to such transfer. In re Stumpf, 932 P.2d 845 (Colo. App. 1996).

**Where separation agreement has been set aside, property transferred in accordance with the agreement was not excluded from the division of the marital property.** In re Bisque, 31 P.3d 175 (Colo. App. 2001).

**Presumption of gift not overcome.** Parties' explanation that title to their home was placed in joint tenancy so as to avoid inheritance taxes does not overcome the presumption that a gift occurred; it merely expresses a reason why the gift was made. In re Moncrief v. Moncrief, 36 Colo. App. 140, 535 P.2d 1137 (1975).

**Resembles division of property by co-owners rather than conveyance.** Transfer of property by husband to his former wife in fulfillment of a property settlement agreement entered into by the parties and approved by the court granting the divorce is a recognition of a "species of common ownership" of the marital estate by the wife resembling a division of property between co-owners and is not a transfer which resembles a conveyance by the husband for the release of an independent obligation owed by him to the wife. Imel v. United States, 375 F. Supp. 1102 (D. Colo. 1973), *aff'd*, 523 F.2d 853 (10th Cir. 1975); In re Questions Submitted by United States Dist. Court, 184 Colo. 1, 517 P.2d 1331 (1974).

**Property acquired before legal separation deemed marital.** Property acquired subsequent to a marriage but after the parties have separated without a decree of legal separation is not excepted from "marital property" by subsection (2). In re Carruthers, 40 Colo. App. 278, 577 P.2d 773 (1977); In re Huff, 834 P.2d 244 (Colo. 1992).

Where parties lived apart for over eleven years without a decree of legal separation or a valid agreement for exclusion of property, property acquired during that period was marital property. In re Huff, 834 P.2d 244 (Colo. 1992).

**The presumption that property acquired by either spouse after marriage is marital property may be overcome** by establishing that the property in question was acquired by a

method listed in subsection (2). Assets not falling with the specific definition of separate property are deemed to be marital in nature subject to equitable division by the court. In *re* McCadam, 910 P.2d 98 (Colo. App. 1995); In *re* Seewald, 22 P.3d 580 (Colo. App. 2001).

**Where a spouse takes title to property under circumstances that give rise to a resulting trust**, that property has not been "acquired" for purposes of subsection (3), and, therefore, the trust property is not part of the marital estate. In *re* Martinez, 77 P.3d 827 (Colo. App. 2003).

**Appreciation of separate property during the course of the marriage is considered marital property** and such increase is subject to division under conditions set forth in this section. In *re* Fleet, 701 P.2d 1245 (Colo. App. 1985).

**Appreciation accrued during period of reconciliation to be shared.** The husband is entitled to an equitable share in the total amount of appreciation that accrued during a period of reconciliation after the wife became sole owner of the family home. In *re* Reeser, 635 P.2d 930 (Colo. App. 1981).

**Where trial court failed to determine if** there had been commingling of husband's pre-marital assets or if any marital appreciation in any of the trust assets had occurred and should have been included in the estate, property division could not be evaluated to determine whether it was inequitable. In *re* Seewald, 22 P.3d 580 (Colo. App. 2001).

**Value of marital property sold by a spouse prior to filing of divorce action** where spouse kept proceeds for himself is properly considered in dividing marital estate. In *re* Paulsen, 677 P.2d 1389 (Colo. App. 1984).

**Partnership property divided according to spouse's contribution.** A trial court's division of partnership property can be based upon the contribution made by each party to the purchase of the property. In *re* Howard, 42 Colo. App. 457, 600 P.2d 93 (1979).

**In order for partnership property to be considered as other than marital property** under subsection (2)(d), the parties must have expressly agreed that the partnership assets would not become marital property. Otherwise, the question is one of intent of the parties, to be found as a fact by the trial court. In *re* Howard, 42 Colo. App. 457, 600 P.2d 93 (1979).

**Because husband's partnership interest was vested and mature and not subject to future contingencies**, trial court erred when it valued that interest by projecting the value of the partnership to the date of husband's expected retirement rather than the date of the parties' legal separation. In *re* Nevarez, 170 P.3d 808 (Colo. App. 2007).

**Court can award any rights party may have resulting from existence of corporate assets.** Although the court cannot award corpo-

rate assets to individual parties in a dissolution proceeding, the court can award to a party any rights he may have because of the existence of corporate assets. In *re* Davis, 44 Colo. App. 355, 618 P.2d 692 (1980).

**Where husband's rights to commissions arose prior to the date of hearing**, they constituted "marital property" and were subject to division. In *re* Johnson, 40 Colo. App. 250, 576 P.2d 188 (1977).

**Money husband received in lieu of retirement benefits upon mandatory separation from Army constituted marital property** subject to distribution under the terms of this section. In *re* Moore, 35 Colo. App. 280, 531 P.2d 995 (1975).

**Residence acquired in anticipation of marriage is marital property.** Where a family residence is selected and acquired within a few days of the parties' marriage in contemplation of that marriage, and the equity accumulated therein results from contributions by both parties, the court does not err in treating the residence and all equity obtained therein as marital property. In *re* Altman, 35 Colo. App. 183, 530 P.2d 1012 (1974).

**Home purchased with wife's proceeds from sale of home owned prior to marriage is not.** In view of evidence that the family home was purchased by the wife with the proceeds of the sale of a home which she owned prior to the marriage, the home was not "marital property" within the meaning of this statute. In *re* Armbeck, 33 Colo. App. 260, 518 P.2d 300 (1974).

**Value of good will of spouse's business deemed marital property.** In a division of marital property, the value of good will incident to husband's dental practice, which is an asset acquired during his marriage, must be considered as marital property. In *re* Nichols, 43 Colo. App. 383, 606 P.2d 1314 (1979).

**Funds withdrawn by husband from joint bank account prior to wife's filing of petition for dissolution are "marital property"** and should have been taken into account by trial court in making its property distribution, notwithstanding that the wife could not trace the funds after the withdrawal. In *re* Posinoff, 683 P.2d 377 (Colo. App. 1984).

**Personal injury settlement offer**, even if just for pain and suffering, is marital property if it arises from an accident which occurred during marriage. In *re* Fjeldheim, 676 P.2d 1234 (Colo. App. 1983).

**Trial court erred in classifying a claim for personal injury protection (PIP) benefits as a marital asset** where a claim had not been submitted to the insurance company as of the date of the hearing. In *re* Balanson, 996 P.2d 213 (Colo. App. 1999), *aff'd* in part and *rev'd* in part on other grounds, 25 P.3d 28 (Colo. 2001).



**Accounts receivable constituted marital property.** In re Bayer, 687 P.2d 537 (Colo. App. 1984).

**Appreciation of premarital property** which is realized during marriage is subject to division upon dissolution of marriage. In re Van Genderen, 720 P.2d 593 (Colo. App. 1985).

**Reorganization under chapter 11 of bankruptcy code** does not necessarily establish a business held premaritally by husband as worthless, so that entire sum received from sale of business's subsidiary stock and liquidation of business constituted marital property for purposes of division of property pursuant to dissolution. In re Van Genderen, 720 P.2d 593 (Colo. App. 1985).

**Shares in mutual fund were "marital property"** subject to equitable division, notwithstanding that funds used to purchase shares may have originally been husband's separate property, where evidence established that husband's intent in purchasing shares was to make a joint investment with wife and that he intended that shares should pass to wife upon his death. In re Meisner, 715 P.2d 1273 (Colo. App. 1985).

**Full increase in value of parties' separate property was properly treated as marital property.** In re Young, 682 P.2d 1233 (Colo. App. 1984).

**Property acquired during first marriage not marital property.** Absent evidence of a contrary intent, property acquired during a first marriage between the parties and before their remarriage may not be declared marital property. In re Stedman, 632 P.2d 1048 (Colo. App. 1981).

**Spouse's interest in a vested but unmatrued employer-supported pension plan** is marital property to the extent such plan has been funded by either employee or employer contributions during the marriage and is, therefore, subject to equitable distribution in dissolution proceeding. In re Grubb, 745 P.2d 661 (Colo. 1987); In re Blake, 807 P.2d 1211 (Colo. App. 1990).

**Marital property subject to division does not include property acquired after the dissolution;** however, compensation that is deferred until after the dissolution, but fully earned during the marriage, is marital property. In re Vogt, 773 P.2d 631 (Colo. App. 1989); In re Anderson, 811 P.2d 419 (Colo. App. 1990); In re Miller, 888 P.2d 317 (Colo. App. 1994).

**Before a trial court can make an equitable distribution of pension rights,** it must first determine the present value of such rights. In re Gavito, 794 P.2d 1377 (Colo. App. 1990).

**Husband's vested, employer-supported pension plan held to be "marital property".** In re Nelson, 746 P.2d 1346 (Colo. 1987); In re Blake, 807 P.2d 1211 (Colo. App. 1990).

**Husband's nonvested military pension held to be marital property.** In re Beckman, 800 P.2d 1376 (Colo. App. 1990).

**Trial court did not err in ruling that it had no authority to distribute the military retirement pay that husband received during the year that the parties were separated** where there was no evidence presented concerning the amount received during that period nor any evidence that either party had dissipated any funds that had been received. In re Riley-Cunningham, 7 P.3d 992 (Colo. App. 1998).

**Under the federal Uniformed Services Former Spouses' Protection Act, the portion of a military retirement pension that constitutes veterans' disability retirement benefits may not be divided as marital property.** In re Lodeski, 107 P.3d 1097 (Colo. App. 2004); In re Warkocz, 141 P.3d 926 (Colo. App. 2006).

**In case where service member had attained twenty or more years of service and was eligible for a longevity retirement when placed on the TDRL,** an amount equal to the amount of TDRL pay, as calculated based on husband's percentage of disability when he was placed on the TDRL, must be excluded from the marital property. Any amounts in excess of that amount may be divided as marital property. In re Poland, 264 P.3d 647 (Colo. App. 2011).

**Colorado state courts are not prohibited from dividing a military pension consisting of nondisability and disability retirement benefits as long as the portion of nondisability benefits is large enough to satisfy the other party's fractional share of the division.** In re Lodeski, 107 P.3d 1097 (Colo. App. 2004).

**Military retirement benefits subject to distribution as marital property in dissolution of marriage cases are limited to disposable retired pay which, under federal law, excludes disability pay.** The exclusion also applies to that portion of a veteran's retirement pay that is computed using the percentage of disability on the date the veteran is placed on the temporary disability retirement list (TDRL). In re Williamson, 205 P.3d 538 (Colo. App. 2009).

**Because husband was not entitled to a longevity retirement at the time he was placed on the TDRL, no portion of his retirement benefits that is based upon his disability status is distributable to wife** pursuant to the parties' separation agreement that required the parties to divide the husband's pension equally according to the time rule formula. In re Williamson, 205 P.3d 538 (Colo. App. 2009).

**Husband's total pay based and computed on his disability is excluded from distribution to wife as marital property, not solely the husband's specific VA benefits.** Further, because the husband was not entitled to any retirement benefits but for his disability benefits, it is immaterial that he waived a portion of his disability benefits to receive VA benefits. In re Williamson, 205 P.3d 538 (Colo. App. 2009).

**The nature of husband's disability retirement benefits as marital or nonmarital does**

not depend on whether the benefits are subject to taxation. Benefits based and computed on husband's disability are nonmarital, even if taxable. In re Williamson, 205 P.3d 538 (Colo. App. 2009).

Trial court was not preempted by federal law from characterizing special separation benefits (SSB) received by former husband upon his voluntary discharge from the Air Force as marital property and from awarding a portion of them to wife. The SSB had more of the characteristics of a deferred compensation plan than a severance payment, and, therefore, constituted marital property subject to distribution. In re McElroy, 905 P.2d 1016 (Colo. App. 1995); In re Heupel, 936 P.2d 561 (Colo. 1997).

SSB benefit paid out after entry of the decree held not to be a "post-decree benefit". Hence, trial court's action in awarding a portion of the benefit to wife as marital property did not constitute a reopening of the decree, but rather an appropriate action to enforce the decree which incorporated the parties' separation agreement. In re Heupel, 936 P.2d 561 (Colo. 1997).

Spouse's election under federal law to receive indivisible veterans' disability benefits and waive divisible military retirement after entry of permanent orders does not divest trial court of jurisdiction in subsequent contempt action to enforce permanent orders. In re Lodeski, 107 P.3d 1097 (Colo. App. 2004); In re Warkocz, 141 P.3d 926 (Colo. App. 2006).

For public policy reasons, military spouse should not be allowed to unilaterally defeat the other spouse's interest in military retirement pay by voluntarily waiving retirement pay in order to receive disability pay. In re Warkocz, 141 P.3d 926 (Colo. App. 2006).

A specific dollar amount need not be set forth in the dissolution decree in order to give the nonmilitary spouse a vested interest in military spouse's retirement benefit. In re Warkocz, 141 P.3d 926 (Colo. App. 2006).

Husband's interest in contingency attorney fees which were earned during the marriage constitutes marital property subject to division. However, any portion of the fees earned after dissolution should be subject to the "reserve jurisdiction method" whereby the trial court retains jurisdiction to distribute payments when the contingent funds are received. In re Vogt, 773 P.2d 631 (Colo. App. 1989).

An unliquidated personal injury claim is marital property within the meaning of this section. The trial court should consider the actual effect that personal injury had on the marital estate in determining what the equitable share of the claim should be, and the court is required to make specific findings supporting the division of such claim. In re Fields, 779 P.2d 1371 (Colo. App. 1989), cert. denied, 781 P.2d 1040 (Colo. 1989).

Assets which consist of amounts received in settlement of husband's personal injury claim and wife's loss of consortium claim are marital property and should be distributed by the court after consideration of the needs and circumstances of the parties. In re Simon, 856 P.2d 47 (Colo. App. 1993).

Stock options owned by husband at the time of marriage but exercised during the marriage using marital funds are presumed to be marital property in the absence of a showing that husband used separate property, such as money he received from an inheritance, to exercise the options. In re Renier, 854 P.2d 1382 (Colo. App. 1993).

Husband's right to severance pay as a substitute for a loss of future wages does not constitute marital property. In re Holmes, 841 P.2d 388 (Colo. App. 1992).

To the extent an employee stock option is granted in consideration of past services, the option may constitute marital property when granted. On the other hand, an employee stock option granted in consideration of future services does not constitute marital property until the employee has performed those future services. In re Miller, 915 P.2d 1314 (Colo. 1996).

Restricted stock options constitute marital property in their entirety where they represent a form of deferred compensation because husband had already earned the right to receive those shares. That husband's full enjoyment of the benefit is conditioned on his remaining an employee affects the present value of the restricted stock shares, not their marital nature. In re Miller, 915 P.2d 1314 (Colo. 1996).

A trial court has discretion to apply the "time rule" formula to the division of stock options acquired during the marriage or to reserve jurisdiction to distribute the stock options if and when they are exercised. In re Balanson, 996 P.2d 213 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 25 P.3d 28 (Colo. 2001).

Employee stock options constitute property only when the employee has a presently enforceable right to the options, regardless of whether the options are presently exercisable. In re Balanson, 25 P.3d 28 (Colo. 2001); In re Powell, 220 P.3d 952 (Colo. App. 2009).

Issue of "vesting" of employee stock options not determinative in ascertaining whether interest in employee stock options constitutes marital property. Rather, an employee stock option constitutes marital property for purposes of dissolution proceedings when an employee has an enforceable right to the options, regardless of whether the options are presently exercisable. In re Powell, 220 P.3d 952 (Colo. App. 2009).

Although wife's employment the year prior to issuance of the stock options may have been an eligibility requirement for the stock



options, such employment did not, without more, confer any enforceable property right under the stock option plan. Wife had a mere expectancy and no property right in the stock options prior to the actual grant of the stock options after the date of the marriage. Therefore, no portion of the employee stock options were the wife's separate property, and wife did not "earn" any portion of the stock options prior to marriage. In re Powell, 220 P.3d 952 (Colo. App. 2009).

**Public employees' retirement association (PERA) disability benefit prior to age 65 replaces future earnings and does not constitute marital property.** In re Hansen, 62 P.3d 1066 (Colo. App. 2002).

**When disabled employee reaches the age of 65, the portion of PERA benefits attributable to years of service before disability constitutes marital property,** and the balance remains separate property. Regardless of employee's recovery or work status, the benefits, excluding the unearned service credit projected until age 65, are more akin to retirement benefits. In re Hansen, 62 P.3d 1066 (Colo. App. 2002).

**Future disability income of husband based upon disability insurance purchased during marriage with marital funds is marital property.** In re Simon, 856 P.2d 47 (Colo. App. 1993).

**Trial court erred in setting apart to wife as her separate property the portions of investment traceable to income generated from trust.** In re Footitt, 903 P.2d 1209 (Colo. App. 1995).

**Mechanism employed by the court for dividing the marital estate is a matter within the trial court's discretion.** In re Dickey, 658 P.2d 276 (Colo. App. 1982).

**Property order not terminable upon remarriage.** Court order constituting an adjustment of property rights between a former husband and wife did not terminate upon remarriage of wife. Greer v. Greer, 32 Colo. App. 196, 510 P.2d 905 (1973).

**Share of marital estate contingent on remaining alive.** Court cannot make a portion of husband's share of the marital estate contingent on his remaining alive. In re Paulsen, 677 P.2d 1389 (Colo. App. 1984).

**Home to spouse with child custody.** Subsection (1)(c) makes it clear that it is desirable to award the family home to the spouse having custody of the children. In re Anderson, 37 Colo. App. 55, 541 P.2d 1274 (1975).

**Subsection (3) provides that possession of title is not dispositive of the method of distribution of marital property.** In re Thompson, 39 Colo. App. 400, 568 P.2d 98 (1977).

**Intent evidenced that property no longer in joint tenancy.** An order for the sale of marital property and distribution of the proceeds evi-

dences an intent that the property is no longer to be held in joint tenancy. Gaskie v. Hugins, 640 P.2d 248 (Colo. App. 1981).

**Order charging husband with selling property within one year effectively divided the marital property** as of the date of the decree. In re Weaver, 39 Colo. App. 523, 571 P.2d 307 (1977).

**Court ordered conveyance of separate property to wife or sale of both non-marital and marital property** is violative of statute unless there is no other way to value and divide the property equitably. In re Sarvis, 695 P.2d 772 (Colo. App. 1984).

**Where the husband's expenditures and labor enabled the wife to invest a considerable percentage of her income,** they should be considered as contributions to the increase in their joint, and her several, property. Thompson v. Thompson, 30 Colo. App. 57, 489 P.2d 1062 (1971).

**Promissory note between the husband and wife and the principal due thereunder,** being property acquired in exchange for property acquired prior to the marriage, were correctly treated as wife's separate property. Accrued interest should be treated as marital property and the interest payable as a marital debt, while interest accruing after the date of the decree is the wife's separate property. In re McCadam, 910 P.2d 98 (Colo. App. 1995).

**Unless promissory notes demonstrate an intent that interest be treated as separate property,** the interest accruing during the marriage is a marital asset, and any interest due at the time of the dissolution of the marriage is a marital debt. In re Lewis, 66 P.3d 204 (Colo. App. 2003).

**Trial court lacked jurisdiction over the securities owned by the parties' children.** However, trial court may consider the securities as a factor in determining how to allocate between the parties any marital debt related to the children's education. In re Gorman, 36 P.3d 211 (Colo. App. 2001).

#### G. After-acquired Property.

**A trial court, in ordering a division of property, cannot award to the divorced wife a share in property** which might be acquired by the ex-husband after the order for a division of property has been made. Menor v. Menor, 154 Colo. 475, 391 P.2d 473 (1964).

**Courts cannot divide property acquired after hearing or decree.** Although courts must divide property on the basis of conditions existing at the date of the hearing or decree, they cannot consider the division of property which the parties may acquire afterwards. In re Johnson, 40 Colo. App. 250, 576 P.2d 188 (1977).

A trial court cannot award to one spouse in a dissolution a share in property which might be

acquired by the other spouse after the order for division of property has been made. In re Ward, 657 P.2d 979 (Colo. App. 1982).

**Court can allow wife to use husband's separate property if husband waived or intentionally relinquished the right to sole ownership of that separate property.** Court, however, could not convey any ownership attributes of that property to wife. In re Ikeler, 148 P.3d 347 (Colo. App. 2006), rev'd on other grounds, 161 P.3d 663 (Colo. 2007).

### III. VALUATION OF PROPERTY.

**Law reviews.** For article, "Valuation of Businesses in Colorado Divorces", see 32 Colo. Law. 73 (June 2003). For article, "Business Valuations in Light of Thornhill", see 38 Colo. Law. 77 (August 2009).

**Market value of real property in dispute is standard** adopted by the general assembly. In re Lord, 626 P.2d 698 (Colo. App. 1980), appeal dismissed, 653 P.2d 385 (Colo. 1982).

**Necessity of finding current value of all property.** Generally, in making a division of property, the court must find the approximate current value of all property owned by the parties, as well as the value of separate property at the time of the marriage or at the time of acquisition, if after marriage. However, where the court determines the percentage ownership each party has in the marital property, and that percentage is not an issue on appeal, the failure to make such findings of current value is not necessarily erroneous. In re Weaver, 39 Colo. App. 523, 571 P.2d 307 (1977).

**This section expressly requires that property be valued as of the date of the dissolution of the marriage or as of the date of the hearing on disposition of the property if such hearing precedes the date of dissolution.** This provision is mandatory, and the only exception is that the marital property dissipated before dissolution of the marriage can be valued as of the date the property last existed. In re Hunt, 909 P.2d 525 (Colo. 1995); In re Finer, 920 P.2d 325 (Colo. App. 1996); In re Lockwood, 971 P.2d 264 (Colo. App. 1998).

The trial court did not have discretion to create, for equitable purposes, a fictitious date of dissolution for purposes of calculating the wife's share of the husband's military pension. In re Lockwood, 971 P.2d 264 (Colo. App. 1998).

**Court's discretion in determining property valuation date.** This section gives the trial court broad discretion in matters of property division, including determination of the property valuation date for division of marital property. Gaskie v. Hugins, 640 P.2d 248 (Colo. App. 1981).

**Court's valuation was sufficiently supported by evidence of parties' agreement** as to value of lot, wife's response to husband's re-

quest for admission of current market value of property, and verified financial statements and proposed final orders submitted by both parties. In re Price, 727 P.2d 1073 (Colo. 1986).

**Valuation on the date of dissolution based on an earlier agreement does not abuse court's discretion,** where trial court was fully appraised of its duty to value the disputed lot as of the date of dissolution. In re Price, 727 P.2d 1073 (Colo. 1986).

**Subsequent testimony to the valuation as of the date of dissolution** which concerned the value of the disputed lot was not sufficient as a matter of law to overcome documentary evidence to the contrary. In re Price, 727 P.2d 1073 (Colo. 1986).

**Stipulated values not binding.** Where the trial court has determined that fairness and equity require that the division be an equal one, the stipulated values set 10 years before are neither binding nor relevant. Gaskie v. Hugins, 640 P.2d 248 (Colo. App. 1981).

However, parties' agreement as to the value nine months before the date of dissolution was not outdated and irrelevant to court's determination of real estate's value. In re Price, 727 P.2d 1073 (Colo. 1986).

**Trial court is not bound by partnership agreement in determining value of law practice.** Where partnership agreement was designed to discourage partners from leaving firm and it appeared husband intended to stay with firm, court was free to use an alternate valuation method such as the excess earnings method. In re Huff, 834 P.2d 244 (Colo. 1992).

**Because husband's partnership interest was vested and mature and not subject to future contingencies,** trial court erred when it valued that interest by projecting the value of the partnership to the date of husband's expected retirement rather than the date of the parties' legal separation. In re Nevarez, 170 P.3d 308 (Colo. App. 2007).

**Excess earnings method** is a generally accepted method for determining the present value of a person's interest in a business, representing both tangible assets and goodwill. In re Huff, 834 P.2d 244 (Colo. 1992).

Excess earnings method did not result in "double dipping" by wife awarded maintenance as well as a portion of present value of husband's interest in law practice. In re Huff, 834 P.2d 244 (Colo. 1992).

**Weight to be accorded to the valuation techniques of an expert is for the trial court's determination,** depending upon the court's assessment of the reliability of the data in a particular case. In re Bookout, 833 P.2d 800 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993); In re Antuna, 8 P.3d 589 (Colo. App. 2000).

**Decision as to which valuation method to rely on is a factual determination to be made**



by the trial court. In re Huff, 834 P.2d 244 (Colo. 1992); In re Page, 70 P.3d 579 (Colo. App. 2003).

**Marketability discount may be applied in determining value of husband's business** where court determines that failure to do so would unfairly penalize husband for ownership of shares that cannot be readily sold or liquidated. The court must make a clear record of the reasons for applying a given discount rate. In re Thornhill, 200 P.3d 1083 (Colo. App. 2008), *aff'd*, 232 P.3d 782 (Colo. 2010).

**It was within the trial court's discretion to accept wife's opinion of value as an owner of the marital residence**, which opinion was partially based upon her extensive knowledge of the property, a heightened awareness of its value, and the valuations provided to her. In re Lewis, 66 P.3d 204 (Colo. App. 2003).

**Goodwill is a property or asset which supplements the earning capacity of another asset, business, or a profession**, and, therefore, is not the earning capacity itself. In re Bookout, 833 P.2d 800 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

**The value of goodwill in an ongoing physical therapy practice is properly measured by arriving at a present value based upon past results** and not by accounting for the postmarital efforts of the professional spouse. In re Bookout, 833 P.2d 800 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

**Identification, valuation, and division of husband's "good will"** as a portion of his physical therapy practice did not divide husband's future income. In re Bookout, 833 P.2d 800 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

**Trial court erred in failing to credit wife with the value of her interest in a medical practice as a marital asset.** In re Antuna, 8 P.3d 589 (Colo. App. 2000).

**The conservation of the principal of an estate is, in itself, a valuable contribution** which should be considered. In re Wildin, 39 Colo. App. 189, 563 P.2d 384 (1977).

**When determining the present value of a vested interest in a trust that is subject to divestment based on a condition subsequent**, a variety of circumstances should be considered, including actuarial information concerning the life expectancy of the life estate beneficiary and information concerning the future distributions to that beneficiary. In re Dale, 87 P.3d 219 (Colo. App. 2003).

**In disposing of a vested but unmaturred pension plan**, the principles of fairness and equity must attend the valuation process, and the contingencies underlying the particular pension plan must be taken into account. In re McGinnis, 778 P.2d 282 (Colo. App. 1989).

**Valuation of undisclosed assets.** Once property has been divided pursuant to this section,

such property becomes akin to separate property, and any increase in the value of ownership interest therein should be considered when determining valuation. The failure to do so constitutes a confiscatory taking. In re Hiner, 710 P.2d 488 (Colo. 1985).

**Increase in value of separate property after dissolution of marriage is necessarily separate.** In re Campbell, 43 Colo. App. 72, 599 P.2d 275 (1979).

**The amount by which the present value of an asset of a spouse acquired before the marriage exceeds its value at the time of the marriage constitutes a marital asset.** In re Burford, 950 P.2d 682 (Colo. App. 1997).

**In carrying out the division of the marital estate, the dissolution court should first add to the marital estate the amount of increase during the course of the marriage, if any, in each asset that was owned by each party before marriage.** If an asset suffered a decrease in value, it should be disregarded in calculating the overall value of a spouse's separate property. Then the court should consider whether the overall value of the spouse's entire separate property has increased or decreased for the purpose of dividing the marital estate. In re Burford, 950 P.2d 682 (Colo. App. 1997).

**Although the assets paid off by husband may not have increased in fair market value, husband's use of marital funds to pay off his separate debts substantially increased his equity in his separate property** and must be considered in the property division. It is not necessary that the spouse produce a marital "asset" capable of being divided when marital funds are used to pay off one spouse's premarital debts. It is sufficient that the spouse paying off or paying down the separate property received a benefit from the marital income such as increased equity in its own property. The court should consider the benefit as an economic circumstance. In re Burford, 26 P.3d 550 (Colo. App. 2001).

**When debts have already been paid, they may be allocated in the property division through reimbursement.** In re Burford, 26 P.3d 550 (Colo. App. 2001).

**Debts incurred during the marriage but which are dissolution litigation costs** should be allocated pursuant to § 14-10-119. In re Burford, 26 P.3d 550 (Colo. App. 2001).

**In the case of a pension plan inaccessible prior to the employee's distant retirement and terminable upon the employee's death**, the risk of forfeiture is an important factor for the trial court to consider. In such a case it would be inequitable to require an immediate, lump-sum payment unless the present value included the risk of forfeiture as a factor. In re McGinnis, 778 P.2d 281 (Colo. App. 1989).

**Vested but unmaturred pension benefits are marital property not subject to inflexible**

**rules of property valuation.** Combination of deferred distribution and reserve jurisdiction valuation based on earliest possible retirement date for husband with full benefits proper where husband was not currently entitled to retirement benefits. In re Kelm, 878 P.2d 34 (Colo. App. 1994), *aff'd* in part and *rev'd* in part on other grounds, 912 P.2d 545 (Colo. 1996).

**No basis for reversal despite court error in valuing wife's vested but unmatured PERA retirement fund.** Because PERA combines elements of defined benefit and defined contribution plans, it was error for the court to base the present value of the wife's PERA account purely upon her contributions as of the date of dissolution. A proper determination of present value required the application of a series of actuarial and investment assumptions relating to the wife's life expectancy and probable retirement age to the contractual or statutorily awarded benefit. However, because husband acquiesced in this error and failed to present any evidence at trial as to the value of wife's PERA pension and because he made no objection or argument challenging wife's valuation during the permanent orders hearing, there is no basis for reversal. In re Zappanti, 80 P.3d 889 (Colo. App. 2003).

**Unvested, unmatured, noncontributory defined benefit pension plans are affected by different contingencies** from those where plans are vested. In re Hunt, 909 P.2d 525 (Colo. 1995).

**Three methods of distribution are at court's disposal** in order to divide a pension plan upon dissolution: (1) Net present value; (2) deferred distribution; and (3) reserve jurisdiction. In re Hunt, 909 P.2d 525 (Colo. 1995).

**"Time rule" formula,** used to apportion pension benefits under the net present value and deferred distribution methods, described in In re Hunt, 909 P.2d 525 (Colo. 1995).

**"Subtraction method" disapproved.** Under the net present value method of distributing a pension plan, trial court's procedure of subtracting the present value of the husband's pension at the time of the marriage from the present value of the husband's pension at the time of the dissolution represented an abuse of discretion because, under the circumstances, this procedure grossly overstated the wife's share. In re James, 950 P.2d 624 (Colo. App. 1997).

**Trial court had discretion to use subtraction method instead of the time-rule formula where the value of the trust was unrelated to any efforts taken by wife or husband,** post-dissolution enhancements were irrelevant, and the wife failed to explain why the time-rule formula would produce a more accurate and fair apportionment of the trust interest. In re Dale, 87 P.3d 219 (Colo. App. 2003).

**Trial court is not preempted from using the net present value method to distribute an**

**unmatured military pension.** In re Riley-Cunningham, 7 P.3d 992 (Colo. App. 1998).

**Trial court did not abuse its discretion in offsetting the net present values of the parties' military pensions and making a present distribution of the respective pensions,** even though husband was retired from active duty while wife was not entitled to retire immediately and was still on active reserve. In re Riley-Cunningham, 7 P.3d 992 (Colo. App. 1998).

**Court did not err by distributing husband's railroad retirement benefits using the net present value method.** In re Zappanti, 80 P.3d 889 (Colo. App. 2003).

**However, trial court is required to apply the coverture fraction,** the accepted means of calculating the marital share of a pension, by multiplying the present value of the pension by the number of years or months that benefits accumulated during the marriage and dividing by the total number of years or months that benefits accumulated. In re Zappanti, 80 P.3d 889 (Colo. App. 2003).

**Court should have considered actuarial information concerning the life expectancy of husband's parents** and relevant information concerning the likelihood that trustee would invade the trust corpus in the future in determining the net present value of a vested interest in a trust that is subject to divestment on a condition subsequent. In re Mohrlang, 85 P.3d 561 (Colo. App. 2003).

**Post-divorce pension enhancements are not necessarily separate property.** Although post-divorce earnings are undisputably separate property, pension enhancements are subject to application of the "time rule" formula and may be apportioned. In re Hunt, 909 P.2d 525 (Colo. 1995).

**Economic fault may be considered by the trial court when it is dividing marital assets.** In re Jorgenson, 143 P.3d 1169 (Colo. App. 2006).

**"Economic fault" concept rejected** as a factor in distribution of post-divorce pension enhancements. In re Hunt, 909 P.2d 525 (Colo. 1995).

**Court is not required to value or divide the parties' respective retirement plans by any set method so long as the division is equitable.** No error in awarding wife the entire contribution she had made to a Public Employee Retirement Account where the benefits from such contribution were significantly less than husband's retirement benefits. In re Kelm, 878 P.2d 34 (Colo. App. 1994), *aff'd* in part and *rev'd* in part on other grounds, 912 P.2d 545 (Colo. 1996).

**Court may retain jurisdiction over the distribution and valuation of stock options** so that each party will "share in the risk of the fate of each of the options." In re Huston, 967 P.2d 181 (Colo. App. 1998).



**Wife entitled to amount of husband's retirement funds, in the event of his death, only to extent of contributions made as of the date of dissolution.** In re Kelm, 878 P.2d 34 (Colo. App. 1994), aff'd in part and rev'd in part on other grounds, 912 P.2d 545 (Colo. 1996).

**An obligation to guarantee the debt of another should not be considered in a property valuation when the chance of liability is so small as to be speculative.** If there is a quantifiable likelihood of liability, the obligation should be valued at its face amount times the percentage chance of liability. In re Jorgenson, 143 P.3d 1169 (Colo. App. 2006).

**Just as a court is required to allocate the contingent value of assets in pensions and trusts, it must similarly determine the value of a contingent marital debt.** It may do so in one of two ways: (1) Determine, on the basis of testimony, the potential obligation, discounted to reflect the percentage of liability; or (2) otherwise divide the marital assets and debts, reserving jurisdiction to allocate the contingent marital debt until such time as the amount of such contingent debt has been determined. In re Jorgenson, 143 P.3d 1169 (Colo. App. 2006).

**"Seller's costs".** The trial court did not err in not deducting normal seller's costs from the value of the home when it purported to split between the parties the remaining equity in the home because "seller's costs" were speculative at best. *Rhoades v. Rhoades*, 188 Colo. 423, 535 P.2d 1122 (1975).

**Husband not entitled to share in the future appreciation of the home because property is valued at the dissolution hearing or property division hearing.** In re Wornell, 697 P.2d 812 (Colo. App. 1985).

**Loss apportioned.** The trial court may apportion a loss in value of separate property between the parties. In re Talarico, 36 Colo. App. 389, 540 P.2d 1147 (1975).

**Conclusion that parties did not contribute to enhancement of stock proper.** Since investment patterns of persons in a situation similar to a particular married couple is not a matter of common knowledge, and therefore, comparisons of the investments in the wife's portfolio to those of some hypothetical average investor or a skilled investment counselor were merely speculation, it was proper for the trial court to conclude on the basis of such observations that neither party contributed to enhancement of the value of the stocks. In re Wildin, 39 Colo. App. 189, 563 P.2d 384 (1977).

**Valuation of intangible assets of husband's business.** In determining the intangible value of husband's business, the important consideration is whether husband's business has a value to him above and beyond the tangible assets. In re Martin, 707 P.2d 1035 (Colo. App. 1985); In re Huff, 834 P.2d 244 (Colo. 1992).

**Spouse was not entitled to any increase in value of assets awarded to her from the date of the decree to the date the permanent orders were entered where the decree was entered prior to the date of the hearing on disposition of property.** In re Graff, 902 P.2d 402 (Colo. App. 1994).

**Specific determination of the nature and elements of goodwill may be required when court orders one party to execute a covenant not to compete for protection of the goodwill of a business awarded to the other party.** In re Fischer, 834 P.2d 270 (Colo. App. 1992).

**Central to the valuation of property is the determination whether the property will actually be sold, thereby resulting in a net equity.** The court should consider husband's intentions as to whether he will sell the property at issue, and if the property is to be sold, the finding of net equity must comport with the evidence. In re Finer, 920 P.2d 325 (Colo. App. 1996).

**In case of dissipation of property, trial court's alternative ruling that stock shares could be valued at the time when they were sold, if that value was higher than the value on the date of the decree, was proper.** In re Huston, 967 P.2d 181 (Colo. App. 1998).

**Trial court did not err in valuing a leased automobile at \$13,500,** where husband had recently prepaid \$13,500 on the lease of the leased vehicle. In re Balanson, 996 P.2d 213 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 25 P.3d 28 (Colo. 2001).

**Subsection (5) makes no provision regarding the date on which interest should begin to accrue on any sum ordered to be paid as part of the division of marital property.** In re Rodrick, 176 P.3d 806 (Colo. App. 2007).

**Applied in** In re Thompson, 706 P.2d 428 (Colo. App. 1985).

#### IV. SCOPE OF REVIEW.

**Scope of review.** Division of property in dissolution of marriage proceedings may only be overturned upon a finding that the trial court abused its discretion. In re Talarico, 36 Colo. App. 389, 540 P.2d 1147 (1975); In re Sharp, 823 P.2d 1387 (Colo. App. 1991).

**An appellate court will alter a division of property only if the trial court abuses its discretion.** In re Graham, 194 Colo. 429, 574 P.2d 75 (1977).

**One who has accepted benefits of judgment may not seek reversal of that judgment on appeal.** In re Jones, 627 P.2d 248 (Colo. 1981).

**Acceptance of the benefits of a judgment constitutes a waiver of appeal rights only if such action is inconsistent with the basis for the appeal.** It is when the appeal, if successful, will again put into issue the right of the party to receive the benefits already accepted that a

waiver of the right to appeal has been found. In re Antuna, 8 P.3d 589 (Colo. App. 2000).

**Husband is not barred from appealing portion of the property division where he had previously received his share of the retirement funds pursuant to the parties' agreement before the hearing on permanent orders.** In re Antuna, 8 P.3d 589 (Colo. App. 2000).

**A trial court having reached its conclusions and entered its order and judgment on documentary evidence alone,** the supreme court was as well qualified to determine the equities involved in a divorce action concerning a division of the property of the parties as was the trial court, and under such circumstances, presumptions in favor of the correctness of the order and judgment were not conclusive. Stephenson v. Stephenson, 134 Colo. 96, 299 P.2d 1095 (1956).

**In an action for divorce, where the questions presented to the appellate court for review concern only the property rights of the parties, matters relating to the divorce were not considered.** Wigton v. Wigton, 73 Colo. 337, 216 P. 1055 (1923).

**Where the reporter's transcript of the testimony taken at a hearing on division of property in a divorce action was not included in the record on error,** the supreme court assumed that the trial court had before it the entire situation of the parties, that the evidence before the court fully supported the determination

made, and that all conflicting claims of the parties were properly resolved. Gier v. Gier, 139 Colo. 289, 339 P.2d 677 (1959).

**Where a decree ordering the title to property to remain in joint tenancy and granting the rights of possession and income in the property to the wife was not challenged,** and had long since become final, the supreme court could not review it. McDonald v. McDonald, 150 Colo. 492, 374 P.2d 690 (1962).

**Under the law of the case doctrine,** conclusions of an appellate court on issues presented to it, as well as rulings logically necessary to sustain such conclusions, become the law of the case and generally must be followed in subsequent proceedings in that case. However, application of the law of the case by a trial court to its property division rulings entered prior to an appeal is a discretionary rule of practice. The trial court's original permanent orders lose any binding effect or precedential value when they are reversed on appeal. In re Burford, 26 P.3d 550 (Colo. App. 2001).

## V. ENFORCEMENT.

**Enforcement of property settlement.** Ordering the payment of an amount due pursuant to the terms of the property settlement, together with interest, is an enforcement of the original decree and not a modification of the property settlement. In re Schutte, 721 P.2d 160 (Colo. App. 1986).

**14-10-114. Maintenance.** (1) **Legislative declaration.** The general assembly hereby finds that the economic lives of spouses are frequently closely intertwined in marriage and that it is often impossible to later segregate the respective decisions and contributions of the spouses. The general assembly further finds that when a dissolution of marriage or legal separation action has been filed and temporary orders are to be determined pursuant to section 14-10-108, it is generally appropriate to utilize the period of temporary orders as a period of adjustment during which the marital arrangements of the parties may be recognized through a temporary blending of the parties' incomes. Accordingly, the general assembly declares that for purposes of temporary orders, it is appropriate in most cases to apply a presumptive formula to the determination of temporary maintenance.

(2) (a) In every proceeding for dissolution of marriage or legal separation when temporary maintenance is requested by a party and when the combined annual gross income of the two parties is seventy-five thousand dollars or less, there shall be a rebuttable presumption in favor of a specific award of temporary maintenance from the higher income party to the lower income party based upon the formula set forth in paragraph (b) of this subsection (2). In those cases in which the combined annual gross income of the parties exceeds seventy-five thousand dollars, the court may award a monthly amount of temporary maintenance pursuant to the provisions of subsections (3) and (4) of this section.

(b) (I) (A) The monthly amount of temporary maintenance in cases in which the parties' combined annual gross income is seventy-five thousand dollars or less shall be equal to forty percent of the higher income party's monthly adjusted gross income less fifty percent of the lower income party's monthly adjusted gross income. If the remainder of such calculation is the number zero or a negative number, the presumption shall be that temporary maintenance shall not be awarded. If the remainder of such calculation is more than zero, that amount shall be the amount of the monthly temporary maintenance.

(B) In any action to establish or modify temporary maintenance pursuant to this subsection (2), the formula set forth in sub-subparagraph (A) of this subparagraph (I) shall



be used as a rebuttable presumption for the establishment or modification of the amount of temporary maintenance. Courts shall deviate from the formula where its application would be inequitable or unjust. Any such deviation shall be accompanied by written or oral findings by the court specifying the reasons for the deviation and the presumed amount under the formula without deviation.

(C) The parties may agree in writing to waive temporary maintenance under this subsection (2) where one party is otherwise entitled to temporary maintenance under the formula or the parties may agree in writing to deviate from the presumptive amount of temporary maintenance. Any such agreement to waive temporary maintenance or to deviate from the presumptive amount shall include the reason or consideration for the waiver or deviation. The court shall have jurisdiction to review such agreement and to decline to approve such agreement if the court determines that the agreement is unconscionable.

(II) At the time of the initial establishment of temporary maintenance pursuant to this subsection (2), or in any proceeding to modify a temporary maintenance order pursuant to this subsection (2), if a party is under an obligation to pay maintenance or alimony pursuant to a prior valid court order, an adjustment shall be made revising such party's income by the amount of such maintenance or alimony actually paid prior to calculating the amount of temporary maintenance.

(III) At the time of the initial establishment of temporary maintenance pursuant to this subsection (2), or in any proceeding to modify a temporary maintenance order pursuant to this subsection (2), if a party is legally responsible for the support of other children who are not the children of the parties and for whom the parties do not share joint legal responsibility, an adjustment shall be made revising such party's income by the amount of such child support paid prior to calculating the amount of temporary maintenance.

(IV) (A) For purposes of this section, "income" shall have the same meaning as that term is described in section 14-10-115 (3).

(B) For purposes of calculating the formula set forth in this paragraph (b), "monthly adjusted gross income" means gross income less preexisting maintenance or alimony obligations actually paid by a party as described in subparagraph (II) of this paragraph (b) and less the amount of child support paid by a party, as described in subparagraph (III) of this paragraph (b).

(c) The period of time covered by any temporary maintenance ordered pursuant to this subsection (2), upon the request of a party, shall begin at the time of the parties' physical separation or filing of the petition or service upon the respondent, whichever occurs last, taking into consideration payments made by either party during such period.

(d) Because spousal maintenance awards entered at temporary orders pursuant to this subsection (2) are made under different standards and for different reasons than spousal maintenance awards entered at permanent orders, the temporary maintenance formula set forth in this subsection (2) shall not be used for the determination of spousal maintenance orders to be entered at permanent orders and any temporary maintenance order entered pursuant to this subsection (2) shall not prejudice the rights of either party at permanent orders.

(e) After determining the presumptive amount of temporary maintenance pursuant to this subsection (2) and the amount of temporary child support pursuant to section 14-10-115, the court shall consider the respective financial resources of each party and determine the temporary payment of marital debt and the temporary allocation of marital property.

(3) In a proceeding for dissolution of marriage or legal separation or a proceeding for maintenance following dissolution of marriage by a court, the court may grant a temporary maintenance order when the parties' combined annual gross income is more than seventy-five thousand dollars or a maintenance order at the time of permanent orders for either spouse only if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property, including marital property apportioned to him or her, to provide for his or her reasonable needs; and

(b) Is unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(4) A temporary maintenance order in those circumstances in which the parties' combined annual gross income is more than seventy-five thousand dollars or a maintenance order entered at the time of permanent orders shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to such party, and the party's ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and that party's future earning capacity;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance.

**Source:** **L. 71:** R&RE, p. 526, § 1. **C.R.S. 1963:** § 46-1-14. **L. 79:** (2)(b) amended, p. 644, § 1, effective July 1. **L. 98:** (2)(a) amended, p. 1397, § 41, effective February 1, 1999. **L. 2001:** Entire section amended, p. 481, § 1, effective July 1. **L. 2007:** (2)(b)(IV)(A) amended, p. 107, § 2, effective March 16.

## ANNOTATION

- I. General Consideration.
- II. Award of Maintenance.
  - A. Prerequisites.
  - B. Determination of Right or Need for Maintenance.
  - C. Amount and Form of Maintenance.
  - D. Discretion of Court.
  - E. Modification and Scope of Review.
- III. Separate Maintenance.
- IV. Antenuptial Agreements.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Legislation Which Should Interest the Bar", see 20 Dicta 217 (1943). For article, "Forms Committee Presents Standard Pleading Samples to Be Used in Divorce Litigation", see 29 Dicta 94 (1952). For note, "The Effect of a Divorce Decree on a Subsequent Claim for Alimony", see 35 U. Colo. L. Rev. 402 (1963). For note on divorce, separation, and the federal income tax, see 39 U. Colo. L. Rev. 544 (1967). For note, "Legislation: Domestic Relations — New Colorado Statutes Govern Procedure in Contested Child Custody Cases", see 40 U. Colo. L. Rev. 485 (1968). For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969). For article, "Pre-Nuptial Agreements Revisited", see 11 Colo. Law. 1882 (1982). For article, "Automatic Escalation Clauses Relating to Maintenance and Child Support", see 12 Colo. Law.

1083 (1983). For article, "The Continued Jurisdiction of the Court to Modify Maintenance", see 13 Colo. Law. 62 (1984). For article, "Taxation", which discusses a recent Tenth Circuit decision dealing with periodic payments as alimony or property settlement, see 61 Den. L.J. 392 (1984). For article, "Domestic Case Update", see 14 Colo. Law. 209 (1985). For article, "Marital Agreements", see 18 Colo. Law. 31 (1989). For article, "The Case For Maintenance Reform", see 23 Colo. Law. 53 (1994). For article, "Voluntary Early Retirement as a Factor in Modifying Maintenance", see 25 Colo. Law. 43 (April 1996). For article, "Post-dissolution Maintenance Review in Trial Court Under CRS §§ 14-10-114 or -122", see 26 Colo. Law. 93 (July 1997). For article, "New Temporary Formulaic Spousal Maintenance in Colorado: An Overview", see 30 Colo. Law. 87 (August 2001). For article, "Complex Financial Issues in Family Law Cases", see 37 Colo. Law. 53 (October 2008).

**Annotator's note.** Since § 14-10-114 is similar to repealed § 46-1-5 (1)(d), C.R.S. 1963, § 46-1-5, CRS 53, CSA, C. 56, § 8, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Any award of maintenance to a spouse in Colorado is a personal statutory right and not a property right.** In re Wise, 264 B.R. 701 (Bankr. D. Colo. 2001), aff'd, 285 B.R. 8 (Bankr. D. Colo. 2002), aff'd, 346 F.3d 1239 (10th Cir. 2003).



The spirit of this section was comprehensive enough to cover a case where there might be some question as to whether a marriage was one de jure, provided there was a marriage de facto. *Eickhoff v. Eickhoff*, 29 Colo. 295, 68 P. 237 (1902).

Uniform Dissolution of Marriage Act provides separate sections that govern the different elements of a dissolution order, specifically property disposition, maintenance, child support, and attorney fees. The court is required to make separate orders regarding these elements based on separate considerations and may not commingle one element with another. In *re Huff*, 834 P.2d 244 (Colo. 1992).

**There is a distinction between maintenance awards and property settlements.** Property divisions are intended to accomplish a just apportionment of marital property over time, whereas maintenance is intended to be a substitute for marital support that can be used, for example, to ease a spouse's transition into the work force and prevent the spouse from becoming dependent on public assistance. In *re Wise*, 264 B.R. 701 (Bankr. D. Colo. 2001).

Division of property is mandatory under § 14-10-113, whereas an award of maintenance is discretionary under this section. In *re Wise*, 264 B.R. 701 (Bankr. D. Colo. 2001).

**Maintenance used to balance equities.** A trial court may use an award of maintenance as a tool to balance equities and compensate a spouse whose work has enabled the other spouse to obtain an education; however, this tool is available for use only where the spouse seeking maintenance meets the statutory threshold requirements of need. In *re McVey*, 641 P.2d 300 (Colo. App. 1981).

Trial court did not abuse its discretion in determining that it would be equitable in view of the division of property for the income of husband and wife to be relatively equal. In *re Martin*, 707 P.2d 1035 (Colo. App. 1985).

**The divorce decree was the principal thing and the judgment for alimony was incidental,** and whether they were entered separately or together, they were treated as part of the same decree. *Miller v. Miller*, 129 Colo. 462, 271 P.2d 411 (1954).

**Matters of maintenance and property division are inextricably interwoven.** In *re McVey*, 641 P.2d 300 (Colo. App. 1981).

It was well-established in Colorado that the courts viewed the testimony in alimony and property settlement matters in the light most favorable to the prevailing party. *Gleason v. Gleason*, 162 Colo. 212, 425 P.2d 688 (1967).

**Alimony was defined generally as payments necessary for food, clothing, habitation, and other necessities for the support of the wife.** *Magarrell v. Magarrell*, 144 Colo. 228, 355 P.2d 946 (1960).

**Insurance policies and the premiums necessary to maintain them in full force were not in any sense to provide for food, clothing, habitation, or other necessities for the support of the wife.** *Magarrell v. Magarrell*, 144 Colo. 228, 355 P.2d 946 (1960).

**An award to the wife of the use, possession, and income of the real estate did not constitute an award of alimony,** because the right to use and possession and the income of real property were but incidents of the ownership of that property. *McDonald v. McDonald*, 150 Colo. 492, 374 P.2d 690 (1962).

**When parties availed themselves of the good offices of the court to fix the amounts of alimony to be paid from time to time and themselves changed the action from one for separate maintenance to one for divorce, it was assumed that they submitted themselves to the jurisdiction of the court for the entry of such orders as it deemed just and fair in accordance.** *Gavette v. Gavette*, 104 Colo. 71, 88 P.2d 964 (1939).

**Where the parties made a good faith although unsuccessful attempt at reconciliation and where the husband supported the family during this time, the support paid and contributed by the husband constituted payment of the maintenance installments accruing during the period they were living together.** In *re Peterson*, 40 Colo. App. 115, 572 P.2d 849 (1977).

**For the effect of an invalidity of marriage determination on maintenance payments which were terminated upon remarriage,** see *Torgan v. Torgan*, 159 Colo. 93, 410 P.2d 167 (1966).

**Applied in** *In re Thompson*, 39 Colo. App. 400, 568 P.2d 98 (1977); *In re Mitchell*, 195 Colo. 399, 579 P.2d 613 (1978); *In re Wagner*, 44 Colo. App. 114, 612 P.2d 1147 (1980); *In re Angerman*, 44 Colo. App. 298, 612 P.2d 1166 (1980); *In re Hartford*, 44 Colo. App. 303, 612 P.2d 1163 (1980); *In re Davis*, 44 Colo. App. 355, 618 P.2d 692 (1980); *In re Carney*, 631 P.2d 1173 (Colo. 1981); *Faris v. Rothenberg*, 648 P.2d 1089 (Colo. 1982); *In re Dickey*, 658 P.2d 276 (Colo. App. 1982); *In re Manzo*, 659 P.2d 669 (Colo. 1983); *In re Westlake*, 674 P.2d 1386 (Colo. App. 1983); *In re Dixon*, 683 P.2d 803, (Colo. App. 1983); *In re Wormell*, 697 P.2d 812 (Colo. App. 1985); *In re Thompson*, 706 P.2d 428 (Colo. App. 1985); *In re Martin*, 707 P.2d 1035 (Colo. App. 1985); *People in Interest of V.H.*, 749 P.2d 460 (Colo. App. 1987); *In re Micaletti*, 796 P.2d 54 (Colo. App. 1990); *In re Sim*, 939 P.2d 504 (Colo. App. 1997); *In re Lafaye*, 89 P.3d 455 (Colo. App. 2003).

## II. AWARD OF MAINTENANCE.

### A. Prerequisites.

**Maintenance must be requested in petition.** Under the uniform act, maintenance must be

requested in the petition for dissolution. In re Boyd, 643 P.2d 804 (Colo. App. 1982).

**Property division must precede consideration of maintenance.** In re Jones, 627 P.2d 248 (Colo. 1981). In re Huff, 834 P.2d 244 (Colo. 1992).

**Application of subsection (1)(a) presupposes dividing marital property after setting apart separate property.** The application of subsection (1)(a) presupposes that the court has first set apart to each spouse his or her respective separate property and has divided the marital property. In re Jones, 627 P.2d 248 (Colo. 1981).

**Alimony being consequent upon obtaining a divorce, there could be no judgment for alimony without a divorce decree,** though they may have been and generally were entered together, the incident could not exist without the principal. Miller v. Miller, 129 Colo. 462, 271 P.2d 411 (1954).

**Where no cause of action was stated in a complaint for divorce, no allowance of alimony or attorney fees could have been made.** Oates v. Oates, 72 Colo. 195, 210 P. 325 (1922).

**No personal judgment for alimony could be entered against the husband where service was by publication,** but such alimony could be made a charge on land over which the court acquired jurisdiction by such service. Fowler v. Fowler, 74 Colo. 231, 220 P. 988 (1923).

**Awards of maintenance are non-dischargeable in bankruptcy** and the question of whether a domestic obligation is in the nature of maintenance must be determined based on federal bankruptcy standards, taking into account the substance of the obligation and the intent of the parties at the time of dissolution. In re Wilson, 888 P.2d 365 (Colo. App. 1994).

**The parties' designation of a debt in the decree of dissolution as either a maintenance award that is non-dischargeable in bankruptcy or a property settlement that is dischargeable is not dispositive and in determining the intent of the parties and the substance of the obligation, the trial court must look beyond the language of the decree and may consider extrinsic evidence.** In re Wilson, 888 P.2d 365 (Colo. App. 1994).

**Trial court improperly found that husband's obligation to pay a street improvement debt was a nondischargeable lump sum maintenance obligation** since, although an obligation to pay such a debt can be in the nature of maintenance, there was no evidence in the record that the parties intended that the obligation be in the nature of maintenance. In re Wilson, 888 P.2d 365 (Colo. App. 1994).

#### B. Determination of Right or Need for Maintenance.

**This section leaves to the trial court the determination under the particular facts of**

**each case whether to award alimony.** Reap v. Reap, 142 Colo. 354, 350 P.2d 1063 (1960).

**This section does not compel a court to grant alimony in a divorce case; it is merely permissive.** Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958); Int'l. Trust Co. v. Liebhardt, 111 Colo. 208, 139 P.2d 264 (1943).

**Alimony could be waived, and the right to seek alimony could be surrendered for a valuable consideration.** Newey v. Newey, 161 Colo. 395, 421 P.2d 464, 422 P.2d 641 (1966).

**Court must make findings of fact which demonstrate the basis of its award of maintenance.** In re Laychak, 704 P.2d 874 (Colo. App. 1985).

**Evidence relevant to issue of "need".** While evidence that husband allegedly inflicted the injuries which resulted in wife's medical expenses and decreased her earning capacity is irrelevant, evidence of wife's medical expenses and earning capacity are relevant to establishing statutory requirements of need and trial court's exclusion of such evidence adversely affected wife's rights regarding maintenance. In re Hulse, 727 P.2d 876 (Colo. App. 1986).

**Determination of spouse's reasonable needs depends on the particular facts and circumstances of the parties' marriage, and court should consider the reasonable expectations of the parties in determining whether the a party should be granted maintenance.** In re Marshall, 781 P.2d 177 (Colo. App. 1989), cert. denied, 794 P.2d 1011 (Colo. 1990).

**The wife is not required to consume her portion of the marital property before being entitled to maintenance.** In re Eller, 38 Colo. App. 74, 552 P.2d 30 (1976); In re Sewell, 817 P.2d 594 (Colo. App. 1991); In re Nordahl, 834 P.2d 838 (Colo. App. 1992); In re Bartolo, 971 P.2d 699 (Colo. App. 1998).

**A court awarding maintenance need not make explicit findings that the wife has insufficient property to meet reasonable needs or is unable to support herself through appropriate employment.** In re Lee, 781 P.2d 102 (Colo. App. 1989).

**All that is required is that the court consider the wife's share of the marital property in arriving at its maintenance award.** In re Eller, 38 Colo. App. 74, 552 P.2d 30 (1976).

**In determining whether to award maintenance, the court must make a threshold determination that the spouse requesting it lacks sufficient property, including marital property, to provide for her reasonable needs and is unable to support herself through appropriate employment.** In re Renier, 854 P.2d 1382 (Colo. App. 1993); In re Fisher, 931 P.2d 558 (Colo. App. 1996); In re Bartolo, 971 P.2d 699 (Colo. App. 1998); In re Rose, 134 P.3d 559 (Colo. App. 2006).

**In making threshold inquiry into a party's entitlement to temporary maintenance, trial**



court may consider the parties' standard of living during the marriage. The ability of a party to meet his or her reasonable needs through appropriate employment is dependent upon the particular facts and circumstances of the marriage and the expectations established during the marriage. In re Thornhill, 232 P.3d 782 (Colo. 2010).

**The trial court properly determined questions of alimony and support basing its findings on the financial conditions, abilities, and needs of the parties as they appeared at the time of the hearing rather than on what those conditions might have been in the past or may be in the future.** Watson v. Watson, 135 Colo. 296, 310 P.2d 554 (1957).

**Because an award of permanent alimony must be based upon the circumstances existing at the time of the hearing thereon, including, but not limited to, the duration of the marriage, the financial condition of the parties, their needs and their abilities.** Boyer v. Boyer, 148 Colo. 535, 366 P.2d 661 (1961).

**Highly relevant factor to be considered by court in effecting just division of marital property** is the extent to which the division will promote the objective of providing for each party's financial needs without maintenance. In re Jones, 627 P.2d 248 (Colo. 1981).

**Fact that parties are in debt and having serious financial problems at time of dissolution does not preclude a nominal award of maintenance, if there is reason to believe that one party may rebound financially and may again be in the position to assist the other spouse in obtaining a standard of living nearer to that enjoyed during their marriage.** In re Fernstrum, 820 P.2d 1149 (Colo. App. 1991).

**Under subsection (1)(a) propriety of award of maintenance depends upon the inadequacy of the property and earning capacity possessed by the party seeking the award.** In re Jones, 627 P.2d 248 (Colo. 1981); In re Olar, 747 P.2d 676 (Colo. 1987).

**Husband's rights in discretionary trust are to be considered as "economic circumstance"** of the husband in determining a just division of the marital property pursuant to § 14-10-113 (1)(c) and as a "relevant factor" in making an award of maintenance under subsection (2). In re Rosenblum, 43 Colo. App. 144, 602 P.2d 892 (1979).

**Contribution to education of spouse.** Among the relevant factors to be considered in a division of marital property is the contribution of the spouse seeking maintenance to the education of the other spouse from whom the maintenance is sought. In re Graham, 194 Colo. 429, 574 P.2d 75 (1977); In re Olar, 747 P.2d 676 (Colo. 1987).

**Voluntary financial contributions to wife by adult children, which are not based upon any legal obligation, are not appropriate factors**

for the trial court to consider in determining the amount of a maintenance award. In re Serdinsky, 740 P.2d 521 (Colo. 1987).

**Limited consideration of a third party's resources, such as a current spouse's income, is not absolutely prohibited** if the existence or use of such assets is directly relevant to an allegation by the payor spouse of a substantial and continuing change of circumstances. In re Bowles, 916 P.2d 615 (Colo. App. 1995).

**The conduct of the party seeking alimony was formerly to be examined closely by the trial court, and evidence of moral delinquency or complete disregard of the marital vows and duties would be viewed as a bar to alimony.** Reap v. Reap, 142 Colo. 354, 350 P.2d 1063 (1960).

**In Colorado, fault was not the sole standard in determining whether alimony would be awarded.** Reap v. Reap, 142 Colo. 354, 350 P.2d 1063 (1960).

**Permanent alimony could be awarded the divorced wife although the decree may have been granted the husband for her fault.** Neander v. Neander, 35 Colo. 495, 84 P. 69 (1906); Vigil v. Vigil, 49 Colo. 156, 111 P. 833 (1910); Bock v. Bock, 154 Colo. 408, 390 P.2d 956 (1964).

**The fact that a person is without funds and without profitable employment has been held not to preclude the allowance of reasonable alimony and support where nothing but a disinclination to work, regardless of the motive therefor, interferes with his ability to earn a reasonable living.** Rapson v. Rapson, 165 Colo. 188, 437 P.2d 780 (1968); Berge v. Berge, 33 Colo. App. 376, 522 P.2d 752 (1974), aff'd, 189 Colo. 103, 536 P.2d 1135 (1975).

**The fact that defendant decided to quit his employment and return to college did not preclude the allowance of a reasonable support order based on his demonstrated earning capacity.** Rapson v. Rapson, 165 Colo. 188, 437 P.2d 780 (1968).

**Even though husband was out of work through no fault of his own and despite his good faith efforts to obtain work, award of monthly maintenance to wife was not an abuse of discretion** because the husband retained a significant earning capacity. In re Gray, 813 P.2d 819 (Colo. App. 1991).

**"Appropriate employment"** means the employment is suited to the individual, including the individual's expectations and intentions as expressed during marriage. In re Olar, 747 P.2d 676 (Colo. 1987).

What constitutes "appropriate employment" requires consideration of the party's economic circumstances and reasonable expectations established during the marriage. The terms "reasonable needs" and "appropriate employment" should not be interpreted narrowly. Aldinger v. Aldinger, 813 P.2d 836 (Colo. App. 1991).

The determination of what constitutes "appropriate employment" and "reasonable needs" under subsection (1) is dependent upon the particular facts and circumstances of each case. In re Sewell, 817 P.2d 594 (Colo. App. 1991).

**It is a defense to an action by a wife for alimony, support, maintenance, or separate maintenance** that the husband already is making her a suitable and regular allowance, provided that allowance is a sufficient one. Vines v. Vines, 137 Colo. 449, 326 P.2d 662 (1958).

**A claim that a trial court failed to rule on the issue of granting or denying alimony in a divorce action** was not supported by a record which showed an interlocutory decree providing for monthly support payments for a minor child until further order of the court, together with fees for defendant's counsel. Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958).

**A spouse who accepts maintenance payments or an attorney fee award is not precluded from appealing such order.** In re Lee, 781 P.2d 102 (Colo. App. 1989).

**Court must reconsider the amount and duration of maintenance awarded upon correcting the property division.** In re Antuna, 8 P.3d 589 (Colo. App. 2000).

#### C. Amount and Form of Maintenance.

**There is no mathematical formula for establishing a just and equitable property settlement or alimony or support.** Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

**In the absence of special circumstances, an order for the support of a wife in a divorce case should be a reasonable sum,** based on the necessities of the wife and the husband's ability to pay. Elmer v. Elmer, 132 Colo. 57, 285 P.2d 601 (1955); Moss v. Moss, 190 Colo. 491, 549 P.2d 404 (1976).

Alimony in gross will not normally be awarded unless special circumstances are present which support such award. Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973).

**While the needs of a divorced wife remaining unmarried are not controlling on the amount of alimony to be awarded,** they are deserving of careful consideration. Rodgers v. Rodgers, 102 Colo. 94, 76 P.2d 1104 (1938).

**A personal judgment against a husband in a divorce action for alimony in a sum not justified by the record** should not be entered simply on the ground of possible indefinite future increase in income, because if his financial situation improves so as to justify an increase in alimony, the power of the court to make additional appropriate orders may be invoked at the wife's pleasure. Gourley v. Gourley, 101 Colo. 430, 73 P.2d 1375 (1937).

**In the absence of special circumstances which require or make a lump-sum award of alimony proper,** or a compelling reason that

necessitates the desirability for such an award, a lump-sum or gross award of alimony should not be made. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

**Absent extraordinary circumstances, court may not order one party to use property awarded in a dissolution proceeding to pay maintenance to the other party.** In re Gray, 813 P.2d 819 (Colo. App. 1991).

**Each case depends on own facts.** As to the determination as to whether to make a lump-sum award of alimony, each case depends upon its own peculiar facts and circumstances. Moss v. Moss, 190 Colo. 491, 549 P.2d 404 (1976).

**Alimony in gross is not unacceptable per se.** Moss v. Moss, 190 Colo. 491, 549 P.2d 404 (1976).

While maintenance in gross is not favored, nevertheless, in a proper case it may be awarded. In re McVey, 641 P.2d 300 (Colo. App. 1981).

**Since the granting of alimony in gross, or lump-sum alimony, as it is sometimes called,** provides a definite and final judgment which the court cannot later modify, periodic payments are preferred, because such payments can be modified if a change in circumstances occurs. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

**Whether the court should award periodic alimony or alimony in gross** is generally held to be a matter within the sound discretion of the court. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972); Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973); Moss v. Moss, 35 Colo. App. 53, 531 P.2d 635 (1974), aff'd, 190 Colo. 491, 549 P.2d 404 (1976); In re Icke, 35 Colo. App. 60, 530 P.2d 1001 (1974), aff'd, 189 Colo. 319, 540 P.2d 1076 (1975).

The trial court has broad discretion in determining the amount of alimony and the form of the award, i.e., periodic payments or alimony in gross. Moss v. Moss, 190 Colo. 491, 549 P.2d 404 (1976).

**Although alimony could consist of periodic payments, indefinite in time and certain in amount,** it was not necessarily true that all such payments in fixed amounts constituted alimony. Magarrell v. Magarrell, 144 Colo. 228, 355 P.2d 946 (1960).

**Periodic alimony is generally favored** because the court retains jurisdiction of the matter and may later modify the award. Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973).

Awards of periodic payments of alimony are preferred over awards of alimony in gross because an award of alimony in gross is a final judgment which is not modifiable at a later time while an award of periodic payments may be modified to adjust for changes in the circumstances of the parties. Moss v. Moss, 190 Colo. 491, 549 P.2d 404 (1976).



**A decree giving land as alimony was not ipso facto erroneous**, because entered after the interlocutory and before the final decree of divorce, there being a prayer for alimony. *Wigton v. Wigton*, 73 Colo. 337, 216 P. 1055 (1923); *Fowler v. Fowler*, 74 Colo. 231, 220 P. 988 (1923).

**In awarding permanent alimony, care should be taken that it does not amount to an appropriation of the entire estate of the husband.** *Elmer v. Elmer*, 132 Colo. 57, 285 P.2d 601 (1955).

**An order for "permanent alimony" cannot amount to confiscation of the assets of the husband.** *Elmer v. Elmer*, 132 Colo. 57, 285 P.2d 601 (1955).

**Moreover, a court cannot make an award which will impoverish the husband.** *Santilli v. Santilli*, 169 Colo. 49, 453 P.2d 606 (1969).

**In setting the amount of maintenance to be awarded, the court must consider all relevant factors** including the ability of the spouse paying maintenance to meet his own needs and the needs of the spouse receiving maintenance. The court may also consider the future earning potential of the spouse. *In re Gray*, 813 P.2d 819 (Colo. App. 1991).

**Trial court was required to balance all of the factors of subsection (4)**, including the mother's needs and abilities, her future earning capacity, the duration of the marriage and standard of living established throughout, and the parties' financial restrictions, and absent an abuse of discretion, court's award will not be reversed and, when the order is supported by competent evidence, it should not be disturbed on review. *In re Atencio*, 47 P.3d 718 (Colo. App. 2002).

**No income is imputed to the wife for choice of a retirement option that resulted in a smaller payment, for delaying payment in another plan, or for requesting that the court ignore the equity in her home.** A decision that income should be imputed to the wife for not choosing differing retirement options or for not using equity in the house for living expenses would be tantamount to requiring her to exhaust her portion of the marital property before she is entitled to maintenance. *In re Folwell*, 910 P.2d 91 (Colo. App. 1995).

**Court may not incorporate attorney fees into maintenance award.** While award of attorney fees must be reviewed in light of parties' resources following property division and award of maintenance, standards for the different elements of the order are separate and distinct; tax consequences also may differ. *In re Huff*, 834 P.2d 244 (Colo. 1992).

**Unliquidated workers' compensation award held to be different from pension.** Whether award is marital property depends on extent to which award compensates for loss of earning capacity and medical expenses incurred

during the marriage. If award compensates the spouse for post-dissolution loss of earning capacity, it is not marital property even if the compensable injury occurred during the marriage. If workers' compensation claim is pending on date of dissolution and will likely include indemnification for loss of marital earnings or medical expenses, trial court may reserve jurisdiction to apportion marital interest upon receipt of award. *In re Smith*, 817 P.2d 641 (Colo. App. 1991).

**Where trial court's errors in making its property division with respect to stock options, interspousal gifts to wife, and wife's interest in the family trust impacted a substantial portion of the total marital assets**, on remand the trial court should reconsider its maintenance award in light of its new property division and in light of the significant decrease in the value of one of the parties' investment accounts. *In re Balanson*, 25 P.3d 28 (Colo. 2001).

**Court may rely on a previous allowance paid and other expenses paid by one party as evidence of the other party's reasonable needs** for purposes of calculating the amount of temporary orders. *In re Rose*, 134 P.3d 559 (Colo. App. 2006).

#### D. Discretion of Court.

**The awarding of alimony and fixing the amount thereof rested in the sound discretion of the trial court** and unless an abuse of discretion was shown its judgment in such cases was not disturbed. *Rodgers v. Rodgers*, 102 Colo. 94, 76 P.2d 1104 (1938); *Kleiger v. Kleiger*, 127 Colo. 86, 254 P.2d 426 (1953); *Bieler v. Bieler*, 130 Colo. 17, 272 P.2d 636 (1954); *Nunemacher v. Nunemacher*, 132 Colo. 300, 287 P.2d 662 (1955); *Schleiger v. Schleiger*, 137 Colo. 279, 324 P.2d 370 (1958); *Green v. Green*, 139 Colo. 551, 342 P.2d 659 (1959); *Brigham v. Brigham*, 141 Colo. 41, 346 P.2d 302 (1959); *Lanz v. Lanz*, 143 Colo. 73, 351 P.2d 845 (1960); *Brownfield v. Brownfield*, 143 Colo. 262, 352 P.2d 674 (1960); *Walden v. Walden*, 147 Colo. 221, 363 P.2d 168 (1961); *Flor v. Flor*, 148 Colo. 514, 366 P.2d 664 (1961); *McMichael v. McMichael*, 152 Colo. 65, 380 P.2d 233 (1963); *Hayutin v. Hayutin*, 152 Colo. 261, 381 P.2d 272 (1963); *Alden v. Alden*, 155 Colo. 51, 393 P.2d 5 (1964); *Kraus v. Kraus*, 159 Colo. 331, 411 P.2d 240 (1966); *MacReynolds v. MacReynolds*, 29 Colo. App. 267, 482 P.2d 407 (1971); *Thompson v. Thompson*, 30 Colo. App. 57, 489 P.2d 1062 (1971); *Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972); *Jekot v. Jekot*, 32 Colo. App. 118, 507 P.2d 473 (1973); *In re Icke*, 35 Colo. App. 60, 530 P.2d 1001 (1974), *aff'd*, 189 Colo. 319, 540 P.2d 1076 (1975); *In re Martin*, 707 P.2d 1035 (Colo. App. 1985); *In re Gray*, 813 P.2d 819 (Colo. App.

1991); In re Bartolo, 971 P.2d 699 (Colo. App. 1998); In re Balanson, 996 P.2d 213 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 25 P.3d 28 (Colo. 2001); In re Lafaye, 89 P.3d 455 (Colo. App. 2003).

Awards of child support and maintenance are matters generally within the sound discretion of the trial court and will not be set aside on appellate review in the absence of an abuse of discretion. In re Krise, 660 P.2d 920 (Colo. App. 1983).

**Although a wife did not request alimony in her answer, once the trial court decided the issue of divorce, it was within its power under this section to determine whether the circumstances required additional orders for alimony and support.** Reap v. Reap, 142 Colo. 354, 350 P.2d 1063 (1960).

**A trial court certainly could, if so inclined, consider the effect of state and federal income taxes on its contemplated award.** Cohan v. Cohan, 150 Colo. 249, 372 P.2d 149 (1962).

**The task of a trial court in a divorce action was to make a fair and equitable award of alimony and support,** letting the taxes, and tax deductions, fall where they may. Cohan v. Cohan, 150 Colo. 249, 372 P.2d 149 (1962).

**The supreme court cannot say as matter of law that a trial court abuses its discretion in limiting the period of time during which alimony should be paid by the husband where the trial court awards alimony in a definite sum payable in monthly installments based on the finding that the award meets the reasonable needs of the wife in light of her present condition.** Liggett v. Liggett, 152 Colo. 110, 380 P.2d 673 (1963).

**Trial court erred in determining that it did not have discretion to determine the duration of maintenance and that it was therefore required to provide for maintenance for an unspecified period of time.** In re Fisher, 931 P.2d 558 (Colo. App. 1996).

**Alimony, support, and property settlement issues were formally considered together to determine whether the court had abused its discretion,** and in making the determination, the court would consider a variety of factors, including whether the property was acquired before or after marriage, the efforts and attitudes of the parties toward its accumulation, the respective ages and earning abilities of the parties, the conduct of the parties during the marriage, the duration of the marriage, their stations in life, their health and physical condition, the necessities of the parties, their financial condition, and all other relevant circumstances. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

**In determining whether the trial court abused its discretion in awarding maintenance, the property and maintenance awards must be considered together.** In re Huff, 834 P.2d 244 (Colo. 1992).

Where the maintenance award reflected a thorough consideration of the family's standard of living, the length of the marriage, the husband's ability to pay, the wife's age and earning capacity, and the wife's responsibilities as residential custodian of five children, the award was amply supported by the evidence and would not be overturned. In re Hunt, 868 P.2d 1140 (Colo. App. 1993).

**The age of the parties, in conjunction with the relative earning potential each of the parties can reasonably anticipate, and also their relative wealth will be considered in determining whether the trial judge abused his discretion in the alimony award.** Smith v. Smith, 172 Colo. 516, 474 P.2d 619 (1970).

**Consideration of maintenance and attorney fees to determine whether court abused its discretion.** In cases where an appeal has been taken from the property division, maintenance, and attorney fee provisions of a dissolution of marriage decree as a whole, they must be considered together to determine whether the trial court abused its discretion. In re Jones, 627 P.2d 248 (Colo. 1981); In re Seewald, 22 P.3d 580 (Colo. App. 2001).

**Finding as to earning capacity not confiscatory.** Where the evidence supported the court's finding that the husband was capable of earning sums greatly in excess of his present net salary, although it appeared that the court based its order on the present net income of the husband, the orders were not confiscatory. In re Anderson, 37 Colo. App. 55, 541 P.2d 1274 (1975).

**Where the amount of property the trial court ordered the defendant to pay the plaintiff restored the plaintiff substantially to the same asset position she had occupied prior to the marriage, since the plaintiff's ability to support herself was substantially the same as it had been prior to the marriage, the trial court did not abuse its discretion.** Cohan v. Cohan, 172 Colo. 563, 474 P.2d 792 (1970).

**Where the husband's income was not stable but fluctuated from month to month, the trial court did not abuse its discretion in directing payments of support and alimony on a percentage of the husbands' income.** Reap v. Reap, 142 Colo. 354, 350 P.2d 1063 (1960).

**Where the wife had contributed her own funds to the purchase of the family home, and there was a comparatively small amount of property owned by the parties, and the wife was left without any right to receive alimony payments, the trial court did not abuse its discretion in awarding the jointly owned home to the wife in its order amended after the husband's death.** Sarno v. Sarno, 28 Colo. App. 598, 478 P.2d 711 (1970).

**Awarding maintenance to wife on decreasing schedule held abuse of discretion.** In re



Lodholm, 35 Colo. App. 411, 536 P.2d 842 (1975).

**Trial court has discretion to award maintenance that decreases incrementally** on a future date when wife's earning potential is expected to increase and again on a future date when wife is expected to begin receiving pension benefits. In re Balanson, 996 P.2d 213 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 25 P.3d 28 (Colo. 2001).

#### E. Modification and Scope of Review.

**That the court has continuing jurisdiction over the payment of alimony** may be assumed as the settled law of this state. Zlaten v. Zlaten, 117 Colo. 296, 186 P.2d 583 (1947).

**A trial court may expressly reserve jurisdiction to review, adjust, or extend a maintenance award** if: (1) An important contingency exists, the outcome of which may significantly affect the amount or duration of the maintenance award; (2) the contingency is based upon an ascertainable, future event or events; (3) the contingency can be resolved within a reasonable and specific period of time. In re Cauffman, 829 P.2d 501 (Colo. App. 1992).

If a trial court intends to reserve jurisdiction over maintenance pursuant to this section it should: (1) State its intent to do so on the record; (2) briefly outline its reasons for doing so, stating what the ascertainable future event upon which the reservation of maintenance jurisdiction is based; and (3) set forth a reasonably specific future time within which maintenance may be reconsidered under this section. In re Cauffman, 829 P.2d 501 (Colo. App. 1992).

**A trial court may retain jurisdiction over maintenance if, at the time of permanent orders, an important future contingency exists** that can be resolved in a reasonable and specific period of time, and if the court explicitly states its intent to reserve jurisdiction, describes the future event, and sets forth a reasonably specific future time within which maintenance may be considered. In re Folwell, 910 P.2d 91 (Colo. App. 1995); In re Lafaye, 89 P.3d 455 (Colo. App. 2003).

**The phrase "a proceeding for maintenance following dissolution of marriage by a court"**, in subsection (3) applies only to those circumstances where the court issuing the decree of dissolution initially lacked personal jurisdiction over the absent spouse and, therefore, could not have ordered one spouse to pay maintenance. It does not provide an alternative for a party to request maintenance at a subsequent date even though he or she waived maintenance at permanent orders. In re Ebel, 116 P.3d 1254 (Colo. App. 2005).

**The trial court erred in providing for future adjustments to maintenance.** The assumptions made constitute improper speculation

upon which to base future changes in maintenance. In re Folwell, 910 P.2d 91 (Colo. App. 1995).

**Court not required to reserve jurisdiction over the issue of maintenance** when, after sale of residence and an additional period in which to reacclimate to working, wife would have sufficient means to satisfy her own needs. In re Lafaye, 89 P.3d 455 (Colo. App. 2003).

**In modifying provision for maintenance, burden is on party seeking modification** to prove a substantial and continuing change of circumstances. Malmgren v. Malmgren, 628 P.2d 164 (Colo. App. 1981); In re DaFoe, 677 P.2d 426 (Colo. App. 1983).

**Reconsideration of maintenance and attorney fees unnecessary absent contest.** When neither party contests a trial court's division of property it is not necessary that the court be able to reconsider the property division in order to correct error in the provisions for maintenance and attorney fees. In re Jones, 627 P.2d 248 (Colo. 1981).

**Award of further maintenance upheld.** The trial court neither abused its discretion nor exceeded its jurisdiction in awarding further maintenance to the wife where a separation agreement, having been incorporated into the divorce decree, became part of the final order when the decree was entered, and allowed a court to "review the issue" of spousal maintenance at end of six months. In re Sinn, 674 P.2d 988 (Colo. App. 1983); In re Woodman, 676 P.2d 1232 (Colo. App. 1983).

**A provision of divorce decree retaining jurisdiction to award such alimony as may be just**, did not alter the finality of that portion of the decree determining the rights and interests of the parties in real estate involved. McDonald v. McDonald, 150 Colo. 492, 374 P.2d 690 (1962).

**Where it appeared from the record in a divorce case that both parties intended that a court retain jurisdiction of a question of permanent alimony and related matters** after the entry of a final decree of divorce, orders entered determining such matters after entry of the decree were not void for want of jurisdiction. Rodgers v. Rodgers, 137 Colo. 74, 323 P.2d 892 (1958).

**To correct an order for support directing payments in excess of defendant's ability to pay, required formal action by the one thus burdened**, since to reduce support payments required by an order of the trial court necessitated a motion by him who sought relief. Lopez v. Lopez, 148 Colo. 404, 366 P.2d 373 (1961).

**One who has accepted benefits of judgment may not seek reversal** of that judgment on appeal. In re Jones, 627 P.2d 248 (Colo. 1981).

**Awarding of attorney fees is discretionary with trial court** and will not be disturbed on review if supported by the evidence. In re Newman, 44 Colo. App. 307, 616 P.2d 982

(1980), aff'd in part, rev'd on other grounds, 653 P.2d 728 (Colo. 1982); *In re DaFoe*, 677 P.2d 426 (Colo. App. 1983).

**Fixing permanent alimony, and readjusting a property settlement was a function of the trial court and could not be assumed by the supreme court.** *Nunemacher v. Nunemacher*, 132 Colo. 300, 287 P.2d 662 (1955); *Brigham v. Brigham*, 141 Colo. 41, 346 P.2d 302 (1959).

**A trial court award to a plaintiff of permanent alimony was subject to review by a trial court in the event a changed condition arises.** *Nunemacher v. Nunemacher*, 132 Colo. 300, 287 P.2d 662 (1955).

**Limited consideration of a third party's resources, such as a current spouse's income, is not absolutely prohibited** if the existence or use of such assets is directly relevant to an allegation by the payor spouse of a substantial and continuing change of circumstances. *In re Bowles*, 916 P.2d 615 (Colo. App. 1995).

### III. SEPARATE MAINTENANCE.

**An allowance for separate maintenance was not alimony** within the strict definition of that term. *Weston v. Weston*, 79 Colo. 478, 246 P. 790 (1926).

**When an original divorce action was dismissed, the parties were still husband and wife, and the wife was at liberty to institute a separate maintenance action** against the husband, just as though there had been no former litigation between the parties. *Morgan v. Morgan*, 139 Colo. 545, 340 P.2d 1060 (1959).

**In determining the amount of support to be awarded in a separate maintenance action, the trial court could have considered the ability of the husband, the value of his estate; and his earning capacity, and adjudication could not result in appropriation of his entire estate or impoverishment to the extent of rendering him unable to maintain himself.** *Lopez v. Lopez*, 148 Colo. 404, 366 P.2d 373 (1961); *Fahey v. Fahey*, 43 Colo. 354, 96 P. 251 (1908).

**In a separate maintenance action only such alimony and support could be awarded as was necessary to adequately maintain a family in the manner to which it was accustomed and suitable to their station, and a husband could be divested of a reasonable proportion of his earnings and, if need be, of his property, that his wife and children could have reasonable support.** *Morgan v. Morgan*, 139 Colo. 545, 340 P.2d 1060 (1959).

**In all cases there was a factor to consider, and that was the ability of a husband and father to meet the reasonable needs of his wife and children.** *Vines v. Vines*, 137 Colo. 449, 326 P.2d 662 (1958).

**The purpose was not to enrich the wife, but to provide suitable support and maintenance for her, taking into consideration the manner in**

**which she is accustomed to living with him, and his ability to provide support.** *Vines v. Vines*, 137 Colo. 449, 326 P.2d 662 (1958).

**A reasonable amount for her maintenance during coverture, or until reconciliation, estimated with reference to the means of her husband, and payable out of his estate, was the relief to which a wife was entitled, if the case made by her complaint should be established.** *Vines v. Vines*, 137 Colo. 449, 326 P.2d 662 (1958).

**In the absence of very special circumstances a lump-sum award could not be made in a separate maintenance suit, and the considerations which supported a lump-sum award or division of property in a divorce action that terminate property rights, were not present in separate maintenance suits where property rights were retained.** *Vines v. Vines*, 137 Colo. 449, 326 P.2d 662 (1958).

**It was an abuse of discretion, to award a wife the equivalent of one-third of the husband's estate, instead of a periodical payment for her support.** *Vines v. Vines*, 137 Colo. 449, 326 P.2d 662 (1958).

**Where trial court's errors in making its property division with respect to stock options, interspousal gifts to wife, and wife's interest in the family trust impacted a substantial portion of the total marital assets, on remand the trial court should reconsider its maintenance award in light of its new property division and in light of the significant decrease in the value of one of the parties' investment accounts.** *In re Balanson*, 25 P.3d 28 (Colo. 2001).

### IV. ANTENUPTIAL AGREEMENTS.

**There is no statutory proscription against contracting for maintenance in an antenuptial agreement.** *In re Newman v. Newman*, 653 P.2d 728 (Colo. 1982).

**Separation agreements and antenuptial agreements are separate and distinct legal documents.** *In re Newman*, 44 Colo. App. 307, 616 P.2d 982 (1980), aff'd in part, rev'd on other grounds, 653 P.2d 728 (Colo. 1982).

**Spouses-to-be have right to enter into antenuptial agreements which contemplate the possibility of dissolution.** *In re Newman*, 44 Colo. App. 307, 616 P.2d 982 (1980), aff'd in part, rev'd on other grounds, 653 P.2d 728 (Colo. 1982).

**Antenuptial agreement no bar to maintenance unless specifically stated.** In the absence of any reference in an antenuptial agreement to a relinquishment of the right to maintenance, the agreement does not bar the wife's claim for maintenance. *In re Stokes*, 43 Colo. App. 461, 608 P.2d 824 (1979).

**Antenuptial agreement did not preclude an award of maintenance or reflect any waiver of**



maintenance by wife. In re Meisner, 715 P.2d 1273 (Colo. App. 1985).

**Antenuptial maintenance agreement is subject to judicial scrutiny for conscionability.** In re Newman v. Newman, 653 P.2d 728 (Colo. 1982); In re Meisner, 715 P.2d 1273 (Colo. App. 1985).

**"Unconscionability"**, as applied to a maintenance agreement, exists when enforcement of the terms of the agreement results in a spouse having insufficient property to provide for his reasonable needs and who is otherwise unable to support himself through appropriate employment. In re Newman v. Newman, 653 P.2d 728 (Colo. 1982); In re Meisner, 715 P.2d 1273 (Colo. App. 1985).

**Maintenance agreement may become unconscionable because of circumstances at time of dissolution.** Even though an antenuptial agreement is entered into in good faith, with full disclosure and without any element of fraud or overreaching, the maintenance provisions

thereof may become voidable for unconscionability occasioned by circumstances existing at the time of the marriage dissolution. In re Newman v. Newman, 653 P.2d 728 (Colo. 1982); In re Meisner, 715 P.2d 1273 (Colo. App. 1985).

**Burden of proof of unconscionability.** One who claims that an antenuptial maintenance agreement is unconscionable must prove that at the time of the marriage dissolution the maintenance agreement rendered the spouse without a means of reasonable support, either because of a lack of property resources or a condition of unemployability. In re Newman v. Newman, 653 P.2d 728 (Colo. 1982).

**Where antenuptial agreement was silent on matter of attorney fees,** the awarding of such fees was controlled by § 14-10-119. In re Newman, 44 Colo. App. 307, 616 P.2d 982 (1980), *aff'd* in part, *rev'd* on other grounds, 653 P.2d 728 (Colo. 1982).

**14-10-115. Child support guidelines - purpose - definitions - determination of income - schedule of basic child support obligations - adjustments to basic child support - additional guidelines - child support commission.** (1) **Purpose and applicability.** (a) The child support guidelines and schedule of basic child support obligations have the following purposes:

(I) To establish as state policy an adequate standard of support for children, subject to the ability of parents to pay;

(II) To make awards more equitable by ensuring more consistent treatment of persons in similar circumstances; and

(III) To improve the efficiency of the court process by promoting settlements and giving courts and the parties guidance in establishing levels of awards.

(b) The child support guidelines and schedule of basic child support obligations do the following:

(I) Calculate child support based upon the parents' combined adjusted gross income estimated to have been allocated to the child if the parents and children were living in an intact household;

(II) Adjust the child support based upon the needs of the children for extraordinary medical expenses and work-related child care costs; and

(III) Allocate the amount of child support to be paid by each parent based upon physical care arrangements.

(c) This section shall apply to all child support obligations, established or modified, as a part of any proceeding, including, but not limited to, articles 5, 6, and 10 of this title and articles 4 and 6 of title 19, C.R.S., regardless of when filed.

(2) **Duty of support - factors to consider.** (a) In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for the child's support and may order an amount determined to be reasonable under the circumstances for a time period that occurred after the date of the parties' physical separation or the filing of the petition or service upon the respondent, whichever date is latest, and prior to the entry of the support order, without regard to marital misconduct.

(b) In determining the amount of support under this subsection (2), the court shall consider all relevant factors, including:

(I) The financial resources of the child;

(II) The financial resources of the custodial parent;

(III) The standard of living the child would have enjoyed had the marriage not been dissolved;

(IV) The physical and emotional condition of the child and his or her educational needs; and

(V) The financial resources and needs of the noncustodial parent.

(3) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Adjusted gross income" means gross income, as specified in subsection (5) of this section, less preexisting child support obligations and less alimony or maintenance actually paid by a parent.

(b) "Combined gross income" means the combined monthly adjusted gross incomes of both parents.

(c) "Income" means the actual gross income of a parent, if employed to full capacity, or potential income, if unemployed or underemployed. Gross income of each parent shall be determined according to subsection (5) of this section.

(d) "Number of children due support", as used in the schedule of basic child support obligations specified in subsection (7) of this section, means children for whom the parents share joint legal responsibility and for whom support is being sought.

(e) "Other children" means children who are not the subject of the child support determination at issue.

(f) "Postsecondary education" includes college and vocational education programs.

(g) "Postsecondary education support" means support for the following expenses associated with attending a college, university, or vocational education program: Tuition, books, and fees.

(h) "Shared physical care", for the purposes of the child support guidelines and schedule of basic child support obligations specified in this section, and as further specified in paragraph (b) of subsection (8) of this section, means that each parent keeps the children overnight for more than ninety-two overnights each year and that both parents contribute to the expenses of the children in addition to the payment of child support.

(i) "Split physical care", for the purposes of the child support guidelines and schedule of basic child support obligations specified in this section, and as further specified in paragraph (c) of subsection (8) of this section, means that each parent has physical care of at least one of the children by means of that child or children residing with that parent the majority of the time.

(4) **Forms - identifying information.** (a) The child support guidelines shall be used with standardized child support guideline forms to be issued by the judicial department. The judicial department is responsible for promulgating and updating the Colorado child support guideline forms, schedules, worksheets, and instructions.

(b) All child support orders entered pursuant to this article shall provide the names and dates of birth of the parties and of the children who are the subject of the order and the parties' residential and mailing addresses. The social security numbers of the parties and children shall be collected pursuant to section 14-14-113 and section 26-13-127, C.R.S.

(5) **Determination of income.** (a) For the purposes of the child support guidelines and schedule of basic child support obligations specified in this section, the gross income of each parent shall be determined according to the following guidelines:

(I) "Gross income" includes income from any source, except as otherwise provided in subparagraph (II) of this paragraph (a), and includes, but is not limited to:

(A) Income from salaries;

(B) Wages, including tips declared by the individual for purposes of reporting to the federal internal revenue service or tips imputed to bring the employee's gross earnings to the minimum wage for the number of hours worked, whichever is greater;

(C) Commissions;

(D) Payments received as an independent contractor for labor or services;

(E) Bonuses;

(F) Dividends;

(G) Severance pay;

(H) Pensions and retirement benefits, including but not limited to those paid pursuant to articles 51, 54, 54.5, and 54.6 of title 24, C.R.S., and article 30 of title 31, C.R.S.;

(I) Royalties;

(J) Rents;



- (K) Interest;
  - (L) Trust income;
  - (M) Annuities;
  - (N) Capital gains;
  - (O) Any moneys drawn by a self-employed individual for personal use;
  - (P) Social security benefits, including social security benefits actually received by a parent as a result of the disability of that parent or as the result of the death of the minor child's stepparent but not including social security benefits received by a minor child or on behalf of a minor child as a result of the death or disability of a stepparent of the child;
  - (Q) Workers' compensation benefits;
  - (R) Unemployment insurance benefits;
  - (S) Disability insurance benefits;
  - (T) Funds held in or payable from any health, accident, disability, or casualty insurance to the extent that such insurance replaces wages or provides income in lieu of wages;
  - (U) Monetary gifts;
  - (V) Monetary prizes, excluding lottery winnings not required by the rules of the Colorado lottery commission to be paid only at the lottery office;
  - (W) Taxable distributions from general partnerships, limited partnerships, closely held corporations, or limited liability companies;
  - (X) Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business if they are significant and reduce personal living expenses;
  - (Y) Alimony or maintenance received; and
  - (Z) Overtime pay, only if the overtime is required by the employer as a condition of employment.
- (II) "Gross income" does not include:
- (A) Child support payments received;
  - (B) Benefits received from means-tested public assistance programs, including but not limited to assistance provided under the Colorado works program, as described in part 7 of article 2 of title 26, C.R.S., supplemental security income, food stamps, and general assistance;
  - (C) Income from additional jobs that result in the employment of the obligor more than forty hours per week or more than what would otherwise be considered to be full-time employment; and
  - (D) Social security benefits received by the minor children, or on behalf of the minor children, as a result of the death or disability of a stepparent are not to be included as income for the minor children for the determination of child support.
- (III) (A) For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "gross income" equals gross receipts minus ordinary and necessary expenses, as defined in sub-subparagraph (B) of this subparagraph (III), required to produce such income.
- (B) "Ordinary and necessary expenses" does not include amounts allowable by the internal revenue service for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating child support.
- (b) (I) If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income; except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a child under the age of thirty months for whom the parents owe a joint legal responsibility or for an incarcerated parent sentenced to one year or more.
- (II) If a noncustodial parent who owes past-due child support is unemployed and not incapacitated and has an obligation of support to a child receiving assistance pursuant to part 7 of article 2 of title 26, C.R.S., the court or delegate child support enforcement unit may order the parent to pay such support in accordance with a plan approved by the court or to participate in work activities. Work activities may include one or more of the following:
- (A) Private or public sector employment;

- (B) Job search activities;
- (C) Community service;
- (D) Vocational training; or
- (E) Any other employment-related activities available to that particular individual.

(III) For the purposes of this section, a parent shall not be deemed “underemployed” if:

(A) The employment is temporary and is reasonably intended to result in higher income within the foreseeable future; or

(B) The employment is a good faith career choice that is not intended to deprive a child of support and does not unreasonably reduce the support available to a child; or

(C) The parent is enrolled in an educational program that is reasonably intended to result in a degree or certification within a reasonable period of time and that will result in a higher income, so long as the educational program is a good faith career choice that is not intended to deprive the child of support and that does not unreasonably reduce the support available to a child.

(c) Income statements of the parents shall be verified with documentation of both current and past earnings. Suitable documentation of current earnings includes pay stubs, employer statements, or receipts and expenses if self-employed. Documentation of current earnings shall be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period. A copy of wage statements or other wage information obtained from the computer data base maintained by the department of labor and employment shall be admissible into evidence for purposes of determining income under this subsection (5).

(6) **Adjustments to gross income.** (a) The amount of child support actually paid by a parent with an order for support of other children shall be deducted from that parent’s gross income.

(b) (I) At the time of the initial establishment of a child support order, or in any proceeding to modify a support order, if a parent is also legally responsible for the support of other children for whom the parents do not share joint legal responsibility, an adjustment shall be made revising the parent’s income prior to calculating the basic child support obligation for the children who are the subject of the support order if the children are living in the home of the parent seeking the adjustment or if the children are living out of the home, and the parent seeking the adjustment provides documented proof of money payments of support of those children. The amount shall not exceed the schedule of basic support obligations listed in this section. For a parent with a gross income of one thousand eight hundred fifty dollars or less per month, the adjustment shall be seventy-five percent of the amount calculated using the low-income adjustment described in sub-subparagraphs (B) and (C) of subparagraph (II) of paragraph (a) of subsection (7) of this section based only upon the responsible parent’s income, without any other adjustments for the number of other children for whom the parent is responsible. For a parent with gross income of more than one thousand eight hundred fifty dollars per month, the adjustment shall be seventy-five percent of the amount listed under the schedule of basic support obligations in paragraph (b) of subsection (7) of this section that would represent a support obligation based only upon the responsible parent’s income, without any other adjustments for the number of other children for whom the parent is responsible. The amount calculated as set forth in this subparagraph (I) shall be subtracted from the amount of the parent’s gross income prior to calculating the basic support obligation based upon both parents’ gross income, as provided in subsection (7) of this section.

(II) The adjustment pursuant to this paragraph (b), based on the responsibility to support other children, shall not be made to the extent that the adjustment contributes to the calculation of a support order lower than a previously existing support order for the children who are the subject of the modification hearing at which an adjustment is sought.

(7) **Schedule of basic child support obligations.** (a) (I) The basic child support obligation shall be determined using the schedule of basic child support obligations contained in paragraph (b) of this subsection (7). The basic child support obligation shall be divided between the parents in proportion to their adjusted gross incomes.



(II) (A) For combined gross income that falls between amounts shown in the schedule of basic child support obligations, basic child support amounts shall be interpolated. The category entitled "number of children due support" in the schedule of basic child support obligations shall have the meaning defined in subsection (3) of this section.

(B) Except as otherwise provided in sub-subparagraph (D) of this subparagraph (II), in circumstances in which the parents' combined monthly adjusted gross income is less than eight hundred fifty dollars, a child support payment of fifty dollars per month shall be required of the obligor. The minimum order of fifty dollars shall not apply when each parent keeps the children more than ninety-two overnights each year as defined in paragraph (h) of subsection (3) of this section. In no case, however, shall the amount of child support ordered to be paid exceed the amount of child support that would otherwise be ordered to be paid if the parents did not share physical custody.

(C) Except as otherwise provided in sub-subparagraph (D) of this subparagraph (II), in circumstances in which the parents' combined monthly adjusted gross income is eight hundred fifty dollars or more, but in which the parent with the least number of overnights per year with the child has a monthly adjusted gross income of less than one thousand eight hundred fifty dollars, the court or delegate child support enforcement unit, pursuant to section 26-13.5-105 (4), C.R.S., shall perform a low-income adjustment calculation of child support as follows: The court or delegate child support enforcement unit shall determine each parent's monthly adjusted gross income, as that term is defined in subsection (3) of this section. Based upon the parents' combined monthly adjusted gross incomes, the court or delegate child support enforcement unit shall determine the monthly basic child support obligation, using the schedule of basic child support obligations set forth in paragraph (b) of this subsection (7) and shall determine each parent's presumptive proportionate share of said obligation. The court or delegate child support enforcement unit shall then adjust the income of the parent with the fewest number of overnights per year with the child by subtracting nine hundred dollars from that parent's monthly adjusted gross income. The court shall multiply the resulting amount by a factor of forty percent. The product of the multiplication shall be added to the following basic minimum child support amount as additional minimum support, unless the product of the multiplication amount is zero or a negative figure, in which case the court shall add zero to the following basic minimum child support amount: Seventy-five dollars for one child; one hundred fifty dollars for two children; two hundred twenty-five dollars for three children; two hundred seventy-five dollars for four children; three hundred twenty-five dollars for five children; and three hundred fifty dollars for six or more children. The court or delegate child support enforcement unit shall compare the product of this addition to the parent's presumptive proportionate share of the monthly basic support obligation determined previously from the schedule of basic child support obligations. The lesser of the two amounts shall be the basic monthly support obligation to be paid by the low-income parent, as adjusted by the low-income parent's proportionate share of the work-related and education-related child care costs, health insurance, extraordinary medical expenses, and other extraordinary adjustments as described in subsections (9) to (11) of this section. The low-income adjustment shall not apply when each parent keeps the children more than ninety-two overnights each year as defined in subsection (8) of this section. In no case, however, shall the amount of child support ordered to be paid exceed the amount of child support that would otherwise be ordered to be paid if the parents did not share physical custody.

(D) In any circumstance in which the obligor's monthly adjusted gross income is less than eight hundred fifty dollars, regardless of the monthly adjusted gross income of the obligee, the obligor shall be ordered to pay fifty dollars per month in child support. The minimum order of fifty dollars shall not apply when each parent keeps the children more than ninety-two overnights each year as defined in subsection (8) of this section. In no case, however, shall the amount of child support ordered to be paid exceed the amount of child support that would otherwise be ordered to be paid if the parents did not share physical custody.

(E) The judge may use discretion to determine child support in circumstances where combined adjusted gross income exceeds the uppermost levels of the schedule of basic child support obligations; except that the presumptive basic child support obligation shall not be

less than it would be based on the highest level of adjusted gross income set forth in the schedule of basic child support obligations.

(b) Schedule of basic child support obligations:

COMBINED GROSS INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN	SIX OR MORE CHILDREN
100						
200						
300						
400						
500						
600						
700						
800						
850	184	269	319	352	382	409
900	193	282	334	369	400	428
950	202	294	349	386	418	447
1000	211	307	364	402	436	467
1050	220	320	379	419	455	486
1100	228	333	395	436	473	506
1150	237	346	410	453	491	525
1200	246	359	425	470	509	545
1250	255	372	440	487	528	565
1300	264	385	456	504	546	584
1350	273	397	471	520	564	603
1400	281	410	486	537	582	622
1450	290	422	500	553	599	641
1500	298	435	515	569	617	660
1550	307	447	530	586	635	679
1600	315	460	545	602	652	698
1650	324	472	559	618	670	717
1700	333	485	574	634	688	736
1750	341	497	589	651	705	755
1800	350	510	604	667	723	774
1850	358	522	619	683	741	793
1900	367	535	633	700	759	812
1950	375	547	648	716	776	830
2000	383	558	661	730	792	847
2050	391	570	674	745	807	864
2100	399	581	687	759	823	881
2150	407	592	700	774	839	898
2200	415	604	714	789	855	915
2250	423	615	727	803	871	931
2300	431	626	740	818	886	948
2350	439	638	753	832	902	965
2400	447	649	766	847	918	982
2450	455	660	779	861	934	999
2500	462	672	793	876	949	1016
2550	470	683	806	890	965	1033
2600	479	694	819	905	981	1050
2650	487	706	833	920	997	1067
2700	495	718	846	935	1013	1084
2750	503	729	859	950	1029	1101
2800	511	741	873	964	1045	1119
2850	519	752	886	979	1061	1136
2900	527	763	898	993	1076	1151
2950	533	772	910	1005	1089	1166
3000	540	782	921	1017	1103	1180
3050	547	792	932	1030	1116	1194
3100	554	801	943	1042	1130	1209
3150	560	811	954	1054	1143	1223
3200	567	821	965	1067	1156	1237
3250	574	831	977	1080	1171	1253
3300	581	841	989	1093	1185	1268



COMBINED GROSS INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN	SIX OR MORE CHILDREN
3350	589	851	1002	1107	1200	1284
3400	596	862	1014	1120	1214	1299
3450	603	872	1026	1133	1229	1315
3500	610	882	1038	1147	1243	1330
3550	617	892	1050	1160	1258	1346
3600	624	903	1062	1173	1272	1361
3650	631	913	1074	1187	1287	1377
3700	638	923	1086	1200	1301	1392
3750	645	934	1098	1214	1315	1408
3800	652	944	1110	1227	1330	1423
3850	660	954	1122	1240	1344	1439
3900	667	964	1135	1254	1359	1454
3950	673	973	1145	1266	1372	1468
4000	677	980	1153	1274	1381	1478
4050	682	987	1161	1283	1391	1488
4100	686	993	1169	1292	1400	1498
4150	691	1000	1177	1301	1410	1509
4200	695	1006	1185	1310	1420	1519
4250	700	1013	1193	1318	1429	1529
4300	704	1020	1201	1327	1439	1539
4350	708	1026	1209	1336	1448	1550
4400	713	1033	1217	1345	1458	1560
4450	717	1039	1225	1354	1467	1570
4500	722	1046	1233	1362	1477	1580
4550	726	1053	1241	1371	1486	1590
4600	731	1059	1249	1380	1496	1601
4650	735	1066	1257	1389	1505	1611
4700	739	1071	1262	1395	1512	1618
4750	742	1075	1267	1400	1517	1623
4800	745	1079	1271	1405	1523	1629
4850	748	1083	1276	1410	1528	1635
4900	751	1088	1280	1415	1533	1641
4950	755	1092	1285	1420	1539	1647
5000	758	1096	1289	1425	1544	1652
5050	761	1100	1294	1430	1550	1658
5100	764	1105	1298	1435	1555	1664
5150	768	1109	1303	1440	1560	1670
5200	771	1113	1307	1445	1566	1676
5250	774	1117	1312	1450	1571	1681
5300	777	1122	1316	1455	1577	1687
5350	781	1126	1321	1460	1582	1693
5400	784	1130	1326	1465	1588	1699
5450	787	1135	1331	1470	1594	1705
5500	790	1139	1336	1476	1600	1712
5550	792	1143	1341	1482	1606	1718
5600	795	1147	1346	1487	1612	1725
5650	798	1152	1351	1493	1618	1731
5700	801	1156	1356	1498	1624	1738
5750	804	1160	1361	1504	1630	1744
5800	807	1164	1365	1509	1636	1750
5850	809	1168	1370	1514	1641	1756
5900	812	1172	1375	1520	1647	1762
5950	815	1176	1380	1525	1653	1769
6000	818	1180	1385	1530	1659	1775
6050	820	1184	1390	1536	1664	1781
6100	823	1188	1394	1541	1670	1787
6150	826	1193	1400	1547	1677	1794
6200	831	1199	1407	1555	1686	1804
6250	836	1206	1415	1563	1695	1813
6300	840	1212	1422	1572	1704	1823
6350	845	1219	1430	1580	1713	1833
6400	849	1225	1437	1588	1722	1842

COMBINED GROSS INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN	SIX OR MORE CHILDREN
6450	854	1232	1445	1597	1731	1852
6500	858	1238	1452	1605	1740	1861
6550	863	1245	1460	1613	1749	1871
6600	868	1251	1467	1621	1758	1881
6650	872	1258	1475	1630	1767	1890
6700	877	1264	1482	1638	1775	1900
6750	882	1271	1491	1647	1785	1910
6800	887	1278	1499	1656	1795	1921
6850	892	1285	1507	1665	1805	1932
6900	897	1293	1515	1675	1815	1942
6950	902	1300	1524	1684	1825	1953
7000	907	1307	1532	1693	1835	1963
7050	912	1314	1540	1702	1845	1974
7100	917	1321	1549	1711	1855	1985
7150	922	1328	1557	1720	1865	1995
7200	927	1336	1565	1729	1875	2006
7250	932	1343	1573	1738	1884	2016
7300	937	1349	1581	1747	1893	2026
7350	942	1356	1588	1755	1902	2036
7400	946	1362	1596	1763	1912	2045
7450	951	1369	1603	1772	1921	2055
7500	955	1375	1611	1780	1930	2065
7550	960	1382	1619	1789	1939	2075
7600	965	1389	1626	1797	1948	2084
7650	969	1395	1634	1805	1957	2094
7700	974	1402	1641	1814	1966	2104
7750	979	1408	1649	1822	1975	2113
7800	983	1415	1657	1830	1984	2123
7850	988	1422	1664	1839	1993	2133
7900	993	1428	1672	1847	2002	2143
7950	997	1435	1679	1856	2011	2152
8000	1002	1441	1687	1864	2021	2162
8050	1006	1448	1694	1872	2030	2172
8100	1011	1454	1702	1881	2039	2181
8150	1016	1461	1710	1889	2048	2191
8200	1020	1468	1717	1898	2057	2201
8250	1025	1474	1725	1906	2066	2211
8300	1030	1481	1732	1914	2075	2220
8350	1034	1487	1740	1923	2084	2230
8400	1039	1494	1748	1931	2093	2240
8450	1043	1501	1755	1939	2102	2250
8500	1048	1507	1763	1948	2111	2259
8550	1053	1514	1770	1956	2121	2269
8600	1057	1520	1778	1965	2130	2279
8650	1062	1527	1785	1973	2139	2288
8700	1066	1533	1793	1981	2148	2298
8750	1070	1539	1800	1989	2157	2308
8800	1075	1546	1808	1998	2166	2317
8850	1079	1552	1815	2006	2175	2327
8900	1083	1558	1823	2014	2184	2336
8950	1088	1565	1830	2023	2193	2346
9000	1092	1571	1838	2031	2202	2356
9050	1096	1577	1845	2039	2211	2365
9100	1101	1583	1853	2048	2220	2375
9150	1105	1590	1860	2056	2228	2384
9200	1110	1596	1868	2064	2237	2394
9250	1114	1602	1875	2072	2246	2404
9300	1118	1609	1883	2081	2255	2413
9350	1123	1615	1890	2089	2264	2423
9400	1127	1621	1898	2097	2273	2433
9450	1131	1628	1905	2106	2282	2442
9500	1136	1634	1913	2114	2291	2452



COMBINED GROSS INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN	SIX OR MORE CHILDREN
9550	1140	1640	1920	2122	2300	2461
9600	1144	1647	1928	2130	2309	2471
9650	1149	1653	1935	2139	2318	2481
9700	1153	1659	1943	2147	2327	2490
9750	1157	1666	1950	2155	2336	2500
9800	1162	1672	1958	2164	2345	2510
9850	1166	1678	1965	2172	2354	2519
9900	1170	1685	1973	2180	2363	2529
9950	1175	1691	1981	2188	2372	2538
10000	1179	1697	1988	2197	2381	2548
10050	1183	1703	1995	2204	2389	2557
10100	1187	1709	2002	2212	2398	2565
10150	1191	1715	2008	2219	2406	2574
10200	1195	1720	2015	2227	2414	2583
10250	1199	1726	2022	2234	2422	2592
10300	1203	1732	2029	2242	2430	2601
10350	1207	1738	2036	2250	2439	2609
10400	1211	1744	2043	2257	2447	2618
10450	1215	1749	2050	2265	2455	2627
10500	1219	1755	2056	2272	2463	2636
10550	1223	1761	2063	2280	2471	2644
10600	1227	1767	2070	2288	2480	2653
10650	1231	1773	2077	2295	2488	2662
10700	1235	1778	2084	2303	2496	2671
10750	1239	1784	2091	2310	2504	2680
10800	1243	1790	2098	2318	2513	2688
10850	1247	1796	2104	2325	2521	2697
10900	1251	1802	2111	2333	2529	2706
10950	1255	1808	2118	2341	2537	2715
11000	1259	1813	2125	2348	2545	2724
11050	1263	1819	2132	2356	2554	2732
11100	1267	1825	2139	2363	2562	2741
11150	1271	1831	2146	2371	2570	2750
11200	1275	1837	2152	2378	2578	2759
11250	1279	1842	2159	2386	2586	2768
11300	1283	1848	2166	2394	2595	2776
11350	1287	1854	2173	2401	2603	2785
11400	1291	1860	2180	2409	2611	2794
11450	1295	1866	2187	2417	2619	2803
11500	1299	1871	2194	2424	2628	2812
11550	1303	1877	2201	2432	2636	2821
11600	1307	1883	2208	2440	2644	2830
11650	1311	1889	2215	2447	2653	2838
11700	1315	1895	2222	2455	2661	2847
11750	1319	1900	2229	2463	2669	2856
11800	1322	1906	2235	2470	2678	2865
11850	1326	1912	2242	2478	2686	2874
11900	1330	1918	2249	2486	2694	2883
11950	1334	1923	2256	2493	2703	2892
12000	1338	1929	2263	2501	2711	2901
12050	1342	1935	2270	2508	2719	2909
12100	1346	1940	2276	2515	2726	2917
12150	1349	1945	2283	2522	2734	2925
12200	1353	1951	2289	2529	2742	2934
12250	1357	1956	2295	2536	2749	2942
12300	1360	1961	2302	2543	2757	2950
12350	1364	1967	2308	2551	2765	2958
12400	1367	1972	2315	2558	2772	2966
12450	1371	1977	2321	2565	2780	2975
12500	1375	1983	2327	2572	2788	2983
12550	1378	1988	2334	2579	2795	2991
12600	1382	1993	2340	2586	2803	2999

COMBINED GROSS INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN	SIX OR MORE CHILDREN
12650	1386	1998	2347	2593	2811	3007
12700	1389	2004	2353	2600	2818	3016
12750	1393	2009	2359	2607	2826	3024
12800	1397	2014	2366	2614	2834	3032
12850	1400	2020	2373	2622	2842	3041
12900	1405	2026	2380	2630	2851	3050
12950	1409	2032	2387	2638	2859	3059
13000	1413	2038	2394	2646	2868	3069
13050	1417	2044	2402	2654	2877	3078
13100	1421	2050	2409	2662	2885	3087
13150	1425	2056	2416	2670	2894	3096
13200	1429	2062	2423	2678	2902	3106
13250	1433	2068	2430	2685	2911	3115
13300	1437	2074	2437	2693	2920	3124
13350	1441	2080	2445	2701	2928	3133
13400	1445	2086	2452	2709	2937	3142
13450	1449	2092	2459	2717	2945	3152
13500	1453	2098	2466	2725	2954	3161
13550	1457	2104	2473	2733	2963	3170
13600	1461	2110	2481	2741	2971	3179
13650	1465	2116	2488	2749	2980	3189
13700	1469	2122	2495	2757	2989	3198
13750	1473	2128	2502	2765	2997	3207
13800	1477	2134	2509	2773	3006	3216
13850	1481	2140	2517	2781	3014	3225
13900	1485	2146	2524	2789	3023	3235
13950	1489	2152	2531	2797	3032	3244
14000	1493	2158	2538	2805	3040	3253
14050	1497	2164	2545	2813	3049	3262
14100	1501	2170	2553	2821	3058	3272
14150	1505	2176	2560	2829	3066	3281
14200	1509	2181	2567	2836	3075	3290
14250	1514	2187	2574	2844	3083	3299
14300	1518	2193	2581	2852	3092	3308
14350	1522	2199	2589	2860	3101	3318
14400	1526	2205	2596	2868	3109	3327
14450	1530	2211	2603	2876	3118	3336
14500	1534	2217	2610	2884	3126	3345
14550	1538	2223	2617	2892	3135	3354
14600	1542	2229	2624	2900	3144	3364
14650	1546	2235	2632	2908	3152	3373
14700	1550	2241	2639	2916	3161	3382
14750	1554	2247	2646	2924	3170	3391
14800	1558	2253	2653	2932	3178	3401
14850	1562	2259	2660	2940	3187	3410
14900	1566	2265	2668	2948	3195	3419
14950	1570	2271	2675	2956	3204	3428
15000	1574	2277	2682	2964	3213	3437
15050	1578	2283	2689	2972	3221	3447
15100	1582	2289	2696	2980	3230	3456
15150	1586	2295	2704	2987	3238	3465
15200	1590	2301	2711	2995	3247	3474
15250	1594	2307	2718	3003	3256	3484
15300	1598	2313	2725	3011	3264	3493
15350	1602	2319	2732	3019	3273	3502
15400	1606	2325	2740	3027	3282	3511
15450	1610	2330	2746	3034	3289	3519
15500	1613	2334	2750	3039	3294	3525
15550	1615	2338	2755	3044	3300	3531
15600	1618	2342	2759	3049	3305	3537
15650	1621	2346	2764	3054	3311	3542
15700	1624	2350	2768	3059	3316	3548



COMBINED GROSS INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN	SIX OR MORE CHILDREN
15750	1626	2353	2773	3064	3322	3554
15800	1629	2357	2778	3069	3327	3560
15850	1632	2361	2782	3074	3332	3566
15900	1634	2365	2787	3079	3338	3572
15950	1637	2369	2791	3084	3343	3577
16000	1640	2373	2796	3089	3349	3583
16050	1643	2377	2800	3094	3354	3589
16100	1645	2381	2805	3099	3360	3595
16150	1648	2385	2809	3104	3365	3601
16200	1651	2389	2814	3109	3371	3607
16250	1654	2392	2818	3114	3376	3612
16300	1656	2396	2823	3119	3381	3618
16350	1659	2400	2828	3124	3387	3624
16400	1662	2404	2832	3129	3392	3630
16450	1665	2408	2837	3134	3398	3636
16500	1667	2412	2841	3140	3403	3641
16550	1670	2416	2846	3145	3409	3647
16600	1673	2420	2850	3150	3414	3653
16650	1675	2424	2855	3155	3420	3659
16700	1678	2428	2859	3160	3425	3665
16750	1681	2431	2864	3165	3430	3671
16800	1684	2435	2868	3170	3436	3676
16850	1686	2439	2873	3175	3441	3682
16900	1689	2443	2878	3180	3447	3688
16950	1692	2447	2882	3185	3452	3694
17000	1695	2451	2887	3190	3458	3700
17050	1697	2455	2891	3195	3463	3706
17100	1700	2459	2896	3200	3469	3711
17150	1703	2463	2900	3205	3474	3717
17200	1705	2467	2905	3210	3479	3723
17250	1708	2471	2909	3215	3485	3729
17300	1711	2474	2914	3220	3490	3735
17350	1714	2478	2918	3225	3496	3740
17400	1716	2482	2923	3230	3501	3746
17450	1719	2486	2928	3235	3507	3752
17500	1722	2490	2932	3240	3512	3758
17550	1725	2494	2937	3245	3518	3764
17600	1727	2498	2941	3250	3523	3770
17650	1730	2502	2946	3255	3528	3775
17700	1733	2506	2950	3260	3534	3781
17750	1736	2510	2955	3265	3539	3787
17800	1738	2513	2959	3270	3545	3793
17850	1741	2517	2964	3275	3550	3799
17900	1744	2521	2968	3280	3556	3805
17950	1746	2525	2973	3285	3561	3810
18000	1749	2529	2978	3290	3567	3816
18050	1752	2533	2982	3295	3572	3822
18100	1755	2537	2987	3300	3577	3828
18150	1757	2541	2991	3305	3583	3834
18200	1760	2545	2996	3310	3588	3839
18250	1763	2549	3000	3315	3594	3845
18300	1766	2552	3005	3320	3599	3851
18350	1768	2556	3009	3325	3605	3857
18400	1771	2560	3014	3330	3610	3863
18450	1774	2564	3018	3335	3616	3869
18500	1776	2568	3023	3340	3621	3874
18550	1779	2572	3027	3345	3626	3880
18600	1782	2576	3032	3350	3632	3886
18650	1785	2580	3037	3355	3637	3892
18700	1787	2584	3041	3360	3643	3898
18750	1790	2588	3046	3365	3648	3904
18800	1793	2592	3050	3370	3654	3909

COMBINED GROSS INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN	SIX OR MORE CHILDREN
18850	1796	2595	3055	3376	3659	3915
18900	1798	2599	3059	3381	3664	3921
18950	1801	2603	3064	3386	3670	3927
19000	1804	2607	3068	3391	3675	3933
19050	1807	2611	3073	3396	3681	3938
19100	1809	2615	3077	3401	3686	3944
19150	1812	2619	3082	3406	3692	3950
19200	1815	2623	3087	3411	3697	3956
19250	1817	2627	3091	3416	3703	3962
19300	1820	2631	3096	3421	3708	3968
19350	1823	2634	3100	3426	3713	3973
19400	1826	2638	3105	3431	3719	3979
19450	1828	2642	3109	3436	3724	3985
19500	1831	2646	3114	3441	3730	3991
19550	1834	2650	3118	3446	3735	3997
19600	1837	2654	3123	3451	3741	4003
19650	1839	2658	3127	3456	3746	4008
19700	1842	2662	3132	3461	3752	4014
19750	1845	2666	3137	3466	3757	4020
19800	1847	2670	3141	3471	3762	4026
19850	1850	2674	3146	3476	3768	4032
19900	1853	2677	3150	3481	3773	4037
19950	1856	2681	3155	3486	3779	4043
20000	1858	2685	3159	3491	3784	4049

(8) **Computation of basic child support - shared physical care - split physical care - stipulations - deviations - basis for periodic updates.** (a) Except in cases of shared physical care or split physical care as defined in paragraphs (h) and (i) of subsection (3) of this section, a total child support obligation is determined by adding each parent's respective basic child support obligation, as determined through the guidelines and schedule of basic child support obligations specified in subsection (7) of this section, work-related net child care costs, extraordinary medical expenses, and extraordinary adjustments to the schedule of basic child support obligations. The parent receiving a child support payment shall be presumed to spend his or her total child support obligation directly on the children. The parent paying child support to the other parent shall owe his or her total child support obligation as child support to the other parent minus any ordered payments included in the calculations made directly on behalf of the children for work-related net child care costs, extraordinary medical expenses, or extraordinary adjustments to the schedule of basic child support obligations.

(b) Because shared physical care presumes that certain basic expenses for the children will be duplicated, an adjustment for shared physical care is made by multiplying the basic child support obligation by one and fifty hundredths (1.50). In cases of shared physical care, each parent's adjusted basic child support obligation obtained by application of paragraph (b) of subsection (7) of this section shall first be divided between the parents in proportion to their respective adjusted gross incomes. Each parent's share of the adjusted basic child support obligation shall then be multiplied by the percentage of time the children spend with the other parent to determine the theoretical basic child support obligation owed to the other parent. To these amounts shall be added each parent's proportionate share of work-related net child care costs, extraordinary medical expenses, and extraordinary adjustments to the schedule of basic child support obligations. The parent owing the greater amount of child support shall owe the difference between the two amounts as a child support order minus any ordered direct payments made on behalf of the children for work-related net child care costs, extraordinary medical expenses, or extraordinary adjustments to the schedule of basic child support obligations. In no case, however, shall the amount of child support ordered to be paid exceed the amount of child support that would otherwise be ordered to be paid if the parents did not share physical custody.

(c) (I) In cases of split physical care, a child support obligation shall be computed separately for each parent based upon the number of children living with the other parent



in accordance with subsections (7), (9), (10), and (11) of this section. The amount so determined shall be a theoretical support obligation due each parent for support of the child or children for whom he or she has primary physical custody. The obligations so determined shall then be offset, with the parent owing the larger amount owing the difference between the two amounts as a child support order.

(II) If the parents also share physical care as outlined in paragraph (b) of this subsection (8), an additional adjustment for shared physical care shall be made as provided in paragraph (b) of this subsection (8).

(d) Stipulations presented to the court shall be reviewed by the court for approval. No hearing shall be required; however, the court shall use the guidelines and schedule of basic child support obligations to review the adequacy of child support orders negotiated by the parties as well as the financial affidavit that fully discloses the financial status of the parties as required for use of the guidelines and schedule of basic child support obligations.

(e) In any action to establish or modify child support, whether temporary or permanent, the guidelines and schedule of basic child support obligations as set forth in subsection (7) of this section shall be used as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines and schedule of basic child support obligations where its application would be inequitable, unjust, or inappropriate. Any such deviation shall be accompanied by written or oral findings by the court specifying the reasons for the deviation and the presumed amount under the guidelines and schedule of basic child support obligations without a deviation. These reasons may include, but are not limited to, the extraordinary medical expenses incurred for treatment of either parent or a current spouse, extraordinary costs associated with parenting time, the gross disparity in income between the parents, the ownership by a parent of a substantial nonincome producing asset, consistent overtime not considered in gross income under sub-subparagraph (C) of subparagraph (II) of paragraph (a) of subsection (5) of this section, or income from employment that is in addition to a full-time job or that results in the employment of the obligor more than forty hours per week or more than what would otherwise be considered to be full-time employment. The existence of a factor enumerated in this section does not require the court to deviate from the guidelines and basic schedule of child support obligations but is a factor to be considered in the decision to deviate. The court may deviate from the guidelines and basic schedule of child support obligations even if no factor enumerated in this section exists.

(f) The guidelines and schedule of basic child support obligations may be used by the parties as the basis for periodic updates of child support obligations.

(9) **Adjustments for child care costs.** (a) Net child care costs incurred on behalf of the children due to employment or job search or the education of either parent shall be added to the basic obligation and shall be divided between the parents in proportion to their adjusted gross incomes.

(b) Child care costs shall not exceed the level required to provide quality care from a licensed source for the children. The value of the federal income tax credit for child care shall be subtracted from actual costs to arrive at a figure for net child care costs.

(10) **Adjustments for health care expenditures for children.** (a) In orders issued pursuant to this section, the court shall also provide for the child's or children's current and future medical needs by ordering either parent or both parents to initiate medical or medical and dental insurance coverage for the child or children through currently effective medical or medical and dental insurance policies held by the parent or parents, purchase medical or medical and dental insurance for the child or children, or provide the child or children with current and future medical needs through some other manner. If a parent has been directed to provide insurance pursuant to this section and that parent's spouse provides the insurance for the benefit of the child or children either directly or through employment, a credit on the child support worksheet shall be given to the parent in the same manner as if the premium were paid by the parent. At the same time, the court shall order payment of medical insurance or medical and dental insurance deductibles and copayments.

(b) The payment of a premium to provide health insurance coverage on behalf of the children subject to the order shall be added to the basic child support obligation and shall be divided between the parents in proportion to their adjusted gross income.

(c) The amount to be added to the basic child support obligation shall be the actual amount of the total insurance premium that is attributable to the child who is the subject of the order. If this amount is not available or cannot be verified, the total cost of the premium should be divided by the total number of persons covered by the policy. The cost per person derived from this calculation shall be multiplied by the number of children who are the subject of the order and who are covered under the policy. This amount shall be added to the basic child support obligation and shall be divided between the parents in proportion to their adjusted gross incomes.

(d) After the total child support obligation is calculated and divided between the parents in proportion to their adjusted gross incomes, the amount calculated in paragraph (c) of this subsection (10) shall be deducted from the obligor's share of the total child support obligation if the obligor is actually paying the premium. If the obligee is actually paying the premium, no further adjustment is necessary.

(e) Prior to allowing the health insurance adjustment, the parent requesting the adjustment must submit proof that the child or children have been enrolled in a health insurance plan and must submit proof of the cost of the premium. The court shall require the parent receiving the adjustment to submit annually proof of continued coverage of the child or children to the delegate child support enforcement unit and to the other parent.

(f) If a parent who is ordered by the court to provide medical or medical and dental insurance for the child or children has insurance that excludes coverage of the child or children because the child or children reside outside the geographic area covered by the insurance policy, the court shall order separate coverage for the child or children if the court determines coverage is available at a reasonable cost.

(g) Where the application of the premium payment on the guidelines and schedule of basic child support obligations results in a child support order of fifty dollars or less or the premium payment is twenty percent or more of the parent's gross income, the court or delegate child support enforcement unit may elect not to require the parent to include the child or children on an existing policy or to purchase insurance. The parent shall, however, be required to provide insurance when it does become available at a reasonable cost.

(h) (I) Any extraordinary medical expenses incurred on behalf of the children shall be added to the basic child support obligation and shall be divided between the parents in proportion to their adjusted gross incomes.

(II) Extraordinary medical expenses are uninsured expenses, including copayments and deductible amounts, in excess of two hundred fifty dollars per child per calendar year. Extraordinary medical expenses shall include, but need not be limited to, such reasonable costs as are reasonably necessary for orthodontia, dental treatment, asthma treatments, physical therapy, vision care, and any uninsured chronic health problem. At the discretion of the court, professional counseling or psychiatric therapy for diagnosed mental disorders may also be considered as an extraordinary medical expense.

(11) **Extraordinary adjustments to the schedule of basic child support obligations - periodic disability benefits.** (a) By agreement of the parties or by order of court, the following reasonable and necessary expenses incurred on behalf of the child shall be divided between the parents in proportion to their adjusted gross income:

(I) Any expenses for attending any special or private elementary or secondary schools to meet the particular educational needs of the child; and

(II) Any expenses for transportation of the child, or the child and an accompanying parent if the child is less than twelve years of age, between the homes of the parents.

(b) Any additional factors that actually diminish the basic needs of the child may be considered for deductions from the basic child support obligation.

(c) In cases where the custodial parent receives periodic disability benefits granted by the federal "Old-age, Survivors, and Disability Insurance Act" on behalf of dependent children due to the disability of the noncustodial parent or receives employer-paid retirement benefits from the federal government on behalf of dependent children due to the retirement of the noncustodial parent, the noncustodial parent's share of the total child support obligation as determined pursuant to subsection (8) of this section shall be reduced in an amount equal to the amount of the benefits.



(12) **Dependency exemptions.** Unless otherwise agreed upon by the parties, the court shall allocate the right to claim dependent children for income tax purposes between the parties. These rights shall be allocated between the parties in proportion to their contributions to the costs of raising the children. A parent shall not be entitled to claim a child as a dependent if he or she has not paid all court-ordered child support for that tax year or if claiming the child as a dependent would not result in any tax benefit.

(13) **Emancipation.** (a) For child support orders entered on or after July 1, 1997, unless a court finds that a child is otherwise emancipated, emancipation occurs and child support terminates without either party filing a motion when the last or only child attains nineteen years of age unless one or more of the following conditions exist:

(I) The parties agree otherwise in a written stipulation after July 1, 1997;

(II) If the child is mentally or physically disabled, the court or the delegate child support enforcement unit may order child support, including payments for medical expenses or insurance or both, to continue beyond the age of nineteen;

(III) If the child is still in high school or an equivalent program, support continues until the end of the month following graduation. A child who ceases to attend high school prior to graduation and later reenrolls is entitled to support upon reenrollment and until the end of the month following graduation, but not beyond age twenty-one.

(IV) If the child marries, the child shall be considered emancipated as of the date of the marriage. If the marriage is annulled, dissolved, or declared invalid, child support may be reinstated.

(V) If the child enters into active military duty, the child shall be considered emancipated.

(b) Nothing in paragraph (a) of this subsection (13) or subsection (15) of this section shall preclude the parties from agreeing in a written stipulation or agreement on or after July 1, 1997, to continue child support beyond the age of nineteen or to provide for postsecondary education expenses for a child and to set forth the details of the payment of the expenses. If the stipulation or agreement is approved by the court and made part of a decree of dissolution of marriage or legal separation, the terms of the agreement shall be enforced as provided in section 14-10-112.

(14) **Annual exchange of information.** (a) When a child support order is entered or modified, the parties may agree or the court may require the parties to exchange financial information, including verification of insurance and its costs, pursuant to paragraph (c) of subsection (5) of this section and other appropriate information once a year or less often, by regular mail, for the purpose of updating and modifying the order without a court hearing. The parties shall use the approved standardized child support forms specified in subsection (4) of this section in exchanging financial information. The forms shall be included with any agreed modification or an agreement that a modification is not appropriate at the time. If the agreed amount departs from the guidelines and schedule of basic child support obligations, the parties shall furnish statements of explanation that shall be included with the forms and shall be filed with the court. The court shall review the agreement pursuant to this paragraph (a) and inform the parties by regular mail whether or not additional or corrected information is needed, or that the modification is granted, or that the modification is denied. If the parties cannot agree, no modification pursuant to this paragraph (a) shall be entered; however, either party may move for or the court may schedule, upon its own motion, a modification hearing.

(b) Upon request of the noncustodial parent, the court may order the custodial parent to submit an annual update of financial information using the approved standardized child support forms, as specified in subsection (4) of this section, including information on the actual expenses relating to the children of the marriage for whom support has been ordered. The court shall not order the custodial parent to update the financial information pursuant to this paragraph (b) in circumstances where the noncustodial parent has failed to exercise parenting time rights or when child support payments are in arrears or where there is documented evidence of domestic violence, child abuse, or a violation of a protection order on the part of the noncustodial parent. The court may order the noncustodial parent to pay the costs involved in preparing an update to the financial information. If the noncustodial parent claims, based upon the information in the updated form, that the custodial parent is

not spending the child support for the benefit of the children, the court may refer the parties to a mediator to resolve the differences. If there are costs for such mediation, the court shall order that the party requesting the mediation pay such costs.

(15) **Post-secondary education.** (a) This subsection (15) shall apply to all child support obligations established or modified as a part of any proceeding, including but not limited to articles 5, 6, and 10 of this title and articles 4 and 6 of title 19, C.R.S., prior to July 1, 1997. This subsection (15) shall not apply to child support orders established on or after July 1, 1997, which shall be governed by paragraph (a) of subsection (13) of this section.

(b) For child support orders entered prior to July 1, 1997, unless a court finds that a child is otherwise emancipated, emancipation occurs and child support terminates without either party filing a motion when the last or only child attains nineteen years of age unless one or more of the following conditions exist:

(I) The parties agree otherwise in a written stipulation after July 1, 1991;

(II) If the child is mentally or physically disabled, the court or the delegate child support enforcement unit may order child support, including payments for medical expenses or insurance or both, to continue beyond the age of nineteen; or

(III) If the child is still in high school or an equivalent program, support continues until the end of the month following graduation, unless there is an order for postsecondary education, in which case support continues through postsecondary education as provided in this subsection (15). A child who ceases to attend high school prior to graduation and later reenrolls is entitled to support upon reenrollment and until the end of the month following graduation, but not beyond age twenty-one.

(IV) If the child marries, the child shall be considered emancipated as of the date of the marriage. If the marriage is annulled, dissolved, or declared invalid, child support may be reinstated.

(V) If the child enters into active military duty, the child shall be considered emancipated.

(c) If the court finds that it is appropriate for the parents to contribute to the costs of a program of postsecondary education, then the court shall terminate child support and enter an order requiring both parents to contribute a sum determined to be reasonable for the education expenses of the child, taking into account the resources of each parent and the child. In determining the amount of each parent's contribution to the costs of a program of postsecondary education for a child, the court shall be limited to an amount not to exceed the amount listed under the schedule of basic child support obligations in paragraph (b) of subsection (7) of this section for the number of children receiving postsecondary education. If such an order is entered, the parents shall contribute to the total sum determined by the court in proportion to their adjusted gross incomes as defined in paragraph (a) of subsection (3) of this section. The amount of contribution that each parent is ordered to pay pursuant to this subsection (15) shall be subtracted from the amount of each parent's gross income, respectively, prior to calculating the basic child support obligation for any remaining children pursuant to subsection (7) of this section.

(d) In no case shall the court issue orders providing for both child support and postsecondary education to be paid for the same time period for the same child regardless of the age of the child.

(e) Either parent or the child may move for an order at any time before the child attains the age of twenty-one years. The order for postsecondary education support may not extend beyond the earlier of the child's twenty-first birthday or the completion of an undergraduate degree.

(f) Either a child seeking an order for postsecondary education expenses or on whose behalf postsecondary education expenses are sought, or the parent from whom the payment of postsecondary education expenses are sought, may request that the court order the child and the parent to seek mediation prior to a hearing on the issue of postsecondary education expenses. Mediation services shall be provided in accordance with section 13-22-305, C.R.S. The court may order the parties to seek mediation if the court finds that mediation is appropriate.



(g) The court may order the support paid directly to the educational institution, to the child, or in such other fashion as is appropriate to support the education of the child.

(h) A child shall not be considered emancipated solely by reason of living away from home while in postsecondary education. If the child resides in the home of one parent while attending school or during periods of time in excess of thirty days when school is not in session, the court may order payments from one parent to the other for room and board until the child attains the age of nineteen.

(i) If the court orders support pursuant to this subsection (15), the court or delegate child support enforcement unit may also order that the parents provide health insurance for the child or pay medical expenses of the child or both for the duration of the order. The order shall provide that these expenses be paid in proportion to their adjusted gross incomes as defined in subsection (3) of this section. The court or delegate child support enforcement unit shall order a parent to provide health insurance if the child is eligible for coverage as a dependent on that parent's insurance policy or if health insurance coverage for the child is available at reasonable cost.

(j) An order for postsecondary education expenses entered between July 1, 1991, and July 1, 1997, may be modified pursuant to this subsection (15) to provide for postsecondary education expenses subject to the statutory provisions for determining the amount of a parent's contribution to the costs of postsecondary education, the limitations on the amount of a parent's contribution, and the changes to the definition of postsecondary education consistent with this section as it existed on July 1, 1994. An order for child support entered prior to July 1, 1997, that does not provide for postsecondary education expenses shall not be modified pursuant to this subsection (15).

(k) Postsecondary education support may be established or modified in the same manner as child support under this article.

(16) **Child support commission.** (a) The child support guidelines, including the schedule of basic child support obligations, and general child support issues shall be reviewed and the results of such review and any recommended changes shall be reported to the governor and to the general assembly on or before December 1, 1991, and at least every four years thereafter by a child support commission, which commission is hereby created.

(b) As part of its review, the commission must consider economic data on the cost of raising children and analyze case data on the application of, and deviations from, the guidelines and the schedule of basic child support obligations to be used in the commission's review to ensure that deviations from the guidelines and schedule of basic child support obligations are limited. In addition, the commission shall review issues identified in the federal "Personal Responsibility and Work Opportunity Reconciliation Act of 1996", Public Law 104-193, including out-of-wedlock births and the prevention of teen pregnancy.

(c) The child support commission shall consist of no more than twenty-one members. The governor shall appoint persons to the commission who are representatives of the judiciary and the Colorado bar association. Members of the commission appointed by the governor shall also include the director of the division in the state department of human services that is responsible for child support enforcement, or his or her designee, a director of a county department of social services, the child support liaison to the judicial department, interested parties, a certified public accountant, and parent representatives. In making his or her appointments to the commission, the governor shall attempt to appoint persons as parent representatives or as other representatives on the commission who include a male custodial parent, a female custodial parent, a male noncustodial parent, a female noncustodial parent, a joint custodial parent, and a parent in an intact family. In making his or her appointments to the commission, the governor shall attempt to assure geographical diversity by appointing at least one member from each of the congressional districts in the state. The remaining two members of the commission shall be a member of the house of representatives appointed by the speaker of the house of representatives and a member of the senate appointed by the president of the senate and shall not be members of the same political party.

(d) Members of the child support commission shall not be compensated for their services on the commission; except that members shall be reimbursed for actual and necessary expenses for travel and mileage incurred in connection with their duties. The

child support commission is authorized, subject to appropriation, to incur expenses related to its work, including the costs associated with public hearings, printing, travel, and research.

(d.5) The terms of the members appointed by the speaker of the house of representatives and the president of the senate who are serving on March 22, 2007, shall be extended to and expire on or shall terminate on the convening date of the first regular session of the sixty-seventh general assembly. As soon as practicable after such convening date, the speaker and the president shall each appoint or reappoint one member in the same manner as provided in paragraph (c) of this subsection (16). Thereafter, the terms of members appointed or reappointed by the speaker and the president shall expire on the convening date of the first regular session of each general assembly, and all subsequent appointments and reappointments by the speaker and the president shall be made as soon as practicable after such convening date. The person making the original appointment or reappointment shall fill any vacancy by appointment for the remainder of an unexpired term. Members appointed or reappointed by the speaker and the president shall serve at the pleasure of the appointing authority and shall continue in office until the member's successor is appointed.

(e) In reviewing the child support guidelines and the schedule of basic child support obligations as required in paragraph (a) of this subsection (16), the child support commission shall study the following issues:

(I) The merits of a statutory time limitation or the application of the doctrine of laches or such other time-limiting provision on the enforcement of support judgments that arise pursuant to the provisions of section 14-10-122;

(II) Whether different time limitations on the enforcement of support judgments should apply depending on whether support payments are made directly to an obligee or whether such payments are made through the family support registry;

(III) The merits of support judgments arising automatically as provided in section 14-10-122 (1) (c); and

(IV) Whether support obligors should receive additional notice and an opportunity for hearing prior to execution on such judgments.

**Source:** L. 71: R&RE, p. 527, § 1. C.R.S. 1963: § 46-1-15. L. 85: (2) added, p. 592, § 10, effective July 1. L. 86: (3) to (16) added, p. 718, § 1, effective November 1. L. 87: (3)(b), (5), IP(7)(a), (10)(a), (11), and (12) amended, (7)(b)(II), (15), and (16) repealed, (7)(d), (7)(e), (10)(c), and (17) added, and (8), (9), (13), and (14) R&RE, pp. 587, 588, 600, 591, 589, §§ 5, 7, 38, 9, 6, 8, effective July 10. L. 89: (7)(d.5) added and (17) amended, p. 792, §§ 14, 15, effective July 1. L. 90: (18) added, p. 890, § 10, effective June 7; (7)(a)(I)(A), (7)(c), and (13)(a)(III) amended and (7)(b)(III) added, pp. 564, 890, 889, §§ 35, 10, 9, effective July 1. L. 91: (18)(a) amended, p. 359, § 21, effective April 9; (1.5) added and (7)(b), (13), (14)(b), and (18) amended, p. 234, § 1, effective July 1. L. 92: (17) amended, p. 2171, § 18, effective June 2; (1.5)(b)(I), (2), (3)(a), (3)(b), (7)(a), (7)(e), (8), (10)(a)(II), (10)(c), (14)(c)(I), (18), and (18)(a) amended, (1.5)(d), (13.5), (14.5), and (16.5) added, (7)(e) repealed, and (10)(b) R&RE, pp. 166, 203, 188, 169, 198, 193, §§ 1, 9, 2, 3, effective August 1. L. 93: (1.5)(b)(I) and (3)(b)(III) amended and (1.5)(e) added, pp. 1556, 577, §§ 1, 7, effective July 1; (1.5)(b)(I), (2), and (10)(c) amended and (3.5) and (18)(e) added, pp. 1559, 1560, §§ 7, 8, effective September 1. L. 94: (1.5)(b)(I), (1.5)(e), (7)(a)(I)(A), (7)(b)(III), (7)(d.5)(I), and (18)(e) amended, p. 1536, § 5, effective July 1; (18)(a) amended, p. 2645, § 107, effective July 1. L. 96: IP(1), (2), (3)(a), (3)(b)(II), (7)(a)(I)(A), (7)(a)(I)(C), (7)(b)(I), (10)(a)(II), (11)(a), (12), (13.5), and (16.5) amended, p. 594, § 7, effective July 1. L. 97: (1.5) amended and (1.6) and (1.7) added, p. 565, § 20, effective July 1; (1.5), (3.5), (7)(b), and (18)(a) amended and (1.6) and (1.7) added, pp. 1264, 1312, §§ 8, 49, effective July 1; (5) and (17) amended, p. 561, § 5, effective July 1; (7)(a)(I)(B) amended, p. 1240, § 37, effective July 1. L. 98: (3)(a), (7)(d.5)(I), and (13)(a)(II) amended, p. 768, § 21, effective July 1; (7)(a)(I)(A) amended, p. 921, § 7, effective July 1; (4)(c), (8), (9), (10)(c), and (14) amended, p. 1398, § 42, effective February 1, 1999. L. 99: (3.5) amended, p. 1085, § 2, effective July 1; (7)(a)(I)(A) amended, p. 621, § 15, effective August 4. L. 2000: (18) amended, p. 1709, § 6, effective July 1. L. 2001: (18)(a) amended and (19) added, p. 721, § 4, effective May 31. L. 2002:



(10)(a)(II), (10)(b), and (13.5)(h)(II) amended, p. 286, § 1, effective January 1, 2003. **L. 2003:** (3)(b)(III) amended, p. 1011, § 15, effective July 1; (10)(a)(II)(B), (10)(a)(II)(C), and (10)(a)(II)(D) amended, p. 1264, § 51, effective July 1. **L. 2004:** (5), (10)(a)(II)(A), (13.5)(h)(II), and (19) amended, p. 385, § 1, effective July 1. **L. 2005:** (1.6) amended, p. 80, § 1, effective August 8. **L. 2006:** IP(1.6) amended, p. 516, § 1, effective August 7. **L. 2007:** Entire section amended with relocated provisions, p. 73, § 1, effective March 16; (16)(d.5) added, p. 178, § 7, effective March 22; (13)(a)(IV), (13)(a)(V), (15)(b)(IV), and (15)(b)(V) added and IP(15)(b) amended, p. 1649, §§ 5, 3, effective May 31; (6)(b)(I) and (10)(a) amended, p. 1651, § 7, effective January 1, 2008. **L. 2008:** (4)(b) and (5)(b)(I) amended, p. 1347, § 1, effective July 1. **L. 2009:** (5)(a)(I)(H) amended, (SB 09-282), ch. 288, p. 1397, § 59, effective January 1, 2010.

**Editor's note:** (1) This section was amended in Senate Bill 07-015, resulting in the relocation of provisions. For a detailed comparison of relocated provisions, see the table located in the back of the index.

(2) Subsection (16.5)(d.5) was originally numbered as subsection (18)(a.5), and the amendments to it in Senate Bill 07-076 were harmonized with Senate Bill 07-015 and renumbered as subsection (16)(d.5).

**Cross references:** (1) For provisions concerning deductions for health insurance from wages due an obligor ordered to provide health insurance, see § 14-14-112.

(2) For the legislative declaration contained in the 1993 act amending subsection (3)(b)(III), see section 1 of chapter 165, Session Laws of Colorado 1993. For the legislative declaration contained in the act amending subsection (18)(a), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 1997 act amending subsections (1.5), (3.5), (7)(b), and (18)(a) and enacting subsections (1.6) and (1.7), see section 1 of chapter 236, Session Laws of Colorado 1997.

(3) For the "Old-age, Survivors, and Disability Insurance Act", see 42 U.S.C. sec. 401 et seq.

## ANNOTATION

- I. General Consideration.
- II. Duty of Support.
- III. Award of Support.
  - A. Amount.
  - B. Discretion of Court.
  - C. Modification.
  - D. Termination upon Emancipation.
- IV. Past Due Support.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court", see 57 Den. L.J. 21 (1979). For article, "Automatic Escalation Clauses Relating to Maintenance and Child Support", see 12 Colo. Law. 1083 (1983). For article, "Support Calculation Revisited", see 12 Colo. Law. 1647 (1983). For article, "Domestic Case Update", see 14 Colo. Law. 209 (1985). For article, "Child Support Guidelines: Will They Cause More Problems Than They Cure?", see 15 Colo. Law. 408 (1986). For article, "Summary of the Report on the Colorado Commission Child Support and Proposed Child Support Guidelines", see 15 Colo. Law. 665 (1986). For article, "New Child Support Guideline Adopted", see 15 Colo. Law. 1662 (1986). For article, "Key Is-

ues in the Colorado Child Support Guidelines", see 16 Colo. Law 51 (1987). For article, "Post-secondary Education Costs: Forging Through a Legislative Labyrinth", see 24 Colo. Law. 43 (1995). For article, "Calculating Income in Child Support Cases", see 25 Colo. Law. 53 (March 1996). For article, "Post-secondary Education Expenses: A Multi-tiered Approach", see 27 Colo. Law. 61 (January 1998). For article, "Determining Gross Income for Child Support Purposes", see 32 Colo. Law. 65 (May 2003). For article, "The State of Voluntary Unemployment and Underemployment in Colorado", see 34 Colo. Law. 49 (November 2005). For article, "Colorado Child Support Case Law Update", see 36 Colo. Law. 79 (October 2007). For article, "Postsecondary Education Expenses after Chalat: Paying College Expenses after Divorce", see 38 Colo. Law. 19 (January 2009). For article, "Child Support Continuation for Disabled Children", see 40 Colo. Law. 61 (December 2011).

**Annotator's note.** Since § 14-10-115 is similar to § 14-10-115 as it existed prior to the 2007 amendment relocating provisions, § 46-1-5 (1)(c), C.R.S. 1963, § 46-1-5, CRS 53, and CSA, C. 56, § 8, relevant cases construing those provisions have been included in the annotations to this section.

**This section does not violate equal protection, due process, and privacy rights, and**

**enforcement of the section is not an unconstitutional taking of property or an ongoing threat of imprisonment for debt.** A distinction between sets of parents based on marital status is rationally related to the legitimate state interest to insure that children of divorced or separated parents receive support despite the divorce or separation. *Stillman v. State*, 87 P.3d 200 (Colo. App. 2003).

**Because it approximates the amount of parental income that the child would have received in an intact family, application of the child support guidelines is not arbitrary, capricious, fundamentally unfair, or coercive.** *Stillman v. State*, 87 P.3d 200 (Colo. App. 2003).

**There may be a remedy for child support apart from a divorce action.** *Scheer v. District Court*, 147 Colo. 265, 363 P.2d 1059 (1961).

**Duty of child support is independent**, and is not limited to, entry of decree of dissolution. In *re Price*, 727 P.2d 1073 (Colo. 1986).

**Uniform Dissolution of Marriage Act provides separate sections that govern the different elements of a dissolution order**, specifically property disposition, maintenance, child support, and attorney fees. The court is required to make separate orders regarding these elements based on separate considerations and may not commingle one element with another. In *re Huff*, 834 P.2d 244 (Colo. 1992).

**Child has standing to seek support for herself** under this section. In *re Conradson*, 43 Colo. App. 432, 604 P.2d 701 (1979).

**Reasonable and necessary business expenses may be satisfied before support payment.** Obligations relating to reasonable and necessary expenses associated with maintaining the structure and solvency of a business or the production of income can be satisfied before payment of child support. In *re Crowley*, 663 P.2d 267 (Colo. App. 1983).

**Interest accrues on arrearages from the date each installment becomes due.** In *re Pote*, 847 P.2d 246 (Colo. App. 1993).

**Award of past pregnancy expenses and support.** There is no jurisdiction under this section to award expenses incurred prior to the date of the filing of a motion for child support. In *re Garcia*, 695 P.2d 774 (Colo. App. 1984).

**Reasonable to charge support against Colorado property of out-of-country father.** Where the trial court ordered the father, who resides in Norway, to pay child support in a lump sum amount, and the court further ordered that such sum should be a charge against certain Colorado property interests of the father, such order was reasonable and not confiscatory. *Berge v. Berge*, 189 Colo. 103, 536 P.2d 1135 (1975).

**Subsection (1.5)(a)(II) provides that emancipation occurs and an order for child support terminates when a child attains 19 years of age**, unless the child is then mentally or

physically disabled and, if a child is physically or mentally incapable of self-support upon attaining majority at age 21, the duty of parental support continues for the duration of the disability. *Koltay v. Koltay*, 667 P.2d 1374 (Colo. 1983); In *re Cropper*, 895 P.2d 1158 (Colo. App. 1995).

**The plain language of subsection (1)(b)(I) creates no exemption for separation agreements entered into under and consistent with earlier legislation.** Although the parties' specific intention in 1991 separation agreement to share four years of college costs prevailed over general intention that child would be emancipated at 21 years of age, subsection (1)(b)(I) nevertheless controls and requires that father's college cost obligation terminates upon the earlier of the child's 21st birthday or completion of a four-year college program. In *re Crowder*, 77 P.3d 858 (Colo. App. 2003).

**Subsection (1.5)(c) was modified to distinguish between orders for postsecondary education costs entered prior to, and after, July 1, 1997, when in a distinct departure from prior law, the court could no longer enter orders for postsecondary education expenses absent written agreement of the parties.** In *re Chalat*, 94 P.3d 1191 (Colo. App. 2004), *aff'd* in part and *rev'd* in part on other grounds, 112 P.3d 47 (Colo. 2005).

**Subsection (1.5)(c.5) was added in 1997 to clarify that the convoluted legislation that had been passed since 1991 was applicable to all orders that concerned postsecondary education expenses and that were established or modified prior to July 1, 1997.** In *re Chalat*, 94 P.3d 1191 (Colo. App. 2004), *aff'd* in part and *rev'd* in part on other grounds, 112 P.3d 47 (Colo. 2005).

**Tax exemptions.** Court has authority to divide tax exemptions between the parents. In *re Berjer*, 789 P.2d 468 (Colo. App. 1989); In *re Nielson*, 794 P.2d 1097 (Colo. App. 1990); In *re Larsen*, 805 P.2d 1195 (Colo. App. 1991).

**Court must allocate dependency exemption between the parties** based on their respective gross incomes. Federal tax law contemplates such an allocation, and does not preempt it. S.F.E. in *Interest of T.I.E.*, 981 P.2d 642 (Colo. App. 1998).

When allocating tax exemptions between the parents, the phrase "contributions to the costs of raising the children" refers to the percentage of child support attributed to each parent in the course of making the child support computation. In *re Staggs*, 940 P.2d 1109 (Colo. App. 1997).

The trial court may consider the allocation of tax exemptions in a motion for modification. In *re Oberg*, 900 P.2d 1267 (Colo. App. 1994).

A parent may not be ordered to pay an ex-spouse child support amounts for a period prior to entry of a child support order. In *re Pote*, 847 P.2d 246 (Colo. App. 1993).



**Husband's discovery request** that wife list all gifts, including without limitation, jewelry, clothes, entertainment, travel, and restaurant meals provided to her or the children by her current husband; list all amounts paid by wife's current husband directly to wife or to other parties from which she received a benefit, including attorney fees, maid service, cable television, mortgage payments, car and home repairs, insurance, and utilities; and list all assets purchased for which her current husband contributed, and husband's definition of "income" to include "all funds available for your use, including gifts" was significantly broader than the statutory definition of gross income, and therefore, denial of husband's motion to compel was proper. In re Seanor, 876 P.2d 44 (Colo. App. 1993).

**Applied** in Smith v. Casey, 198 Colo. 433, 601 P.2d 632 (1979); In re Hartford, 44 Colo. App. 303, 612 P.2d 1163 (1980); In re Dickey, 658 P.2d 276 (Colo. App. 1982); In re Steele, 714 P.2d 497 (Colo. App. 1985); In re Stone, 749 P.2d 467 (Colo. App. 1987).

## II. DUTY OF SUPPORT.

**This section includes adopted children** as well as natural children. In re Ashlock, 629 P.2d 1108 (Colo. App. 1981).

**Absent a legal parent-child relationship, there is no duty to support a child under this section.** In re Bonifas, 879 P.2d 478 (Colo. App. 1994).

**Husband and wife who sought and were granted custody of a non-biological child under a parental responsibility order** owed a duty of support to the child, and trial court had the authority in their dissolution of marriage proceeding to order husband to pay child support pursuant to subsections (1) and (17). In re Rodrick, 176 P.3d 806 (Colo. App. 2007).

**Only the parents' incomes and not the guardians' are to be included in the determination of child support**, as supported by § 15-14-209 (2), which states, "A guardian need not use the guardian's personal funds for the ward's expenses". Sidman v. Sidman, 240 P.3d 360 (Colo. App. 2009).

**Section contemplates a parent being responsible for the support of his children, not his former spouse, however reprehensible his behavior.** Therefore it was error to award the reimbursement of mother's transportation costs as child care. In re Kluver, 771 P.2d 34 (Colo. App. 1989).

**Child must reside and be supported by spouse granted custody and support.** Wife who has been granted child custody is only entitled to support payments when the children were actually with her and supported by her. Brown v. Brown, 183 Colo. 356, 516 P.2d 1129 (1973).

**This section contemplates that, when in a divorce case, custody of a minor child is awarded to the wife, an order for its support may be made on the husband, and in proceeding to such order the court looks only to the future.** Gourley v. Gourley, 101 Colo. 430, 73 P.2d 1375 (1937).

**It was not an abuse of discretion for trial court to award child support during the pendency of the dissolution proceeding.** In re Atencio, 47 P.3d 718 (Colo. App. 2002).

**Where plaintiff alleged that defendant was the father of the minor children of the parties, but had failed and refused to support them, and that they were in need of support which he has the means and ability to provide, if established by evidence, plaintiff would be entitled to appropriate relief.** Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

**Person without funds or profitable employment not relieved of support obligation.** Merely because a spouse desires to work on a long-range investment does not relieve him of his obligation to support his children, and the fact that a person is without funds and without profitable employment has been held not to preclude the allowance of reasonable alimony and support where nothing but a disinclination to work, regardless of the motive therefor, interferes with his ability to earn a reasonable living. Berge v. Berge, 33 Colo. App. 376, 522 P.2d 752 (1974), aff'd, 189 Colo. 103, 536 P.2d 1135 (1975).

**Where the oldest of three children of the parties was living with father, the trial court did not abuse its discretion in declining to award plaintiff support money for all of the children, since such award would require defendant to pay twice for support of child in his custody.** Cohan v. Cohan, 150 Colo. 249, 372 P.2d 149 (1962).

**Custodial parent can be ordered to pay support to noncustodial parent under Uniform Dissolution of Marriage Act.** In re Fest, 742 P.2d 962 (Colo. App. 1987).

**In order for child support to be calculated according to shared physical custody, sufficient evidence must be submitted that each parent keeps the children overnight for more than 25% of the time and that both parents contribute to the expenses of the children in addition to the payment of child support.** In re Redford, 776 P.2d 1149 (Colo. App. 1989).

**There is no statutory requirement that any particular amount of expense be proven by the parent seeking a support adjustment for shared physical custody.** In re Redford, 776 P.2d 1149 (Colo. App. 1989).

**Application of shared custody formula that results in a support payment by the custodial parent to the noncustodial parent is not necessarily prohibited.** In re Antuna, 8 P.3d 589 (Colo. App. 2000).

Where there was an absence of evidence from husband establishing that he contributed to the child's financial needs, there was no basis for application of the shared custody formula under worksheet B. In re Antuna, 8 P.3d 589 (Colo. App. 2000).

Where a mother removed her child from the state and deliberately concealed her whereabouts from the father, and by her affirmative acts voluntarily assumed responsibility for the child's support for a period of several years, during which time it appears that the child wanted for nothing necessary to health, comfort, and welfare, the mother was not in a position to claim reimbursement for such support. Griffith v. Griffith, 152 Colo. 292, 381 P.2d 455 (1963).

Where a father asserted that his right to direct and select the nature of the education of his son coexisted with the obligation to contribute to the costs of the education, it was held that it was for the divorced wife as custodian to make the decisions concerning the place and nature of the son's college education, subject only to the approval of the divorce court acting with due regard for the financial capabilities of the father. Van Orman v. Van Orman, 30 Colo. App. 177, 492 P.2d 81 (1971).

A divorced father did not have an absolute duty to pay for the college expenses of his minor child. Van Orman v. Van Orman, 30 Colo. App. 177, 492 P.2d 81 (1971).

When it had been properly demonstrated at trial that the welfare of the child would be served by further education at the college level, the father could properly be compelled to contribute to the costs of such education on a basis commensurate with the father's ability to pay until such time as the child attained majority or was otherwise emancipated. Van Orman v. Van Orman, 30 Colo. App. 177, 492 P.2d 81 (1971).

Travel expenses for a child, including the travel expenses of the guardians accompanying the child, shall be divided between the parents. Court did not apply the correct legal standard when it ordered the guardians to travel with juvenile at their own expense. Sidman v. Sidman, 240 P.3d 360 (Colo. App. 2009).

Award of retroactive child support is error. Since the court lacked proper jurisdiction to enter support orders until husband was personally served, its attempt to order retroactive child support was void. In re McKendry, 735 P.2d 908 (Colo. App. 1986).

Termination of support pursuant to decree. Absent a provision in the decree or a court order to the contrary, a father's duty to support pursuant to a decree which was paid to his ex-wife terminated with her death, although his common law and statutory duty of support continued. Application of Connolly, 761 P.2d 224 (Colo. App. 1988).

Phrase "each will contribute whatever may be necessary for the support of their children" creates a binding promise on part of father to contribute to children's financial support. In re Meisner, 807 P.2d 1205 (Colo. App. 1990).

"Absolute requirement" or "necessary requirement" is not the appropriate standard to apply in determining whether private school was an appropriate placement for a child. The court should consider whether private schooling meets the child's particular educational needs. In re Eaton, 894 P.2d 56 (Colo. App. 1995).

A motion to quash subpoenas issued to third persons allegedly contributing to support of children was properly granted where the voluntary donations of such parties had nothing to do with a defendant's duty to support children. Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963).

Support for adult child. A dissolution action is a proper proceeding to enforce continued support of an adult child. Koltay v. Koltay, 667 P.2d 1374 (Colo. 1983).

### III. AWARD OF SUPPORT.

#### A. Amount.

Law reviews. For article, "Calculation of Potential Income in Child Support Matters", see 20 Colo. Law. 233 (1991). For article, "Postsecondary Education Costs: Forging Through a Legislative Labyrinth", see 24 Colo. Law. 43 (1995).

Needs of the children are of paramount importance in determining child support obligations. Wright v. Wright, 182 Colo. 425, 514 P.2d 73 (1973); In re Van Inwegen, 757 P.2d 1118 (Colo. App. 1988).

There is no mathematical formula for establishing a just and equitable property settlement or alimony or support. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

The guidelines for calculating child support require a court to calculate a monthly amount of child support based on the parties' combined adjusted gross income, adjust the child support based upon the needs of the children for extraordinary medical expenses and work-related child care costs, and allocate each parent's share based on the physical custody arrangements. In re Aldrich, 945 P.2d 1370 (Colo. 1997).

Adoption subsidy. An adoption subsidy should not be considered a credit against the noncustodial parent's child support obligation. The underlying intent of the child support statute is best served by declining to offset a non-custodial parent's support obligation by the amount of an adoption subsidy or to consider the subsidy as a factor that may diminish the child's



basic needs within the meaning of subsection (13)(b). In re Bolding-Roberts, 113 P.3d 1265 (Colo. App. 2005).

**An award of alimony and child support should bear a reasonable relationship to the needs of a wife and children.** Vines v. Vines, 137 Colo. 449, 326 P.2d 662 (1958).

**Subsection (1)(a) authorizes the court to consider social security disability payments received on behalf of the children in calculating child support.** In re Quintana, 30 P.3d 870 (Colo. App. 2001).

**Social security disability benefits received by custodial parent for benefit of child on account of custodial parent's disability are not included in the custodial parent's gross income but are instead considered a financial resource of the child pursuant to subsections (2)(b)(I) and (11)(b).** In re Anthony-Guillar, 207 P.3d 934 (Colo. App. 2009).

**The extent to which the child's social security disability payment represents a "reduction in need" of the child is a question to be determined by the trial court based upon the totality of the circumstances. The court is not bound to deduct the entire amount of the child's social security disability payment from the basic support obligation.** In re Anthony-Guillar, 207 P.3d 934 (Colo. App. 2009).

**Social security survivor benefits should not be treated any differently than disability benefits.** Thus, survivor benefits received by the wife in a representative capacity for son from previous marriage should not be included in wife's gross income for purposes of calculating husband's support obligation for daughter. In re Ross-Ooley, 251 P.3d 1221 (Colo. App. 2010).

**Trial court did not err in excluding adoption subsidies and foster care payments from mother's gross income in child support considerations.** These payments are income of the children on whose behalf the mother receives them and are not part of mother's income. In re Dunkle, 194 P.3d 462 (Colo. App. 2007).

**Father is not entitled to an offset of his support obligation against the benefit amount he receives through his railroad retirement on behalf of his child** since he retains the payments and he is the noncustodial parent. In re Zappanti, 80 P.3d 889 (Colo. App. 2003).

**Subsection (1.5)(b)(I) does not require that expenses be absolutely necessary but only that they be reasonable.** In re Eaton, 894 P.2d 56 (Colo. App. 1995); In re Elmer, 936 P.2d 617 (Colo. App. 1997).

**Determination of conscionability of support provisions.** To determine whether the child support provisions of a separation agreement which has been incorporated into a prior dissolution decree are fair, reasonable, and just, a trial court should consider and apply all the criteria provided by the general assembly for judicial evaluation of the provisions of property settle-

ment agreements: the economic circumstances of the parties, § 14-10-112; the division of property, § 14-10-113(1); and the provisions for maintenance, § 14-10-114(1). In re Carney, 631 P.2d 1173 (Colo. 1981).

In determining whether the terms of the original child support decree have become unconscionable, the trial court should apply the criteria set forth in subsection (1). In re Hughes, 635 P.2d 933 (Colo. App. 1981); In re Gomez, 728 P.2d 747 (Colo. App. 1986).

**In a divorce action, particularly with respect to the care, custody, and maintenance of minor children, the court, at the time of making an award for the minor children, was obligated to appraise conditions as they exist at the time of the presentation.** Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955); Watson v. Watson, 135 Colo. 296, 310 P.2d 554 (1957); Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963); In re Serfoss, 642 P.2d 44 (Colo. App. 1981); In re McKendry, 735 P.2d 908 (Colo. App. 1986).

**Parent's net income is primary consideration in determining support.** With regard to a parent's ability to pay support for his child, net income after reasonable and justifiable business expenses should be the primary consideration. In re Crowley, 663 P.2d 267 (Colo. App. 1983).

**The applicable rule of support ability is the father's ability to pay weighed against the reasonable needs of his children,** because society does not require a father in poor or moderate circumstances to support children on a higher scale just because the family once so lived or because the mother may desire to so live after the divorce. Kane v. Kane, 154 Colo. 440, 391 P.2d 361 (1964).

In making its award of child support, a trial court must weigh the father's ability to pay against the reasonable needs of the children. Berge v. Berge, 33 Colo. App. 376, 522 P.2d 752 (1974), *aff'd*, 189 Colo. 103, 536 P.2d 1135 (1975).

**Where the father's income, while substantial, is limited and subject to numerous demands, an order contemplating only the needs of the child and not bearing any relationship to the ability of the father to pay, and that could possibly become confiscatory of all of the father's available resources, is not valid.** Van Orman v. Van Orman, 30 Colo. App. 177, 492 P.2d 81 (1971).

**Finding as to earning capacity not confiscatory.** Where the evidence supports the court's finding that the husband is capable of earning sums greatly in excess of his present net salary, although it appears that the court based its order on the present net income of the husband, the orders are not confiscatory. In re Anderson, 37 Colo. App. 55, 541 P.2d 1274 (1975).

**Order that husband pay one-half of extraordinary medical and dental bills of the**

**children**, while unlimited as to amount or duration, was not confiscatory considering that the expenses were to be borne equally by each parent. In re Anderson, 37 Colo. App. 55, 541 P.2d 1274 (1975).

**Factors considered in assessing propriety of child support provisions in separation agreement.** In assessing the propriety of child support provisions in a separation agreement, the court must consider, in addition to unconscionability, other factors, such as the living standards the child would have enjoyed had the parties not dissolved the marriage and the physical and emotional well-being of the child. In re Brown, 626 P.2d 755 (Colo. App. 1981).

**Child support obligations cannot be altered by agreement of the parents.** Wright v. Wright, 182 Colo. 425, 514 P.2d 73 (1973).

**Child support cannot be based on financial resources of nonparent with whom child living.** The factors to be considered in making a support award do not include the financial resources of a nonparent with whom the child is living. In re Conradson, 43 Colo. App. 432, 604 P.2d 701 (1979).

**Estimates of children's expenses to be considered.** A trial court should not determine the amount of child support to be paid by a husband based solely on some amount that it feels is commensurate with his income but should make the determination on evidence that includes estimates of the actual needs and expenses of the children involved. In re Berry, 660 P.2d 512 (Colo. App. 1983).

A court must consider and make findings concerning a reasonable pro rata portion of necessary general family expenses as "necessary for support of the child." In re Klein, 671 P.2d 1345 (Colo. App. 1983).

**Standard of living employed in determination of child support.** Where the evidence shows that the standard of living at the time of separation in all probability would have continued but for the dissolution, that is the standard of living the court must employ in its determination of child support. In re Klien, 671 P.2d 1345 (Colo. App. 1983).

**This section does not require specific findings of fact concerning children's assets**, but only that, before determining the amount of support to be paid by a parent, the court consider, among other things the financial resources of the child. In re Wolfert, 42 Colo. App. 433, 598 P.2d 524 (1979).

**Obligation of support not affected by gifts or transfers.** The intent of the uniform act, § 11-50-101 et seq., is to allow custodians to disburse funds whether or not the children are adequately supported. Gifts under that act do nothing to relieve a parent of the separate duty to support the children, nor does that act authorize the custodian to disburse the funds as a means of fulfilling the parent's obligation of

support. In re Wolfert, 42 Colo. App. 433, 598 P.2d 524 (1979).

Where a parent or parents voluntarily make gifts to children during the parents' marriage and the gifts are not in fulfillment of a court order to pay support, and where the parents are, at the time of dissolution of the marriage, able to meet their support obligations, the court may order that such gifts not be used to reduce the legal obligation of support. This rule assumes that the court has properly considered the financial resources of the children as required by subsection (1), before ordering the amount of support to be paid by the parents. In re Wolfert, 42 Colo. App. 433, 598 P.2d 524 (1979).

**Court may order life insurance naming children as beneficiaries be maintained** by parent obligated to pay child support, just as its provisions for child support now extend beyond the death of the parent, unless otherwise provided. In re Icke, 35 Colo. App. 60, 530 P.2d 1001 (1974), aff'd, 189 Colo. 319, 540 P.2d 1076 (1975).

**Award of additional \$6,000 for "recreational opportunities" for children was fairly embraced within the factors to be considered by court in dividing marital property** and did not create a separate "recreational fund" for the needs of the children in the nature of child support. In re Jackson, 698 P.2d 1347 (Colo. 1985).

**The judgment in the divorce action did not determine the limits of the husband's obligation to support the children**, and the children were not parties to that action, and their rights were not concluded thereby. Scheer v. District Court, 147 Colo. 265, 363 P.2d 1059 (1961).

**Where there was no verification of the father's income as required by this section**, the trial court was directed to take additional evidence to determine the income and to modify the support order. In re Velasquez, 773 P.2d 635 (Colo. App. 1989).

**Trial court may draw inference that parent was concealing income**, where parent refused to make a willing disclosure of financial status. In re Sgarlatti, 801 P.2d 18 (Colo. App. 1990).

**Although the general assembly specifically provided for the use of extrapolation for combined gross income amounts falling between amounts shown in the guideline schedule**, it did not provide for the use of extrapolation when combined gross incomes fall above or below the guideline schedule. In re Van Inwegen, 757 P.2d 1118 (Colo. App. 1988).

**Section guidelines applicable in determination of amount of modified award** despite fact that guidelines were enacted after the original support order. In re Anderson, 761 P.2d 293 (Colo. App. 1988).

**Application of new child support guidelines** resulting in more than a ten percent change in support due creates a rebuttable presumption



that existing support award must be modified. In re Pugliese, 761 P.2d 277 (Colo. App. 1988).

**The general assembly intended income imputation to be an important exception to the normal rule of computation based on actual gross income of the parent.** This exception applies when the parent shirks his or her child support obligation by unreasonably foregoing higher paying employment that he or she could obtain. The legislature meant this exception to prevent detriment to children by deterring parents from making employment choices that do not account for their children's welfare. Nevertheless, the general assembly intended courts to approach income imputation with caution. People v. Martinez, 70 P.3d 474 (Colo. 2003).

**Imputing to voluntarily unemployed wife an income equal to income that of a person employed at the minimum wage even though evidence indicated that wife had been offered a higher paying job** was not abuse of court's discretion given evidence of wife's ill health and problems in obtaining day care. In re Beyer, 789 P.2d 468 (Colo. App. 1989).

**Imputing of full-time income to mother working part-time was error** where mother did not voluntarily choose part-time employment but was required to stay home during the day to care for one of her children who had Downs syndrome. In re Pote, 847 P.2d 246 (Colo. App. 1993).

**Court abused its discretion in finding that mother's underemployment was voluntary** where mother worked only 32 hours per week so that she would have time to take the parties' child, who had cerebral palsy, to physical therapy. In re Foss, 30 P.3d 850 (Colo. App. 2000).

**Interest was properly included in calculation of imputed income.** In re Jaeger, 883 P.2d 577 (Colo. App. 1994).

**"Overtime", in determination of parent's gross income** (prior to 1996 amendment), does not include income from "extra" jobs. In re Marson, 929 P.2d 51 (Colo. App. 1996).

**It was proper for the trial court to find that the overtime worked by father was required and to include such income within the father's gross income** for the following reasons: (1) In his position as equity owner, director, and officer of the family-owned corporation, he was his own supervisor; (2) the evidence established, and the court found, that his position as vice-president and job-site foreman required that he work more than other employees as evidenced by his own testimony that his job as foreman could not always be done in a 40-hour week; and (3) the evidence established that the reason the father was required to work twenty to 25 hours of overtime per week was to assure that the jobs for which he was responsible would be completed in a timely fashion in order to avoid penalties that would work a direct financial dis-

advantage to the father. In re Rice & Foutch, 987 P.2d 947 (Colo. App. 1999).

**Trial court did not abuse its discretion** in excluding mother's overtime pay from the determination of her gross income. Mother chose to work extra hours voluntarily, and the overtime was not required as a condition of her employment. In re Dunkle, 194 P.3d 462 (Colo. App. 2007).

**Section imposes no burden on one parent to prove that an available job exists for the other parent.** Rather, the determination of income hinges on the ability of the parent to perform work. In re Mackey, 940 P.2d 1112 (Colo. App. 1997).

**Court is merely required by subsection (7)(b)(I) to determine potential income** and statute imposes no burden on one parent to prove that an available job exists for the other parent or that a particular job is available. In re Bregar, 952 P.2d 783 (Colo. App. 1997).

**In order to impute income based upon a parent's voluntary underemployment,** the trial court must examine all relevant factors bearing on whether the parent is shirking his or her child support obligation by unreasonably foregoing higher paying employment that he or she could obtain, and, if the parent is, the trial court must determine what he or she can reasonably earn and contribute to the child's support. If the trial court does not find that the parent is shirking his or her child support obligation by unreasonably foregoing higher paying employment, the court should calculate the amount of child support from actual gross income only. People v. Martinez, 70 P.3d 474 (Colo. 2003).

In determining if a parent is voluntarily underemployed, the factors the court may consider may include: The firing and post-firing conduct of the parent; the amount of time the parent spent looking for a job of equal caliber before accepting a lower paying job; whether the parent refused an offer of employment at a higher salary; whether the parent sought a job in the field in which he or she has experience and training; the availability of jobs for a person with the parent's level of education, training, and skills; the prevailing wage rates in the region; the parent's prior employment experience and history; and the parent's history of child support payment. People v. Martinez, 70 P.3d 474 (Colo. 2003).

**The court must make findings sufficient to support a determination of underemployment.** Imputing support without factual findings supporting a determination of underemployment is in error. In re Martin, 42 P.3d 75 (Colo. App. 2002).

**Father not underemployed** where mother presented no evidence that employment at income previously earned by father was available to him, no evidence of alternative employment

at a higher level of remuneration than he presently earned, and no evidence that support to the children had been unreasonably reduced. In re Campbell, 905 P.2d 19 (Colo. App. 1995).

**Trial court properly found father was voluntarily underemployed** where father, a licensed attorney, had opted for inactive status and worked seasonally for an apple orchard at \$10 per hour. In re Elmer, 936 P.2d 617 (Colo. App. 1997).

**Trial court properly declined to find that father was voluntarily unemployed or underemployed** where he voluntarily refused to file a claim for damages resulting from a work-related accident. In re England, 997 P.2d 1288 (Colo. App. 1999).

**Loss of employment due to addiction and re-employment at a lower wage does not constitute voluntary underemployment; however,** a person who has been involuntarily terminated from a position for drug use may subsequently become voluntarily unemployed or underemployed based on actions taken after the termination. In re Atencio, 47 P.3d 718 (Colo. App. 2002).

**The trial court erroneously computed child support by relying solely upon the husband's income** and disregarding the wife's statutory obligation to contribute to the child's support. If both parents have actual income, or a reasonable ability to earn income, it is erroneous as a matter of law to allocate the support obligation to one parent. In re Sewell, 817 P.2d 594 (Colo. App. 1991).

In computing child support, the trial court erred in failing to consider either the wife's income as represented by the monthly maintenance award or her ability to earn income from the marital property distributed to her under the court's decree. In re Sewell, 817 P.2d 594 (Colo. App. 1991).

**For purposes of child support, father's income, as derived from the exercise of stock options, is limited to the difference between his purchase price of the optioned stock and the price at which he then sold it.** In re Campbell, 905 P.2d 19 (Colo. App. 1995).

**Court should initially include the amount of a capital gain** as a component of gross income for the year in which the gain was received. Thereafter, the court has authority to deviate from the child support guidelines if their application would be inequitable, unjust, or inappropriate. In re Zisch, 967 P.2d 199 (Colo. App. 1998).

**When considering capital gains from the sale of property awarded in a property division,** the court shall include in gross income only those capital gains realized from post-property division appreciation in the property. In re Upson, 991 P.2d 341 (Colo. App. 1999).

**Court erred in not deducting ordinary and necessary expenses from capital gains when**

**self-employed.** For purposes of determining a person's gross income, when the person was self-employed as a builder of custom homes, ordinary and necessary expenses incurred to sell property should have been deducted from the person's gross income. In re Glenn, 60 P.3d 775 (Colo. App. 2002).

**Husband's taxable distributions from a subchapter S corporation** owned wholly by him and two partners, one of whom had left, while not properly considered as extra income, should have been included as gross income, less ordinary and necessary business expenses. In re Upson, 991 P.2d 341 (Colo. App. 1999).

**In determining monthly child support obligation for the period following the year in which a capital gain is received,** the court should impute as income to the party a rate of return that the net capital gain, after taxes, can reasonably be expected to generate. In re Zisch, 967 P.2d 199 (Colo. App. 1998).

**Subsection (7)(a) does not provide for deduction of federal and state income taxes in computing gross income, including from lottery winnings,** for purposes of calculating child support. In re Bohn, 8 P.3d 539 (Colo. App. 2000).

**The amount received as gross income from lottery winnings is used to calculate child support for the year in which the income is received.** Thereafter, if a parent invests a portion of the funds which were received as income in one year, any interest earned in the subsequent years is properly included as gross income for purposes of calculating child support in those years. In re Bohn, 8 P.3d 539 (Colo. App. 2000).

**Income from an irrevocable trust of which wife was beneficiary should not be omitted from wife's gross income** for purposes of calculating child support, even though the trial court correctly declined to treat the income as property subject to division. In re Pooley, 996 P.2d 230 (Colo. App. 1998).

**If a parent is voluntarily unemployed or underemployed, child support must be based on the parent's potential income.** While a parent is entitled to remain underemployed, the other parent's child support obligation may not be increased as a result. In re Mackey, 940 P.2d 1112 (Colo. App. 1997).

**The magistrate did not err in imputing to the father the annual income he had earned prior to his resignation.** The evidence amply supports the magistrate's determination that the father quit his job because he won the lottery, that he was physically capable of working but was voluntarily unemployed, and that his decision to resign from his job was not a good faith career choice. In re McCord, 910 P.2d 85 (Colo. App. 1995).

**Trial court did not err in imputing income to husband absent findings regarding invol-**



**untary job loss, ability to pay, and needs of the child.** Although the child's needs may be considered in determining the amount of child support that must be paid at a given level of income, nothing in subsection (7) suggests that the child's needs are relevant to the determination of a parent's income. In re Yates, 148 P.3d 304 (Colo. App. 2006).

**Mother's decision to accept travel agency job, rather than to collect unemployment benefits until she found a higher paying job,** was a good faith career choice and she therefore was not voluntarily underemployed. In re McCord, 910 P.2d 85 (Colo. App. 1995).

**Trial court has the prerogative to determine that husband's decision to leave the practice of law and pursue cattle ranching does not fit the exceptions set forth in subsection (7)(b)(III)(B),** where husband argued the change was a good faith career choice, was not intended to reduce the support available to his children, and did not unreasonably reduce support. In re Bregar, 952 P.2d 783 (Colo. App. 1997).

**Person who is involuntarily terminated from his position due to his own misconduct is not voluntarily unemployed or underemployed.** Whether a person lost a job because of willful or knowing misconduct is not determinative of whether the person is voluntarily unemployed or underemployed. What is determinative is the person's subsequent course of action and decision making. A person who has been involuntarily terminated from a position may thereafter become voluntarily unemployed or underemployed by not attempting in good faith to obtain new employment at a comparable salary or by refusing to accept suitable employment offers. People ex rel. J.R.T., 55 P.3d 217 (Colo. App. 2002), aff'd sub nom. People v. Martinez, 70 P.3d 474 (Colo. 2003).

**"Support available to a child" in subsection (7)(b)(III)(B) is not synonymous with "basic child support obligation" elsewhere in this section.** "Basic child support obligation", as defined in subsection (10), typically involves consideration of both parties' respective incomes. "Support available to a child" in subsection (7)(b)(III)(B), however, focuses on the career decision and any associated income change of the putatively underemployed parent that affects his or her ability to provide child support. People ex rel. Cerda v. Walker, 32 P.3d 628 (Colo. App. 2001).

**Thus, if the mother has improved her ability to provide child support, it does not necessarily mean that the father's voluntary underemployment did not unreasonably reduce his ability to provide child support.** Because both parents have a duty to support a child to the best of their abilities, an increase in one parent's ability to provide child support cannot serve as justification for the other parent's unreasonable

reduction in his or her ability to provide child support. People ex rel. Cerda v. Walker, 32 P.3d 628 (Colo. App. 2001).

**In computing parental income for purposes of establishing child support payments, child support for other dependents which a parent is legally obligated to pay, shall be deducted,** and such deduction is not limited to amounts actually paid pursuant to such obligation. In re Eze, 856 P.2d 75 (Colo. App. 1993).

**The intent of this section is that a parent who is legally responsible for the support of other children be given a deduction, within statutory guidelines, for child support actually paid, regardless whether an order for that support had been entered.** Thus, when a prior support order does not reflect the parent's full legal responsibility for support, the parent is entitled to a deduction under paragraph (d.5) of subsection (7), instead of under paragraph (d), in determining the parent's gross income. In re K.M.T., 33 P.3d 1276 (Colo. App. 2001).

**Adequate proof of child support obligations actually paid for other dependents** is required when computing parental income for the purpose of establishing child support for present dependents. In re Dickson, 983 P.2d 44 (Colo. App. 1998).

**"Maintenance actually paid by a parent", as used in subsection (10)(a)(II), includes payments made by a parent to a former spouse.** It is not limited to payments made to the mother of the child in the paternity proceedings before the court; it includes all maintenance payments made by a parent. In Interest of A.R.W., 903 P.2d 10 (Colo. App. 1994).

**The court must consider the father's and the child's financial resources in addition to considering the mother's resources in deciding the appropriate amount of the parents' contributions to the child's college expenses.** In re Eaton, 894 P.2d 56 (Colo. App. 1995) (decided under law in effect prior to 1993 amendment).

**Court did not err in including \$350 rent in father's gross income without excluding allowable business deductions** since record revealed nothing to warrant reversal of the trial court's implicit determination that any claimed expenses were not necessary or required to produce the rental income in question. In re Cropper, 895 P.2d 1158 (Colo. App. 1995).

**Trial court should have considered mother's detailed evidence of the children's living expenses and the fact that father provided and fully paid for a residence for the children in determining the child support obligation,** given the difficulty in applying Colorado child support guidelines to the needs of children in Russia. People ex rel. A.K., 72 P.3d 402 (Colo. App. 2003).

**Once the requisites for shared physical custody have been established, subsection (10)(c)**

requires that the child support obligation be adjusted by the mathematical formula contained in subsection (14)(b). In re Redford, 776 P.2d 1149 (Colo. App. 1989).

**If trial court deviates from the guidelines,** it is required to make findings that application of the guidelines would be inequitable and specifying the reasons for the deviation. Thus, when court deviated from guidelines, it was required to find either that one of the relevant factors in subsection (1) applied or that the husband did not make contributions to the child's expenses beyond what he was obligated to pay in child support. In re Marshall, 781 P.2d 177 (Colo. App. 1989), cert. denied, 794 P.2d 1011 (Colo. 1990).

Modification of award required where trial court deviates from guidelines but fails to make findings required by subsection (3)(a). In re Sgarlatti, 801 P.2d 18 (Colo. App. 1990).

**Trial court must make provision for expense of transportation of child between homes of parents,** which expense is to be divided between parents in proportion to their adjusted gross income. In re Marshall, 781 P.2d 177 (Colo. App. 1989), cert. denied, 794 P.2d 1011 (Colo. 1990); In re Sgarlatti, 801 P.2d 18 (Colo. App. 1990).

**Trial court did not err in including transportation expenses in the child support calculation** before those expenses were actually known since there was no dispute as to the parents' income and the magistrate was free to adopt the percentage share of the father's income as shown in the father's computation. In re Andersen, 895 P.2d 1161 (Colo. App. 1995).

**Husband's personal injury settlement payments** are a financial resource that constitutes "gross income" under the child support guidelines. In re Fain, 794 P.2d 1086 (Colo. App. 1990).

**Proper for court to base child support calculation on father's monthly income from his railroad annuity despite that income deriving from a previously divided asset** since the property division does not change the status of those monthly payments as an income source to be considered in determining the husband's child support obligation. In re Zappanti, 80 P.3d 889 (Colo. App. 2003).

**For investments, income is limited to the gain on the original investment.** However, a party's characterization of payments as a return on investment is not binding on the court. In re Laughlin, 932 P.2d 858 (Colo. App. 1997).

**Trial court did not err in using a two-year average of father's investment income** when calculating father's overall income for the purposes of calculating child support. In re Rice and Fouch, 987 P.2d 947 (Colo. App. 1999).

**No error in the trial court's conclusion that father's "actual gross income" included interest or dividends which had accrued to his**

**IRA but which he had not withdrawn.** The use of the word "actual" in subsection (7)(a) does not limit gross income to that "actually received". In re Tessmer, 903 P.2d 1194 (Colo. App. 1995).

**Trial court correctly excluded father's voluntary enhanced retirement program (VERP) benefit from calculation of his gross income.** In determining whether the VERP benefit constitutes income for child support purposes, the court must answer the following questions: (1) Is the VERP benefit severance pay? (2) Is the VERP benefit an employer contribution to pension and retirement benefits? (3) Should an undistributed employer contribution be treated as income? (4) Does father's option to elect a lump sum distribution or monthly annuity payments of his retirement account, including the VERP benefit, mean that the VERP benefit should be credited as income? In re Mugge, 66 P.3d 207 (Colo. App. 2003).

The requirements that father voluntarily retire rather than be terminated and that he provide a general release of the employer distinguish the VERP benefit from a typical severance pay program, and thus the VERP benefit was not severance pay includable within the statutory definition of gross income. In re Mugge, 66 P.3d 207 (Colo. App. 2003).

The employer denominated the VERP benefit as a retirement benefit, credited the benefit to the father's retirement account in its pension plan, and calculated the amount using age and years of service, therefore the VERP benefit was an employer-contributed pension or retirement benefit. In re Mugge, 66 P.3d 207 (Colo. App. 2003).

Because the employer determined the amounts of pension plan contributions and the employees did not have the option of directly receiving the amounts as wages, prior to any distribution, the employer's VERP contribution to father's account in its pension plan did not constitute gross income for consideration under the child support guidelines. In re Mugge, 66 P.3d 207 (Colo. App. 2003).

VERP benefit should not be treated as gross income for child support purposes merely because father could have elected a lump sum distribution or monthly annuity payments instead of rolling the benefit over into another qualified pension plan. In re Mugge, 66 P.3d 207 (Colo. App. 2003).

**Employer contributions to father's insurance plans not income for child support purposes.** Similar to employer retirement plan contributions, father did not have the option to take the contributions as wages and use them for general living expenses, so such contributions are not properly considered income for purposes of the child support calculation. In re Davis, 252 P.3d 530 (Colo. App. 2011).



**Extraordinary medical expenses** were required to be divided between the parties in direct proportion to their adjusted gross income and added to the basic child support, even where the child's condition existed and was known at the time of the original agreement where the parties agreed to each pay one-half of these expenses. In re Nielsen, 794 P.2d 1097 (Colo. App. 1990).

**Meaning of "adjusted gross income"**. Definition of "adjusted gross income" in subsection (10)(a) does not provide for the deduction of federal and state income taxes or FICA taxes in computation for child support purposes. In re Baroni, 781 P.2d 191 (Colo. App. 1989).

**The fact that certain items may be deductible on a party's federal income tax return does not require exclusion from gross income under the child support guideline.** In re Eaton, 894 P.2d 56 (Colo. App. 1995).

**Trial court did not err in determining that "gross income" included the foreign service premium, the commodities and services allowance, and the expatriate tax equalization payment made to compensate person for the cost of living in a foreign locale.** In re Stress, 939 P.2d 500 (Colo. App. 1997).

**Meaning of "extraordinary medical expenses"**. Extraordinary medical expenses, as defined in subsection (12)(b), must be "uninsured". Where psychological counseling services were insured expenses under the father's medical insurance plan, trial court erred in requiring him to pay for child's counseling by a psychologist not participating in the plan absent a finding that such counseling was not adequately or reasonably covered by the plan. In re Ahrens, 847 P.2d 257 (Colo. App. 1993).

**A parent's obligation for extraordinary medical expenses is an integral part of the child support obligation and, as such, is non-dischargeable in bankruptcy.** Parent who provided letter to court asserting the obligation had been discharged was ordered to pay for his share of the extraordinary medical expenses on behalf of the children. In re Campbell, 140 P.3d 320 (Colo. App. 2006).

**Basic allowance for quarters (BAQ) constitutes an in-kind payment that is income for child support purposes.** In re Long, 921 P.2d 67 (Colo. App. 1996).

**Increased cost for the addition of teenage son to automobile insurance is not an extraordinary expense under subsection (13).** In re Long, 921 P.2d 67 (Colo. App. 1996).

**Court does not have authority to impute a gross income** where actual income is tax exempt. Rather the amount received each month shall be deemed to be a gross income. In re Fain, 794 P.2d 1986 (Colo. App. 1990).

**"Gross" income for purposes of calculating child support can include the amount of income an asset could reasonably be expected to generate** even if that asset has been con-

sumed prior to the support determination. In re Laughlin, 932 P.2d 858 (Colo. App. 1997).

**The burden is upon the parent contesting the support order to prove that a deviation from the presumptive award is both reasonable and necessary.** In re Baroni, 781 P.2d 191 (Colo. App. 1989).

**No automatic adjustment of gross income for non-ordered support.** Non-ordered child support payments to others are not to be determined by a mechanical application of the child support schedule. Rather the impact of payment of non-ordered obligations must be evaluated as provided in subsection (3)(a). People in Interest of C.D., 767 P.2d 809 (Colo. App. 1989).

Party alleging that payment of non-ordered support obligation requires deviation from presumptive award determined under statutory guidelines has burden to prove the claim. Deviation from guidelines must be shown reasonable and necessary considering certain enumerated factors. People in Interest of C.D., 767 P.2d 809 (Colo. App. 1989).

**An agreement of the parties regarding child support, custody, and visitation does not bind the court,** and the court must review child support guidelines to determine the adequacy of the child support agreement of the parties. In re Micaletti, 796 P.2d 54 (Colo. App. 1990).

**Trial court's apportionment of costs for child's guardian ad litem upheld** where court apportioned costs between mother and father on the basis of the underemployed mother's potential income. Weber v. Wallace, 789 P.2d 427 (Colo. App. 1989).

**Specific written or oral findings** must be made by the court to support deviation from the child support amounts specified by the statutory schedule, and this applies to approving a stipulation of the parties. In re Miller, 790 P.2d 890 (Colo. App. 1990); In Interest of D.R.V., 885 P.2d 351 (Colo. App. 1994).

**Where the parties' gross income exceeded the uppermost level of income scheduled in the guidelines and the minimum child support amount is presumed to be set forth in the highest level in the guidelines,** this presumption may be rebutted, and the court must exercise discretion considering the financial resources of both parents and the children, the physical and emotional condition of the children and their educational needs, the needs of the noncustodial parent, and the standard of living that the children would have enjoyed had the parents' marriage not been dissolved. In re Schwaab and Rollins, 794 P.2d 1112 (Colo. App. 1990); In re Balanson, 996 P.2d 213 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 25 P.3d 28 (Colo. 2001).

**Where parties' gross income exceeded the uppermost level of income in the guidelines,** trial court was required to calculate the minimum presumptive amount of support and, in

addition, translate the children's higher standard of living into specific monetary requirements. In re Bookout, 833 P.2d 800 (Colo. App. 1990), cert. denied, 846 P.2d 189 (Colo. 1993).

**There is a rebuttable presumption that the basic child support obligation at the upper level of the guidelines is the minimum presumptive amount of support.** Where father won five million dollars in the Colorado state lottery and the parties' adjusted gross incomes thereafter exceeded the uppermost levels of the guidelines, the court remanded the case for a redetermination of child support. In re Foss, 30 P.3d 850 (Colo. App. 2000).

**Where parties' income exceeded the highest combined gross income level set out in the guidelines,** the gross disparity in their incomes may explain the initial basis for deviation by the court, but additional findings concerning the needs of the children must be entered to establish the amount of deviation ordered. In re Upson, 991 P.2d 341 (Colo. App. 1999).

**Because the children's needs are of paramount importance in determining the child support obligation,** in calculating the appropriate amount of child support, the court should look at, among other things, the costs of food, shelter, clothing, medical care, education, and recreational costs at the level enjoyed before the dissolution. In re Schwaab and Rollins, 794 P.2d 1112 (Colo. App. 1990).

**Viewing the statute as a whole, the means of meeting the "particular educational needs of a child" are not limited to providing private school only when a child has a learning disability or otherwise qualifies for a program of special education.** In re Payan, 890 P.2d 264 (Colo. App. 1995).

**Where the mother has sole custody of the three children, and there is a different visitation schedule for each child, in deciding whether the shared custody calculation for child support is applicable,** the court must calculate the number of overnight stays for each child, divide each by three and total the results to determine the total amount of time the father spends with the children. If the cumulative number of overnights is less than 25% of the year, the shared custody calculation is inapplicable. In re Quam, 813 P.2d 833 (Colo. App. 1991).

**Court erred in beginning the child support calculation for children with different parenting time schedules who are in the mother's primary care by using a separate worksheet for each child.** This error effectively treated each child as an only child under the guidelines and resulted in an inflated child support amount. The court did not enter sufficient findings to support a deviation from the presumed amount under the guidelines. In re Wells, 252 P.3d 1212 (Colo. App. 2011).

**Each parent in a dissolution proceeding has the obligation to support their children to**

**the best of their abilities,** and the court may determine that one parent's failure to find or keep a job is a voluntary refusal to carry out a support obligation. In re Nordahl, 834 P.2d 838 (Colo. App. 1992).

**Costs of high school extracurricular activities** such as cheerleading, driver's education, sports, and debate do not qualify as higher educational expenses under subsection (13). In re Ansay, 839 P.2d 527 (Colo. App. 1992).

**Inclusion of ice skating fees in the support calculation as a reasonable and necessary expense was warranted.** In re Laughlin, 932 P.2d 858 (Colo. App. 1997).

**Trial court erred in ordering parent to pay percentage of children's estimated educational expenses without specifying sum to be paid.** In re Pollock, 881 P.2d 470 (Colo. App. 1994).

Because of a lack of certainty of future bonuses, the court did not abuse its discretion in refusing to estimate the amount of any possible future bonuses for present support purposes. In re Finer, 920 P.2d 325 (Colo. App. 1996).

**The trial court did not err in not considering income from the parties' mentally retarded adult son in calculating child support obligation.** The trial court is not bound to deduct automatically the amount of a child's income from the basic child support obligation when that income does not reduce the need for parental support. In re Folwell, 910 P.2d 91 (Colo. App. 1995).

**Trial court did not abuse its discretion setting appropriate amount of child support** when it included the child's pro rata share of the standard and ongoing living expenses in wife's monthly needs. In re Balanson, 996 P.2d 213 (Colo. App. 1999), aff'd, 25 P.3d 28 (Colo. 2001).

## B. Discretion of Court.

**Determination of child support is in the sound discretion of the trial court,** and in the absence of an abuse of that discretion, not shown here, it will not be disturbed on review. Brigham v. Brigham, 141 Colo. 41, 346 P.2d 302 (1959); Lanz v. Lanz, 143 Colo. 73, 351 P.2d 845 (1960); Huber v. Huber, 143 Colo. 255, 353 P.2d 379 (1960); Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972); Ferguson v. Ferguson, Colo. App., 507 P.2d 1110 (1973); Berge v. Berge, 33 Colo. App. 376, 522 P.2d 752 (1974), aff'd, 189 Colo. 103, 536 P.2d 1135 (1975); In re Krise, 660 P.2d 920 (Colo. App. 1983); In re Garcia, 695 P.2d 774 (Colo. App. 1984); In re Pierce, 720 P.2d 591 (Colo. App. 1985).

**Alimony, support, and property settlement issues were formerly considered together to determine whether the court had abused its discretion,** and in making the determination, the court would consider a variety of factors, includ-



ing whether the property was acquired before or after marriage, the efforts and attitudes of the parties towards its accumulation, the respective ages and earning abilities of the parties, the conduct of the parties during the marriage, the duration of the marriage, their stations in life, their health and physical condition, the necessities of the parties, their financial condition, and other relevant circumstances. *Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972).

**Court may consider only relevant provisions of section.** In awarding child support, a trial court is obligated to consider only the relevant provisions of this section. It commits reversible error by considering matters related to adoption. In re Ashlock, 629 P.2d 1108 (Colo. App. 1981).

**In granting a divorce a court has no authority under the statute to decree that a part of the property of the husband shall be the sole property of his children.** *Menor v. Menor*, 154 Colo. 475, 391 P.2d 473 (1964); *Giambrocco v. Giambrocco*, 161 Colo. 510, 423 P.2d 328 (1967).

**The trial court was without authority to direct the husband to give to each of his children a share in a future estate which he may or may not acquire, because the obligation of the defendant is to provide reasonable support for his children according to their need, within the range of his ability, and a father of children is under no obligation to settle any property upon his children, or to deed them an interest in any asset; on the contrary he may by will or deed or other voluntary act disinherit a child if he sees fit to do so.** *Menor v. Menor*, 154 Colo. 475, 391 P.2d 473 (1964); *Giambrocco v. Giambrocco*, 161 Colo. 510, 423 P.2d 328 (1967).

**Former husband may not discover the amount of former wife's current husband's income but may discover the existence of former wife's income in the form of regular payments made to the former wife by her current husband.** In re Nimmo, 891 P.2d 1002 (Colo. 1995).

**Although trial court abused its discretion in modifying child support and cause was remanded upon appeal, the trial court order for child support remained in full force and effect pending entry of a new support order.** In re Van Inwegen, 757 P.2d 1118 (Colo. App. 1988).

**Court improperly ordered noncustodial mother to make support payments when the court made a finding that the mother did not have the financial ability to pay child support.** In re Jarman, 752 P.2d 1068 (Colo. App. 1988).

**There is a rebuttable presumption in any action to establish or modify child support that \$1,000 is the minimum presumptive amount of child support for one child when the parental combined income exceeds the uppermost levels of the guideline; however, the trial court may**

exercise its discretion and choose to set a different amount after consideration of all relevant factors. In re Van Inwegen, 757 P.2d 1118 (Colo. App. 1988).

**As a matter of law, the trial court may not initially refuse to apply child support guidelines.** In re Thornton, 802 P.2d 1194 (Colo. App. 1990).

**Cost of a nanny may be included in the calculation of child support.** S.F.E. in Interest of T.I.E., 981 P.2d 642 (Colo. App. 1998).

**Trial court erred in failing to divide uninsured medical expenses in proportion to parents' adjusted gross incomes without making necessary findings to support deviation from guidelines.** In re Pollock, 881 P.2d 470 (Colo. App. 1994).

**The trial court has discretion to order that the reasonable and necessary costs of a child's attendance at a private school be divided between the parents in proportion to their income.** In re Elmer, 936 P.2d 617 (Colo. App. 1997) (decided prior to 1998 amendment to subsection (13)(a)(II)); In re West, 94 P.3d 1248 (Colo. App. 2004).

**Attendance at a private school may be approved where it is necessary to meet the particular educational needs of the child.** In re West, 94 P.3d 1248 (Colo. App. 2004).

**In determining whether the children's parochial school tuition should be approved prospectively as a reasonable and necessary expense, the court should consider the parents' income, the standard of living that the children would have enjoyed if the parents' marriage had not been dissolved, and other factors as appropriate.** In re West, 94 P.3d 1248 (Colo. App. 2004).

**The trial court exceeded its authority in ordering the husband to fund an educational trust for the benefit of the parties' son.** The courts have been granted no authority to order the creation of a trust for the benefit of minor children. In re Sewell, 817 P.2d 594 (Colo. App. 1991).

**Trial court did not abuse its discretion in ordering the husband to pay all college expenses of the parties' son.** Use of word "divided" in subsection (13) does not imply that both parents must contribute to each item of support; court is given discretion in subsection (1) to order "either or both" parents to pay support. In re Huff, 834 P.2d 244 (Colo. 1992) (decided under law in effect prior to enactment of subsection (1.5), dealing specifically with postsecondary education support).

**A parent may also be required to contribute to the costs associated with a child's athletic activities in some cases.** The child's particular needs and predissolution standard of living are among the factors to be considered by the court. In re West, 94 P.3d 1248 (Colo. App. 2004).

**Psychiatric therapy for child was properly included** as an extraordinary medical expense in an order under this section. In re Elmer, 936 P.2d 617 (Colo. App. 1997).

**Trial court erred in allocating to father all of child's travel expenses for visitation**, rather than proportionately allocating them between the parties, in absence of finding that such allocation was appropriate. In re Elmer, 936 P.2d 617 (Colo. App. 1997) (decided prior to 1998 amendment to subsection (13)(a)(II)).

**Child support guideline does not provide for allocation between the parties of a parent's travel expenses.** In re Elmer, 936 P.2d 617 (Colo. App. 1997) (decided prior to 1998 amendment to subsection (13)(a)(II)).

**Adjustment of the child support amount to allow for transportation expenses** is not limited to expenses incurred in long distance or interstate travel and does apply to automobile expenses incurred in transporting a child between the homes of the parents. In re L.F., 56 P.3d 1249 (Colo. App. 2002).

**Award constituted an application of, and not a deviation from, the guidelines** where the evidence and the findings were sufficient to support only a partial offset of the child's income for her pro rata share of reasonable and necessary monthly expenses as well as the maintenance of a fund for vacations, one-time purchases, and other occasional expenses. In re Cropper, 895 P.2d 1158 (Colo. App. 1995).

**The burden is upon the parent contesting the support order to prove that a deviation from the presumptive award is both reasonable and necessary.** In re Stress, 939 P.2d 500 (Colo. App. 1997).

**Trial court did not abuse its discretion in finding that parent did not meet this burden.** In re Stress, 939 P.2d 500 (Colo. App. 1997).

**Trial court may deviate from the child support guidelines** set forth in this section if the application of such guidelines would be inequitable, but if it does deviate, the court must make specific factual findings to support any deviation and failure to make such specific findings requires reversal. In re English, 757 P.2d 1130 (Colo. App. 1988); In re Hoffman, 878 P.2d 103 (Colo. App. 1994); In re Andersen, 895 P.2d 1161 (Colo. App. 1995).

The trial court has discretion to deviate from the guidelines where justified, provided it makes appropriate findings. In re Thornton, 802 P.2d 1194 (Colo. App. 1990); In re Payan, 890 P.2d 264 (Colo. App. 1995).

**Deviation from child support guidelines is not justified by hardship resulting solely from application of the guidelines**, absent other unusual or unique financial circumstances. In re Thornton, 802 P.2d 1194 (Colo. App. 1990).

**Taking care of three-year-old triplets may be considered extraordinary circumstances** justifying a deviation from the child support

guidelines. In re Ikeler, 148 P.3d 347 (Colo. App. 2006), rev'd on other grounds, 161 P.3d 663 (Colo. 2007).

**The court must make specific factual findings, however, justifying such a deviation.** In re Ikeler, 148 P.3d 347 (Colo. App. 2006), rev'd on other grounds, 161 P.3d 663 (Colo. 2007).

**The finding that it is important for the child to spend extended time with mother is, in itself, irrelevant to the issue of whether there should be a deviation in child support.** In re Andersen, 895 P.2d 1161 (Colo. App. 1995).

**A finding that one parent has a higher cost of living** will not, in and of itself, ordinarily justify deviating from the guidelines. In re Andersen, 895 P.2d 1161 (Colo. App. 1995).

**Case remanded for reconsideration of deviation from guidelines based on new spouse's income** under the guidelines in In re Nimmo, 891 P.2d 1002 (Colo. 1995). In re Andersen, 895 P.2d 1161 (Colo. App. 1995).

**Subsection (13) does not require an automatic adjustment to presumptive amount of child support** but rather gives the trial court discretion to determine if an adjustment on account of a child's financial resources is appropriate. In re Thornton, 802 P.2d 1194 (Colo. App. 1990).

**Application of child support guidelines establishes an amount of support that is presumed to be necessary to meet a child's needs;** however, the extent to which an unemancipated child's income should be used to defray basic support obligations is within the trial court's discretion and depends upon the totality of circumstances in a particular case. In re Pollock, 881 P.2d 470 (Colo. App. 1994); In re Cropper, 895 P.2d 1158 (Colo. App. 1995).

**Trial court did not abuse its discretion in declining to include child's receipt of public support payments as income available to the child under subsection (13)(b).** Such payments represent gratuitous contributions from the government and do not reduce the parent's duty to provide support. They are intended to supplement other income, not to substitute for it. In re Thornton, 802 P.2d 1194 (Colo. App. 1990).

**But it is proper under subsection (13)(b) for the court to consider mother's receipt of social security disability payments on behalf of the children as an adjustment to child support** because those payments actually diminished the children's basic needs. In re Quintana, 30 P.3d 870 (Colo. App. 2001).

**Court is authorized under this section to calculate child support based on a determination of a parent's potential income** if parent is voluntarily unemployed or underemployed. In re Marshall, 781 P.2d 177 (Colo. App. 1989), cert. denied, 794 P.2d 1011 (Colo. 1990).

**Trial court did not abuse its discretion in reducing the father's amount of child support**, where it found that the father was not



voluntarily underemployed but had terminated his full time employment to return to college to obtain an advanced degree. In re Ehlert, 868 P.2d 1168 (Colo. App. 1994).

**If a court determines that a parent engaged in a good faith effort to achieve higher income, financial independence, or a career in the foreseeable future,** to impute income to that parent would unfairly penalize the parent's effort at self-sufficiency and would be contrary to the public policy of encouraging the financial independence of dependent spouses. In re Seanor, 876 P.2d 44 (Colo. App. 1993).

**Wife was engaged in a good faith effort to achieve a college education in order to further her income position where** the evidence showed she had not worked for approximately nine years and she had completed two years of study towards a bachelors degree in a three-year period, during which time she had achieved a 3.72 grade point average. She had not attended school the previous year because of the death of her current spouse's mother and the hospitalization and continued medical complications and concerns of one of the children. In re Seanor, 876 P.2d 44 (Colo. App. 1993).

**Trial court properly determined that father, a convicted sex offender, was voluntarily underemployed.** Although the conviction likely limited father's employment opportunities, father did not attempt to find gainful employment despite having an M.B.A. degree, a real estate broker's license, and many years of work experience. People ex rel. A.R.D., 43 P.3d 632 (Colo. App. 2001).

**Extent to which a child's income and assets should be applied to the payment of educational expenses or basic support is a question of fact to be determined by the trial court under the totality of circumstances in each case.** In re Barrett, 797 P.2d 848 (Colo. App. 1990); In re Pollock, 881 P.2d 470 (Colo. App. 1994); In re Davis, 252 P.3d 530 (Colo. App. 2011).

**The limit on postsecondary expenses is the amount calculated as if the child receiving such education had been the only child.** Legislative history makes it clear that the 1994 amendment was intended to clarify rather than change the statute. In re Parker, 886 P.2d 312 (Colo. App. 1994).

**Trial court did not abuse discretion in not deviating from the child support guidelines in order to avoid calculating child support based on IRA interest and dividends.** In re Tessmer, 903 P.2d 1194 (Colo. App. 1995).

**Absent a finding that a child has been diagnosed as having a mental disorder, a non-custodial parent cannot be required to share in the costs for therapy,** whether such costs are included within the child support obligation or ordered to be paid separately. Absent the need for therapy because of a mental disorder, such

cost must be borne by the party who makes the decision to provide the child with therapy. In re Finer, 920 P.2d 325 (Colo. App. 1996).

**Court may not deviate downward from the presumptive child support award to ensure continued eligibility for public assistance benefits.** Court erred in ordering mother to pay \$245 per month in child support instead of the statutory amount of \$399 per month in order to preserve the paternal grandparents' public daycare benefits. In re Hein, 253 P.3d 636 (Colo. App. 2010).

**Applied in** In re Rosser, 767 P.2d 807 (Colo. App. 1988).

### C. Modification.

**The provisions of subsections (2) and (7)(e) indicate that the general assembly did not intend to include health insurance premiums in the ordinary and necessary expenses covered by the basic child support obligation set forth in the guidelines;** therefore, health insurance premiums paid by the father cannot be deducted from the total amount of the father's support obligation under the child support guidelines. In re English, 757 P.2d 1130 (Colo. App. 1988).

Where there was no evidence presented to establish the asserted extra cost of purchasing health insurance through the employment of the father's present spouse, there was no basis for the trial court to apply this section. In re Ansay, 839 P.2d 527 (Colo. App. 1992).

**Application of the provisions of this section by the court for the modification of a prior child support order entered under the Uniform Parentage Act was error as a matter of law.** Ashcraft v. Allis, 747 P.2d 1274 (Colo. App. 1987).

**Pre-1991 postsecondary education support orders.** Subsection (1.5)(c.5) allows the modification of pre-1991 postsecondary education support orders. In re Chalat, 112 P.3d 47 (Colo. 2005).

**Substantial and continuing changed circumstances requirement and postsecondary education support orders.** Absent application of the age of emancipation (§ 14-10-122 (4)) or medical insurance (§ 14-10-122 (1)) exceptions, the court's continuing jurisdiction to modify postsecondary education support orders is invoked only upon a showing of substantial and continuing changed circumstances by the party seeking modification. Nothing in the plain language of subsection (1.5)(c.5) or § 14-10-122 alters this clear, unambiguous requirement. In re Chalat, 112 P.3d 47 (Colo. 2005).

**Effect of amendments to postsecondary education support scheme on the substantial and continuing changed circumstances requirement.** The general assembly did not express an intent that its enactments of amendments to the postsecondary education support scheme alone automatically triggers a court's

continuing jurisdiction to modify child support. The requirement for substantial and continuing changed circumstances must still be shown. In re Chalot, 112 P.3d 47 (Colo. 2005).

**Order specifying amount where original order merely imposed duty.** Where an original court order imposes a duty of support without specifying an amount under the criteria of this section, a subsequent court order specifying the amount need only conform with this section, rather than the modification requirements of § 14-10-122. In re Saiz, 634 P.2d 1020 (Colo. App. 1981).

**If the financial ability of the husband and father improves, and the needs of the minor children increase,** the jurisdiction of the court to make additional orders for the care and maintenance of the minor children may be invoked at any time in a proper proceeding. Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955).

**Trial court properly denied father's motion for modification, which was based solely on the 1993 statutory amendment to subsection (1.5)(b)(I) and which did not allege any substantial or continuing change in the parents' or the child's circumstances.** In re Eaton, 894 P.2d 56 (Colo. App. 1995).

**The provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification.** Thus, if child support is modified, the modification should be effective as of the date of filing of the request therefor. In re Mackey, 940 P.2d 1112 (Colo. App. 1997).

**Any order reducing the amount of support money operated only in future.** Engleman v. Engleman, 145 Colo. 299, 358 P.2d 864 (1961).

**The proposition that future support payments could not be reduced as long as a husband was in default,** even though a proper showing could be made of inability to pay, was not the law in Colorado. Kane v. Kane, 154 Colo. 440, 391 P.2d 361 (1964).

**Parent's medical expenses relevant to modification as well as to initial determination of support.** Where change in presumed support under guideline based on gross income is less than ten percent, the parent seeking modification may nonetheless establish a substantial and continuing change in circumstances, justifying a deviation from the guideline, due to an increase in the parent's personal medical expenses. In re Ford, 851 P.2d 295 (Colo. App. 1993).

**Deviation from the guidelines in calculating the basic child support obligation was error** where court reasoned that father would not be able to support himself if required to pay the amount specified in the guidelines in light of his required contribution to the extraordinary medical expenses required by the child. In re Nielsen, 794 P.2d 1097 (Colo. App. 1990).

**In circumstances where father is providing health insurance coverage for new spouse and father's other children living with him,** in addition to child who is subject to order, the amount of the premium attributable to such child was "not available or cannot be verified" and trial court erred by refusing to allow the addition to the support obligation for a portion of that premium. In re Andersen, 895 P.2d 1161 (Colo. App. 1995).

**Child's income may allow for a reduction of the support obligation** if the court determines that it does "actually diminish basic needs" of child. In re Kluver, 771 P.2d 34 (Colo. App. 1989).

Mother's receipt of social security disability payments on behalf of the children actually diminished children's basic needs and court did not abuse its discretion by including the payments in the adjustment of the father's child support obligation. In re Quintana, 30 P.3d 870 (Colo. App. 2001).

**Modification of award based on child's income for purposes of extraordinary educational expenditures or the satisfaction of basic needs is a question of fact** to be determined under the totality of circumstances in each case. In re Barrett, 797 P.2d 848 (Colo. App. 1990).

A trial court is not bound to deduct automatically the entire amount of a child's income from his or her educational costs or basic support obligation but must look at the child's reduced need, if any, for parental support. In re Barrett, 797 P.2d 848 (Colo. App. 1990); In re Cropper, 895 P.2d 1158 (Colo. App. 1995).

Trial court abused its discretion in refusing to deviate from a strict application of the guideline calculations for basic child support where certain expenses were shown to be duplicative. In re Barrett, 797 P.2d 848 (Colo. App. 1990).

The court did not err in denying a modification for contributions earned by the children where evidence showed that the older children did not receive any Pell grants toward their college expenses, and testimony regarding the additional expenses towards which the children put their earnings was sufficient for the court to determine that a reduction in the amount of support was not appropriate. In re Ansay, 839 P.2d 527 (Colo. App. 1992).

**A trial court does not err if it requires parents who are legally responsible for support to contribute to a dependent child's needs in lieu of requiring the child to expend all of his or her own resources.** In re Pring, 742 P.2d 343 (Colo. App. 1987); In re Cropper, 895 P.2d 1158 (Colo. App. 1995).

**Child support obligations to children of a second marriage may be deducted from a parent's income** when the court is considering a modification of child support ordered for children of a first marriage. In re Hannum, 796 P.2d 57 (Colo. App. 1990).



**The allocation of tax exemptions may be considered** when the court is considering a modification of child support. In re Oberg, 900 P.2d 1267 (Colo. App. 1994).

**In considering a modification of child support, the trial court is bound** by the facts and circumstances of the parents and the children as they exist at the time of the hearing. If there is a pending foreclosure sale, the court should await the sale's completion and complete its record on the amount of debt incurred before it determines the modification question. In re Kimbrough, 784 P.2d 852 (Colo. App. 1989).

**Court did not violate prohibition against adjustment that results in support payments lower than previously existing support order** under subsection (7)(d.5)(II) when the decrease in the husband's child support obligation was due solely to the switch to a shared custody child support calculation and a decrease in the wife's work-related child care expenses. The decrease was entirely unrelated to the income adjustment given to the wife for her after-born child. In re Martin, 910 P.2d 83 (Colo. App. 1995).

**Court had authority to recalculate child support using a different worksheet than previously used.** Once court gained jurisdiction to modify child support pursuant to the wife's motion, the court is not prohibited from utilizing the proper formula for such support, particularly when that formula was part of the same statute under which the wife filed her motion to modify. In re Martin, 910 P.2d 83 (Colo. App. 1995).

**Rebuttable presumption of a change of circumstances** existed under the child support guidelines where the parties changed custody of one of the minor children from the mother to the father. In re Miller, 790 P.2d 890 (Colo. App. 1990).

**For purpose of calculating and modifying child support,** trial court properly included in gross income of husband an amount which a one-time post-decree inheritance could be expected to yield, although calculation of such amount was incorrect. In re Armstrong, 831 P.2d 501 (Colo. App. 1992).

**Trial court did not impermissibly interfere with husband's constitutional property rights** by including in gross income an amount which a one-time post-decree inheritance received by husband could be expected to yield. In re Armstrong, 831 P.2d 501 (Colo. App. 1992).

**A monetary inheritance should be included in gross income for purposes of calculating child support** in the year that the beneficiary withdraws from the inheritance and relies on it as a source of income. In re A.M.D., 78 P.3d 741 (Colo. 2003).

**That remainder of a monetary inheritance that is not withdrawn and spent** should be treated as an income-producing asset and the

actual interest income it generates should be included in gross income. In re A.M.D., 78 P.3d 741 (Colo. 2003).

**In determining how much of the principal of an inheritance to include in gross income,** the trial court should apply a two-part test: (1) The court must decide whether an inheritance is monetary; and, if so, (2) whether the recipient used the principal as a source of income either to meet existing living expenses or to increase the recipient's standard of living. In re A.M.D., 78 P.3d 741 (Colo. 2003).

**Court did not make findings required by subsection (14.5) to modify the allocation of federal income tax exemptions between the parties.** Order allocating exemptions to the parties in alternating years, therefore, was reversed and the cause remanded to the trial court. In re Trout, 897 P.2d 838 (Colo. App. 1994).

**Failure to submit financial information to the trial court** and the failure of the trial court to review the modified agreement between the parties rendered the resulting trial court order subject to being set aside under C.R.C.P. 60 (b)(5). In re Smith, 928 P.2d 828 (Colo. App. 1996).

**Court's award of income tax exemption to father in alternate years, as part of court's judgment on mother's motion to modify child support was supported by the record and complies with the requirements of this section.** The court was not required to hold an additional hearing before amending the judgment when it had already heard testimony concerning the parties' incomes and had determined the percentage contribution of the parties to the costs of raising the child. The court could conclude on that record that father would receive a tax benefit from the exemption award. In Interest of A.R.W., 903 P.2d 10 (Colo. App. 1994).

**Father's post-dissolution motion for reimbursement of previously paid child care expenses was properly denied.** Reimbursement is not mandated under this section and the court has discretion whether to refer the parties to mediation. In re Lishnevsky, 981 P.2d 609 (Colo. App. 1999).

**Court should compare child support order currently in effect with child support guidelines to determine whether a substantial and continuing change of circumstances exists.** Although the parties' current child support order was the result of the parties' agreement to a reduced amount of child support, the court should have compared the current child support order with the presumed child support obligation under the guidelines at the time of mother's motion to determine if mother had shown a substantial and continuing change of circumstances sufficient to maintain her motion for modification. In re M.G.C.-G., 228 P.3d 271 (Colo. App. 2010).

#### D. Termination upon Emancipation.

**The resolution of the question of emancipation was concerned more with the extinguishment of parental rights and duties** than with the removal of the disabilities of infancy, and it occurred only when there was a complete severance of the filial tie, and the child's possession or lack of possession of the right to vote had little or no bearing on the determination as to whether such tie had or had not been severed. *Van Orman v. Van Orman*, 30 Colo. App. 177, 492 P.2d 81 (1971).

**The enactment of the voting rights act of 1970, lowering the federal voting age to 18 years**, did not emancipate a 20 year old son, as a matter of law. *Van Orman v. Van Orman*, 30 Colo. App. 177, 492 P.2d 81 (1971).

**In Colorado, a person retains the status of minority until the age of 21 years**, and that statutory definition is controlling as to the age at which emancipation occurs as a matter of law, except where otherwise provided by statute. *Van Orman v. Van Orman*, 30 Colo. App. 177, 492 P.2d 81 (1971).

**In the absence of emancipation occurring upon attainment of majority**, the question of whether a child was emancipated was essentially one of fact determinable by the trier of fact. *Van Orman v. Van Orman*, 30 Colo. App. 177, 492 P.2d 81 (1971).

**Change in the age of emancipation and duty of support in this section did not automatically modify a parent's existing obligation of support which required obligor to pay support until child reached 21 years**. In *re* *Dion*, 970 P.2d 968 (Colo. App. 1997).

**The marriage of the minor daughter terminated the parental duty of support** and no enforceable rights to support payments could thereafter accrue to the mother. *Berglund v. Berglund*, 28 Colo. App. 382, 474 P.2d 800 (1970).

**Support for dependent child after attainment of majority**. This article gives the court jurisdiction to enter a decree for support of a dependent child of the marriage after attainment of majority. In *re* *Koltay*, 646 P.2d 405 (Colo. App. 1982), *aff'd*, 667 P.2d 1374 (Colo. 1983).

Once a child is over 21 and physically and mentally capable of self support, such child is not entitled to receive support payments from father, despite the fact that the child had an expectation of attending college had parents not divorced. Factors such as standard of living child would have enjoyed and educational needs can only be applied in determining child support if the child had not reached majority. In *re* *Plummer*, 735 P.2d 165 (Colo. 1987).

**Express provision for post-emancipation support, where circumstances warrant, may be made in a decree entered before the child's twenty-first birthday**. In such a case, factors

such as standard of living and expectation of attending college may be considered. In *re* *Huff*, 834 P.2d 244 (Colo. 1992) (decided under law in effect prior to enactment of subsection (1.5), dealing specifically with postsecondary education support).

Provision for post-emancipation support may also be made by written agreement of the parties, as is indicated by reading this section together with § 14-10-122 (3). In *re* *Huff*, 834 P.2d 244 (Colo. 1992).

**Meaning of "previously existing support order"**. An order entered October 22, 1993, *nunc pro tunc* August 12, 1993, made retroactive to August 1, 1992, modifying a March 1992 support order, is not a "previously existing support order" with regard to a modification of support to take into account a child born to the father and his new wife in December 1992, because it was not "previously existing" until it was actually entered by the court. In *re* *Oberg*, 900 P.2d 1267 (Colo. App. 1994).

#### IV. PAST DUE SUPPORT.

**Past due child support payments in themselves constitute debt**. *Colo. State Bank v. Utt*, 622 P.2d 584 (Colo. App. 1980).

**Amount owed may be garnished** by bank which held judgment against former wife. *Colo. State Bank v. Utt*, 622 P.2d 584 (Colo. App. 1980).

**It was not error to require a husband to pay arrears of support money for his minor children during the period of time the wife refuses him the right to visit the children**, where no objection was made to the entry of such order. *Hayes v. Hayes*, 134 Colo. 315, 303 P.2d 238 (1956).

**A trial court could not punish a father, delinquent in his child support payments through no fault of his own**, by denying him visitation rights until he became current in his payments. *Kane v. Kane*, 154 Colo. 440, 391 P.2d 361 (1964).

**A trial court was without authority to forgive delinquent payments of support money**. *Gier v. Gier*, 139 Colo. 289, 339 P.2d 677 (1959); *Engleman v. Engleman*, 145 Colo. 299, 358 P.2d 864 (1961); *Drazich v. Drazich*, 153 Colo. 218, 385 P.2d 259 (1963).

**Overpayments on child support made direct to one child could not be set off against accrued overdue installments which were owed to the mother on behalf of another child**. *Dorsey v. Dorsey*, 28 Colo. App. 63, 470 P.2d 581 (1970).

**The general rule was to the effect that when a father was required by a divorce decree to pay to the mother money for the support of their dependent children**, and the unpaid and accrued installments became judgments in her favor, he could not, as a matter of



law, claim credit on account of payments voluntarily made directly to the children, special considerations of an equitable nature could justify a court in crediting such payments on his

indebtedness to the mother when that could be done without injustice to her. *Dorsey v. Dorsey*, 28 Colo. App. 63, 470 P.2d 581 (1970).

**14-10-116. Appointment in domestic relations cases - representation of child's best interests - legal representative of the child - disclosure.** (1) The court may, upon the motion of either party or upon its own motion, appoint an attorney, in good standing and licensed to practice law in the state of Colorado, to serve as the legal representative of the child, representing the best interests of the child in any domestic relations proceeding that involves allocation of parental responsibilities. In no instance may the same person serve as both the child's legal representative pursuant to this section and as the child and family investigator for the court pursuant to section 14-10-116.5. Within seven days after the appointment, the appointed person shall comply with the disclosure provisions of subsection (2.5) of this section.

(2) The legal representative of the child, appointed pursuant to subsection (1) of this section, shall represent the best interests of the minor or dependent child, as described in section 14-10-124, with respect to the child's custody, the allocation of parental responsibilities, support for the child, the child's property, parenting time, or any other issue related to the child that is identified by the legal representative of the child or the appointing court. The legal representative of the child shall actively participate in all aspects of the case involving the child, within the bounds of the law. The legal representative of the child shall comply with the provisions set forth in the Colorado rules of professional conduct and any applicable provisions set forth in chief justice directives or other practice standards established by rule or directive of the chief justice pursuant to section 13-91-105 (1) (c), C.R.S., concerning the duties or responsibilities of best interest representation in legal matters affecting children. The legal representative of the child shall not be called as a witness in the case. While the legal representative of the child shall ascertain and consider the wishes of the child, the legal representative of the child is not required to adopt the child's wishes in his or her recommendation or advocacy for the child unless such wishes serve the child's best interest as described in section 14-10-124.

(2.5) (a) Within seven days after his or her appointment, the appointed person shall disclose to each party, attorneys of record, and the court any familial, financial, or social relationship that the appointed person has or has had with the child, either party, the attorneys of record, or the judicial officer and, if a relationship exists, the nature of the relationship.

(b) Based on the disclosure required pursuant to paragraph (a) of this subsection (2.5), the court may, in its discretion, terminate the appointment and appoint a different person in the proceedings. A party has seven days from the date of the disclosure to object to the appointment based upon information contained in the disclosure. If a party objects to the appointment, the court shall appoint a different person or confirm the appointment within seven days after the date of the party's objection. If no party timely objects to the appointment, then the appointment is deemed confirmed.

(3) (a) The court shall enter an order for costs, fees, and disbursements in favor of the child's legal representative appointed pursuant to subsection (1) of this section. The order shall be made against any or all of the parties; except that, if the responsible parties are determined to be indigent, the costs, fees, and disbursements shall be borne by the state.

(b) In a proceeding for dissolution of marriage or legal separation, prior to the entry of a decree of dissolution or legal separation, the court shall not enter an order requiring the state to bear the costs, fees, or disbursements related to the appointment of a child's legal representative unless both parties are determined to be indigent after considering the combined income and assets of the parties.

(c) If the appointment of a child's legal representative occurs in a case involving unmarried parties, including those proceedings that occur after the entry of a decree for dissolution of marriage or of legal separation, the court shall make every reasonable effort to apportion costs between the parties in a manner that will minimize the costs, fees, and disbursements that shall be borne by the state.

**Source:** L. 71: R&RE, p. 527, § 1. C.R.S. 1963: § 46-1-16. L. 73: p. 554, § 8. L. 93: Entire section amended, p. 577, § 8, effective July 1. L. 97: Entire section R&RE, p. 32, § 1, effective July 1. L. 98: (2)(a) amended, p. 1399, § 43, effective February 1, 1999. L. 2000: (1) amended, p. 1773, § 3, effective July 1. L. 2005: Entire section amended, p. 958, § 2, effective July 1. L. 2009: (3) amended, (SB 09-268), ch. 207, p. 941, § 1, effective May 1. L. 2012: (1) amended and (2.5) added, (SB 12-056), ch. 108, p. 367, § 1, effective July 1.

**Editor's note:** (1) The duties of a special advocate, as formerly set out in subsection (2), were similar to the guidelines for the child and family investigator as set forth in section 14-10-116.5.

(2) Section 6 of chapter 108, Session Laws of Colorado 2012, provides that the act amending subsection (1) and adding subsection (2.5) applies to court appointments made on or after July 1, 2012.

**Cross references:** (1) For the duty of the public defender to represent indigents, see §§ 21-1-103 to 21-1-104.

(2) For the legislative declaration contained in the 1993 act amending this section, see section 1 of chapter 165, Session Laws of Colorado 1993. For the legislative declarations contained in the 2005 act amending this section, see sections 1 and 3 of chapter 244, Session Laws of Colorado 2005.

## ANNOTATION

**Law reviews.** For article, "The Role of Children's Counsel in Contested Child Custody, Visitation and Support Cases", see 15 Colo. Law. 224 (1986). For article, "The Role of the Guardian ad Litem in Custody and Visitation Disputes", see 17 Colo. Law. 1301 (1988). For article, "Custody Cases and the Theory of Parental Alienation Syndrome", see 20 Colo. Law. 53 (1991). For article, "Final Draft of Proposed GAL Standards of Practice", see 22 Colo. Law. 1907 (1993). For article, "Child Custody: The Right Choice at the Right Price", see 26 Colo. Law. 67 (August 1997). For article, "Division of the GAL Role in Domestic Relations Cases", see 27 Colo. Law. 45 (April 1998). For article, "The Role of Guardian ad Litem: Changes in the Wind", see 27 Colo. Law. 73 (November 1998). For article, "Considerations Regarding the Role of the Special Advocate", see 29 Colo. Law. 107 (July 2000). For article, "Special Advocates-Some Fundamentals", see 30 Colo. Law. 39 (June 2001). For article, "Special Advocates-Revised Chief Judge Directive", see 30 Colo. Law. 83 (July 2001). For article, "Use of the Special Advocate as Arbitrator in Domestic Relations Cases", see 31 Colo. Law. 123 (July 2002). For article, "Parenting Time in Divorce", see 31 Colo. Law. 25 (October 2002).

**Annotator's note.** The following annotations include cases decided under this section as it existed prior to its 1997 repeal and reenactment.

**No right to participate through chosen counsel.** This section does not include a right for a child to participate in custody matters through counsel chosen by the child. In re Hartley, 886 P.2d 665 (Colo. 1994).

**Relationship between an attorney and child client differs from relationship between attorney and adult client.** In re Hartley, 886 P.2d 665 (Colo. 1994).

**Child's attorney acts both as guardian and as advocate,** since child is not competent to make legally binding decisions. In re Hartley, 886 P.2d 665 (Colo. 1994).

**Imposition of higher degree of objectivity on a child's attorney.** An attorney appointed to represent a child in a custody dispute must present all evidence available concerning the child's best interests. The attorney's role is not simply to parrot the child's expressed wishes. In re Barnhouse, 765 P.2d 610 (Colo. App. 1988), cert. denied, 490 U.S. 1021, 109 S. Ct. 1747, 104 L. Ed.2d 184 (1989).

**Trial court did abuse its discretion by denying a motion for appointment of a child representative to present the child's wishes regarding parenting time.** A child representative cannot be called as a witness and cannot represent a child's views without question. The attorney is charged with a higher degree of objectivity than when representing an adult. In re Custody of C.J.S., 37 P.3d 479 (Colo. App. 2001).

**Quasi-judicial immunity.** A court appointed guardian ad litem in service of the public interest in the welfare of children is entitled to absolute quasi-judicial immunity. Short by Ossterhous v. Short, 730 F. Supp. 1307 (D. Colo. 1990).

**Attorney should practice in county of child's residence.** If the court, in exercise of its discretion, appointed an attorney to represent these minor children, it is obvious that in terms of client access and the mitigation of expenses, any attorney so appointed should be practicing in the county where the child is residing. Bacher v. District Court, 186 Colo. 314, 527 P.2d 56 (1974).

**Trial court's apportionment of costs for child's guardian ad litem upheld** where court



apportioned costs between mother and father on the basis of the underemployed mother's potential income. *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989).

**Court's order specifying that the special advocate's cost may be later assessed between the parties** sufficiently preserved the issue, despite the father's original indication in his motion for appointment of a special advocate that he would pay the special advocate's initial fee. Therefore, the trial court did not abuse its discretion requiring mother to later share in that fee. *In re Emerson*, 77 P.3d 923 (Colo. App. 2003).

**In a custody action, the attorney-client relationship with the child's mother is insufficient** as a matter of law to impose a duty from the mother's attorneys to the child as if the child were a client. *McGee v. Hyatt Legal Serv., Inc.*, 813 P.2d 754 (Colo. 1991).

**Mere inability of parents to communicate is not a sufficient ground to continue the**

**appointment of the GAL** so that he may act as a mediator or facilitator for them beyond the entry of a final decree. *In re Finer*, 920 P.2d 325 (Colo. App. 1996).

**Claim for fees by a child and family investigator (CFI) appointed by a court**, which claim the parties agree was in the nature of a "domestic support obligation", is discharged under 11 U.S.C. §§ 101(14A) and 523(a)(5) because the claim was assigned to a nongovernmental third party. The CFI is not one of the enumerated parties under 11 U.S.C. § 101(14A) that can assign its claim to a nongovernmental entity. *In re Cordova*, 439 B.R. 756 (Bankr. D. Colo. 2010).

**Applied** in *In re Parker*, 41 Colo. App. 287, 584 P.2d 103 (1978); *In re Conradson*, 43 Colo. App. 432, 604 P.2d 701 (1979); *Deeb v. Morris*, 14 B.R. 217 (D. Colo. 1981); *In re Koltay*, 646 P.2d 405 (Colo. App. 1982).

**14-10-116.5. Appointment in domestic relations cases - child and family investigator - disclosure.** (1) The court may, upon the motion of either party or upon its own motion, appoint a neutral third person to serve the court as a child and family investigator pursuant to subsection (2) of this section in a domestic relations proceeding that involves allocation of parental responsibilities. The court shall set forth the specific duties of the child and family investigator in a written order of appointment. The same person may not serve as both the legal representative of the child pursuant to section 14-10-116 and as the child and family investigator for the court pursuant to this section. Within seven days after the appointment, the appointed person shall comply with the disclosure provisions of subsection (2.5) of this section.

(2) A child and family investigator appointed by the court may be an attorney, a mental health professional, or any other individual with appropriate training, qualifications, and an independent perspective acceptable to the court. The child and family investigator for the court shall investigate, report, and make recommendations as specifically directed by the court in the appointment order, taking into consideration the relevant factors for determining the best interests of the child as specified in section 14-10-124. The child and family investigator shall make independent and informed recommendations to the court, in the form of a written report filed with the court, unless otherwise ordered by the court. While the child and family investigator shall consider the wishes of the child, the child and family investigator need not adopt such wishes in making his or her recommendations to the court unless they serve the child's best interests as described in section 14-10-124. The child's wishes, if expressed, shall be disclosed in the child and family investigator's written report. The child and family investigator may be called to testify as a witness regarding his or her recommendations. The child and family investigator shall comply with applicable provisions set forth in chief justice directives, and any other practice or ethical standards established by rule, statute, or licensing board that regulates the child and family investigator.

(2.5) (a) Within seven days after his or her appointment, the appointed person shall disclose to each party, attorneys of record, and the court any familial, financial, or social relationship that the appointed person has or has had with the child, either party, the attorneys of record, or the judicial officer and, if a relationship exists, the nature of the relationship.

(b) Based on the disclosure required pursuant to paragraph (a) of this subsection (2.5), the court may, in its discretion, terminate the appointment and appoint a different person in the proceedings. A party has seven days from the date of the disclosure to object to the appointment based upon information contained in the disclosure. If a party objects to the

appointment, the court shall appoint a different person or confirm the appointment within seven days after the date of the party's objection. If no party timely objects to the appointment, then the appointment is deemed confirmed.

(3) (a) The court shall enter an order for costs, fees, and disbursements in favor of the child and family investigator appointed pursuant to subsection (1) of this section. The order shall be made against any or all of the parties; except that, if the responsible parties are determined to be indigent, the costs, fees, and disbursements shall be borne by the state.

(b) In a proceeding for dissolution of marriage or legal separation, prior to the entry of a decree of dissolution or legal separation, the court shall not enter an order requiring the state to bear the costs, fees, or disbursements related to the appointment of a child and family investigator unless both parties are determined to be indigent after considering the combined income and assets of the parties.

(c) If the appointment of a child and family investigator occurs in a case involving unmarried parties, including those proceedings that occur after the entry of a decree for dissolution of marriage or of legal separation, the court shall make every reasonable effort to apportion costs between the parties in a manner that will minimize the costs, fees, and disbursements that shall be borne by the state.

**Source:** **L. 2005:** Entire section added, p. 960, § 4, effective July 1. **L. 2009:** (3) amended, (SB 09-268), ch. 207, p. 942, § 2, effective May 1. **L. 2012:** (1) amended and (2.5) added, (SB 12-056), ch. 108, p. 368, § 2, effective July 1.

**Editor's note:** Section 6 of chapter 108, Session Laws of Colorado 2012, provides that the act amending subsection (1) and adding subsection (2.5) applies to court appointments made on or after July 1, 2012.

**Cross references:** For the legislative declarations contained in the 2005 act enacting this section, see sections 1 and 3 of chapter 244, Session Laws of Colorado 2005.

## ANNOTATION

**Law reviews.** For article, "Child and Family Investigator Standards in Colorado—Part I", see 35 Colo. Law. 61 (July 2006). For article, "Child and Family Investigator Standards in

Colorado—Part II", see 35 Colo. Law. 75 (August 2006). For article, "CFIs and APR Evaluators—Similarities and Differences", see 37 Colo. Law. 31 (January 2008).

**14-10-117. Payment of maintenance or child support.** (1) Upon its own motion or upon motion of either party, the court may at any time order that maintenance or child support payments be made to the clerk of the court or, if the executive director of the department of human services has notified the state court administrator that the judicial district issuing the order is ready to participate in the family support registry pursuant to section 26-13-114 (5), C.R.S., and, for payments for maintenance obligations, the family support registry is ready to accept maintenance payments, through the family support registry, as trustee, for remittance to the person entitled to receive the payments. The court may not order payments to be made to the clerk of the court once payments may be made through the family support registry. The payments shall be due on a certain date or dates of each month. If the support payments are required under this section, title 19, C.R.S., or section 26-13-114 (1), C.R.S., to be made through the family support registry, the court shall order that payments be made through the registry in accordance with the procedures specified in section 26-13-114, C.R.S.

(2) The clerk of the court shall maintain records listing the amount of payments, the date when payments are required to be made, and the names and addresses of the parties affected by the order for those payments he or she receives through the court registry.

(3) If payments are to be made through the family support registry, the parties affected by the order shall inform the family support registry, and if payments are to be made through the court registry, the parties affected by the order shall inform the clerk of the court of any change of address or of other conditions that may affect the administration of the order.



(4) (Deleted by amendment, L. 98, p. 756, § 6, effective July 1, 1998.)

(5) and (6) Repealed.

(7) In cases in which a party is ordered to make payments through the court registry, upon receipt of a verified notice of a support obligation assigned to the state, the clerk of the court shall, without further action by the court, pay the support to the county child support enforcement unit rather than to the obligee. When the state no longer has authorization to receive any support payments, the county child support enforcement unit shall notify the clerk of the court to stop sending the support payments to the county and to send the support payments directly to the obligee.

**Source:** L. 71: R&RE, p. 527, § 1. **C.R.S. 1963:** § 46-1-17. **L. 77:** (4) amended, p. 824, § 1, effective May 24. **L. 86:** (1) amended, p. 724, § 2, effective July 1. **L. 88:** (7) added, p. 632, § 6, effective July 1. **L. 90:** (1) amended, p. 1414, § 13, effective June 8. **L. 98:** (1), (2), (3), (4), and (7) amended, p. 756, § 6, effective July 1. **L. 99:** (1) amended, p. 1091, § 11, effective July 1. **L. 2005:** (5) and (6) repealed, p. 498, § 1, effective August 8.

### ANNOTATION

**Applied** in *Adams County Dept. of Soc. Servs. v. Frederick*, 44 Colo. App. 378, 613 P.2d 642 (1980).

#### 14-10-118. Enforcement of orders.

(1) Repealed.

(2) The court has the power to require security to be given to insure enforcement of its orders, in addition to other methods of enforcing court orders prescribed by statute or by the Colorado rules of civil procedure on or after July 6, 1973.

**Source:** L. 71: R&RE, p. 528, § 1. **C.R.S. 1963:** § 46-1-18. **L. 73:** p. 554, § 9. **L. 81:** (1) amended, p. 909, § 3, effective June 8. **L. 82:** (1) amended, p. 280, § 3, effective April 7. **L. 87:** (1) amended, p. 595, § 25, effective July 10. **L. 92:** (1) amended, p. 577, § 5, effective July 1. **L. 93:** (1) amended, p. 1871, § 5, effective June 6. **L. 94:** (1) amended, p. 1252, § 6, effective July 1. **L. 96:** (1) repealed, p. 598, § 8, effective July 1.

### ANNOTATION

- I. General Consideration.
- II. Security for Enforcement of Order.
- III. Enforcement by Execution.
- IV. Enforcement by Contempt.

#### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Enforcement of Divorce Decrees in Colorado", see 21 *Rocky Mt. L. Rev.* 364 (1949).

**Annotator's note.** Since § 14-10-118 is similar to repealed § 46-1-5 (3), **C.R.S. 1963**, § 46-1-5, **CRS 53**, **CSA**, **C. 56**, § 8, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The early law allowed the court to require husband to give security and permitted enforcement of decree in any manner consistent with rules and practice of court. *Johnson v. Johnson*, 22 Colo. 20, 43 P. 130 (1895).

**Section provides only for issuance of temporary injunction.** In *re Davis*, 44 Colo. App. 355, 618 P.2d 692 (1980).

**C.R.C.P. 65 (h) grants authority to courts in dissolution proceedings to make prohibitive or mandatory orders** as may be just. In *re Davis*, 44 Colo. App. 355, 618 P.2d 692 (1980).

**Order to direct employer to withhold payments.** This section does not preclude an order to the person obligated to pay support or maintenance to direct an employer to withhold child support or maintenance payments as they become due. In *re McCue*, 645 P.2d 854 (Colo. App. 1982).

**Enforcement of agreement which did not specify dollar amount for child support is not modification of agreement.** Agreement established duty on father to pay child support and it is within the discretion of the court to determine a reasonably necessary dollar amount. In *re Meisner*, 807 P.2d 1205 (Colo. App. 1990).

**Attorney fees.** An award of attorney fees may not be enforced by an assignment under this section. In re McCue, 645 P.2d 854 (Colo. App. 1982).

## II. SECURITY FOR ENFORCEMENT OF ORDER.

**The general assembly authorized a court to require security for the payment of alimony.** Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955).

**Security required by court must be reasonable in both amount and duration.** In re Jaeger, 883 P.2d 577 (Colo. App. 1994).

If the amount ordered as security is greatly in excess of the amount actually owed, it is not security, but is confiscatory. Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955); In re Jaeger, 883 P.2d 577 (Colo. App. 1994).

**It was held that the supreme court was fortified in limiting the court's authority to require security for the payment of alimony** by reason of the fact that with respect to orders for the payment of sums required for the support and maintenance and education of the minor children of the parties, the general assembly had wisely enacted § 14-6-101 which made it a felony for a husband to neglect, fail or refuse to provide reasonable support and maintenance for his minor children under the age of 16 years, and a father who thus neglected to discharge his natural, as well as his statutory, duty to his children "shall be deemed guilty of a felony", and may be imprisoned for so doing unless he provided a bond conditioned upon the support of such children. Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955).

**The writ of ne exeat was not a form of security for the payment of alimony** within the meaning of this section. Price v. Price, 80 Colo. 158, 249 P. 648 (1926).

**Property lien authorized.** A court may impose a lien on a party's property in order to enforce an agreement where the party has threatened to dispose of the property and put himself beyond the court's jurisdiction. In re Valley, 633 P.2d 1104 (Colo. App. 1981).

**Amount and duration of security held unreasonable** where court required replacement of any security used for payment of maintenance, and amount of security equaled the amount of maintenance awarded, and where there was no competent evidence supporting the amount required to be set aside as security for the payment of child support and health insurance. In re Jaeger, 883 P.2d 577 (Colo. App. 1994).

## III. ENFORCEMENT BY EXECUTION.

**Mature installments of alimony under a divorce decree were final judgments,** the pay-

ment of which the court could enforce by execution or imprisonment. Daniels v. Daniels, 9 Colo. 133, 10 P. 657 (1886); Paul v. Marty, 72 Colo. 399, 211 P. 667 (1922); Miller v. Miller, 79 Colo. 609, 247 P. 567 (1926); Burke v. Burke, 127 Colo. 257, 255 P.2d 740 (1953); Beardshear v. Beardshear, 143 Colo. 293, 352 P.2d 969 (1960).

**Child support payment becomes money judgment when it matures.** A child support payment under a decree for dissolution of marriage becomes a money judgment when it matures and may be enforced as other judgments without further action by the court. In re McCue, 645 P.2d 854 (Colo. App. 1982).

**The judgments were enforceable during the entire period of the statute of limitations.** Hauck v. Schuck, 143 Colo. 324, 353 P.2d 79 (1960).

**Action by a court, in the form of an order of entry of judgment, is a mandatory prerequisite to enforcement of child support obligations** by means other than remedial contempt proceedings. People in Interest of G.S., 678 P.2d 1033 (Colo. App. 1983).

**A husband was not prejudiced by the entering of a judgment for the correct total amount due under a divorce decree,** as each installment which matures under a decree which had not been modified became a judgment debt similar to any other judgment for money. Jenner v. Jenner, 138 Colo. 149, 330 P.2d 544 (1958).

**A trial court had power, without previous notice to a husband, to enter judgment for any total arrears** so that execution might issue thereon and the proceedings available to any judgment creditor could thereby be made available to the wife. Jenner v. Jenner, 138 Colo. 149, 330 P.2d 544 (1958).

**The trial court exceeded its jurisdiction in an order limiting the wife's right to collect her judgment on an arrearage,** because the judgment entered was no different than any other money judgment, and the wife was entitled to levy execution on her judgment in the same manner as any other judgment creditor was entitled to collect on a judgment, and no authority empowered the trial court to enter an order authorizing a judgment creditor to parcel out payments in liquidating a judgment. Green v. Green, 168 Colo. 303, 451 P.2d 282 (1969).

**Each installment of child support maturing under a decree which had not been modified became a judgment debt similar to any other judgment** for money and retroactive modifications thereof could not be effected. Jenner v. Jenner, 138 Colo. 149, 330 P.2d 544 (1958); Drazich v. Drazich, 153 Colo. 218, 385 P.2d 259 (1963); Talbot v. Talbot, 155 Colo. 350, 394 P.2d 607 (1964).



Since past due installments for support money under a valid order constituted a debt and were in and of themselves judgment, a trial court had no power or authority to cancel such payments. *Carey v. Carey*, 29 Colo. App. 328, 486 P.2d 38 (1971).

Since accrued installments of support or alimony were final judgments, the appropriate statute of limitations was that which pertained to judgments. *Hauck v. Schuck*, 143 Colo. 324, 353 P.2d 79 (1960).

The defense of laches was not applicable in an action to enforce accrued child support payments ordered in a divorce action; it was applicable only where the attempted enforcement was by contempt proceedings. *Jenner v. Jenner*, 138 Colo. 149, 330 P.2d 544 (1958); *Hauck v. Schuck*, 143 Colo. 324, 353 P.2d 79 (1960); *Carey v. Carey*, 29 Colo. App. 328, 486 P.2d 38 (1971).

A husband in default in the payment of support money was not entitled to notice of the entry of a judgment thereon. *Jenner v. Jenner*, 138 Colo. 149, 330 P.2d 544 (1958).

Assignment of wages is proper. An assignment of wages to satisfy a judgment for child support arrearages is proper. In re *McCue*, 645 P.2d 854 (Colo. App. 1982).

Order is analogous to garnishment. An order entered pursuant to subsection (1) is analogous to a garnishment and should be governed by applicable limitations on garnishment. In re *McCue*, 645 P.2d 854 (Colo. App. 1982).

#### IV. ENFORCEMENT BY CONTEMPT.

A court may exercise its power of contempt to enforce orders entered in a dissolution of marriage proceeding. *Gonzales v. District Court*, 629 P. 2d 1074 (Colo. 1981).

Contempt not separate proceeding. Contempt for failure to comply with the court's orders is not a separate proceeding but a continuance of the dissolution action. *Gonzales v. District Court*, 629 P.2d 1074 (Colo. 1981).

**14-10-119. Attorney's fees.** The court from time to time, after considering the financial resources of both parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

**Source:** L. 71: R&RE, p. 528, § 1. C.R.S. 1963: § 46-1-19.

**Cross references:** For allowance of attorney fees generally, see C.R.C.P. 3(a), 30(g), 37(a), 37(c), 56(g), and 107(d); for awarding of attorney fees in civil actions generally, see § 13-17-102.

The power to punish for contempt should be used with caution after due deliberation, and only when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice. *Engleman v. Engleman*, 145 Colo. 299, 358 P.2d 864 (1961).

Absent any procedural attempt to correct an order for support payments under this section, based upon its being founded in mistake, or absent action designed to seek modification of the order, the trial court could only determine whether the husband was in contempt for failure to comply with the order. *Lopez v. Lopez*, 148 Colo. 404, 366 P.2d 373 (1961).

Moreover, a defendant could not be held in contempt for failure to pay alimony where it clearly appeared that he was unable to perform the acts required of him by the support order. *Lopez v. Lopez*, 148 Colo. 404, 366 P.2d 373 (1961).

A defendant could not be imprisoned for failure to pay alimony where it clearly and satisfactorily appeared that he was absolutely unable to perform the acts required of him at the time the order of commitment was made. *Lopez v. Lopez*, 148 Colo. 404, 366 P.2d 373 (1961).

Where a divorced wife for a long period of time supported the minor child of herself and divorced husband without receiving or claiming the alimony adjudged her for its support, there being no sufficient cause shown for her delay in attempting to enforce payment, the doctrine of laches applied, and a judgment of contempt against defendant for failure to pay the alimony was reversed. *Price v. Price*, 80 Colo. 158, 249 P. 648 (1926).

The contention of defendant that an order abating the proceedings until he complied with an order of court for the payment of alimony deprived him of his right to make a defense, and that imprisonment for failure to comply with the order was in violation of his constitutional rights, was overruled. *Miller v. Miller*, 79 Colo. 609, 247 P. 567 (1926).

## ANNOTATION

- I. General Consideration.
- II. Award of Attorney Fees.
  - A. Right and Need for Award.
  - B. Amount.
  - C. Discretion of Court.
  - D. Enforcement.
  - E. Modification and Scope of Review.
- III. Antenuptial Agreements.

## I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Payment of the Wife's Attorney Fee in Colorado Divorce Cases", see 34 Rocky Mt. L. Rev. 481 (1962). For article, "Attorney's Fees", see 11 Colo. Law. 411 (1982). For article, "Domestic Case Update", see 14 Colo. Law. 209 (1985). For article, "Attorney Fees at Temporary Orders: Reality or Illusion?", see 24 Colo. Law. 2185 (1995).

**Annotator's note.** Since § 14-10-119 is similar to repealed § 46-1-5 (1)(e), C.R.S. 1963, § 46-1-5, CRS 53, CSA, C. 56, § 8, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**The former divorce act was silent on the subject of counsel fees and suit money**, but in discussing the power of the district court to make allowance for these items, the supreme court held that notwithstanding the silence of the statute with respect to these matters, it had the authority to order such allowances because its jurisdiction as to such items did not depend upon the statute. *Pleyte v. Pleyte*, 15 Colo. 125, 25 P. 25 (1890); *Hart v. Hart*, 31 Colo. 333, 73 P. 35 (1903).

**Attorney fees are not a non-challengeable marital debt under § 14-10-113.** In re Rieger, 827 P.2d 625 (Colo. App. 1992).

**Debts incurred during the marriage but which are dissolution litigation costs** should be allocated pursuant to this section, not § 14-10-113. In re Burford, 26 P.3d 550 (Colo. App. 2001).

**Uniform Dissolution of Marriage Act provides separate sections that govern the different elements of a dissolution order**, specifically property disposition, maintenance, child support, and attorney fees. The court is required to make separate orders regarding these elements based on separate considerations and may not commingle one element with another. In re Huff, 834 P.2d 244 (Colo. 1992).

**This section inapplicable to wife's independent action seeking to reopen dissolution decree.** In re Burns, 717 P.2d 991 (Colo. App. 1985); cert. denied, *Burns v. Burns*, 745 P.2d 1391 (Colo. 1987).

**Intent to equalize status.** The provision in the dissolution of marriage statute which sanc-

tions the assessment of attorney fees was intended to equalize the status of the parties to the dissolution proceeding. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

The purpose of allowing the court discretion as to attorney fees is to equalize the status of the parties by enabling the court to ensure that neither party is forced to suffer unduly as a consequence of the termination of the marriage. In re Mitchell, 195 Colo. 399, 579 P.2d 613 (1978); In re Meisner, 715 P.2d 1273 (Colo. App. 1985).

This section is designed to allow the court to apportion costs and fees equitably between the parties. In re Nichols, 38 Colo. App. 82, 553 P.2d 77 (1976); In re Hauger, 679 P.2d 604 (Colo. App. 1984).

**This section empowers the trial court to equitably apportion costs and fees between parties based on relative ability to pay.** Section 5-12-106 (1)(a) mandates interest on such an order and C.A.R. 37 specifies the trial court's authority to mandate interest. In re Gutfreund, 148 P.3d 136 (Colo. 2006).

**Attorney fees are to be awarded primarily to equalize the financial positions of the parties.** In re Trout, 897 P.2d 838 (Colo. App. 1994); In re Bregar, 952 P.2d 783 (Colo. App. 1997).

**Primary purpose of award of attorney fees under this section is to equalize the parties' financial positions.** Although mother deceived father by failing to disclose disability benefits received on behalf of the minor child, the court reduced father's child support arrearages in payment of father's attorney fees to punish mother without making the proper findings pursuant to this section for an award of attorney fees and without considering the policies relating to child support and the best interests of the child before reducing child support arrearages. In re Anthony-Guillar, 207 P.3d 934 (Colo. App. 2009).

**The principle that in maintenance and divorce proceedings a wife had a right to be placed on an equal footing with her husband was particularly applicable** where the facts show that the wife's absence from the state is due to being unable to afford the expenses of litigation without her fault, and where she may have meritorious claims difficult to pursue in absentia. *McMillion v. McMillion*, 31 Colo. App. 33, 497 P.2d 331 (1972).

**Fairness in domestic relations cases seeks to place the wife on a plane of equality with the husband in such litigation by allowing her suit money and attorney fees out of the husband's estate or earnings**, where such appears necessary to bring about such parity, but such allowance will not be granted unless it is shown that the wife is destitute in whole or in part of the means necessary to maintain herself and



carry on the litigation, and a concomitant to this condition for relief is a showing of the husband's present ability to pay such allowance. *Tower v. Tower*, 147 Colo. 480, 364 P.2d 565 (1961); *Peercy v. Peercy*, 154 Colo. 575, 392 P.2d 609 (1964).

**Provision in agreement granting parties remedies at law and in equity for enforcement of agreement** gave court jurisdiction to hear motion for attorney fees. In *re Meisner*, 807 P.2d 1205 (Colo. App. 1990).

**By the allowance of attorney fees, full and complete adjudication of all claims in the one action will result;** otherwise, a multiplicity of suits will ensue, forcing the attorney to sue the wife, and she in turn to join the husband under his indemnity agreement. *Tower v. Tower*, 147 Colo. 480, 364 P.2d 565 (1961).

**The power of the court to allow attorney fees to the wife for the purpose of prosecuting her suit or defending the husband's suit** was an incident to the court's powers to award alimony and divide property. *Krall v. Krall*, 31 Colo. App. 538, 504 P.2d 681 (1972).

**If there is a wide disparity in the parties' earning capacities, an award of attorney fees is permissible.** In *re Renier*, 854 P.2d 1382 (Colo. App. 1993).

**An allowance for counsel fees, being for the benefit of the wife to put her in a position to litigate on the same footing as the husband,** was made on the same basis as alimony or other forms of support by the husband to the wife. *Allison v. Allison*, 150 Colo. 377, 372 P.2d 946 (1962).

**Trial court has the authority to advance prospective fees and costs during the litigation of a dissolution of marriage action** if necessary to diminish the advantage that one spouse may have over the other in litigation because of their respective financial circumstances. In *re Rose*, 134 P.3d 559 (Colo. App. 2006).

**The purpose of an award of attorney fees is to apportion equitably the costs of dissolution,** based on the current resources of the parties. In *re Renier*, 854 P.2d 1382 (Colo. App. 1993); In *re Footitt*, 903 P.2d 1209 (Colo. App. 1995); In *re Aldrich*, 945 P.2d 1370 (Colo. App. 1997).

**Waiver of attorney fee provision in an antenuptial agreement** is voidable on the grounds of unconscionability. In *re Dechant*, 867 P.2d 193 (Colo. App. 1993) (decided under law in effect prior to amendment effective July 1, 1986).

**The allowance to a wife was based upon the same underlying thought as is an allowance to her to buy food, shelter, and clothing.** *Allison v. Allison*, 150 Colo. 377, 372 P.2d 946 (1962).

**Payment of attorney fees is a substantive aspect of a dissolution action, and permanent**

**orders are not final until the court addresses that issue.** Unlike statutory and contractual fee-shifting provisions that premise the award of attorney fees on the merits of the claims and a determination of who prevailed in the action, the apportionment of attorney fees in a dissolution action is inextricably intertwined with the other issues to be resolved by the court in determining permanent orders. In *re Hill*, 166 P.3d 269 (Colo. App. 2007).

**Where an attorney withdrew as counsel for the wife in a divorce action and his motion for fees was ordered held in abeyance until final settlement** of the action, a subsequent property settlement agreement providing that each of the parties would pay his own counsel fees was not binding on the counsel if services rendered prior to withdrawal entitled him to additional fees. *Morrison v. Peck*, 151 Colo. 83, 376 P.2d 58 (1962).

**Withdrawal of wife's counsel before determination of attorney fees issue cannot be construed as a waiver by wife regarding payment of the fees.** In *re Hill*, 166 P.3d 269 (Colo. App. 2007).

**Reconciliation did not deprive the court of jurisdiction to award attorney fees.** *Pacheco v. Pacheco*, 156 Colo. 356, 398 P.2d 978 (1965).

**The trial court was in error when it concluded that it was without jurisdiction to grant an allowance of attorney fees.** *Tower v. Tower*, 147 Colo. 480, 364 P.2d 565 (1961).

**On review of an order adjudging a defendant in a divorce case guilty of contempt for failure to pay alimony,** under the facts disclosed, it was held that the trial court had jurisdiction to make an order allowing counsel fees to the wife for the hearing on review. *Miller v. Miller*, 79 Colo. 609, 247 P. 567 (1926); *Watson v. Watson*, 135 Colo. 296, 310 P.2d 554 (1957).

**No violation of involuntary servitude proscription.** The assertion in a divorce that one may be forced to work for the benefit of the other spouse's attorney, despite the fact that the burdened party is without "fault", cannot be equated with slavery or involuntary servitude within the meaning of § 26 of art. II, Colo. Const. In *re Franks*, 189 Colo. 499, 542 P.2d 845 (1975).

Because the dissolution of marriage statute, in an effort to eliminate the inequities resulting from the termination of the relationship, provides for attorney fees, as well as maintenance and child support, when the relative status of the parties involved indicates the need of such, it does not constitute involuntary servitude. In *re Franks*, 189 Colo. 499, 542 P.2d 845 (1975).

**Applied** in *re Deines*, 44 Colo. App. 98, 608 P.2d 375 (1980); *Gann v. Gann*, 616 P.2d 1000 (Colo. App. 1980); In *re Davis*, 44 Colo. App. 355, 618 P.2d 692 (1980); In *re Kiefer*, 738 P.2d 54 (Colo. App. 1987).

## II. AWARD OF ATTORNEY FEES.

### A. Right and Need for Award.

When a husband desires the luxury of a divorce from his wife, he should be compelled to pay the expenses of his wife pending the litigation, and, in cases where the wife is a nonresident of the state, if she desires to come to the state of Colorado to make a defense, she should be given an opportunity to do so, and the courts should require plaintiff to deposit in court a sum sufficient to pay the expenses of the wife from her home to the state of Colorado, to be paid to her upon her arrival here within a reasonable time, with such additional sum as may be necessary to properly defend the suit, and in case the plaintiff is unable to make reasonable provision for his wife during the pendency of the suit, the suit should be abated until he is able to do so. *McMillion v. McMillion*, 31 Colo. App. 33, 497 P.2d 331 (1972).

On the question of allowance of attorney fees for the wife, the court should take into consideration, among other things, the financial condition of the parties, their income, and necessities of the case. *Miller v. Miller*, 79 Colo. 609, 247 P. 567 (1926).

In awarding fees and costs under this section, the district court must consider the relative financial status of each party by making findings concerning their relative incomes, assets, and liabilities. In re *Aldrich*, 945 P.2d 1370 (Colo. 1997); In re *Chalat*, 94 P.3d 1191 (Colo. App. 2004), *aff'd in part and rev'd in part* on other grounds, 112 P.3d 47 (Colo. 2005).

The financial resources of the husband were greater than those of the wife and that disparity supports the order for attorney fees. In re *Lishnevsky*, 981 P.2d 609 (Colo. App. 1999).

An order providing for the father to pay attorney fees for the mother could not stand in view of the favorable financial condition of the mother, since the purpose of providing an allowance for attorney fees is to place the wife on an equal footing with the husband. *Andrews v. Andrews*, 161 Colo. 529, 423 P.2d 573 (1967).

Where defendant initiated the circumstances making attorney fees necessary, an allowance to plaintiff therefor was proper. *Parker v. Parker*, 142 Colo. 416, 350 P.2d 1067 (1960).

Where a wife's estate is small, she is not required to impair her capital in order to litigate properly her side of the controversy, especially is this true where the value of the assets of the parties are grossly disproportionate. *Smith v. Smith*, 172 Colo. 516, 474 P.2d 619 (1970).

Additional expert testimony was unnecessary to support award of attorney fees to mother in child support modification action where testimony of the mother, her attorney, and

the attorney's affidavit adequately supported the award. In re *Pollock*, 881 P.2d 470 (Colo. App. 1994).

Husband is not liable for deceased wife's attorney fees where the wife dies during the pendency of the action and prior to the entry of an order making permanent property disposition. In re *Benjamin*, 740 P.2d 532 (Colo. App. 1987).

A spouse who accepts maintenance payments or an attorney fees award is not precluded from appealing such order. In re *Lee*, 781 P.2d 102 (Colo. App. 1989).

Plaintiff not entitled to attorney fees under this section when the statutory basis for grandparents' visitation request was § 19-1-117. Additionally, because the attorney fee provision contained in § 19-1-117 (3) was the more specific provision, it should control. In re *Gallegos*, 251 P.3d 1086 (Colo. App. 2010).

### B. Amount.

This section cannot be construed as a general grant of authority to determine the amount of fees to which an attorney is entitled. In re *Nichols*, 38 Colo. App. 82, 553 P.2d 77 (1976); In re *Shapard*, 129 P.3d 1007 (Colo. App. 2004).

The trial court's duty is to determine what reasonable fee a party should be responsible for under all the circumstances of the case. The effect of an order granting fees to a party less than the amount actually billed by the attorney is not to modify the fee contract between the attorney and client. In re *Seely*, 689 P.2d 1154 (Colo. App. 1984); In re *Bowles*, 916 P.2d 615 (Colo. App. 1995).

Enforcement of attorney's charging lien raises separate issues. Nothing in this section allows a spouse's attorney, as lienholder or otherwise, to litigate a claim for fees against the other spouse. In re *Shapard*, 129 P.3d 1007 (Colo. App. 2004).

Predicate to an award of attorney fees. There must be proof of reasonableness premised upon considerations of the amount of the fees charged, the time spent by the attorney, the services rendered, and the prevailing rates in the community. In re *Sarvis*, 695 P.2d 772 (Colo. App. 1984).

On application for allowance of attorney fees in a divorce suit, it may be that no evidence is required as to the amount to be allowed, where all the facts are within the knowledge of the court. *Miller v. Miller*, 79 Colo. 609, 247 P. 567 (1926).

Where the same judge had heard various aspects of this case over a period of several months and was thoroughly familiar with the file and with the financial resources of the parties, it was not necessary that evidence be presented as to the current situation unless there was a claim



of change of circumstances. In re Peterson, 40 Colo. App. 115, 572 P.2d 849 (1977).

### C. Discretion of Court.

**Before or after the issuance of a decree in a divorce action, the trial court could make such orders** as the circumstances warrant for suit money, court costs, and attorney fees. Morrison v. Peck, 151 Colo. 83, 376 P.2d 58 (1962).

**The allowance of attorney fees and suit money is within the sound discretion of the trial court**, and unless that discretion has been abused, the allowance made or denied will not be disturbed. Morgan v. Morgan, 139 Colo. 545, 340 P.2d 1060 (1959); Allison v. Allison, 150 Colo. 377, 372 P.2d 946 (1962); Berglund v. Berglund, 28 Colo. App. 382, 474 P.2d 800 (1970); Krall v. Krall, 31 Colo. App. 538, 504 P.2d 681 (1972); In re Peterson, 40 Colo. App. 115, 572 P.2d 849 (1977); In re DaFoe, 677 P.2d 426 (Colo. App. 1983); In re Connell, 831 P.2d 913 (Colo. App. 1992); In re LeBlanc, 944 P.2d 686 (Colo. App. 1997); In re Lishnevsky, 981 P.2d 609 (Colo. App. 1999).

This section confers significant discretion on the trial court, and permits consideration of the financial resources of both parties, so that where the husband has limited income and substantial financial obligations including payment of child support and the children's attorney fees, there is no abuse of discretion in the court's denial of the wife's motion for attorney fees. In re Parker, 41 Colo. App. 287, 584 P.2d 103 (1978); In re Rieger, 827 P.2d 625 (Colo. App. 1992).

The awarding of attorney fees is discretionary with the trial court and will not be disturbed on review if supported by the evidence. In re Icke, 35 Colo. App. 60, 530 P.2d 1001 (1974), *aff'd*, 189 Colo. 319, 540 P.2d 1076 (1975); In re Newman, 44 Colo. App. 307, 616 P.2d 982 (1980), *aff'd in part, rev'd on other grounds*, 653 P.2d 728 (Colo. 1982).

An award of attorney fees in subsequent litigation to enforce a separation agreement is within the trial court's discretion. Baker v. Baker, 667 P.2d 767 (Colo. App. 1983).

**Notwithstanding the trial court's discretion in the allowance of fees, such discretion is a judicial one**, and requires and presupposes a hearing together with a presentation of facts upon which to base the exercise of such discretion. Tower v. Tower, 147 Colo. 480, 364 P.2d 565 (1961).

**Court must conduct a hearing**, on the reasonableness of an award of attorney fees if a party requests a hearing. In re Aldrich, 945 P.2d 1370 (Colo. 1997).

But a court need not conduct a hearing *sua sponte* if a hearing is not timely requested by a party. In re Aldrich, 945 P.2d 1370 (Colo. 1997).

**This section does not limit the authority of the trial court to award counsel fees only as**

**against a defendant**, but such fees may be assessed against either or both of the parties. Morrison v. Peck, 151 Colo. 83, 376 P.2d 58 (1962).

**It is within the trial court's discretion to award only a portion of the attorney fees.** In re Schwaab, 794 P.2d 1112 (Colo. App. 1990); In re Connell, 831 P.2d 913 (Colo. App. 1992).

**Where trial court's errors in making its property division with respect to stock options, interspousal gifts to wife, and wife's interest in the family trust impacted a substantial portion of the total marital assets**, on remand the trial court should reconsider its attorney fee award, since in making an attorney fee award, the court must consider the financial resources of both parties. In re Balanson, 25 P.3d 28 (Colo. 2001).

**On a final property settlement, if it developed that the wife had ample assets of her own to pay for the services of her attorneys**, then any additional fees, including the services of counsel on a writ of error and other related matters, may have or may not have been awarded against the husband as the court determines. Kane v. Kane, 154 Colo. 440, 391 P.2d 361 (1964).

**The trial court erred in not affording the plaintiff an opportunity to present evidence as to the services rendered by her attorneys, and the reasonable value of such services.** Hoffman v. Hoffman, 167 Colo. 432, 447 P.2d 1005 (1968).

**The trial court in a separate maintenance action had no authority to award counsel fees to the wife in a divorce action** instituted by the husband and pending in another state, such fees being a matter for determination by the courts of the state where the divorce action is pending. Morgan v. Morgan, 139 Colo. 545, 340 P.2d 1060 (1959).

**Order for defendant to pay portion of plaintiff's attorney fees upheld.** Krall v. Krall, 31 Colo. App. 538, 504 P.2d 681 (1972).

**Abuse of discretion.** Where the wife not only earned more than husband, but had assets worth substantially more than husband's, and, moreover, initiated the proceedings making attorney fees necessary, the trial court abused its discretion in awarding attorney fees to wife. In re Corbin, 42 Colo. App. 200, 591 P.2d 1046 (1979).

Because family owned corporations were not parties to the dissolution action and because wife instituted post-decree proceedings that were groundless for lack of jurisdiction over the corporations against which relief was sought, court abused its discretion in imposing attorney fees against corporation and divorced husband. In re Noon, 735 P.2d 884 (Colo. App. 1986).

**Where the trial court's property division order was an attempt to place the wife in the same financial position insofar as her sepa-**

**rate property** was concerned as she had been prior to the two-year-old marriage, but after the wife deducted her attorney fees, she was left with less than she had when she was married, the supreme court held that the portion of that order requiring the wife to pay her attorney fees constituted an abuse of discretion. *Smith v. Smith*, 172 Colo. 516, 474 P.2d 619 (1970).

**Denial of wife's motion for expenses held abuse of discretion.** *McMillion v. McMillion*, 31 Colo. App. 33, 497 P.2d 331 (1972).

**There is no abuse of discretion** where trial court does not take into account the resources of wife's new husband in concluding that she is entitled to attorney fees. *In re Erickson*, 43 Colo. App. 319, 602 P.2d 909 (1979).

Where wife is unemployed and has no income, there is no abuse of discretion in an order for partial payment of her attorney fees. *In re Erickson*, 43 Colo. App. 319, 602 P.2d 909 (1979).

Where husband was temporarily unemployed at the time of the hearing and wife's assets were substantially greater than husband's, trial court did not abuse its discretion in denying wife's request for attorney fees. *In re McKendry*, 735 P.2d 908 (Colo. App. 1986).

**Trial court did not err in awarding attorneys fees in a nonparent custody proceeding authorized by § 14-10-123.** The award was neither punitive nor inequitable and did not constitute an abuse of discretion. *In re Custody of C.J.S.*, 37 P.3d 479 (Colo. App. 2001).

**Where the agreement which provided that each party bear its own legal fees did not contemplate efforts to change the agreement** after it was finally approved by the court and incorporated into the decree of divorce, the award of attorney fees by the trial court was within its discretion. *Lay v. Lay*, 162 Colo. 43, 425 P.2d 704 (1967).

**Because the issue as to whether special separation benefits received by former husband upon his voluntary discharge from the Air Force constituted marital property was one of first impression,** trial court did not abuse its discretion in denying wife attorney fees. *In re McElroy*, 905 P.2d 1016 (Colo. App. 1995).

**Award of attorney fees to attorney appearing on pro bono basis is allowable under statute.** *In re Swink*, 807 P.2d 1245 (Colo. App. 1991).

**Trial court has wide discretion in awarding fees and costs and is not bound by the general provisions for recovery of costs for a prevailing party.** *In re Pickering*, 967 P.2d 164 (Colo. App. 1997).

**Trial court considering the award of attorney fees under this section must consider not only the reasonableness of the charge per hour but also the necessity for incurring the hours billed.** *In re Rieger*, 827 P.2d 625 (Colo. App. 1992).

**Trial court erred in denying husband's request for hearing on the reasonableness and necessity of wife's attorney fees and other costs.** *In re Mockelmann*, 944 P.2d 670 (Colo. App. 1997).

**This section allows for the award of attorney fees in subsequent proceedings even though the spouse was denied attorney fees in the original dissolution proceeding.** Thus, it was an abuse of discretion for the court to deny attorney fees on a subsequent motion where the denial was based on the denial of fees in the original proceeding. *In re Plesich*, 881 P.2d 379 (Colo. App. 1994).

**Trial court may review a waiver of attorney fees in a marital agreement for unconscionability at the time of dissolution,** because an unconscionable waiver violates the public policy interest behind protecting spouses and thus is not a valid contract term under § 14-2-304. *In re Ikeler*, 161 P.3d 663 (Colo. 2007).

#### D. Enforcement.

**The allowance to a wife was enforceable by contempt.** *Allison v. Allison*, 150 Colo. 377, 372 P.2d 946 (1962).

**An order for payment of counsel fees decreed by the court to a wife in a divorce action** was not a debt dischargeable in bankruptcy. *Allison v. Allison*, 150 Colo. 377, 372 P.2d 946 (1962).

**Award of attorney fees may not be enforced by an assignment** under § 14-10-118. *In re McCue*, 645 P.2d 854 (Colo. App. 1982).

#### E. Modification and Scope of Review.

**Reconsideration of property division to correct error unnecessary absent contest.** When neither party contests a trial court's division of property it is not necessary that the court be able to reconsider the property division in order to correct error in the provisions for maintenance and attorney fees. *In re Jones*, 627 P.2d 248 (Colo. 1981).

**Despite a disparity of income,** when the court found that the spouse receiving maintenance had considerable assets and ordered her to pay her own attorney fees, there was no abuse of discretion. *In re Weibel*, 965 P.2d 126 (Colo. App. 1998).

**Issues on review whether attorney fees should have been awarded** must depend upon whether the record reflects that the property settlement order contemplated attorney fees and whether as a whole it was fair and equitable. *Rayer v. Rayer*, 32 Colo. App. 400, 512 P.2d 637 (1973).

**Lack of written findings of facts leaves no basis for review.** Where a trial court makes no written findings of fact in support of its denial of an award of attorney fees, a reviewing court has



no basis on which to review the ruling. In re Pilcher, 628 P.2d 126 (Colo. App. 1980).

**Where the motion of an attorney, who had withdrawn as counsel for the wife in a divorce action, for allowance of fees was denied,** and record disclosed no evidence or offer of proof to show value of services rendered prior to withdrawal, the action was remanded for findings on the value of his services rendered, if any, for which he had not been compensated, and for judgment pursuant thereto. *Morrison v. Peck*, 151 Colo. 83, 376 P.2d 58 (1962).

**A finding by the trial court that under the circumstances shown each party should pay his or her own costs and attorney fees,** supported by the record, will not be disturbed. *Jensen v. Jensen*, 142 Colo. 420, 351 P.2d 387 (1960).

**Under the circumstances shown, the trial court's order was adequate to permit appellate review.** In re Woolley, 25 P.3d 1284 (Colo. App. 2001).

**Where an order requiring a husband to pay attorney fees for his wife was a means of paying off her indebtedness** rather than of enabling her to prosecute, it could properly be considered by the court as part of the division of property settlement and the question on review would have been whether the property settlement as a whole was fair and equitable, not whether the wife had the financial ability to pay her own fees. *Krall v. Krall*, 31 Colo. App. 538, 504 P.2d 681 (1972).

**The supreme court has, in the exercise of its appellate jurisdiction, power to act on**

**applications for attorney fees, costs, alimony, etc., in matters pending on error;** however, under ordinary circumstances all of these matters should be presented to the trial court for the reason that the trial court has already had the case before it and is better equipped to determine questions of fact and to make a full and complete investigation and adjudication. *Watson v. Watson*, 135 Colo. 296, 310 P.2d 554 (1957).

**An order granting attorney fees was reviewable even though there had been no final judgment in the case.** *Daniels v. Daniels*, 9 Colo. 133, 10 P. 657 (1886); *Bagot v. Bagot*, 68 Colo. 562, 191 P. 96 (1920); *Benham v. Willmer*, 71 Colo. 451, 207 P. 592 (1922); *Hobbs v. Hobbs*, 72 Colo. 190, 210 P. 398 (1922); *Stockham v. Stockham*, 145 Colo. 376, 358 P.2d 1026 (1961).

### III. ANTENUPTIAL AGREEMENTS.

**Section controls awarding of attorney fees where antenuptial agreement was silent on the matter.** In re Newman, 44 Colo. App. 307, 616 P.2d 982 (1980), *aff'd* in part, *rev'd* on other grounds, 653 P.2d 728 (Colo. 1982).

**No unconstitutional impairment of antenuptial contract by award.** Where the matter of attorney fees was left open by an antenuptial contract, there was therefore no unconstitutional impairment of that contract by the award of such. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**14-10-120. Decree.** (1) A decree of dissolution of marriage or of legal separation is final when entered, subject to the right of appeal. An appeal from the decree of dissolution that does not challenge the finding that the marriage is irretrievably broken does not delay the finality of that provision of the decree which dissolves the marriage beyond the time for appealing from that provision, so that either of the parties may remarry pending appeal.

(2) No earlier than one hundred eighty-two days after entry of a decree of legal separation, on motion of either party and proof that a notice has been mailed to the other party at his or her last-known address, the court shall convert the decree of legal separation to a decree of dissolution of marriage, and a copy thereof shall be mailed to both parties.

(3) The clerk of the court shall give notice of the entry of a decree of dissolution to the office of state registrar of vital statistics in the division of administration of the department of public health and environment, which office shall make this information available to the public upon request.

(4) No decree that may enter shall relieve a spouse from any obligation imposed by law as a result of the marriage for the support or maintenance of a spouse determined to be mentally incompetent by a court of competent jurisdiction prior to the decree, unless such spouse has sufficient property or means of support.

(5) Whenever child support has been ordered, the decree of dissolution, legal separation, declaration of invalidity, allocating parental responsibilities, or support shall contain an order for an income assignment pursuant to section 14-14-111.5.

(6) Notwithstanding the entry of a final decree of dissolution of marriage or of legal separation pursuant to this section, the district court may maintain jurisdiction to enter such temporary or permanent civil protection orders as may be provided by law upon request of any of the parties to the action for dissolution of marriage or legal separation, including, but not limited to, any protection order requested pursuant to section 14-10-108.

**Source:** **L. 71:** R&RE, p. 528, § 1. **C.R.S. 1963:** § 46-1-20. **L. 75:** (3) R&RE, p. 585, § 1, effective May 31; (4) amended, p. 925, § 21, effective July 1. **L. 77:** (2) amended, p. 825, § 1, effective May 26. **L. 85:** (5) added, p. 592, § 11, effective July 1. **L. 94:** (5) amended, p. 1539, § 6, effective May 31; (3) amended, p. 2731, § 348, effective July 1. **L. 96:** (5) amended, p. 622, § 31, effective July 1. **L. 98:** (5) amended, p. 1399, § 44, effective February 1, 1999. **L. 99:** (6) added, p. 500, § 2, effective July 1. **L. 2003:** (6) amended, p. 1012, § 16, effective July 1. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 831, § 27, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (3), see section 1 of chapter 345, Session Laws of Colorado 1994.

## ANNOTATION

**Law reviews.** For article, "Income Tax on Alimony", see 30 Dicta 263 (1953).

**Annotator's note.** Since § 14-10-120 is similar to repealed § 46-1-7, C.R.S. 1963, § 46-1-9, CRS 53, CSA, C. 56, §§ 13 through 17, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**The general assembly intended to eliminate the six-month delay** for a decree of dissolution to become effective and intended to terminate the marital status of the parties immediately upon entry of the decree of dissolution. *Estate of Burford v. Burford*, 935 P.2d 943 (Colo. 1997).

**This section permits a party to appeal the termination of the marital status only when** the party challenges the district court's finding that the marriage is irretrievably broken or by raising a jurisdictional defect in the proceedings. *Estate of Burford v. Burford*, 935 P.2d 943 (Colo. 1997).

**An unappealed decree of dissolution is final when entered** to determine the status of the parties and that abatement does not occur should one party die after the decree is entered. *Estate of Burford v. Burford*, 935 P.2d 943 (Colo. 1997).

**There was but one final decree in a divorce suit, although it may consist of different provisions**, one for a dissolution of the marriage relation, another for security for the payment of alimony, and various other provisions embodied in the one instrument. *Diegel v. Diegel*, 73 Colo. 330, 215 P. 143 (1923).

**No other decree was required to be entered than the interlocutory one** which in a normal situation mechanically became final. *Morris v. Propst*, 98 Colo. 213, 55 P.2d 944 (1936); *Rodgers v. Rodgers*, 137 Colo. 74, 323 P.2d 892 (1958).

**A court need not have entered a final decree reiterating or summarizing or tying together its previous orders** including an interlocutory decree in Colorado. *Rodgers v. Rodgers*, 137 Colo. 74, 323 P.2d 892 (1958).

**It may have been said that the interlocutory decree was a final order by express provision of the former statute**, but, it was pertinent to observe that while the statute said that the interlocutory decree was a final order and therefore subject to review on writ of error, that it did not say that such order was a final decree of divorce. *Doty v. Doty*, 103 Colo. 543, 88 P.2d 573 (1939).

**An unverified, unsupported motion to set aside an interlocutory decree of divorce** was not a "motion or petition" within the meaning of the former section concerning the setting aside of interlocutory decrees. *Morris v. Propst*, 98 Colo. 213, 55 P.2d 944 (1936).

**The prevailing party in a divorce action could not be compelled to permit a decree to become final** against his express desire and over his objection. *Faith v. Faith*, 128 Colo. 483, 261 P.2d 255 (1953); *McClanahan v. County Court*, 136 Colo. 426, 318 P.2d 599 (1957).

**Where the prevailing party in a divorce action moved to dismiss the same prior to the entry of a final decree**, a trial court lacked jurisdiction to act in the case other than to dismiss the same. *McClanahan v. County Court*, 136 Colo. 426, 318 P.2d 599 (1957).

**Decree of dissolution entered after a spouse's death** is void for lack of jurisdiction, and the dissolution action is abated. In *Re Connell*, 870 P.2d 632 (Colo. App. 1994).

**A reversal of the judgment of the trial court was had because of its refusal to grant plaintiff's motion to dismiss her divorce case** after the entry of the interlocutory decree. *Faith v. Faith*, 128 Colo. 483, 261 P.2d 225 (1953).

**Where it appears from a record and from the conduct of counsel that the parties agreed that a court would defer determination of permanent alimony, property settlement, and related matters until after the entry of a final decree of divorce**, orders entered pursuant thereto were not void because not included in such decree, or the questions reserved therein.



Rodgers v. Rodgers, 137 Colo. 74, 323 P.2d 892 (1958).

**Where orders for permanent alimony and related matters were not included in the interlocutory decree, because a court had taken the matter under advisement, orders resulting therefrom were valid and remained in full force and effect, constituting a modification of the interlocutory decree and were merged in a final decree which recited upon the terms and conditions contained in the interlocutory decree or any modification of change thereof.** Rodgers v. Rodgers, 137 Colo. 74, 323 P.2d 892 (1958).

**Provision in agreement incorporated into dissolution decree** which required a father to pay a daughter's medical bills until the daughter was "gainfully employed" was not ambiguous and required that the employment of the daughter be self-supporting, rather than remunerative, in order to terminate the father's obligations. In re Norton, 757 P.2d 1127 (Colo. App. 1988).

**The former section relating to the entry of an interlocutory decree in a divorce action within 48 hours after close of a trial, or the return of a verdict, was directory and not mandatory or jurisdictional.** Kemper v. Kemper, 140 Colo. 367, 344 P.2d 449 (1959).

**Formerly, the necessity for the lapse of six months and the entry of a final decree was just as essential to the power of a court to order a division of property, as to authorize it to enter a final decree.** McCoy v. McCoy, 139 Colo. 105, 336 P.2d 302 (1959).

**A writ of error in a divorce case was not dismissible on the ground that it was not filed within six months after the issuance of the interlocutory decree.** Simmons v. Simmons, 107 Colo. 78, 108 P.2d 871 (1940).

**However, notice of a motion to vacate an interlocutory decree of divorce, served upon the administrator of the estate of successful party after the latter's death and after the expiration of the six-month period designated by statute, was futile and without effect.** Morris v. Propst, 98 Colo. 213, 55 P.2d 944 (1936).

**Where the wife's lien was created by the judgment of the court in a divorce action based upon the stipulation of the parties, the judgment became final and where a subsequent order of abatement terminated the proceedings relative to the motion which the husband had filed to reduce the payments to the wife, it had no effect upon the final judgment which created the lien.** Willis v. Neilson, 32 Colo. App. 129, 507 P.2d 1106 (1973).

**C.R.C.P. 59(e) specifies that a party may move to alter or amend a judgment by a motion filed not later than 10 days after entry of judgment; therefore, where appellate filed such a motion within the allotted time, and the trial court subsequently did amend its judgment pursuant to such motion and the supplemental motion, the original court's judgment never be-**

came final, and it was not enforceable by either divorced party with respect to his or her property rights, because it did not create an enforceable right either in the husband or in his estate to take a divided share of the joint tenancy property. Sarno v. Sarno, 28 Colo. App. 598, 478 P.2d 711 (1970).

**Order under C.R.C.P. 54(b) authorized.** Section 14-10-105, providing that the Colorado rules of civil procedure apply to dissolution proceedings except as "otherwise specifically provided" in the act, and this section, providing that a decree of dissolution of marriage is "final" when entered, subject to the right of appeal, authorize the trial court to enter an order pursuant to C.R.C.P. 54(b) making the decree final for purposes of appeal. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

**Appealability of decree on entry of such order.** Upon the entry of an order under C.R.C.P. 54(b) a decree of dissolution of marriage may be appealed prior to entry of permanent orders on the issues of child custody, support, and division of property. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

**Stay of decree pending appeal.** When an appeal is taken from the finding that the marriage is "irretrievably broken", the finality of the decree dissolving the marriage may be stayed upon an appropriate motion duly made. In re Franks, 189 Colo. 499, 542 P.2d 845 (1975).

**Where a decree in a divorce action ordering title to real property to remain in joint tenancy, and granting the right to possession and income therefrom to the wife, had become final and the time for appeal had expired, the decree could not be reversed by the supreme court.** McDonald v. McDonald, 150 Colo. 492, 374 P.2d 690 (1962).

**Dissolution decree severing joint tenancy upheld, even though documents conveying house into tenancy in common were not executed.** Cannon v. Waddell, 642 P.2d 520 (Colo. App. 1981).

**Where the record on error in a divorce action contained no reporter's transcript, the supreme court had no means of reviewing the evidence; hence, the findings and judgment of a trial court were presumed to be supported by the evidence.** Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958).

**Erroneous divorce decree valid and binding.** Although divorce decree was an erroneous judgment, until modified by the court which entered it, or set aside on motion for new trial, or until reversed by an appellate court on direct review proceedings, it was valid and binding. McLeod v. Provident Mut. Life Ins. Co., 186 Colo. 234, 526 P.2d 1318 (1974).

**The validity of the arbitration agreement is not governed by the characterization of the proceeding as one for legal separation or for**

**dissolution of marriage.** While the agreement for binding Rabbinical arbitration was entered into in the context of a legal separation proceeding that was later dismissed, its validity and application to the current dissolution of marriage proceeding between the same parties is not affected. *In re Popack*, 998 P.2d 464 (Colo. App. 2000).

**For appeals procedure in divorce cases under early laws,** see *Daniels v. Daniels*, 9 Colo. 133, 10 P. 657 (1886); *Mercer v. Mercer*, 13 Colo. App. 237, 57 P. 750 (1899); *Mercer v. Mercer*, 27 Colo. 216, 60 P. 349 (1900); *Eickhoff v. Eickhoff*, 27 Colo. 380, 61 P. 225 (1900); *Eickhoff v. Eickhoff*, 29 Colo. 295, 68 P. 237 (1902); *Carlton v. Carlton*, 44 Colo. 27, 96 P. 995 (1908); *Dickinson v. Dickinson*, 46 Colo. 351, 104 P. 414 (1909); *Rudolph v. Rudolph*, 50 Colo. 243, 114 P. 977 (1911); *Prewitt v. Prewitt*, 52 Colo. 522, 122 P. 766 (1912); *Harrington v. Harrington*, 58 Colo. 154, 144 P. 20 (1914); *Gill v. Gill*, 59 Colo. 40, 148 P. 264 (1915); *Boyd v.*

*Boyd*, 63 Colo. 157, 164 P. 703 (1917); *Chamberlain v. Chamberlain*, 66 Colo. 562, 185 P. 354 (1919); *Kurtz v. Kurtz*, 70 Colo. 20, 196 P. 530 (1921); *Hobbs v. Hobbs*, 72, Colo. 190, 210 P. 398 (1922); *Diegel v. Diegel*, 73 Colo. 330, 215 P. 143 (1923); *Perry v. Perry*, 74 Colo. 106, 219 P. 221 (1923); *Miller v. Miller*, 74 Colo. 143, 219 P. 783 (1923); *Unzicker v. Unzicker*, 74 Colo. 211, 220 P. 495 (1923); *Fowler v. Fowler*, 74 Colo. 231, 220 P. 988 (1923); *Diebold v. Diebold*, 76 Colo. 255, 230 P. 605 (1924); *Hultquist v. Hultquist*, 77 Colo. 260, 236 P. 777 (1925); *Lednum v. Lednum*, 78 Colo. 57, 239 P. 877 (1925); *Weston v. Weston*, 79 Colo. 478, 246 P. 790 (1926); *Ikeler v. Ikeler*, 82 Colo. 278, 260 P. 104 (1927); *Taylor v. Taylor*, 85 Colo. 65, 273 P. 878 (1928); *Blackmer v. Blackmer*, 87 Colo. 173, 286 P. 114 (1930); *Laizure v. Baker*, 91 Colo. 48, 11 P.2d 560 (1932); *Hayhurst v. Hayhurst*, 91 Colo. 58, 11 P.2d 804 (1932); *Pierce v. Pierce*, 97 Colo. 39, 46 P.2d 748 (1935).

**14-10-120.3. Dissolution of marriage or legal separation upon affidavit - requirements.** (1) Final orders in a proceeding for dissolution of marriage or legal separation may be entered upon the affidavit of either or both parties when:

(a) There are no minor children of the husband and wife and the wife is not pregnant or the husband and wife are both represented by counsel and have entered into a separation agreement that provides for the allocation of parental responsibilities concerning the children of the marriage and setting out the amount of child support to be provided by the husband or wife or both; and

(b) The adverse party is served in the manner provided by the Colorado rules of civil procedure; and

(c) There is no genuine issue as to any material fact; and

(d) There is no marital property to be divided or the parties have entered into an agreement for the division of their marital property.

(2) If one party desires to submit the matter for entry of final orders upon an affidavit, the submitting party shall file his or her affidavit setting forth sworn testimony showing the court's jurisdiction and factual averments supporting the relief requested in the proceeding together with a copy of the proposed decree, a copy of any separation agreement proposed for adoption by the court, and any other supporting evidence. The filing of the affidavit does not shorten any statutory waiting period required for entry of a decree of dissolution or decree of legal separation.

(3) The court shall not be bound to enter a decree upon the affidavits of either or both parties, but the court may, upon its own motion, require that a formal hearing be held to determine any or all issues presented by the pleadings.

**Source:** **L. 82:** Entire section added, p. 303, § 1, effective May 22. **L. 98:** (1)(a) amended, p. 1399, § 45, effective February 1, 1999. **L. 2012:** IP(1) and (2) amended, (HB 12-1233), ch. 52, p. 187, § 2, effective July 1.

**Editor's note:** Section 3 of chapter 52, Session Laws of Colorado 2012, provides that the act amending the introductory portion of subsection (1) and subsection (2) applies to petitions for legal separation filed on or after July 1, 2012.

## ANNOTATION

**Law reviews.** For article, "Legislative Activities in Family Law", see 11 Colo. Law. 1560

(1982). For article, "Mediation and the Colorado Lawyer", see 11 Colo. Law. 2315 (1982).



**14-10-120.5. Petition - fee - assessment - displaced homemakers fund.** (1) There shall be assessed against a nonindigent petitioner a fee of five dollars for each filing of a petition for dissolution of marriage, declaration of invalidity of marriage, legal separation, or declaratory judgment concerning the status of marriage. All such fees collected shall be transmitted to the state treasurer for deposit in the displaced homemakers fund created pursuant to section 8-15.5-108, C.R.S.

(2) Notwithstanding the amount specified for the fee in subsection (1) of this section, the chief justice of the supreme court by rule or as otherwise provided by law may reduce the amount of the fee if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of the fee is credited. After the uncommitted reserves of the fund are sufficiently reduced, the chief justice by rule or as otherwise provided by law may increase the amount of the fee as provided in section 24-75-402 (4), C.R.S.

**Source:** **L. 80:** Entire section added, p. 455, § 2, effective July 1. **L. 98:** Entire section amended, p. 1330, § 40, effective June 1. **L. 2009:** (1) amended, (SB 09-038), ch. 119, p. 498, § 2, effective July 1.

**Cross references:** For the docket fees for dissolution of marriage actions, see § 13-32-101.

**14-10-121. Independence of provisions of decree or temporary order.** If a party fails to comply with a provision of a decree or temporary order or injunction, the obligation of the other party to make payments for support or maintenance or to permit parenting time is not suspended; but said party may move the court to grant an appropriate order.

**Source:** **L. 71:** R&RE, p. 529, § 1. **C.R.S. 1963:** § 46-1-21. **L. 93:** Entire section amended, p. 577, § 9, effective July 1.

**Cross references:** For the legislative declaration contained in the 1993 act amending this section, see section 1 of chapter 165, Session Laws of Colorado 1993.

#### ANNOTATION

**Intent of general assembly** is to make matters relating to child support and child custody independent of each other. *County of Clearwater v. Petrash*, 198 Colo. 231, 598 P.2d 138 (1979).

**Applied** in *Wise v. Bravo*, 666 F.2d 1328 (10th Cir. 1981).

**14-10-122. Modification and termination of provisions for maintenance, support, and property disposition - automatic lien.** (1) (a) Except as otherwise provided in section 14-10-112 (6), the provisions of any decree respecting maintenance may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of changed circumstances so substantial and continuing as to make the terms unfair, and, except as otherwise provided in subsection (5) of this section, the provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of changed circumstances that are substantial and continuing or on the ground that the order does not contain a provision regarding medical support, such as insurance coverage, payment for medical insurance deductibles and copayments, or unreimbursed medical expenses. The provisions as to property disposition may not be revoked or modified unless the court finds the existence of conditions that justify the reopening of a judgment.

(b) Application of the child support guidelines and schedule of basic child support obligations set forth in section 14-10-115 to the circumstances of the parties at the time of the filing of a motion for modification of the child support order which results in less than a ten percent change in the amount of support due per month shall be deemed not to be a substantial and continuing change of circumstances.

(c) In any action or proceeding in any court of this state in which child support,

maintenance when combined with child support, or maintenance is ordered, a payment becomes a final money judgment, referred to in this section as a support judgment, when it is due and not paid. Such payment shall not be retroactively modified except pursuant to paragraph (a) of this subsection (1) and may be enforced as other judgments without further action by the court; except that an existing child support order with respect to child support payable by the obligor may be modified retroactively to the time that a mutually agreed upon change of physical custody occurs pursuant to subsection (5) of this section. A support judgment is entitled to full faith and credit and may be enforced in any court of this state or any other state. In order to enforce a support judgment, the obligee shall file with the court that issued the order a verified entry of support judgment specifying the period of time that the support judgment covers and the total amount of the support judgment for that period. The obligee or the delegate child support enforcement unit shall not be required to wait fourteen days to execute on such support judgment. A verified entry of support judgment is not required to be signed by an attorney. A verified entry of support judgment may be used to enforce a support judgment for debt entered pursuant to section 14-14-104. The filing of a verified entry of support judgment shall revive all individual support judgments that have arisen during the period of time specified in the entry of support judgment and that have not been satisfied, pursuant to rule 54 (h) of the Colorado rules of civil procedure, without the requirement of a separate motion, notice, or hearing. Notwithstanding the provisions of this paragraph (c), no court order for support judgment nor verified entry of support judgment shall be required in order for the county and state child support enforcement units to certify past-due amounts of child support to the internal revenue service or to the department of revenue for purposes of intercepting a federal or state tax refund or lottery winnings.

(d) If maintenance or child support is modified pursuant to this section, the modification should be effective as of the date of the filing of the motion, unless the court finds that it would cause undue hardship or substantial injustice or unless there has been a mutually agreed upon change of physical custody as provided for in subsection (5) of this section. In no instance shall the order be retroactively modified prior to the date of filing, unless there has been a mutually agreed upon change of physical custody. The court may modify installments of maintenance or child support due between the filing of the motion and the entry of the order even if the circumstances justifying the modification no longer exist at the time the order is entered.

(1.5) (a) **Lien by operation of law.** (I) Commencing July 1, 1997, all cases in which services are provided in accordance with Title IV-D of the federal "Social Security Act", as amended, referred to in this subsection (1.5) as "IV-D cases", shall be subject to the provisions of this subsection (1.5), regardless of the date the order for child support was entered. In any IV-D case in which current child support, child support when combined with maintenance, or maintenance has been ordered, a payment becomes a support judgment when it is due and not paid, and a lien therefor is created by operation of law against the obligor's real and personal property and any interest in any such real or personal property. The entry of an order for child support debt, retroactive child support, or child support arrearages or a verified entry of judgment pursuant to this section creates a lien by operation of law against the obligor's real and personal property and any interest in any such real and personal property.

(II) The amount of such lien shall be limited to the amount of the support judgment for outstanding child support, child support when combined with maintenance, maintenance, child support debt, retroactive child support, or child support arrearages, any interest accrued thereon, and the amount of any filing fees as specified in this section.

(III) A support judgment or lien shall be entitled to full faith and credit and may be enforced in any court of this state or any other state. Full faith and credit shall be accorded to such a lien arising from another state that complies with the provisions of this subsection (1.5). Judicial notice or hearing or the filing of a verified entry of judgment shall not be required prior to the enforcement of such a lien.

(IV) The creation of a lien pursuant to this section shall be in addition to any other remedy allowed by law.



(b) **Lien on real property.** (I) To evidence a lien on real property created pursuant to this subsection (1.5), a delegate child support enforcement unit shall issue a notice of lien and record the same in the real estate records in the office of the clerk and recorder of any county in the state of Colorado in which the obligor holds an interest in real property. From the time of recording of the notice of lien, such lien shall be an encumbrance in favor of the obligee, or the assignee of the obligee, and shall encumber any interest of the obligor in any real property in such county.

(II) The lien on real property created by this section shall remain in effect for the earlier of twelve years or until all past-due amounts are paid, including any accrued interest and costs, without the necessity of renewal. A lien on real property arising pursuant to this subsection (1.5) may be extended or renewed indefinitely beyond twelve years by rerecording the lien every twelve years. Within twenty calendar days after satisfaction of the debt or debts described in the notice of lien, the delegate child support enforcement unit shall record a release of lien with the clerk and recorder of the county where the notice of lien was recorded. A release of lien shall be conclusive evidence that the lien is extinguished.

(III) The child support enforcement unit shall be exempt from the payment of recording fees charged by the clerk and recorder for the recording of notices of lien or releases of lien.

(c) **Lien on personal property other than wages and moneys held by a financial institution as defined in 42 U.S.C. sec. 669 (d) or motor vehicles.** (I) To evidence a lien on personal property, other than wages and moneys held by a financial institution as defined in 42 U.S.C. sec. 669 (d) or motor vehicles, created pursuant to this subsection (1.5), the state child support enforcement agency shall file a notice of lien with the secretary of state by means of direct electronic data transmission. From the time of filing the notice of lien with the secretary of state, such lien shall be an encumbrance in favor of the obligee, or the assignee of the obligee, and shall encumber all personal property or any interest of the obligor in any personal property.

(II) The lien on personal property created by this section shall remain in effect for the earlier of twelve years or until all past-due amounts are paid, including any accrued interest and costs, without the necessity of renewal. A lien on personal property arising pursuant to this subsection (1.5) may be extended or renewed indefinitely beyond twelve years by rerecording the lien every twelve years. Within twenty calendar days after satisfaction of the debt or debts described in the notice of lien, the state child support enforcement agency shall file a release of lien with the secretary of state. The filing of such a release of lien shall be conclusive evidence that the lien is extinguished.

(III) The state child support enforcement agency shall be exempt from paying a fee for the filing of notices of liens or releases of liens with the secretary of state pursuant to this paragraph (c).

(IV) For purposes of this paragraph (c), "personal property" means property that the child support enforcement agency has determined has a net equity value of not less than five thousand dollars at the time of the filing of the notice of lien with the secretary of state.

(d) **Lien on motor vehicles.** (I) (A) To evidence a lien on a motor vehicle created pursuant to this subsection (1.5), a delegate child support enforcement unit shall issue a notice of lien to the authorized agent as defined in section 42-6-102 (1), C.R.S., by first class mail. From the time of filing of the lien for public record and the notation of such lien on the owner's certificate of title, such lien shall be an encumbrance in favor of the obligee, or the assignee of the obligee, and shall encumber any interest of the obligor in the motor vehicle. In order for any such lien to be effective as a valid lien against a motor vehicle, the obligee, or assignee of the obligee, shall have such lien filed for public record and noted on the owner's certificate of title in the manner provided in sections 42-6-121 and 42-6-129, C.R.S.

(B) Liens on motor vehicles created by this section shall remain in effect for the same period of time as any other lien on motor vehicles as specified in section 42-6-127, C.R.S., or until the entire amount of the lien is paid, whichever occurs first. A lien created pursuant to this section may be renewed pursuant to section 42-6-127, C.R.S. Within twenty calendar days after satisfaction of the debt or debts described in the notice of lien, the delegate child support enforcement unit shall release the lien pursuant to the procedures specified in

section 42-6-125, C.R.S. When a lien on a motor vehicle created pursuant to this subsection (1.5) is released, the authorized agent and the executive director of the department of revenue shall proceed as provided in section 42-6-126, C.R.S.

(C) The child support enforcement unit shall not be exempt from the payment of filing fees charged by the authorized agent for the filing of either the notice of lien or the release of lien. However, the child support enforcement unit may add the amount of the filing fee to the lien amount and collect the amount of such fees from the obligor.

(II) For purposes of this subsection (1.5), "motor vehicle" means any self-propelled vehicle that is designed primarily for travel on the public highways and that is generally and commonly used to transport persons and property over the public highways, trailers, semitrailers, and trailer coaches, without motive power; that has a net equity value based upon the loan value identified for such vehicle in the national automobile dealers' association car guide of not less than five thousand dollars at the time of the filing of the notice of lien and that meets such additional conditions as the state board of human services may establish by rule; and on which vehicle a lien already exists that is filed for public record and noted accordingly on the owner's certificate of title. "Motor vehicle" does not include low-power scooters, as defined in section 42-1-102, C.R.S.; vehicles that operate only upon rails or tracks laid in place on the ground or that travel through the air or that derive their motive power from overhead electric lines; farm tractors, farm trailers, and other machines and tools used in the production, harvesting, and care of farm products; and special mobile machinery or industrial machinery not designed primarily for highway transportation. "Motor vehicle" does not include a vehicle that has a net equity value based upon the loan value identified for such vehicle in the national automobile dealers' association car guide of less than five thousand dollars at the time of the filing of the notice of lien and does not include a vehicle that is not otherwise encumbered by a lien or mortgage that is filed for public record and noted accordingly on the owner's certificate of title.

(e) **Priority of a lien.** (I) A lien on real property created pursuant to this section shall be in effect for the earlier of twelve years or until all past-due amounts are paid and shall have priority over all unrecorded liens and all subsequent recorded or unrecorded liens from the time of recording, except such liens as may be exempted by regulation of the state board of human services. A lien on real property arising pursuant to this subsection (1.5) may be extended or renewed indefinitely beyond twelve years by rerecording the lien every twelve years.

(II) A lien on personal property, other than motor vehicles, created pursuant to this section shall be in effect for the earlier of twelve years or until all past-due amounts are paid and shall have priority from the time the lien is filed with the central filing officer over all unfiled liens and all subsequent filed or unfiled liens, except such liens as may be exempted by regulation of the state board of human services. A lien on personal property arising pursuant to this subsection (1.5) may be extended or renewed indefinitely beyond twelve years by rerecording the lien every twelve years.

(III) Liens on motor vehicles created pursuant to this section shall remain in effect for the same period of time as any other lien on motor vehicles as specified in section 42-6-127, C.R.S., or until all past-due amounts are paid, whichever occurs first, and shall have priority from the time the lien is filed for public record and noted on the owner's certificate of title over all unfiled liens and all subsequent filed or unfiled liens, except such liens as may be exempted by regulation of the state board of human services.

(f) **Notice of lien - contents.** (I) The notice of lien shall contain the following information:

(A) The name and address of the delegate child support enforcement unit and the name of the obligee or the assignee of the obligee as grantee of the lien;

(B) The name, social security number, and last-known address of the obligor as grantor of the lien;

(C) The year, make, and vehicle identification number of any motor vehicle for liens arising pursuant to paragraph (d) of this subsection (1.5);

(D) A general description of the personal property for liens arising pursuant to paragraph (c) of this subsection (1.5);



(E) The county and court case number of the court of record that issued the order of current child support, child support debt, retroactive child support, child support arrearages, child support when combined with maintenance, or maintenance or of the court of record where the verified entry of judgment was filed;

(F) The date the order was entered;

(G) The date the obligation commenced;

(H) The amount of the order for current child support, child support debt, retroactive child support, child support arrearages, child support when combined with maintenance, or maintenance;

(I) The total amount of past-due support as of a date certain; and

(J) A statement that interest may accrue on all amounts ordered to be paid, pursuant to sections 14-14-106 and 5-12-101, C.R.S., and may be collected from the obligor in addition to costs of sale, attorney fees, and any other costs or fees incident to such sale for liens arising pursuant to paragraphs (b) and (c) of this subsection (1.5).

(II) For purposes of liens against motor vehicles, the notice of lien shall include the information set forth in subparagraph (I) of this paragraph (f) in addition to the information specified in section 42-6-120, C.R.S.

(g) **Rules.** The state board of human services shall promulgate rules and regulations concerning the procedures and mechanism by which to implement this subsection (1.5).

(h) **Bona fide purchasers - bona fide lenders.** (I) The provisions of this subsection (1.5) shall not apply to any bona fide purchaser who acquires an interest in any personal property or any motor vehicle without notice of the lien or to any bona fide lender who lent money to the obligor without notice of the lien the security or partial security for which is any personal property or motor vehicle of such obligor.

(II) For purposes of this paragraph (h):

(A) "Bona fide purchaser" means a purchaser for value in good faith and without notice of an adverse claim, including but not limited to an automatic lien arising pursuant to this subsection (1.5).

(B) "Bona fide lender" means a lender for value in good faith and without notice of an adverse claim, including but not limited to an automatic lien arising pursuant to this subsection (1.5).

(i) **No liability.** No clerk and recorder, authorized agent as defined in section 42-6-102 (1), C.R.S., financial institution, lienholder, or filing officer, nor any employee of any of such persons or entities, shall be liable for damages for actions taken in good faith compliance with this subsection (1.5).

(j) **Definition.** For purposes of this subsection (1.5), "child support debt" shall have the same meaning as set forth in section 26-13.5-102 (3), C.R.S.

(2) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

(3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child but not by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump-sum payment, to the extent just and appropriate in the circumstances.

(4) Notwithstanding the provisions of subsection (1) of this section, the provisions of any decree respecting child support may be modified as a result of the change in age for the duty of support as provided in section 14-10-115 (15), but only as to installments accruing subsequent to the filing of the motion for modification; except that section 14-10-115 (15) (b) does not apply to modifications of child support orders with respect to a child who has already achieved the age of nineteen as of July 1, 1991.

(5) Notwithstanding the provisions of subsection (1) of this section, when a mutually agreed upon change of physical care occurs, the provisions for child support of the obligor under the existing child support order, if modified pursuant to this section, will be modified as of the date when physical care was changed. When a mutually agreed upon change of physical care occurs, parties are encouraged to avail themselves of the provision set forth

in section 14-10-115 (14) (a) for updating and modifying a child support order without a court hearing.

(6) (a) Notwithstanding any other provisions of this article, within the time frames set forth in paragraph (c) of this subsection (6), the individual named as the father in the order may file a motion to modify or terminate an order for child support entered pursuant to this article if genetic test results based on DNA testing, administered in accordance with section 13-25-126, C.R.S., establish the exclusion of the individual named as the father in the order as the biological parent of the child for whose benefit the child support order was entered.

(b) If the court finds pursuant to paragraph (a) of this subsection (6) that the individual named as the father in the order is not the biological parent of the child for whose benefit the child support order was entered and that it is just and proper under the circumstances and in the best interests of the child, the court shall modify the provisions of the order for support with respect to that child by terminating the child support obligation as to installments accruing subsequent to the filing of the motion for modification or termination, and the court may vacate or deem as satisfied, in whole or in part, unpaid child support obligations arising from or based upon the order determining parentage. The court shall not order restitution from the state for any sums paid to or collected by the state for the benefit of the child.

(c) (I) A motion to modify or terminate an order for child support pursuant to this subsection (6) must be filed within two years from the date of the entry of the initial order establishing the child support obligation.

(II) Repealed.

(d) Notwithstanding the provisions of paragraphs (a) and (b) of this subsection (6), a court order for child support shall not be modified or terminated pursuant to this subsection (6) if:

(I) The child support obligor acknowledged paternity pursuant to section 19-4-105 (1) (c) or (1) (e), C.R.S., knowing that he was not the father of the child;

(II) The child was adopted by the child support obligor; or

(III) The child was conceived by means of assisted reproduction.

(e) A motion filed pursuant to this section may be brought by the individual named as the father in the order and shall be served in the manner set forth in the Colorado rules of civil procedure upon all other parties. The court shall not modify or set aside a final order determining parentage pursuant to this section without a hearing.

(f) For purposes of this subsection (6), “DNA” means deoxyribonucleic acid.

**Source:** L. 71: R&RE, p. 529, § 1. C.R.S. 1963: § 46-1-22. L. 86: (1) amended, p. 724, § 3, effective November 1. L. 87: (1)(c) added, p. 587, § 4, effective July 10. L. 88: (1)(c) amended, p. 633, § 7, effective July 1. L. 89: (1)(a) and (1)(c) amended, p. 792, § 16, effective July 1. L. 90: (1)(c) amended, p. 891, § 11, effective July 1. L. 91: (4) and (5) added, pp. 238, 253, §§ 2, 8, effective July 1. L. 92: (1)(d) added, p. 203, § 10, effective August 1. L. 93: (1)(a) amended, p. 1557, § 2, effective July 1. L. 97: (1)(c) amended, p. 561, § 6, effective July 1; (1.5) added, p. 1266, § 9, effective July 1. L. 98: (1)(a), (1)(c), (1)(d), and (5) amended, p. 764, § 14, effective July 1; (5) amended, p. 1400, § 46, effective February 1, 1999. L. 99: (1.5)(c), (1.5)(e)(II), and (1.5)(i) amended, p. 751, § 21, effective January 1, 2000. L. 2000: (1.5)(b)(II) amended, p. 1704, § 1, effective July 1. L. 2001: (1.5)(c) amended, p. 1445, § 38, effective July 1. L. 2004: (1.5)(b)(II), (1.5)(c)(II), (1.5)(e)(I), and (1.5)(e)(II) amended, p. 386, § 2, effective July 1. L. 2007: (1)(b), (4), and (5) amended, p. 107, § 3, effective March 16. L. 2008: (6) added, p. 1656, § 3, effective August 15. L. 2009: (1.5)(d)(II) amended, (HB 09-1026), ch. 281, p. 1258, § 19, effective October 1. L. 2010: (1.5)(d)(II) amended, (HB 10-1172), ch. 320, p. 1493, § 18, effective October 1. L. 2012: (1)(c) amended, (SB 12-175), ch. 208, p. 831, § 28, effective July 1.

**Editor’s note:** (1) Amendments to subsection (5) by Senate Bill 98-139 and House Bill 98-1183 were harmonized, effective February 1, 1999.

(2) The term “custody” has been changed in other places in the Colorado Revised Statutes to correspond with the use of the term “parental responsibility” as described in § 14-10-124.



(3) Subsection (6)(c)(II)(B) provided for the repeal of subsection (6)(c)(II), effective July 1, 2011. (See L. 2008, p. 1656.)

(4) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(c) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For the legislative declaration contained in the 1997 act enacting subsection (1.5), see section 1 of chapter 236, Session Laws of Colorado 1997.

## ANNOTATION

- I. General Consideration.
- II. Modification.
  - A. Procedure.
  - B. Unconscionability.
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  - F. Effective Date of Modification.
  - G. Scope of Review.
- III. Termination of Maintenance and Child Support.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Interstate Modification of Support Decrees", see 28 Rocky Mt. L. Rev. 355 (1956). For article, "The Economy: Its Effects on Family Law", see 11 Colo. Law. 97 (1982). For article, "Automatic Escalation Clauses Relating to Maintenance and Child Support", see 12 Colo. Law. 1083 (1983). For article, "Support Calculation Revisited", see 12 Colo. Law. 1647 (1983). For article, "The Continued Jurisdiction of the Court to Modify Maintenance", see 13 Colo. Law. 62 (1984). For article, "Domestic Case Update", see 14 Colo. Law. 209 (1985). For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987). For article, "Maintenance in Colorado: Issues and Factors", see 21 Colo. Law. 2399 (1992). For article, "Overcoming Difficulties in Collecting Child Support and Maintenance", see 24 Colo. Law. 2725 (1995). For article, "Post-dissolution Maintenance Review in Trial Court Under CRS §§ 14-10-114 or -122", see 26 Colo. Law. 93 (July 1997). For article, "Postsecondary Education Expenses after Chalat: Paying College Expenses after Divorce", see 38 Colo. Law. 19 (January 2009). For article, "Modifying or Terminating Maintenance Based on Cohabitation", see 38 Colo. Law. 45 (June 2009). For article, "The Modification of a Denial of Spousal Maintenance at Permanent Orders", see 39 Colo. Law. 37 (February 2010).

**Annotator's note.** Cases relevant to § 14-10-122 (1) decided prior to its earliest source, L. 71, p. 529, § 1, have been included in the annotations to this section.

**This section effects a legislative abrogation of the common law** that developed under the divorce statutes operative prior to the uniform

dissolution of marriage act. In re Icke, 189 Colo. 319, 540 P.2d 1076 (1975).

**For the effect of this section on prior law,** see In re Edwards, 39 Colo. App. 26, 560 P.2d 849 (1977).

**Abatement of maintenance payments not authorized by this section.** In re Ward, 717 P.2d 513 (Colo. App. 1985).

**Social security benefits may be credited towards support obligation.** Social security disability benefit payments and social security retirement benefit payments for minor children may, at the discretion of the trial court, be credited toward a father's obligation to pay support. In re Robinson, 651 P.2d 454 (Colo. App. 1982).

When social security disability benefit payments for children are set off against a father's obligation to pay support, the father is entitled to credit only up to the extent of his obligation for monthly payments of child support, but not in excess thereof. In re Robinson, 651 P.2d 454 (Colo. App. 1982).

**Life insurance reasonable means of meeting obligation.** The maintenance of a life insurance policy with the former husband's minor children as beneficiaries provides a reasonable and practical means by which the obligation under this section can be met. In re Icke, 189 Colo. 319, 540 P.2d 1076 (1975).

Where the husband was in very poor health, suffering from diabetes and high blood pressure, had heart damage and had previously suffered a stroke, and furthermore, because of his poor health, the husband was under doctor's orders to work in a low pressure occupation, the trial court did not err in ordering the husband to carry a life insurance in favor of his former wife. In re Koltavy, 44 Colo. App. 305, 612 P.2d 1161 (1980).

**Court may order life insurance naming children as beneficiaries be maintained by parent obligated to pay child support,** just as its provisions for child support now extend beyond the death of the parent, unless otherwise provided. In re Icke, 35 Colo. App. 60, 530 P.2d 1001 (1974), aff'd, 189 Colo. 319, 540 P.2d 1076 (1975).

**Valuation of undisclosed assets.** Once property has been divided pursuant to § 14-10-113, such property becomes akin to separate property, and any increase in the value of ownership

interest therein should be considered when determining valuation. The failure to do so constitutes a confiscatory taking. In re Hiner, 710 P.2d 488 (Colo. 1985).

**The doctrine of equitable estoppel may properly be applied to afford relief from accrued arrearages in child support** if the party asserting the claim demonstrates reasonable reliance, to the party's detriment, upon the acts or representations of the other person and lack of knowledge or convenient means of knowing the facts. In re Dennin and Lohf, 811 P.2d 449 (Colo. App. 1991).

The doctrine of equitable estoppel did not prevent enforcement of California decree to pay child support where father's failure to pay ordered amount or to seek modification did not fall within any of the special circumstances for which estoppel is applicable. In re Barone, 895 P.2d 1075 (Colo. App. 1994).

**Where a court finds that the doctrine of equitable estoppel will support a reduction in child support arrearages due to a parent's misconduct**, the court must determine whether such reduction meets the statutory policies contained in § 14-10-115 and whether such reduction will damage the child's interests. The court's calculation of the reduction of the arrearages must be based on the amount of child support that would have been paid but for the misconduct of the parent. In re Anthony-Guillar, 207 P.3d 934 (Colo. App. 2009).

**Child support obligations may be modified only as to installments accruing after motion to modify has been filed.** In re Pote, 847 P.2d 246 (Colo. App. 1993) (decided under law in effect prior to 1991 amendment relating to voluntary change of physical custody).

**The provisions of any decree respecting child support may be modified only as to installments accruing after the filing for modification.** Thus, the trial court's ability to modify retroactively an accrued child support obligation is severely restricted. In re Wright, 924 P.2d 1207 (Colo. App. 1996).

**Interest accrues on arrearages from the date each installment becomes due.** In re Pote, 847 P.2d 246 (Colo. App. 1993).

**Entry of a judgment pursuant to this section for past due support payments will not alter a trial court's authority to enforce its order underlying that judgment through contempt proceedings.** The entry of a judgment, by operation of law pursuant to this section, does not deprive the trial court of its authority to enforce its child support and maintenance orders underlying the judgment. In re Nussbeck, 974 P.2d 493 (Colo. 1999) (overruling In re Woodrum, 618 P.2d 732 (Colo. App. 1980)).

**Applied in Blank v. District Court**, 190 Colo. 114, 543 P.2d 1255 (1975); Glickman v. Mesigh, 200 Colo. 320, 615 P.2d 23 (1980); Soehner v. Soehner, 642 P.2d 27 (Colo. App. 1981); In re

Manzo, 659 P.2d 669 (Colo. 1983); In re Ward, 670 P.2d 1260 (Colo. App. 1983); In re Hauger, 679 P.2d 604 (Colo. App. 1984); In re Burns, 717 P.2d 991 (Colo. App. 1985); In re Aragon, 773 P.2d 1110 (Colo. App. 1989); In re Wisdom, 833 P.2d 884 (Colo. App. 1992).

## II. MODIFICATION.

### A. Procedure.

**Application for increase of alimony, and not contempt proceeding**, was proper remedy of divorced wife complaining of reduction of alimony by court order. Weydeveld v. Weydeveld, 100 Colo. 301, 67 P.2d 72 (1937).

**Orderly process requires a motion for modification of support payments, notice thereof, and a setting of the matter for hearing and disposition**, and the party opposing modification has the right to prepare for such issue and present countervailing evidence. Wheeler v. Wheeler, 155 Colo. 7, 392 P.2d 285 (1964).

**The mere filing of a petition to modify support payments and even having a hearing thereon without proceeding to a conclusion** and the entry of an order thereon can have no legal effect. Drazich v. Drazich, 153 Colo. 218, 385 P.2d 259 (1963).

**The former statute of 1883 made provision for a reasonable and proper alteration in the amount of alimony** allowed in a decree of divorce, and was held to contemplate that when such a change occurred in the condition or circumstances of the parties as renders a modification of the decree in this respect proper, that the application therefor should be made to the trial court, but such an application, necessarily based on new and additional matters, could be entertained in the supreme court on a petition for a rehearing of an appeal, although the original decree was here modified on the hearing. Luthe v. Luthe, 12 Colo. 421, 21 P. 467 (1889).

**A judgment modifying, or refusing to modify, that part of the original divorce decree awarding alimony** was a judgment in a divorce action, and was clearly subject to the requirement of notice as to a review, as was the original judgment or decree. Diegel v. Diegel, 73 Colo. 330, 215 P. 143 (1923).

**Where a modification of a decree awarding alimony was sought, the application, though made in the same case**, was upon a petition asserting new facts, and upon a new notice, and the judgment of the court thereon was a final judgment to which a writ of error would lie. Prewitt v. Prewitt, 52 Colo. 522, 122 P. 766 (1912).

**Order specifying amount where original order merely imposed duty.** Where an original court order imposes a duty of support without specifying an amount under the criteria of § 14-



10-115, a subsequent court order specifying the amount need only conform with § 14-10-115 rather than the modification requirements of this section. In re Saiz, 634 P.2d 1020 (Colo. App. 1981).

**Reference to C.R.C.P. 60 to reopen judgment.** There is no specific provision in this section, controlling the procedure by which a property division order may be reopened. Therefore, in order to determine whether the judgment may be reopened, reference must be made to C.R.C.P. 60. In re Scheuerman, 42 Colo. App. 206, 591 P.2d 1044 (1979).

**Appropriate motion required to alter, amend, or vacate original trial court's order.** Original trial court's order valuing the marital property was a valid final judgment which could be altered only upon appropriate motion under either C.R.C.P. 59 or 60. In re McKendry, 735 P.2d 908 (Colo. App. 1986).

**The provisions of this section governing retroactive modification of child support upon a change of physical custody conflict with, but control over, C.R.C.P. 60 (b)** because subsection (1)(c) expressly provides for retroactive modification of child support without imposing any time limit. In re Green, 93 P.3d 614 (Colo. App. 2004).

**Upon registration, decree of foreign court becomes in effect a Colorado order,** and is subject to the same limitations as to modification as if entered in a Colorado court. Such orders can only be modified by compliance with this section. Malmgren v. Malmgren, 628 P.2d 164 (Colo. App. 1981).

**Informal motion to modify is permissible.** Unless due process is violated, the informality of an oral motion by one party to set aside the property agreement amounts to no more than an irregularity which does not affect the jurisdiction of the district court. In re Stroud, 631 P.2d 168 (Colo. 1981).

**A property division is final and nonmodifiable** absent conditions justifying relief from judgment. In re Wells, 833 P.2d 797 (Colo. App. 1991).

**Reconsideration of property division to correct error unnecessary absent contest.** When neither party contests a trial court's division of property it is not necessary that the court be able to reconsider the property division in order to correct error in the provisions for maintenance and attorney fees. In re Jones, 627 P.2d 248 (Colo. 1981).

**Findings based on needs and circumstances on hearing date.** In modification of support orders, the court must base its findings and orders on the needs of the children and the circumstances of the parents at the time of the hearing rather than on what those conditions might have been in the past or may be in the future. In re Serfoss, 642 P.2d 44 (Colo. App. 1981).

In modification of maintenance, court must base its findings and orders on needs and circumstances of parties at the time of the hearing rather than on what those conditions might have been in the past or may be in the future and should consider the parties' actual financial situation and their ability to earn. In re Ward, 717 P.2d 513 (Colo. App. 1985).

**Although a separation agreement incorporated into a decree may expressly prohibit any modification of maintenance** provisions contained therein, a district court may modify the maintenance provisions of a separation agreement incorporated into a dissolution decree on grounds of unconscionability if the agreement is silent on the subject or if the parties specifically reserve such power to the court. Any effort to limit or preclude the authority of district court to modify the maintenance provision of separation agreement must be articulated by language that is specific and unequivocal. In re Udis, 780 P.2d 499 (Colo. 1989).

**Family law referee lacks authority** to hear a motion for the modification of child support when the party against whom such motion is filed objects to a hearing before a referee. In re Mead, 765 P.2d 1072 (Colo. App. 1988).

**In those cases in which a child support obligation has been ordered and the obligated parent becomes eligible for social security benefits,** a motion to modify child support is required before the child support obligation of the parent may be reduced by the amount of social security benefits paid for the benefit of the child. In re Wright, 924 P.2d 1207 (Colo. App. 1996).

## B. Unconscionability.

**Premise for challenge to separation agreement.** A challenge to a separation agreement under this article directed to the provisions pertaining to maintenance and child support must be premised on whether the agreement is unconscionable. In re Lowery, 39 Colo. App. 413, 568 P.2d 103 (1977), *aff'd*, 195 Colo. 86, 575 P.2d 430 (1978).

**Fraud and overreaching must also be shown.** In order to set aside the property division provisions of a settlement agreement, in addition to establishing the unconscionability of the agreement, fraud and overreaching must be shown. In re Lowery, 39 Colo. App. 413, 568 P.2d 103 (1977), *aff'd*, 195 Colo. 86, 575 P.2d 430 (1978).

**"Unconscionable" construed.** The term "unconscionable", in subsection (1), has the same meaning of fair, reasonable and just, as the identical term used in § 14-10-112. In re Carney, 631 P.2d 1173 (Colo. App. 1981); In re Dixon, 683 P.2d 803, (Colo. App. 1983).

**In determining whether an agreement is, or has become, unconscionable,** the trial court

should consider and apply the pertinent criteria set forth in the following sections: Section 14-10-112 as to the economic circumstances of the parties; § 14-10-113 (1) as to the division of property; § 14-10-114 (1) as to maintenance; and § 14-10-115 (1) as to child support. In re Lowery, 39 Colo. App. 413, 568 P.2d 103 (1977), *aff'd*, 195 Colo. 86, 575 P.2d 430 (1978).

In determining whether the terms of the original child support decree have become unconscionable, the trial court should apply the criteria set forth in § 14-10-115 (1). In re Hughes, 635 P.2d 933 (Colo. App. 1981).

**In deciding whether the terms of a dissolution decree have become unconscionable**, a trial court should consider and apply the criteria listed in § 14-10-115 (1). In re Pring, 742 P.2d 343 (Colo. App. 1987).

**A party seeking modification of the terms of a separation agreement incorporated into a dissolution decree** has a heavy burden of proving that those provisions have become unconscionable under all relevant circumstances. In re Udis, 780 P.2d 499 (Colo. 1989).

**Presumption of unconscionability provision deprived parties of right to objective judicial determination.** Provision in divorce decree specifying conditions under which unconscionability would be presumed deprived parties of the right to have an objective judicial determination in the future, based on the circumstances then existing. In re Davis, 44 Colo. App. 355, 618 P.2d 692 (1980).

**No presumption of unconscionability in cost of living increase provision.** Provision in property settlement providing for a cost of living increase in child support based on the consumer price index does not create presumption of unconscionability because provision was not imposed by the court. In re Lamm, 682 P.2d 67 (Colo. App. 1984).

**Educational savings not basis for unconscionability.** The fact that a parent manages to save money for her children's education should not be a reason to punish that parent's frugality by allowing such savings to serve as a basis to characterize the initial agreement as unconscionable. In re Anderson, 638 P.2d 826 (Colo. App. 1981).

**Parties are free to mutually agree upon child support provision which a court could not impose upon them.** In re Lamm, 682 P.2d 67 (Colo. App. 1984).

**Where the trial court reserves jurisdiction for the modification of a maintenance decree** but does not establish a standard other than the unconscionability standard in this section, the unconscionability standard must be applied. In re Bowman-Berry, 749 P.2d 465 (Colo. App. 1987).

**The fact that a spouse who receives maintenance enjoys increased income** in compari-

son to the amount of income earned by that spouse at the time the decree was entered does not necessarily require the conclusion that the initial award of maintenance has been rendered unconscionable. In re Udis, 780 P.2d 499 (Colo. 1989).

**Wife's increased earnings do not require conclusion that maintenance amount is unconscionable** nor do they reduce dollar for dollar the amount properly awarded where record supports the determination that wife met the threshold for maintenance. In re Connell, 831 P.2d 913 (Colo. App. 1992).

Where wife was earning \$1,500 per month, but her standard of living was below that enjoyed during the marriage, it was within the court's discretion to determine that the continuing disparity of income between the husband and wife required continuing maintenance, although in a lower monthly amount. Aldinger v. Aldinger, 813 P.2d 836 (Colo. App. 1991).

**Obligor spouse's reduced income as a result of a job change in anticipation of or in connection with early retirement may be considered by court in reducing maintenance, and the obligor shall not be considered voluntarily underemployed if** (1) the obligor's decision was made in good faith and not with the motivation to decrease or eliminate maintenance, and (2) the decision was objectively reasonable based on factors such as the obligor's age, health, and the practice of the industry in which the obligor was employed. A similar analysis would apply to an obligee spouse who took an early retirement and sought to increase maintenance on that basis. In re Swing, 194 P.3d 498 (Colo. App. 2008).

#### C. Changed Circumstances.

**It was fundamental that orders for the payment of alimony were subject to modification due to the changed circumstances of the parties.** Stevens v. Stevens, 31 Colo. 188, 72 P. 1061 (1903); Prewitt v. Prewitt, 52 Colo. 522, 122 P. 766 (1912); Jewel v. Jewel, 71 Colo. 470, 207 P. 991 (1922); Diegel v. Diegel, 73 Colo. 330, 215 P. 143 (1923); Huff v. Huff, 77 Colo. 15, 234 P. 167 (1925); Harris v. Harris, 113 Colo. 41, 154 P.2d 617 (1944); Elmer v. Elmer, 132 Colo. 57, 285 P.2d 601 (1955); Huber v. Huber, 143 Colo. 255, 353 P.2d 379 (1960); Brownfield v. Brownfield, 143 Colo. 262, 352 P.2d 674 (1960); Lopez v. Lopez, 148 Colo. 404, 366 P.2d 373 (1961).

**There must be evidence of change of circumstances from time of previous decree** awarding child support to justify a change in provisions. Manson v. Manson, 35 Colo. App. 144, 529 P.2d 1345 (1974); In re Soderquist, 44 Colo. App. 131, 608 P.2d 851 (1980); In re Davis, 44 Colo. App. 355, 618 P.2d 692 (1980).



The question is not whether, based on current financial circumstances of the parties, a court would have awarded the same amount of child support as that incorporated in the original decree. Instead, the question on a motion to modify is different: Have the terms of the original award become unfair, i.e., unconscionable. In *re* Anderson, 638 P.2d 826 (Colo. App. 1981); In *re* DaFoe, 677 P.2d 426 (Colo. App. 1983).

**The burden is heavy upon him who seeks modification;** "changed circumstances so substantial and continuing as to make the terms unconscionable" must be shown. In *re* Lodholm, 35 Colo. App. 411, 536 P.2d 842 (1975); In *re* Erickson, 43 Colo. App. 319, 602 P.2d 909 (1979); In *re* Anderson, 638 P.2d 826 (Colo. App. 1981); *McVay v. Johnson*, 727 P.2d 416 (Colo. App. 1986); In *re* Pring, 742 P.2d 343 (Colo. App. 1987).

This section places the burden upon the party who seeks the modification to show changed circumstances so substantial as to make the terms of the decree unconscionable. In *re* Davis, 44 Colo. App. 355, 618 P.2d 692 (1980).

In modifying a provision for maintenance, the burden is on the party seeking the modification to prove a substantial and continuing change of circumstances, and that, in considering the modification, the court should take into account the provisions of § 14-10-114. *Malmgren v. Malmgren*, 628 P.2d 164 (Colo. App. 1981).

**Question is not whether, based on the current financial circumstances of the parties, a court would have awarded the same amount of child support as that incorporated in the original decree, but whether the terms of the original agreement have become unfair.** In *re* Aldrich, 945 P.2d 1370 (Colo. 1997).

**Provisions as to property disposition may not be modified absent conditions justifying the reopening of a judgment,** and no attempt was made to establish the existence of such conditions. In *re* Anderson, 711 P.2d 699 (Colo. App. 1985).

**Child support may be modified** only upon a showing of changed circumstances that are substantial and continuing. In *re* Hamilton, 857 P.2d 542 (Colo. App. 1993); In *re* Aldrich, 945 P.2d 1370 (Colo. 1997); In *re* Lishnevsky, 981 P.2d 609 (Colo. App. 1999).

**A change is not substantial and continuing if application of the guidelines to the parties' present situation results in a change of less than 10% in the amount of child support.** In *re* Lishnevsky, 981 P.2d 609 (Colo. App. 1999).

**It is not every change of circumstance that entitles a former husband to a reduction of his support payments.** *Frazier v. Frazier*, 164 Colo. 245, 433 P.2d 764 (1967).

**Substantial and continuing changed circumstances requirement and postsecondary education support orders.** Absent application of the age of emancipation (subsection (4)) or

medical insurance (subsection (1)) exceptions, the court's continuing jurisdiction to modify postsecondary education support orders is invoked only upon a showing of substantial and continuing changed circumstances by the party seeking modification. Nothing in the plain language of § 14-10-115 (1.5)(c.5) or this section alters this clear, unambiguous requirement. In *re* Chalot, 112 P.3d 47 (Colo. 2005).

**Effect of amendments to postsecondary education support scheme on the substantial and continuing changed circumstances requirement.** The general assembly did not express an intent that its enactments of amendments to the postsecondary education support scheme alone automatically triggers a court's continuing jurisdiction to modify child support. The requirement for substantial and continuing changed circumstances must still be shown. In *re* Chalot, 112 P.3d 47 (Colo. 2005).

**Trial court properly denied father's motion for modification, which was based solely on the 1993 statutory amendment to § 14-10-115 (1.5)(b)(I) and which did not allege any substantial or continuing change in the parents' or the child's circumstances.** In *re* Eaton, 894 P.2d 56 (Colo. App. 1995).

**Where the divorce decree by its terms anticipated the very change in circumstances upon which the court at the modification hearing based its new order,** such an increase in income could not support a later decree of the court modifying the original decree, because where the alleged change in the circumstances of the parties was one that the trial court anticipated and made allowance for when entering the original decree, such change would not be a ground for a modification of the decree. *Andrews v. Andrews*, 161 Colo. 529, 423 P.2d 573 (1967).

**Where the most recent court order in a divorce action was based on the parties' written stipulation and agreement,** and the wording of the order clearly and unambiguously stated that defendant was to pay \$25 per week for the support of the minor children, and there was no mention in that order of any alimony or support for plaintiff, the subsequent remarriage of plaintiff was immaterial in the disposition of the case considering reduction in payments. *Ferguson v. Ferguson*, 32 Colo. App. 145, 507 P.2d 1110 (1973).

**When a divorce decree directed the father to pay a specified amount periodically for the joint benefit of more than one minor child,** the emancipation of one of the children did not automatically affect the liability of the father for the full sum prescribed by the order, rather it became the burden of the father to make such showing as would entitle him to be relieved of all or a part of such obligation, and his failure to do so estopped him from asserting any credits for such emancipation under an arrearage judg-

ment for the full amount of the group allowance. *Ferguson v. Ferguson*, 32 Colo. App. 145, 507 P.2d 1110 (1973).

**If the financial ability of the husband and father improves, and the needs of the minor children increase, the jurisdiction of the court to make additional orders for the care and maintenance of the minor children may be invoked.** *Watson v. Watson*, 135 Colo. 296, 310 P.2d 554 (1957); *Garrow v. Garrow*, 152 Colo. 480, 382 P.2d 809 (1963).

If the financial ability of the father improves and the needs of the minor children increase, it is proper to make appropriate increases in the amount of child support. *Pacheco v. Pacheco*, 38 Colo. App. 181, 554 P.2d 720 (1976).

**A former spouse receiving maintenance should be permitted to benefit from his or her frugality and not the obligor.** The former spouse should not be penalized for choosing a more austere lifestyle. *In re Weibel*, 965 P.2d 126 (Colo. App. 1998).

**The fact that the spouse receiving maintenance is able to increase his or her income does not, in itself, make the initial award unconscionable.** *In re Weibel*, 965 P.2d 126 (Colo. App. 1998).

**The evidence did not support the husband's allegations with reference to his income or inability to pay,** where he had the same employer and there was a very negligible difference in his income, and the substantial increase in his expenses was brought about by obligations incurred through entering into a new marriage, since this type of change was not, by itself, a ground for modification. *Beddoes v. Beddoes*, 155 Colo. 115, 393 P.2d 1 (1964).

**Improved ability to pay support insufficient for modification.** Evidence of the father's ability to pay an increased amount of child support is insufficient alone to justify modification. *In re Hughes*, 635 P.2d 933 (Colo. App. 1981).

**Nor does it provide a basis for reduction.** Where a father's income exceeds that which he was earning at the time of entry of the original decree, there was no basis for reduction of future support payments. *In re Anderson*, 638 P.2d 826 (Colo. App. 1981).

**Child's needs more compelling than father's.** Despite the fact that the father had left the military and enrolled in college, the trial court erred when it denied the mother's motion for an increase in child support where there was a reasonable inference from the evidence that the father's military experience qualified him for civilian employment. *In re Mizer*, 683 P.2d 382 (Colo. App. 1984).

**Applications for a reduction in child support payments based on such a change in the mother's financial condition as her gainful employment, an increase in her earnings, her acquisition of property, or the like, have been**

denied in many cases, where no other circumstances warranted a reduction in the payments, because a mother's employment or income does not relieve the father of the obligation to support his children under a support order, and the mother's employment or property would not inure to the father's benefit as a change of circumstances diminishing his obligation to support children. *Beddoes v. Beddoes*, 155 Colo. 115, 393 P.2d 1 (1964).

**In equitably adjusting financial obligations of parties based upon changed circumstances,** the property division remains fixed and requisite adjustments to achieve fairness are to be made in the maintenance provisions of a decree. *In re Jones*, 627 P.2d 248 (Colo. 1981).

**In making a determination of changed circumstances** that are substantial and continuing, the statutory child support guidelines must be considered in conjunction with the other evidence presented. *In re Miller*, 790 P.2d 890 (Colo. App. 1990).

**The courts have not created a rigid rule** precluding reduction in support or maintenance payments when both incomes have increased. *In re DaFoe*, 677 P.2d 426 (Colo. App. 1983).

**Inflation may be considered.** The effects of inflation are a proper factor to be considered in an action for child support modification. Nevertheless, there must be proper proof of the rate of inflation and its specific effects on the petitioner's circumstances. *In re Hughes*, 635 P.2d 933 (Colo. App. 1981).

**Social security payments made to a dependent child** as a result of the supporting parent's death must be considered by the court on a motion to terminate or modify its order for child support. *In re Estate of Meek*, 669 P.2d 628 (Colo. App. 1983).

**Voluntarily accepted reduction due to temporarily reduced income not relevant.** The fact that a custodial parent has voluntarily agreed to a reduction of child support during the time when the noncustodial parent's income was temporarily reduced has no relevance to the situation, where that parent's income later increases. *In re Anderson*, 638 P.2d 826 (Colo. App. 1981).

**Where there was no showing of change in the circumstances of the parties subsequent to a prior hearing as would justify a modification of orders for the payment of alimony,** a motion therefor was properly denied. *Brownfield v. Brownfield*, 143 Colo. 262, 352 P.2d 674 (1960).

**Nothing in the statute precludes the trial court from ordering a support payment that exceeds the known needs of the child.** *In re McCord*, 910 P.2d 85 (Colo. App. 1995).

**Subsection (1)(a) no longer requires a finding of unconscionability for modification of child support.** *In re Ehlert*, 868 P.2d 1168 (Colo. App. 1994).



Even if there was no change, as such, in the circumstances, the trial court could modify a support order where it resulted solely from an agreement between the parties, and was not an order entered after contested hearing before the court, because the parties could not tie the hands of a court as concerns the issue of support for minor children. *Wright v. Wright*, 31 Colo. App. 381, 504 P.2d 1119 (1972), rev'd on other grounds, 514 P.2d 73 (1973).

**Application of new child support guidelines** resulting in more than a 10 percent change in support due creates a rebuttable presumption that existing support award must be modified. In re *Pugliese*, 761 P.2d 277 (Colo. App. 1988); In re *Aldrich*, 945 P.2d 1370 (Colo. 1997).

**Language in subsection (1)(b) requiring courts to evaluate motions to modify child support in view of "the circumstances of the parties at the time of the filing of a motion for modification"** does not limit a court to consider only the actual, not potential, income of the parties. Such an interpretation is undermined by the preceding text in subsection (1)(b) requiring the application of the child support guidelines to the parties circumstances at the time the motion was filed, which guidelines include the requirement that child support be calculated based upon a determination of potential income where a parent is voluntarily unemployed or underemployed. *People ex rel. J.R.T.*, 55 P.3d 217 (Colo. App. 2002), aff'd on other grounds sub nom. *People v. Martinez*, 70 P.3d 474 (Colo. 2003).

**Presumption regarding 10% change set forth in subsection (1)(b) is rebuttable, not conclusive.** Where change in presumed support under guideline based on gross income is less than 10%, the parent seeking modification may nonetheless establish a substantial and continuing change in circumstances, justifying a deviation from the guideline, due to an increase in the parent's personal medical expenses. In re *Ford*, 851 P.2d 295 (Colo. App. 1993).

If the party requesting modification demonstrates that an increase in the obligor's income would result in at least a 10% change in the amount of child support, the child's needs are presumed. In re *McCord*, 910 P.2d 85 (Colo. App. 1995).

**A rebuttable presumption exists that a modification of child support must be granted** whenever application of the child support guidelines would result in more than a 10% change in the amount due. In re *Lishnevsky*, 981 P.2d 609 (Colo. App. 1999).

**Increase in parties' income constitutes a substantial change of circumstances** sufficient to justify increased child support. In re *Anderson*, 761 P.2d 293 (Colo. App. 1988).

**Unmarried cohabitation does not constitute "remarriage"** for the purposes of a suspension, reduction, or termination of spousal

maintenance. In re *Dwyer*, 825 P.2d 1018 (Colo. App. 1991).

**Original support decree anticipated continual support for children while attending school past age 21**, and, therefore, the court was without authority to change decree under auspices of changed circumstances. In re *Channell*, 797 P.2d 819 (Colo. App. 1990).

**Court did not make findings required by § 14-10-115 (14.5) to modify the allocation of federal income tax exemptions between the parties.** Order allocating exemptions to the parties in alternating years, therefore, was reversed and the cause remanded to the trial court. In re *Trout*, 897 P.2d 838 (Colo. App. 1994).

**The court is without authority to create a presumption of changed circumstances that alone would require modification of a support order.** The court's order in effect creates such a presumption only as to the husband's income. While the court may order both parties to exchange relevant financial information, it may not order an automatic increase in child support based solely upon a cost of living raise that the husband might receive. In re *Trout*, 897 P.2d 838 (Colo. App. 1994).

**Obligor spouse's reduced income as a result of a job change in anticipation of or in connection with early retirement may be considered by court in reducing maintenance, and the obligor shall not be considered voluntarily underemployed if** (1) the obligor's decision was made in good faith and not with the motivation to decrease or eliminate maintenance, and (2) the decision was objectively reasonable based on factors such as the obligor's age, health, and the practice of the industry in which the obligor was employed. A similar analysis would apply to an obligee spouse who took an early retirement and sought to increase maintenance on that basis. In re *Swing*, 194 P.3d 498 (Colo. App. 2008).

**Although court must consider the interests of both parties in determining whether the maintenance established in the original order has become unfair as a result of a change in circumstances**, nothing precludes an obligor from making a decision that serves the obligor's own interests, nor does the section require that modification be denied solely because an obligor's decision disadvantages the obligee by reducing the ability to pay maintenance. In re *Swing*, 194 P.3d 498 (Colo. App. 2008).

**Court should compare child support order currently in effect with child support guidelines to determine whether a substantial and continuing change of circumstances exists.** Although the parties' current child support order was the result of the parties' agreement to a reduced amount of child support, the court should have compared the current child support order with the presumed child support obligation under the guidelines at the time of mother's

motion to determine if mother had shown a substantial and continuing change of circumstances sufficient to maintain her motion for modification. In re M.G.C.-G., 228 P.3d 271 (Colo. App. 2010).

**Evidence sufficient to constitute "changed circumstances".** Where neither party had ever followed original support order and instead had made their own agreement and operated under it for several years, it was appropriate for the trial court to modify the child support provision specified in the original decree. In re Menu, 719 P.2d 742 (Colo. App. 1986).

**For evidence insufficient to constitute "changed circumstances",** see In re Corbin, 42 Colo. App. 200, 591 P.2d 1046 (1979); In re Soderquist, 44 Colo. App. 131, 608 P.2d 851 (1980); McVay v. Johnson, 727 P.2d 416 (Colo. App. 1986).

#### D. Discretion of Court.

**Modification of decree allowing alimony is clearly discretionary** and discretion depends upon the facts. Weydeveld v. Weydeveld, 100 Colo. 301, 67 P.2d 72 (1937); Huber v. Huber, 143 Colo. 255, 353 P.2d 379 (1960); Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963).

**In exercising jurisdiction to change or modify an alimony decree courts should proceed with caution,** and unless the evidence clearly shows that the original decree is no longer fair and just, it should not be changed. Harris v. Harris, 113 Colo. 41, 154 P.2d 617 (1944); Beddoes v. Beddoes, 155 Colo. 115, 393 P.2d 1 (1964).

**A trial court does not have the power to retroactively modify child support arrearages which accrue prior to the filing of a motion to modify.** In re Greenblatt, 789 P.2d 489 (Colo. App. 1990).

**Although a trial court has broad discretion** in determining the amount and duration of a maintenance award, a trial court's order will not be upheld if it produces an unfair or inequitable result. Sinn v. Sinn, 696 P.2d 333 (Colo. 1985).

**No authority of court to modify permanent orders without findings supported by evidence justifying modification.** In re Mattson, 694 P.2d 1285 (Colo. App. 1984).

**Payment of alimony in full to date of application for reduction was not a condition precedent** to the court's power to reduce. Weydeveld v. Weydeveld, 100 Colo. 301, 67 P.2d 72 (1937).

**Where an action was on the motion of a defendant for modification of support and visitation orders,** the trial court was under no duty to make written findings of fact and conclusions of law. Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963).

**Child support provisions of separation agreement are not binding on court.** In re

Corbin, 42 Colo. App. 200, 591 P.2d 1046 (1979).

**Maintenance and attorney fee provisions considered together to determine court's abuse of discretion.** In cases where an appeal has been taken from the property division, maintenance and attorney's fee provisions of a dissolution of marriage decree as a whole, they must be considered together to determine whether the trial court abused its discretion. In re Jones, 627 P.2d 248 (Colo. 1981).

**Where the husband's annual salary had not decreased since the entry of the decree, his voluntary assumption of obligations incident to his second marriage** did not constitute such a change in circumstances as to require a modification of the original order, the court did not abuse its discretion in denying his motion to modify. Watson v. Watson, 29 Colo. App. 449, 485 P.2d 919 (1971).

**Where financial status changed between date motion filed and date of hearing.** While the trial court is authorized to consider the needs of the parties as they appear on the date the motion is filed, where the financial status of a party had changed materially between the date the motion was filed and the date of the hearing, the court must take into consideration the circumstances present on each date in determining what relief should be granted. In re Edwards, 39 Colo. App. 26, 560 P.2d 849 (1977).

**Trial judge lacked authority to order husband's assets transferred and sold** where husband sought modification of decree due to changed circumstances and former wife made no challenge to property disposition and did not establish conditions justifying such relief. Mackey v. Hall, 694 P.2d 1275 (Colo. 1985).

**Where only 12 days elapsed between the denial of a motion for modification of a final decree fixing support payments and the filing of a new motion,** no change of circumstances being shown since the denial of the former motion, it was error for trial court to modify the decree on a showing that the husband had remarried and assumed additional obligations as a result thereof. Haase v. Haase, 151 Colo. 168, 376 P.2d 698 (1962).

**Burden of proof for request for modification was not circumvented by court by requiring automatic reinstatement of original spousal maintenance award** at end of period of reduction. In re Ward, 740 P.2d 18 (Colo. 1987).

**Trial court has discretion to determine on a case by case basis whether the best interests of the child require it to raise guideline factors** on its own motion in a proceeding for modification of child support. In re Aldrich, 945 P.2d 1370 (Colo. 1997).

**Court did not abuse discretion by refusing to modify maintenance amount so that it would stay at higher level which was intended to be temporary while the wife completed her**



education and obtained employment even though wife had not obtained suitable employment. In re Wolford, 789 P.2d 459 (Colo. App. 1989).

**Court did not abuse discretion in requiring husband to reimburse wife for deficiencies created by temporarily reduced spousal maintenance payments.** In re Ward, 740 P.2d 18 (Colo. 1987).

**Trial court erred in modifying judgment on its own motion** to allow payment of attorney fees and home sale proceeds in installments without evidence, argument, or finding of "existence of conditions that justify reopening of a judgment." In re Connell, 831 P.2d 913 (Colo. App. 1992).

**Trial court erred in denying mother's motion to set aside ex parte judgment in favor of father for medical and college expenses and attorney fees** since subsection (1)(c) applies to child support payments, which mature under a decree without modification and become a judgment debt similar to any other judgment for money, but not to medical and college expenses, which are subject to additional elements of proof. In re Jacobs, 859 P.2d 914 (Colo. App. 1993).

**Although subsection (1)(c) restricts a trial court's discretion to modify retroactively an accrued child support obligation, the restriction does not extend to the authority to set aside such a judgment on an appropriate basis.** Remand to the district court is appropriate where the mother's motion to set aside the judgment contested her liability for further payments of child support, including the medical and college expenses, because of the emancipation of the children. In re Jacobs, 859 P.2d 914 (Colo. App. 1993).

**The provisions of any decree respecting child support may be modified only as to installments accruing after the filing for modification.** Thus, the trial court's ability to modify retroactively an accrued child support obligation is severely restricted. In re Wright, 924 P.2d 1207 (Colo. App. 1996).

#### E. Jurisdiction of Court.

**The former section, under which jurisdiction was retained by the court to make revisions of its orders in divorce proceedings,** did not provide for a retrial procedure, such was not its purpose, as an application for modification of a divorce decree in pursuance of the statute was neither a rehearing of the original case nor a review of the equities. Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

**Such rule applied to the incidental fact of paternity in a divorce proceeding.** Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

**The trial court's jurisdiction in divorce actions, for the purpose of later revisions of its**

**orders, including division of property,** "because of fraud, misrepresentation, or concealment", was controlled by statute rather than by C.R.C.P. 60(b). Ingels v. Ingels, 29 Colo. App. 585, 487 P.2d 812 (1971).

**A court had jurisdiction to modify a decree as to permanent alimony** at a term subsequent to that at which the decree was entered and before the completion of the payments therein provided, without regard to the section of the code of civil procedure dealing with relief from judgments. Stevens v. Stevens, 31 Colo. 188, 72 P. 1061 (1903); Huff v. Huff, 77 Colo. 15, 234 P. 167 (1925).

**It was held a court rendering a decree of divorce** retained jurisdiction to modify provisions thereof relating to alimony, division of property or a money judgment. Diegel v. Diegel, 73 Colo. 330, 215 P. 143 (1923); Rodgers v. Rodgers, 102 Colo. 94, 76 P.2d 1104 (1938); Mockelmann v. Mockelmann, 121 P.3d 337 (Colo. App. 2005).

The court has continuing jurisdiction for the purpose of such later revisions of its order pertaining to child support as changing circumstances may require. Pacheco v. Pacheco, 38 Colo. App. 181, 554 P.2d 720 (1976).

**The holding that the trial court retained jurisdiction to hear an application for modification of the judgment for permanent alimony,** where an agreement was incorporated in the decree, was overruled. Lay v. Lay, 162 Colo. 43, 425 P.2d 704 (1967).

**Where there had been a change in circumstances before approving an application for a reduction,** in matters of that kind the trial court had jurisdiction, notwithstanding the fact that prior to the modification order a writ of error had been issued by this court. Michaelson v. Michaelson, 167 Colo. 58, 445 P.2d 211 (1968).

**Continuing jurisdiction as to child support.** After jurisdiction of the parties in a divorce action attaches, the court retains jurisdiction over matters concerning the support of the minor children, and may, without notice to husband, enter judgment for arrearages in child support payments. Sauls v. Sauls, 40 Colo. App. 275, 577 P.2d 771 (1977); In re Warner, 719 P.2d 363 (Colo. App. 1986).

**Formerly, terms of agreement not subject to modification absent court's reservation of such powers.** Where a separation agreement was adopted and incorporated into the decree of divorce, and the agreement did not reserve to the court jurisdiction to modify the terms of the alimony provision, nor did the court in its order adopting and incorporating the agreement into the divorce decree specifically reserve the right to modify the terms thereof, the court cannot later modify such an agreement. Burleson v. District Court, 196 Colo. 445, 586 P.2d 665 (1978).

**Specific agreement that court would retain jurisdiction controls.** Where the parties specifically agreed that the trial court would retain jurisdiction to reopen the proceedings if any undisclosed assets were subsequently discovered, that agreement is binding, notwithstanding the provisions of C.R.C.P. 60(b) and this section. In re Hiner, 669 P.2d 135 (Colo. App. 1983), aff'd in part and rev'd in part on other grounds, 710 P.2d 488 (Colo. 1985).

**Court has the power to reserve the right to modify its judgment** based upon the occurrence of an expressly anticipated change of circumstances and is not required to find that the statutory threshold as contained in this section has been met. In re Mirise, 673 P.2d 803 (Colo. App. 1983).

**The court retains jurisdiction to modify an award of limited maintenance even after the term for maintenance has passed** where an actual need for continued support may not have been evident during the term of limited maintenance and the parties have provided for further court orders. Aldinger v. Aldinger, 813 P.2d 836 (Colo. App. 1991).

**The court should not be deprived of the authority to modify an award of support based solely on the desire of promoting the goals of finality and permanency of a dissolution decree**, even though the term for limited maintenance has expired. Aldinger v. Aldinger, 813 P.2d 836 (Colo. App. 1991).

**The court has jurisdiction to consider a motion to modify maintenance which is filed after the original maintenance obligation has ended** where maintenance was awarded as part of a decree of dissolution and the parties have not by agreement expressly precluded the court's jurisdiction. Aldinger v. Aldinger, 813 P.2d 836 (Colo. App. 1991).

**A trial court may expressly reserve jurisdiction to review, adjust, or extend a maintenance award** if: (1) An important contingency exists, the outcome of which may significantly affect the amount or duration of the maintenance award; (2) the contingency is based upon an ascertainable, future event or events; (3) the contingency can be resolved within a reasonable and specific period time. In re Cauffman, 829 P.2d 501 (Colo. App. 1992).

If a trial court intends to reserve jurisdiction over maintenance pursuant to this section it should: (1) State its intent to do so on the record; (2) briefly outline its reasons for doing so, stating what the ascertainable future event upon which the reservation of maintenance jurisdiction is based; and (3) set forth a reasonably specific future time within which maintenance may be reconsidered under this section. In re Cauffman, 829 P.2d 501 (Colo. App. 1992).

**Only where the parties have expressly agreed to preclude modification under § 14-10-112 (6),** should maintenance be incapable of

modification. Sinn v. Sinn, 696 P.2d 333 (Colo. 1985); In re Lee, 781 P.2d 102 (Colo. App. 1989); Aldinger v. Aldinger, 813 P.2d 836 (Colo. App. 1991).

**By accepting the parties' separation agreement, incorporating it into the decree of dissolution, and granting the decree of dissolution that specified that the court retained jurisdiction "as provided by law", the court retained jurisdiction** even though the contractual maintenance agreement specified that at the end of a three-year period, maintenance would be waived forever. In re Burke, 39 P.3d 1226 (Colo. App. 2001).

**Any effort to limit or preclude the authority of a district court to modify the maintenance provision of a separation agreement** must be articulated in language that is specific and unequivocal; if the parties are silent or if the parties reserve such power to the court, a district court may modify the maintenance provisions of a separation agreement incorporated into a decree. In re Burke, 39 P.3d 1226 (Colo. App. 2001).

**District court did not have the power to void a separation agreement that was incorporated in an Illinois judgment.** Upon remand, if the conditions for modification of child support are shown, the district court may modify the Illinois decree but it must recognize the Illinois judgment as the standard against which a change sought under this section must be measured. Rae v. Rubin, 719 P.2d 743 (Colo. App. 1986).

**This section authorizes the modification of those awards traditionally labeled as maintenance in gross**, even though the decree does not expressly reserve the power to modify the order. Sinn v. Sinn, 696 P.2d 333 (Colo. 1985).

**The characterization of periodic payments as maintenance or property division** should be based on the purpose of the payments as determined by the totality of the circumstances. Sinn v. Sinn, 696 P.2d 333 (Colo. 1985).

**No authority to award "equitable reimbursement" of past expenses.** The court does not have the authority in a dissolution of marriage action to award to the wife an "equitable reimbursement" of expenses incurred and paid by wife for the past support of the children. In re Serfoss, 642 P.2d 44 (Colo. App. 1981).

**Separation agreement provision that was incorporated into the dissolution of marriage decree requiring husband to pay part of his future social security benefits to wife is void.** State courts lack subject matter jurisdiction to divide parties' social security benefits in a property distribution. In re Anderson, 252 P.3d 490 (Colo. App. 2010).

**It was formerly well-established in this state that a property settlement agreement which was approved and incorporated in a divorce decree could not subsequently be modified, in the absence of fraud or overreaching.**



Lay v. Lay, 162 Colo. 43, 425 P.2d 704 (1967); In re Corley, 38 Colo. App. 319, 558 P.2d 450 (1976).

Where the agreement of the parties specifically stated that no modification of any term in the agreement would be valid unless in writing and signed by both parties and there was no reservation to the court of the power to modify the maintenance provisions, nor did the court, as a condition of approval of the agreement, reserve the power to modify, the maintenance aspect of the property settlement provision in the decree could only be modified upon proof of fraud or overreaching, or by the subsequent agreement of the parties. In re Corley, 38 Colo. App. 319, 558 P.2d 450 (1976).

**A provision in an agreement which obligated the husband to make fixed monthly payments to the wife**, where the agreement was approved by the court and incorporated in the decree of divorce, was not subject to subsequent modification. Lay v. Lay, 162 Colo. 43, 425 P.2d 704 (1967).

**The parties could, in an agreement**, reserve to the court the power to modify the "alimony" provision, and the court, as a condition to approval of the agreement, could reserve such power to itself, and it could also be modified by the subsequent agreement of the parties. Lay v. Lay, 162 Colo. 43, 425 P.2d 704 (1967).

**The law is well settled in Colorado that a decree determining property rights in a divorce matter is final** and cannot be subsequently modified by reason of changed circumstances. McDonald v. McDonald, 150 Colo. 492, 374 P.2d 690 (1962).

**Formerly, where parties to a divorce action enter into an agreement settling their property rights**, which agreement was incorporated in the final decree, the court was thereafter without jurisdiction, no fraud in procuring the settlement appearing, to modify the terms of the decree concerning such property rights in the absence of consent of the parties. Hall v. Hall, 105 Colo. 227, 97 P.2d 415 (1939).

**Although a former section gave the courts jurisdiction to enforce separate maintenance agreements**, it was not to be construed to mean that parties to such agreements could not modify them by mutual consent. Gavette v. Gavette, 104 Colo. 71, 88 P.2d 964 (1939).

**Trial court's modification of property division, to pay home sale proceeds and attorney fees in installments, limited wife's collection remedies and was therefore in excess of its jurisdiction.** In re Greenblatt, 789 P.2d 489 (Colo. App. 1990); In re Connell, 831 P.2d 913 (Colo. App. 1992).

**Where child was disabled and unable to support herself, an agreement between the parties that child support would terminate when the child reached 21 did not divest the court of jurisdiction to order continuing child**

**support.** In re Salas, 868 P.2d 1180 (Colo. App. 1994).

#### F. Effective Date of Modification.

**Formerly a modifying order or decree relates only to future support payments** and can be effective only from the time of its entry. Lopez v. Lopez, 148 Colo. 404, 366 P.2d 373 (1961); Drazich v. Drazich, 153 Colo. 218, 385 P.2d 259 (1963).

**The general rule that an order reducing the amount of support money operates only in futuro** was not always applicable. Griffith v. Griffith, 152 Colo. 292, 381 P.2d 455 (1963).

**Docketing delays do not excuse or reduce a child support obligation.** Without specific findings of hardship or injustice under subsection (1)(d), modification must be made retroactive. However, amounts awarded retroactively are not arrearages requiring payment of interest under § 14-14-106. In re Armit, 878 P.2d 101 (Colo. App. 1994).

**Generally the modification of support orders must be based on the needs of the parties at the time of the hearing thereon**, rather than on what such conditions may have been in the past or may be in the future. Huber v. Huber, 143 Colo. 255, 353 P.2d 379 (1960).

**Court may now modify support payments back to date of filing of motion**, rather than only from the date of the hearing on the motion as was the case under the earlier statute. In re Walsh, 44 Colo. App. 502, 614 P.2d 913 (1980).

But the trial court has discretion in determining whether to back date a reduction order to the time motion was filed, and trial court's determination will stand absent an abuse of discretion. In re DaFoe, 677 P.2d 426 (Colo. App. 1983).

**Under subsection (5), modification of support must date from the change in physical custody.** Mother was not liable for child support arrearages based on a stipulation between the parties under which she agreed to pay child support, because she regained physical custody of the child and the child continued to live with her for the entire period for which support was claimed. In re Foley, 879 P.2d 452 (Colo. App. 1994).

**Provisions of subsection (1) and subsection (5) relating to retroactivity of modification date are irreconcilable.** The subsection enacted latest, which states that modification should be effective as of the date of the filing of the motion for modification of child support, read together with the consistent provisions of the statutory section, prevails. The conflicting subsection relating to retroactive modification back to the date of change of physical custody is repealed by implication. In re Pickering, 967 P.2d 164 (Colo. App. 1997) (decided prior to 1998 amendments to subsection (1) and (5)).

**Subsection (5) provides that when children change their primary residence,** the provisions for obligor's child support under the existing child support order will be modified as of the date when the physical care was changed. It does not provide that either parent's obligation terminates for a time; instead, the existing order is to be modified as of the date the children switch residences. In re Emerson, 77 P.3d 923 (Colo. App. 2003).

**Nor does the inability to calculate the amount due change the fact that mother became the obligor as of the date of the change in residence.** In re Emerson, 77 P.3d 923 (Colo. App. 2003).

**Subsection (5) relates only to provisions for child support for the obligor under the existing order.** Where parents agreed that child could live with father who is the obligor under the existing child support order, child support may be ordered for mother effective the date of filing of a motion, not retroactive to the date when physical care was changed. In re White, 240 P.3d 534 (Colo. App. 2010) (holding contrary to In re Emerson, annotated above).

**Mother does not become "obligor" under existing child support order by virtue of a mutually agreed upon change in physical care.** The statute encourages parties in such cases to modify or update the child support order. Mother's obligation commences at the time of filing of the motion. In re White, 240 P.3d 534 (Colo. App. 2010) (holding contrary to In re Emerson, annotated above).

**Subsection (5) provides a limited exception to the general rule that child support may only be modified retroactive to the date of filing of a motion** and was designed to protect the obligor in an existing order who has accepted the physical care of the child. In re White, 240 P.3d 534 (Colo. App. 2010) (holding contrary to In re Emerson, annotated above).

#### G. Scope of Review.

**Application of the provisions of this section by the court for the modification of a prior child support order entered under the Uniform Parentage Act was error as a matter of law.** Ashcraft v. Allis, 747 P.2d 1274 (Colo. App. 1987).

**One who has accepted benefits of judgment may not seek reversal of that judgment on appeal.** In re Jones, 627 P.2d 248 (Colo. 1981).

**Unless it clearly appeared that the trial court, in resolving the problems arising under the evidence appearing in the record, acted unreasonably or arbitrarily in making the orders and awards of which complaint is made, it was not proper for the supreme court to modify or set them aside.** Rodgers v. Rodgers, 102 Colo. 94, 76 P.2d 1104 (1938); Cohan v. Cohan, 150 Colo. 249, 372 P.2d 149 (1962).

**There was no difficulty in laying down the rule that governed, but there was difficulty in applying it,** because what was, and what was not, reasonable and where a reasonable discretion ended and arbitrary action began was not susceptible of mathematical demonstration, and the application of the rule necessarily introduced the factor of individual judgment, which, as between different persons in the same case, was a variable quantity. Cohan v. Cohan, 150 Colo. 249, 372 P.2d 149 (1962).

**A decree of divorce which had been modified by the supreme court on the determination of an appeal** in respect to the amount and payment of alimony could have been further modified on petition for rehearing as to provide for the acceptance of the husband's tender of a deed of real estate in lieu of all pecuniary allowances of alimony. Luthe v. Luthe, 12 Colo. 421, 21 P. 467 (1889).

**Where a mother through her attorney in open court, disclaimed any interest in upholding a judgment for cumulated support payments and recommended that the judgment be set aside and lesser sum substituted in justice to both parties, she could not change her position in the supreme court because dissatisfied with amount of reduction by the trial court.** Griffith v. Griffith, 152 Colo. 292, 381 P.2d 455 (1963).

**Referee's findings concerning whether a sufficient change of circumstances has occurred to justify modification of child support order is binding upon the court, unless such findings are without evidentiary support.** McVay v. Johnson, 727 P.2d 416 (Colo. App. 1986).

**Judgment which took into consideration the proceeds of moneys embezzled by the husband set aside.** In re Allen, 724 P.2d 651 (Colo. 1986).

### III. TERMINATION OF MAINTENANCE AND CHILD SUPPORT.

**Annotator's note.** Since §§ 14-10-122 (2) and 14-10-122 (3) are similar to repealed § 46-1-5 (5), C.R.S. 1963, and § 46-1-5, CRS 53, and because repealed § 46-2-5, C.R.S. 1963, and § 46-2-5, CRS 53 have some relevance, relevant cases decided under those provisions have been included in the annotations to this section.

**Section inapplicable where agreement provides that only wife's death would absolve husband's liability.** Although the language of a separation agreement does not explicitly provide for the continuation or termination of maintenance in the event of remarriage where it indicates that it was the contemplation of the parties that only the wife's death would absolve the husband of liability for payment of maintenance, the provisions of this section do not



apply. In re Hahn, 628 P.2d 175 (Colo. App. 1981).

**The presence of a general nonmodification clause in the separation agreement is sufficient to overcome the statutory presumption that maintenance terminates upon the recipient's remarriage.** While express language concerning termination is preferable, the absence of that language is not fatal if the intent is evident from the agreement or decree as a whole. In re Parsons, 30 P.3d 868 (Colo. App. 2001).

**The public policy which provides an obligation for one spouse to support the other spouse when there is a need and an ability to pay applies equally to reinstate a support obligation following annulment of a subsequent marriage where the equities dictate.** In re Cargill and Rollins, 843 P.2d 1335 (Colo. 1993).

**Ordinarily alimony ceased upon the death of the husband, or the wife.** Elmer v. Elmer, 132 Colo. 57, 285 P.2d 601 (1955); Doll v. Doll, 140 Colo. 546, 345 P.2d 723 (1959); Menor v. Menor, 154 Colo. 475, 391 P.2d 473 (1964); In re Piper, 820 P.2d 1198 (Colo. App. 1991).

**Child support obligation of noncustodial parent continues after death of custodial parent.** When a noncustodial parent's child support obligation is incorporated into a dissolution decree, and the custodial parent dies and the child is not in the physical custody of the noncustodial parent, the child support obligation of the noncustodial parent continues beyond the death of the custodial parent in accordance with the terms of the dissolution decree. Abrams v. Connelly, 781 P.2d 651 (Colo. 1989).

**Legal obligation expanded.** In effect, by this section the general assembly has expanded the legal obligation of the parent of a minor child entitled to receive support pursuant to a dissolution of marriage decree. In re Icke, 189 Colo. 319, 540 P.2d 1076 (1975).

**Parent was not divested of child support obligation based on payments that accrued prior to a final adoption decree.** In addition, father was denied equitable relief from child support obligation where record did not reflect evidence of representations upon which the father relied or that an evidentiary hearing was requested. In re Murray, 790 P.2d 868 (Colo. App. 1989).

**Unless otherwise provided, the obligation to support minor children survives the death of the parent.** In re Icke, 189 Colo. 319, 540 P.2d 1076 (1975).

**There was no authority under which a husband could be compelled to carry insurance on his life to the end that a divorced wife could from that source continue to receive alimony after the death of the husband, as this obligation to pay alimony ends with death.** Ferguson v. Olmsted, 168 Colo. 374, 451 P.2d 746 (1969).

**Carrying life insurance as means of continuing alimony permitted.** Subsection (2) changes the rule under prior law that an order

requiring a husband to carry life insurance as a means of continuing alimony after his death was not permitted. In re Koktavy, 44 Colo. App. 305, 612 P.2d 1161 (1980).

**Court may order spouse to obtain life insurance to secure future maintenance payments even though the obligation to pay maintenance terminated upon the death of the spouse.** In re Graff, 902 P.2d 402 (Colo. App. 1994).

**Under subsection (5) of former § 46-1-5, C.R.S. 1963, where there is no written agreement or stipulation to the contrary, the right to alimony automatically terminated by operation of law upon remarriage of the wife without the necessity of the husband's affirmative action for termination by court order.** Spratlen v. Spratlen, 30 Colo. App. 91, 491 P.2d 608 (1971).

**Where an agreement to pay alimony was indefinite in time, and merely provided that the reduction of husband's obligations at his father's death would be taken into consideration in fixing the amount of periodic alimony payments due thereafter, since there was no written agreement to the contrary, the trial court should have ruled that the husband's obligation to pay alimony ceased at the wife's remarriage.** Spratlen v. Spratlen, 30 Colo. App. 91, 491 P.2d 608 (1971).

**The term "remarriage" as used in this section means the status of remarriage, including both common law and ceremonial marriage.** In re Cargill and Rollins, 843 P.2d 1335 (Colo. 1993).

**Remarriage does not terminate property right adjustment.** Court order constituting an adjustment of property rights between a former husband and wife did not terminate upon remarriage of wife. Greer v. Greer, 32 Colo. App. 196, 510 P.2d 905 (1973).

**An annulment of a marriage does not automatically reinstate a maintenance obligation from a previous marriage as a matter of law, but the obligation may be reinstated depending on the facts and equities of the situation.** In re Cargill and Rollins, 843 P.2d 1335 (Colo. 1993).

**Remarriage may warrant reduction in "child support" payments to eliminate that portion of the payment actually intended as maintenance.** Gebhardt v. Gebhardt, 198 Colo. 28, 595 P.2d 1048 (1979).

**Duty to support dependent adult child.** Where an adult child, subject to proof of her alleged incapacity, is still dependent on her parents, then the child is not emancipated under this article and the duty of support continues. In re Koltay, 646 P.2d 405 (Colo. App. 1982), aff'd, 667 P.2d 1374 (Colo. 1983).

**Provision for post-emancipation support may be made by written agreement of the parties or, in proper circumstances, may be included in a decree entered before the child's 21st birthday**

and guided by consideration of the factors listed in § 14-10-115. In re Huff, 834 P.2d 244 (Colo. 1992).

**What constitutes emancipation is a question of law.** In re Robinson, 629 P.2d 1069 (Colo. 1981); Baker v. Baker, 667 P.2d 767 (Colo. App. 1983).

**Establishment of emancipation.** When, by express or implied agreement between a child and a parent, a child who is capable of providing for his own care and support undertakes to leave his parent's home, earn his own living and do as he wishes with his earnings, emancipation occurs. In re Robinson, 629 P.2d 1069 (Colo. 1981).

Whether emancipation has been established must be determined in light of all the relevant facts and circumstances of the case. In re Robinson, 629 P.2d 1069 (Colo. 1981).

Emancipation ordinarily occurs upon the attainment of majority. Koltay v. Koltay, 667 P.2d 1374 (Colo. 1983).

**Burden of proving emancipation** is on the one asserting it. In re Robinson, 629 P.2d 1069 (Colo. 1981).

**Minor unemancipated child's earnings from summer employment** do not affect the noncustodial parent's obligation to provide support. In re Anderson, 638 P.2d 826 (Colo. App. 1981).

**Emancipation does not occur where child incapable of self-support.** If a child is physically or mentally incapable of self-support when he attains the age of majority, "emancipation" does not occur, and the duty of parental support continues for the duration of the child's disability. Koltay v. Koltay, 667 P.2d 1374 (Colo. 1983).

**Emancipation automatic upon child's marriage.** Emancipation occurs automatically upon the valid marriage of child, and the validity of a marriage is tested under the laws of the jurisdiction where the marriage took place. In re Fetters, 41 Colo. App. 281, 584 P.2d 104 (1978).

**Child, once emancipated by marriage, could become unemancipated** by the subsequent annulment of that marriage. In re Fetters, 41 Colo. App. 281, 584 P.2d 104 (1978).

**A minor may be emancipated for some purposes but not for others.** In re Robinson, 629 P.2d 1069 (Colo. 1981).

**For evidence insufficient to support finding that child emancipated,** see In re Clay, 670 P.2d 31 (Colo. App. 1983).

**For evidence insufficient to establish temporary emancipation during summer vacation,** see In re Robinson, 629 P.2d 1069 (Colo. 1981).

**Support payments for a child who is emancipated by marriage do not automatically terminate unless** there is a specific amount separately stated for the support of the particular

child emancipated. Ferguson v. Ferguson, 32 Colo. App. 145, 507 P.2d 1110 (1973).

**Change in the age of emancipation and duty of support in § 14-10-115 did not automatically modify a parent's existing obligation of support** and plain language of subsection (4) makes clear that the changes in the age of emancipation will affect a support obligation only if a motion to modify is filed and only with respect to those support payments coming due after such filing. In re Dion, 970 P.2d 968 (Colo. App. 1997).

**This section plainly establishes substantial and continuing changed circumstances as the prerequisite to modification of all postsecondary education support orders.** While the parties can agree to postsecondary education support, the terms of their agreement do not bind the court, and the parties cannot preclude or limit subsequent court modification of terms concerning child support. In re Ludwig, 122 P.3d 1056 (Colo. App. 2005).

**A defendant who sought reduction in support payments had burden of proving** that the payments should be reduced by any particular amount. Ferguson v. Ferguson, 32 Colo. App. 145, 507 P.2d 1110 (1973).

**Formerly, the necessity for a separate maintenance could have terminated at any time by reconciliation of the parties,** or by the death of one of them. Vines v. Vines, 137 Colo. 449, 326 P.2d 662 (1958).

**The general rule was that reconciliation did not automatically terminate property settlement agreements,** and the courts in such cases looked to the intent of the parties to determine if reconciliation was meant to revoke the property settlement agreement, and the question of whether or not reconciliation affects a property settlement agreement was a question of fact to be determined by the evidence. Larson v. Goodman, 28 Colo. App. 418, 475 P.2d 712 (1970).

**It is error as a matter of law** to fail to weigh the evidence giving due consideration and thought to all of the statutory factors of § 14-10-115 (1) where the noncustodial parent has ample resources with which to contribute to his children's education, and their ability to acquire and their need for an education are established by the evidence. In re Pring, 742 P.2d 343 (Colo. App. 1987).

Hence, the trial court erred in requiring these children to exhaust their own assets for educational purposes before requiring either parent to contribute to their education. In re Pring, 742 P.2d 343 (Colo. App. 1987).

**Absent a finding that a motion for custody evaluation was made for purpose of delay, the court must order an evaluation upon request of one of the parties.** Kuyatt v. District Court, 817 P.2d 116 (Colo. 1991).



Where the agreement fails to expressly provide for the termination of child support or educational costs, the court must interpret and enforce the implied obligation to render it lawful. In re Meisner, 807 P.2d 1205 (Colo. App. 1990); In re Wisdom, 833 P.2d 884 (Colo. App. 1992).

When court interprets an implied obligation, it must consider all of the provisions of the agreement as well as the circumstances at the time it was made, consonant with its dominant purpose. In re Wisdom, 833 P.2d 884 (Colo. App. 1992).

**14-10-123. Commencement of proceedings concerning allocation of parental responsibilities - jurisdiction - automatic temporary injunction - enforcement.** (1) A proceeding concerning the allocation of parental responsibilities is commenced in the district court or as otherwise provided by law:

(a) By a parent:  
 (I) By filing a petition for dissolution or legal separation; or  
 (II) By filing a petition seeking the allocation of parental responsibilities with respect to a child in the county where the child is permanently resident or where the child is found; or

(b) By a person other than a parent, by filing a petition seeking the allocation of parental responsibilities for the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical care of one of the child's parents;

(c) By a person other than a parent who has had the physical care of a child for a period of one hundred eighty-two days or more, if such action is commenced within one hundred eighty-two days after the termination of such physical care; or

(d) By a parent or person other than a parent who has been granted custody of a child or who has been allocated parental responsibilities through a juvenile court order entered pursuant to section 19-1-104 (6), C.R.S., by filing a certified copy of the juvenile court order in the county where the child is permanently resident. Such order shall be treated in the district court as any other decree issued in a proceeding concerning the allocation of parental responsibilities.

(2) Except for a proceeding concerning the allocation of parental responsibilities commenced pursuant to paragraph (d) of subsection (1) of this section, notice of a proceeding concerning the allocation of parental responsibilities shall be given to the child's parent, guardian, and custodian or person allocated parental responsibilities, who may appear and be heard and may file a responsive pleading. The court may, upon a showing of good cause, permit the intervention of other interested parties.

(2.5) Upon the filing of a petition pursuant to subsection (1) of this section, each party shall provide to the court, in the manner prescribed by the court, his or her social security number and the social security number of each child named in the petition.

(3) (a) Upon the filing of a petition concerning the allocation of parental responsibilities pursuant to this section and upon personal service of the petition and summons on a respondent or upon waiver and acceptance of service by a respondent, a temporary injunction shall be in effect against both parties:

(I) Enjoining each party from molesting or disturbing the peace of the other party;  
 (II) Restraining each party from removing a minor child who is the subject of the proceeding from the state without the consent of all other parties or an order of the court modifying the injunction; and

(III) Restraining each party, without at least fourteen days' advance notification and the written consent of all other parties or an order of the court modifying the injunction, from cancelling, modifying, terminating, or allowing to lapse for nonpayment of premiums a policy of health insurance or life insurance that provides coverage to a minor child who is the subject of the proceeding or that names the minor child as a beneficiary of a policy.

(b) The provisions of the temporary injunction shall be printed upon the summons and the petition. The temporary injunction shall be in effect upon personal service of the petition and summons on a respondent or upon waiver and acceptance of service by a respondent and shall remain in effect against each party until the court enters the final decree, dismisses the petition, or enters a further order modifying the injunction. A party may apply to the

court for further temporary orders pursuant to section 14-10-125, an expanded temporary injunction, or modification or revocation of the temporary injunction.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this subsection (3), the temporary injunction described in this subsection (3) shall not apply to a proceeding concerning the allocation of parental responsibilities commenced pursuant to paragraph (d) of subsection (1) of this section or to a proceeding concerning the allocation of parental responsibilities commenced by a parent that is governed by the automatic temporary injunction pursuant to section 14-10-107 (4) (b).

(d) For purposes of enforcing the automatic temporary injunction that becomes effective in accordance with this subsection (3), if the respondent shows a duly authorized peace officer, as described in section 16-2.5-101, C.R.S., a copy of the petition and summons filed and issued pursuant to this section, or if the petitioner shows the peace officer a copy of the petition and summons filed and issued pursuant to this section together with a certified copy of the affidavit of service of process or a certified copy of the waiver and acceptance of service, and the peace officer has cause to believe that a violation of the part of the automatic temporary injunction that enjoins a party from molesting or disturbing the peace of the other party has occurred, the peace officer shall use every reasonable means to enforce that part of the injunction against the petitioner or respondent, as applicable. A peace officer shall not be held civilly or criminally liable for his or her actions pursuant to this subsection (3) if the peace officer acts in good faith and without malice.

**Source:** **L. 71:** R&RE, p. 529, § 1. **C.R.S. 1963:** § 46-1-23. **L. 73:** p. 554, § 10. **L. 97:** Entire section amended, p. 515, § 1, effective July 1. **L. 98:** Entire section amended, p. 1377, § 3, effective February 1, 1999. **L. 2010:** (3) added, (HB 10-1097), ch. 39, p. 159, § 2, effective August 15. **L. 2011:** (2.5) added, (SB 11-123), ch. 46, p. 119, § 3, effective August 10. **L. 2012:** (1)(c) amended, (SB 12-175), ch. 208, p. 832, § 29, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(c) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For procedure for intervention of other parties generally, see C.R.C.P. 24; for procedure in a custody proceeding, see § 14-13-209.

## ANNOTATION

**Law reviews.** For note, "The Puzzle of Jurisdiction in Child Custody Actions", see U. Colo. L. Rev. 541 (1966). For article, "Mediation of Contested Child Custody Disputes", see 11 Colo. Law. 336 (1982). For article, "The Role of the Guardian ad Litem in Custody and Visitation Disputes", see 17 Colo. Law. 1301 (1988). For article, "Custody Evaluations in Colorado", see 18 Colo. Law. 1523 (1989). For article, "Legal Protection of Children in Non-traditional Families", see 29 Colo. Law. 79 (November 2000). For article, "Parental Rights and Responsibilities of Grandparents and Third Parties", see 30 Colo. Law. 63 (May 2001). For article, "The Constitutionality of Colorado's Grandparent Visitation and Third-Party Standing Statutes", see 32 Colo. Law. 51 (February 2003). For article, "Securing the Nonparent's Place in a Child's Life Through Adoption and Adoption Alternatives", see 37 Colo. Law. 27 (October 2008).

**No jurisdiction.** Colorado court lacks jurisdiction to hear a petition for custody filed by a

parent when a child is not a permanent resident nor located in the state when the petition is filed. In re Barnes, 907 P.2d 679 (Colo. App. 1995).

**This section permits the intervention of interested parties;** it does not mandate that they be made parties. In re Trough, 631 P.2d 1183 (Colo. App. 1981).

**Court retains jurisdiction over child custody issues** until the child reaches the age of emancipation. In re Hartley, 886 P.2d 665 (Colo. 1994).

**Petition need not be incidental to dissolution of marriage.** Petitions for legal custody do not have to be incidental to a dissolution of marriage proceeding for the district court to have jurisdiction. In re Davis, 656 P.2d 42 (Colo. App. 1982); In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004).

**Applications for parental responsibilities by a nonparent implicate the fundamental constitutional right to family autonomy and privacy, and a legislative enactment that infringes on a fundamental right is constitu-**



tionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible. In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004).

Subsection (1)(c) limits jurisdiction to the class of nonparents who may seek parental responsibilities to only those individuals who have had a recent or continuing role as a caretaker and thereby protects against undue interference with the parent-child relationship. In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004).

Subsection (1)(c) is the legislature's recognition of psychological parenting, and a determination of "physical care" includes the amount of time a child has spent in the actual, physical possession of a nonparent and the psychological bonds nonparents develop with children who have been in their physical possession and control for a significant period of time and does not require that this be exclusive physical care; but the jurisdictional requirements of this paragraph (c), which creates standing for non-parents, must be applied narrowly. In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004).

Nothing in subsection (1)(c) requires that a legal relationship exist between the nonparent and the child, but only that the nonparent had physical care of the child for at least six months. In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004).

To establish standing, however, the nonparent must show that the natural parent or parents voluntarily relinquished custody of the child. The nonparent bears the burden of proving that the natural parent voluntarily permitted the nonparent to share in or assume the parent's responsibility to provide physical care to the child. In re C.R.C., 148 P.3d 458 (Colo. App. 2006).

Under any definition of psychological parent, emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with the person who is the psychological parent. In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004).

Once a petition under this section is certified to be determined as part of a pending dependency and neglect action under the Children's Code, dissolution-of-marriage statutes cease to apply. Instead, provisions of the Children's Code govern, in view of the differing policies behind the respective statutes. People in Interest of D.C., 851 P.2d 291 (Colo. App. 1993).

This section does not give standing to a person on the basis that he is a presumptive father under the Uniform Parentage Act. In re Ohr, 97 P.3d 354 (Colo. App. 2004).

Nonparents who had physical custody of child beginning immediately after his birth had standing to seek custody under this section where, in adopting subsection (1)(b), the general assembly intended that a literal meaning

be applied to the term "physical custody" and did not intend to equate "physical custody" with either "legal custody" or the "parental right to continued physical or legal custody". Thus, in keeping with the overriding policy of promoting the best interests of children, Colorado has adhered to a liberalized view as to the standing of nonparents to commence and participate in custody proceedings. In re Custody of C.C.R.S., 872 P.2d 1337 (Colo. App. 1993), *aff'd*, 892 P.2d 246 (Colo. 1995).

To establish standing, however, the nonparent must show that the natural parent or parents voluntarily relinquished custody of the child. The nonparent bears the burden of proving that the natural parent voluntarily permitted the nonparent to share in or assume the parent's responsibility to provide physical care to the child. In re C.R.C., 148 P.3d 458 (Colo. App. 2006).

Person fitting criteria in subsection (1) of this section may qualify as an "appropriate party" within the meaning of § 19-4-116. In re Ohr, 97 P.3d 354 (Colo. App. 2004).

To determine whether a nonparent had "physical care" and, thus, standing to seek allocation of parental responsibilities, courts should consider the nature, frequency, and duration of contacts between the child and the parent and between the child and the nonparent, including the amount of time the child has spent in the actual, physical possession of the nonparent and the parent, which physical care need not be uninterrupted or exclusive. In re L.F., 121 P.3d 267 (Colo. App. 2005).

The court should consider the manner in which a child came into the nonparent's physical possession in determining the threshold issue of whether the nonparent has standing under this section, and the nonparent must show that the natural parent voluntarily relinquished custody of the child. The nonparent bears the burden of proving that the natural parent voluntarily permitted the nonparent to share in or assume the parent's responsibility to provide physical care to the child. In re C.R.C., 148 P.3d 458 (Colo. App. 2006).

The existence of a bond between a caregiver and a child, or the lack of a bond between the parents and the child, where the parents continue to exercise their personal rights by directing the caregiver, is irrelevant to the determination of whether the caregiver had "physical care" of the child as required by subsection (1)(c). In re L.F., 121 P.3d 267 (Colo. App. 2005).

Granting standing under subsection (1)(c) to those who care for and nurture a child at the request of and under the ongoing direction and control of the parents could be disruptive of the parent-child relationship and implicate the parents' decision-making rights, regardless of whether the caregiver developed a bond with the child; it could also burden parents who continue

to exercise their decision-making rights with the threat that those who provide care at their discretion and under their direction would be able to initiate emotionally and financially costly litigation. In re L.F., 121 P.3d 267 (Colo. App. 2005).

**Subsection (1)(b) creates a basis for standing that is independent of subsection (1)(c),** and, because it was not disputed that the child was in the care of her grandmother, stepfather met the requirements of subsection (1)(b). Based on the plain language of the statute, stepfather was eligible to bring the action even though child was not in his physical care. In re K.M.B., 80 P.3d 914 (Colo. App. 2003).

**Nothing within the plain language of either subsection (1)(b) or (1)(c) requires the two subsections to be applied together** or engrfts the physical care requirement imposed in the latter subsection upon nonparents who seek standing under the former subsection. By its terms, subsection (1)(b) establishes that any nonparent has standing as long as the child is not in the physical care of a parent. In re K.M.B., 80 P.3d 914 (Colo. App. 2003).

**Both subsection (1)(b) and subsection (1)(c) are limited by the requirement that the biological parent consent or acquiesce in the transfer of physical care to the party seeking standing.** Both subsections require volition on the part of the biological parents. In re C.R.C., 148 P.3d 458 (Colo. App. 2006).

**Proof that the nonparent had become the psychological parent of the child** is not a condition precedent to standing under either subsection (1)(b) or (1)(c). In re Custody of A.D.C., 969 P.2d 708 (Colo. App. 1998).

**The fact that reported cases under this section involved step-parents or blood relatives of the child or his parents does not mean that only those persons should be accorded standing as “person(s) other than a parent”** where no language in the statute or in any Colorado appellate decision indicates that such relationship is a legal requirement for nonparent standing to commence custody proceedings. In re Custody of C.C.R.S., 872 P.2d 1337 (Colo. App. 1993), aff’d, 892 P.2d 246 (Colo. 1995).

**Petition filed within six months of child’s nonparent’s departure from the joint residence was timely, and court properly exercised jurisdiction over motion for parental responsibilities by second mother to child** when both mothers lived with child for six and one-half years, both shared financial cost of supporting the child, and both shared in major decisions involving the child, even though only one mother was listed as the child’s mother on the child’s adoption papers. In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004).

**Colorado district court had no jurisdiction under this section when it issued order granting full faith and credit to Wyoming court**

**order.** Gutierrez v. District Court, 183 Colo. 264, 516 P.2d 647 (1973).

**Proceedings under the Uniform Dissolution of Marriage Act are not preempted by the Colorado Children’s Code** where mother placed child with non-parents in contemplation of relinquishment and adoption proceedings under the Children’s Code, but such proceedings later became impossible when the mother withdrew her consent and did not honor her agreement to obtain counseling as required by the Children’s Code. In re Custody of C.C.R.S., 872 P.2d 1337 (Colo. App. 1993), aff’d, 892 P.2d 246 (Colo. 1995).

**Showing of unfitness of biological parent is not required before parental responsibilities can be allocated to nonparent.** People ex rel. A.M.K., 68 P.3d 563 (Colo. App. 2003).

**Due process does not require a showing of parental unfitness or the use of an enhanced standard of proof** in a case that does not involve the termination or relinquishment of parental rights nor their abrogation by adoption. In re Custody of C.C.R.S., 872 P.2d 1337 (Colo. App. 1993), aff’d, 892 P.2d 246 (Colo. 1995).

**Due process does not require clear and convincing evidence to support the award of custody to a nonparent** with standing to seek custody of a child, but, rather, a showing by a preponderance of the evidence that it is in the best interests of the child. In re Custody of A.D.C., 969 P.2d 708 (Colo. App. 1998).

**Child is not an “other” party who may intervene through independent counsel pursuant to this section.** Since a child is represented by a guardian ad litem in custody, visitation, and parenting time proceedings, a child is already fully represented and is not a party able to intervene in such proceedings. In re Hartley, 886 P.2d 665 (Colo. 1994).

**Stepfather lacked standing to seek parenting time, even under argument of “psychological parent”,** under subsection (1)(c) because he did not have physical care of the child in the six months prior to filing his motion as required by subsection (1). In re C.T.G., 179 P.3d 213 (Colo. App. 2007).

**Presumption favoring a parent’s determination regarding the best interests of the child may be rebutted by proof of clear and convincing evidence of either:** (1) The parent’s unfitness; or (2) the best interests of the child. In re Adoption of C.A., 137 P.3d 318 (Colo. 2006); In re Reese, 227 P.3d 900 (Colo. App. 2010).

**Nonparent need not show demonstrated harm to child to satisfy “special weight” accorded to parental determinations.** In re Adoption of C.A., 137 P.3d 318 (Colo. 2006); In re Reese, 227 P.3d 900 (Colo. App. 2010).

**Court may not allocate parental responsibilities to a nonparent unless it accords “special weight” to the parent’s determination of the best interests of the child.** Application of



the clear and convincing proof standard is necessary to accord special weight to a parent's determination of best interests. In re Reese, 227 P.3d 900 (Colo. App. 2010).

**A court meets the due process requirement in Troxel v. Granville, 530 U.S. 57 (2000), to accord "special weight" to a parent's determination of the best interests of a child** by considering all relevant factors set forth in § 14-10-124 and entering findings based on clear and convincing proof that the best interests of the child justify the award of parental responsibilities to the nonparent. In re Reese, 227 P.3d 900 (Colo. App. 2010).

**The intrinsic threat of emotional harm to child from curtailment or termination of relationship with psychological parent** is not, in itself, sufficient to satisfy the requirement that the court give special weight to the presumption

that a parent's determination is in the best interests of the child. Section 14-10-124 identifies non-exclusive statutory factors courts should consider in determining the best interests of the child. In re Reese, 227 P.3d 900 (Colo. App. 2010).

**Husband and wife who sought and were granted custody of a nonbiological child under a parental responsibility order** owed a duty of support to the child, and trial court had the authority in their dissolution of marriage proceeding to order husband to pay child support pursuant to § 14-10-115 (1) and (17). In re Rodrick, 176 P.3d 806 (Colo. App. 2007).

**Applied in** In re Pilcher, 628 P.2d 126 (Colo. App. 1980); Deeb v. Morris, 14 Bankr. 217 (Bankr. D. Colo. 1981); In re Johnson, 634 P.2d 1034 (Colo. App. 1981); In re Matter of V.R.P.F., 939 P.2d 512 (Colo. App. 1997).

**14-10-123.3. Requests for parental responsibility for a child by grandparents.** Whenever a grandparent seeks parental responsibility for his or her grandchild pursuant to the provisions of this article, the court entering such order shall consider any credible evidence of the grandparent's past conduct of child abuse or neglect. Such evidence may include, but shall not be limited to, medical records, school records, police reports, information contained in records and reports of child abuse or neglect, and court records received by the court pursuant to section 19-1-307 (2) (f), C.R.S.

**Source: L. 91:** Entire section added, p. 261, § 1, effective May 31. **L. 98:** Entire section amended, p. 1378, § 4, effective February 1, 1999. **L. 2003:** Entire section amended, p. 1401, § 4, effective January 1, 2004.

**Cross references:** For the legislative declaration contained in the 2003 act amending this section, see section 1 of chapter 196, Session Laws of Colorado 2003.

#### ANNOTATION

**Law reviews.** For article, "Parental Rights and Responsibilities of Grandparents and Third Parties", see 30 Colo. Law. 63 (May 2001).

**14-10-123.4. Rights of children in matters relating to parental responsibilities.** The general assembly hereby declares that children have certain rights in the determination of matters relating to parental responsibilities, including the right to have such determinations based upon the best interests of the child.

**Source: L. 87:** Entire section added, p. 574, § 1, effective July 1. **L. 98:** Entire section amended, p. 1378, § 5, effective February 1, 1999.

#### ANNOTATION

**Law reviews.** For article, "The Constitutionality of Colorado's Grandparent Visitation and Third-Party Standing Statutes", see 32 Colo. Law. 51 (February 2003).

**This section, coupled with the permissive language found throughout §§ 14-10-123.5 and 14-10-124,** indicates that the best interests of the child, and not the rights or wishes of

either parent, must dictate the outcome of any custody dispute. In re Lester, 791 P.2d 1244 (Colo. App. 1990).

**An award of custody to a nonparent with standing** may be made upon a showing by a preponderance of the evidence that it is in the best interests of the child. In re Custody of A.D.C., 969 P.2d 708 (Colo. App. 1998).

**No right to participate through chosen counsel.** This section does not include a right for a child to participate in custody matters through counsel chosen by the child. In re Hartley, 886 P.2d 665 (Colo. 1994).

**To protect rights of the child, the court may interview the child or appoint a guardian ad litem to represent the child's interests.** In re D.R.V-A, 976 P.2d 881 (Colo. App. 1999).

#### **14-10-123.5. Joint custody. (Repealed)**

**Source:** L. 83: Entire section added, p. 645, § 2, effective June 10. L. 84: (4) amended, p. 1118, § 10, effective June 7. L. 87: (1) and (6) amended and (8) added, pp. 574, 575, §§ 5, 2, effective July 1; (6) repealed, p. 577, § 2, effective July 1. L. 98: (9) added by revision, pp. 1378, 1415, §§ 6, 85.

**Editor's note:** Subsection (9) provided for the repeal of this section, effective February 1, 1999. (See L. 98, pp. 1378, 1415.)

**14-10-123.6. Required notice of prior restraining orders to prevent domestic abuse - proceedings concerning parental responsibilities relating to a child - resources for family services.** (1) The general assembly hereby finds, determines, and declares that domestic violence is a pervasive problem in society and that a significant portion of domestic violence in society occurs in or near the home. The general assembly further recognizes research demonstrating that children in a home where domestic violence occurs are at greater risk of emotional, psychological, and physical harm. Studies have found that eighty to ninety percent of the children living in homes with domestic violence are aware of the violence. The general assembly finds that emerging research has established that these children are at greater risk of the following: Psychological, social, and behavioral problems; higher rates of academic problems; more physical illnesses, particularly stress-associated disorders; and a greater propensity to exhibit aggressive and violent behavior, sometimes carrying violent and violence-tolerant roles to their adult relationships. Studies have also noted that children are affected to varying degrees by witnessing violence in the home, and each child should be assessed on an independent basis. Accordingly, the general assembly determines that it is in the best interests of the children of the state of Colorado for the courts to advise the parents or guardians of children affected by domestic violence about the availability of resources and services and for such persons to be provided with information concerning the resources and services available to aid in the positive development of their children. It is the intent of the general assembly that such information would increase the awareness of the possible effects of domestic violence on children in the home, while providing the parents and legal guardians of these children with a comprehensive resource of available children's services as well as potential financial resources to assist parents and legal guardians seeking to retain services for their children affected by domestic violence.

(2) When filing a proceeding concerning the allocation of parental responsibilities relating to a child pursuant to this article, the filing party shall have a duty to disclose to the court the existence of any prior temporary or permanent restraining orders to prevent domestic abuse issued pursuant to article 14 of title 13, C.R.S., and any emergency protection orders issued pursuant to section 13-14-103, C.R.S., entered against either party by any court within two years prior to the filing of the proceeding. The disclosure required pursuant to this section shall address the subject matter of the previous restraining orders or emergency protection orders, including the case number and jurisdiction issuing such orders.

(3) After the filing of the petition, the court shall advise the parties concerning domestic violence services and potential financial resources that may be available and shall strongly encourage the parties to obtain such services for their children, in appropriate cases. If the parties' children participate in such services, the court shall apportion the costs of such services between the parties as it deems appropriate.

(4) The parties to a domestic relations petition filed pursuant to this article shall receive information concerning domestic violence services and potential financial resources that may be available.



**Source:** L. 95: Entire section added, p. 83, § 1, effective July 1. L. 98: Entire section amended, p. 1379, § 7, effective February 1, 1999. L. 99: Entire section amended, p. 502, § 10, effective July 1. L. 2001: Entire section amended, p. 979, § 2, effective August 8. L. 2004: (2) amended, p. 555, § 11, effective July 1.

**14-10-123.7. Parental education - legislative declaration.** (1) The general assembly recognizes research that documents the negative impact divorce and separation can have on children when the parents continue the marital conflict, expose the children to this conflict, or place the children in the middle of the conflict or when one parent drops out of the child's life. This research establishes that children of divorce or separation may exhibit a decreased ability to function academically, socially, and psychologically because of the stress of the divorce or separation process. The general assembly also finds that, by understanding the process of divorce and its impact on both adults and children, parents can more effectively help and support their children during this time of family reconfiguration. Accordingly, the general assembly finds that it is in the best interests of children to authorize courts to establish, or contract with providers for the establishment of, educational programs for separating, divorcing, and divorced parents with minor children. The intent of these programs is to educate parents about the divorce process and its impact on adults and children and to teach coparenting skills and strategies so that parents may continue to parent their children in a cooperative manner.

(2) A court may order a parent whose child is under eighteen years of age to attend a program designed to provide education concerning the impact of separation and divorce on children in cases in which the parent of a minor is a named party in a dissolution of marriage proceeding, a legal separation proceeding, a proceeding concerning the allocation of parental responsibilities, parenting time proceedings, or postdecree proceedings involving the allocation of parental responsibilities or parenting time or proceedings in which the parent is the subject of a protection order issued pursuant to this article.

(3) Each judicial district, or combination of judicial districts as designated by the chief justice of the Colorado supreme court, may establish an educational program for divorcing and separating parents who are parties to any of the types of proceedings specified in subsection (2) of this section or arrange for the provision of such educational programs by private providers through competitively negotiated contracts. The educational program shall inform parents about the divorce process and its impact on adults and children and shall teach parents coparenting skills and strategies so that they may continue to parent their children in a cooperative manner. Any such educational program shall be administered and monitored by the implementing judicial district or districts and shall be paid for by the participating parents in accordance with each parent's ability to pay.

**Source:** L. 96: Entire section added, p. 249, § 1, effective July 1. L. 97: (2) amended, p. 80, § 1, effective March 24. L. 98: (2) amended, p. 1380, § 8, effective February 1, 1999. L. 2003: (2) amended, p. 1012, § 17, effective July 1.

**14-10-123.8. Access to records.** Access to information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to any party allocated parental responsibilities, unless otherwise ordered by the court for good cause shown.

**Source:** L. 98: Entire section added, p. 1380, § 9, effective February 1, 1999.

#### ANNOTATION

Because father receives parenting time, this section entitles him to have access to his child's records absent a showing of good cause

for depriving him of that right, despite fact that mother is sole custodian. In re Schenck, 39 P.3d 1250 (Colo. App. 2001).

**14-10-124. Best interests of child.** (1) **Legislative declaration.** The general assembly finds and declares that it is in the best interest of all parties to encourage frequent and continuing contact between each parent and the minor children of the marriage after the parents have separated or dissolved their marriage. In order to effectuate this goal, the general assembly urges parents to share the rights and responsibilities of child-rearing and to encourage the love, affection, and contact between the children and the parents.

(1.3) **Definitions.** For purposes of this section and section 14-10-129 (2) (c), unless the context otherwise requires:

(a) “Domestic violence” means an act of violence or a threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship, and may include any act or threatened act against a person or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.

(b) “Intimate relationship” means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both parents of the same child regardless of whether the persons have been married or have lived together at any time.

(1.5) **Allocation of parental responsibilities.** The court shall determine the allocation of parental responsibilities, including parenting time and decision-making responsibilities, in accordance with the best interests of the child giving paramount consideration to the physical, mental, and emotional conditions and needs of the child as follows:

(a) **Determination of parenting time.** The court, upon the motion of either party or upon its own motion, may make provisions for parenting time that the court finds are in the child’s best interests unless the court finds, after a hearing, that parenting time by the party would endanger the child’s physical health or significantly impair the child’s emotional development. In determining the best interests of the child for purposes of parenting time, the court shall consider all relevant factors, including:

- (I) The wishes of the child’s parents as to parenting time;
- (II) The wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule;
- (III) The interaction and interrelationship of the child with his or her parents, his or her siblings, and any other person who may significantly affect the child’s best interests;
- (IV) The child’s adjustment to his or her home, school, and community;
- (V) The mental and physical health of all individuals involved, except that a disability alone shall not be a basis to deny or restrict parenting time;
- (VI) The ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party;
- (VII) Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support;
- (VIII) The physical proximity of the parties to each other as this relates to the practical considerations of parenting time;
- (IX) Whether one of the parties has been a perpetrator of child abuse or neglect under section 18-6-401, C.R.S., or under the law of any state, which factor shall be supported by credible evidence;

(X) Whether one of the parties has been a perpetrator of domestic violence, which factor shall be supported by a preponderance of the evidence;

(XI) The ability of each party to place the needs of the child ahead of his or her own needs.

(b) **Allocation of decision-making responsibility.** The court, upon the motion of either party or its own motion, shall allocate the decision-making responsibilities between the parties based upon the best interests of the child. In determining decision-making responsibility, the court may allocate the decision-making responsibility with respect to each issue affecting the child mutually between both parties or individually to one or the other party or any combination thereof. In determining the best interests of the child for purposes of allocating decision-making responsibilities, the court shall consider, in addition to the factors set forth in paragraph (a) of this subsection (1.5), all relevant factors including:

(I) Credible evidence of the ability of the parties to cooperate and to make decisions jointly;



(II) Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support that would indicate an ability as mutual decision makers to provide a positive and nourishing relationship with the child;

(III) Whether an allocation of mutual decision-making responsibility on any one or a number of issues will promote more frequent or continuing contact between the child and each of the parties;

(IV) Whether one of the parties has been a perpetrator of child abuse or neglect under section 18-6-401, C.R.S., or under the law of any state, which factor shall be supported by credible evidence. If the court makes a finding of fact that one of the parties has been a perpetrator of child abuse or neglect, then it shall not be in the best interests of the child to allocate mutual decision-making with respect to any issue over the objection of the other party or the legal representative of the child.

(V) Whether one of the parties has been a perpetrator of domestic violence, which factor shall be supported by a preponderance of the evidence. If the court makes a finding of fact that one of the parties has been a perpetrator of domestic violence, then it shall not be in the best interests of the child to allocate mutual decision-making responsibility over the objection of the other party or the legal representative of the child, unless the court finds that the parties are able to make shared decisions about their children without physical confrontation and in a place and manner that is not a danger to the abused party or the child.

(2) The court shall not consider conduct of a party that does not affect that party's relationship to the child.

(3) In determining parenting time or decision-making responsibilities, the court shall not presume that any person is better able to serve the best interests of the child because of that person's sex.

(3.5) A request by either party for genetic testing shall not prejudice the requesting party in the allocation of parental responsibilities pursuant to subsection (1.5) of this section.

(4) If a party is absent or leaves home because of an act or threatened act of domestic violence committed by the other party, such absence or leaving shall not be a factor in determining the best interests of the child.

(5) Repealed.

(6) In the event of a medical emergency, either party shall be allowed to obtain necessary medical treatment for the minor child or children without being in violation of the order allocating decision-making responsibility or in contempt of court.

(7) In order to implement an order allocating parental responsibilities, both parties may submit a parenting plan or plans for the court's approval that shall address both parenting time and the allocation of decision-making responsibilities. If no parenting plan is submitted or if the court does not approve a submitted parenting plan, the court, on its own motion, shall formulate a parenting plan that shall address parenting time and the allocation of decision-making responsibilities.

(8) The court may order mediation, pursuant to section 13-22-311, C.R.S., to assist the parties in formulating or modifying a parenting plan or in implementing a parenting plan specified in subsection (7) of this section and may allocate the cost of said mediation between the parties.

**Source:** L. 71: R&RE, p. 529, § 1. C.R.S. 1963: § 46-1-24. L. 79: (3) added, p. 645, § 1, effective March 2. L. 81: (4) added, p. 904, § 1, effective May 22. L. 83: (1) R&RE and (1.5) and (5) added, p. 647, §§ 3, 4, effective June 10. L. 87: (1.5)(g) to (1.5)(m) added and (5) repealed, pp. 574, 576, §§ 3, 6, effective July 1; (1.5)(m) repealed, p. 1578, § 22, effective July 1. L. 98: Entire section amended, p. 1380, § 10, effective February 1, 1999. L. 2005: (1.5)(b)(IV) and (1.5)(b)(V) amended, p. 961, § 6, effective July 1; (3.5) added, p. 377, § 2, effective January 1, 2006. L. 2010: (1.3) added and (1.5)(a)(X), (1.5)(b)(V), and (4) amended, (HB 10-1135), ch. 87, p. 290, § 1, effective July 1.

**Cross references:** (1) For the "Uniform Child-custody Jurisdiction and Enforcement Act", see article 13 of this title.

(2) For the legislative declarations contained in the 2005 act amending subsections (1.5)(b)(IV) and (1.5)(b)(V), see sections 1 and 3 of chapter 244, Session Laws of Colorado 2005.

## ANNOTATION

- I. General Consideration.
- II. Determination of Best Interests.
  - A. In General.
  - B. Evidence.
  - C. Discretion of Court.
  - D. Custody and Visitation.
- III. Tender Years Doctrine.
- IV. Jurisdiction of Court.
- V. Motions and Orders.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Legislation: Domestic Relations — New Colorado Statutes Govern Procedure in Contested Child Custody Cases", see 40 U. Colo. L. Rev. 485 (1968). For article, "Legislative Update", see 12 Colo. Law. 1257 (1983). For article, "Moving the Children Out of State", see 12 Colo. Law. 1450 (1983). For article, "Helping Joint Custody Work", see 14 Colo. Law. 1984 (1985). For article, "Dealing with Sexual Abuse Allegations in Custody and Visitation Disputes — Parts I and II", see 16 Colo. Law. 1005 and 1225 (1987). For article, "Children of Divorce", see 16 Colo. Law. 1853 (1987). For article, "The Role of the Guardian ad Litem in Custody and Visitation Disputes", see 17 Colo. Law. 1301 (1988). For article, "Custody Evaluations in Colorado", see 18 Colo. Law. 1523 (1989). For article, "Drafting the Joint Parenting Plan", see 18 Colo. Law. 2117 (1989). For article, "Custody Cases and the Theory of Parental Alienation Syndrome", see 20 Colo. Law. 53 (1991). For article, "Relocation: An Issue In Need of Clarification in Colorado", see 20 Colo. Law. 2517 (1991). For article, "Elimination of 'Custody' in Colorado: The Impact of H.B.1183", see 27 Colo. Law. 83 (September 1998). For article, "How to Explain the New Parental Responsibility Law to Clients", see 27 Colo. Law. 85 (October 1998). For article, "Addressing New Standards for Modification Under the Parental Responsibility Act", see 28 Colo. Law. 67 (June 1999). For article, "Representing Children When There Are Allegations of Domestic Violence", see 28 Colo. Law. 77 (November 1999). For article, "Parenting Time in Divorce", see 31 Colo. Law. 25 (October 2002). For article, "The Child's Wishes in APR Proceedings: An Evidentiary Conundrum", see 36 Colo. Law. 33 (January 2007). For article, "Domestic Violence Intervention: 2010 Update", see 39 Colo. Law. 83 (September 2010).

**Annotator's note.** Since § 14-10-124 is similar to repealed § 46-1-5 (1)(b), C.R.S. 1963, § 46-1-5, CRS 53, and CSA, C. 56, § 8, relevant

cases construing those provisions have been included in the annotations to this section.

**Trial court should have applied the standard for an original determination of visitation, which is based on the best interests of the child,** where the order awarding parenting time to stepfather was a temporary order. Although paternity decree operated as a final order and permanent allocation as to paternity and custody, its award of parenting time to stepfather was a temporary order because the parties had not reached an agreement on a permanent parenting time schedule but had agreed to maintain the interim schedule and work toward a permanent one. The fact that the parties adhered to the schedule for nearly three years did not change the nature of the order. In re C.T.G., 179 P.3d 213 (Colo. App. 2007).

**Trial court erred by failing to afford parents their due process rights because court did not presume parents were acting in the child's best interests,** but instead placed upon them the burden of demonstrating that visitation with stepfather would endanger the child; the court did not find that "special circumstances" existed which justified the intrusion on the parents' rights; and the court did not apply a clear and convincing evidence standard. In re C.T.G., 179 P.3d 213 (Colo. App. 2007).

**Even if stepfather was a psychological parent, stepfather failed to present evidence to rebut presumption that parents were acting in their child's best interests** by terminating stepfather's visitation and failed to show or proffer evidence of special circumstances that would justify trial court's order allowing visitation against the wishes of the parents. The visitation order infringed upon parents' fundamental right to direct the upbringing of their child. In re C.T.G., 179 P.3d 213 (Colo. App. 2007).

**A court meets the due process requirement in *Troxel v. Granville*, 530 U.S. 57 (2000), to accord "special weight" to a parent's determination of the best interests of a child** by considering all relevant factors set forth in this section and entering findings based on clear and convincing proof that the best interests of the child justify the award of parental responsibilities to the nonparent. In re Reese, 227 P.3d 900 (Colo. App. 2010).

**The intrinsic threat of emotional harm to child from curtailment or termination of relationship with psychological parent** is not, in itself, sufficient to satisfy the requirement that the court give special weight to the presumption that a parent's determination is in the best interests of the child. This section identifies non-



exclusive statutory factors courts should consider in determining the best interests of the child. In re Reese, 227 P.3d 900 (Colo. App. 2010).

**Applied** in Woodhouse v. District Court, 196 Colo. 558, 587 P.2d 1199 (1978); In re Pilcher, 628 P.2d 126 (Colo. App. 1980); In re Rinow, 624 P.2d 365 (Colo. App. 1981); Dawson v. Pub. Employees' Retirement Ass'n, 664 P.2d 702 (Colo. 1983).

## II. DETERMINATION OF BEST INTERESTS.

### A. In General.

**Applications for parental responsibilities by a nonparent implicate the fundamental constitutional right to family autonomy and privacy,** and a legislative enactment that infringes on a fundamental right is constitutionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible. In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004).

**The constitutional presumption that a fit parent acts in the best interests of the child applies to all stages of an allocation of parental responsibilities proceeding.** The applicable standard for consideration of an order granting any parenting time to non-parents in the face of the parent's objection includes a presumption in favor of the parental determination; an opportunity to rebut this presumption with a showing by the non-parents through clear and convincing evidence that the parental determination is not in the child's best interests; and placement of the ultimate burden on the non-parents to establish by clear and convincing evidence that allocation of parenting time to them is in the best interests of the child. In re B.J., 242 P.3d 1128 (Colo. 2010).

**Determining whether to apply the best interest standard or the endangerment standard** may involve inquiry into both the quantitative and the qualitative aspects of the proposed change to parenting time, as well as the reason or reasons advanced for the change. In re West, 94 P.3d 1248 (Colo. App. 2004).

**The principal issue before the courts is the welfare of the child,** and to that welfare the rights and personal desires of the parents are subservient. Miller v. Miller, 129 Colo. 462, 271 P.2d 411 (1954); Hayes v. Hayes, 134 Colo. 315, 303 P.2d 238 (1956); Jensen v. Jensen, 142 Colo. 420, 351 P.2d 387 (1960); Grosso v. Grosso, 149 Colo. 183, 368 P.2d 561 (1962); Root v. Allen, 151 Colo. 311, 377 P.2d 117 (1962).

The prime criterion of a custody award in the court's determination is the welfare of the children. Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973).

The primary focus of any custody determination, including one involving separation of children, must be the best interests of the children. In re Dickey, 658 P.2d 276 (Colo. App. 1982).

The best interests of the child must predominate in any custody determination. In re McGee, 44 Colo. App. 330, 613 P.2d 348 (1980).

It is the well-being of the child rather than the reward or punishment of a parent that ought to guide every aspect of a custody determination, including visitation. In re McGee, 44 Colo. App. 330, 613 P.2d 348 (1980).

Where trial court made no finding that father's conduct in his homosexual lifestyle endangered the child physically or impaired the child's emotional development, father could not be precluded from having overnight guests during his parenting time or taking child to gay environment of father's church. In re Dorworth, 33 P.3d 1260 (Colo. App. 2001).

**The best interests of a child as an individual, and not as a sibling,** are the controlling factors in divided custody determinations. In re Barnhouse, 765 P.2d 610 (Colo. App. 1988), cert. denied, 490 U.S. 1021, 109 S. Ct. 1747, 104 L. Ed.2d 184 (1989).

**In cases involving child custody the principal issue before the court is not the convenience of the parents.** Kelley v. Kelley, 161 Colo. 486, 423 P.2d 315 (1967).

**Section 14-10-123.4 coupled with the permissive language found throughout § 14-10-123.5 and this section** indicates that the best interests of the child, and not the rights or wishes of either parent, must dictate the outcome of any custody dispute. In re Lester, 791 P.2d 1244 (Colo. App. 1990).

**In determining a custodial dispute between a parent and a nonparent, Colorado courts recognize that the best interests standard is subject to a presumption that the biological parent has a first and prior right to custody.** Abrams v. Connolly, 781 P.2d 651 (Colo. 1989); In re Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995); In re C.M., 74 P.3d 342 (Colo. App. 2002); People ex rel. A.M.K., 68 P.3d 563 (Colo. App. 2003).

Natural parents have a fundamental liberty interest in the companionship, care, custody, and management of their children. This fundamental liberty interest gives rise to a presumption that the best interests of the child will be furthered by a fit natural parent. People ex rel. A.M.K., 68 P.3d 563 (Colo. App. 2003).

**This presumption may be rebutted by evidence establishing that the welfare of the child, i.e., the best interests of the child, is better served by granting custody to a nonparent.** Abrams v. Connolly, 781 P.2d 651 (Colo. 1989); In re Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995); In re C.M., 74 P.3d 342 (Colo. App.

2002); In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

**The right of a parent to have the custody of his child must give way where the welfare of the child requires it.** Root v. Allen, 151 Colo. 311, 377 P.2d 117 (1962).

**When it is conducive to the child's best interests, a trial court may refuse to award custody to either parent** and may award custody to someone other than a natural parent of the child and even to a nonresident of the state. Rippere v. Rippere, 157 Colo. 29, 400 P.2d 920 (1965).

**In determining the best interests of the child, the court must consider all relevant factors, including those enumerated in subsection (1.5).** In re Lester, 791 P.2d 1244 (Colo. App. 1990); In re Finer, 920 P.2d 325 (Colo. App. 1996); In re Fickling, 100 P.3d 571 (Colo. App. 2004).

**When the court is determining the best interests of the child, the analysis must consider the least detrimental alternative.** In re Martin, 42 P.3d 75 (Colo. App. 2002).

**The phrase "best interests of the child" has identical meaning in this section and § 19-1-101 et seq.** People in Interest of A.A.G., 902 P.2d 437 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 912 P.2d 1385 (Colo. 1996).

**Factors enumerated in subsection (1.5) may be considered in dependency action** pursuant to the Children's Code. People in Interest of A.A.G., 902 P.2d 437 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 912 P.2d 1385 (Colo. 1996).

**The general assembly did not intend to bar or presumptively bar an abusive parent or spouse from exercising individual decision-making responsibility** with respect to children by enacting subsections (1.5)(b)(IV) and (1.5)(b)(V). The general assembly chose to either prohibit or presumptively prohibit only mutual decision-making responsibility. In re Bertsch, 97 P.3d 219 (Colo. App. 2004).

**The general assembly's failure to amend bill following testimony from proponent noting that there was nothing in the bill requiring or prohibiting court from giving sole decision-making on every issue to one party or the other** led court to conclude that the general assembly did not mean to preclude as a matter of law abusive parents or spouses from exercising individual, or even sole, decision-making responsibility. In re Bertsch, 97 P.3d 219 (Colo. App. 2004).

**The court is to consider whether a parent has been a perpetrator of child or spouse abuse as but two, albeit important, factors in assessing the best interests of the child in determining whether to award parenting time or individual decision-making responsibility.** In re

Bertsch, 97 P.3d 219 (Colo. App. 2004); In re Yates, 148 P.3d 304 (Colo. App. 2006).

**This construction does not lead to an absurd result.** Because the court makes a finding that a person has abused a child or spouse in the past does not necessarily and inevitably mean either that history is doomed to repeat itself or that the individual is capable of becoming a fit, or even the more fit, parent of a child. In re Bertsch, 97 P.3d 219 (Colo. App. 2004).

**Allocation of parental responsibilities to wife was proper where wife, despite being previously convicted of child abuse,** had since received and benefitted from counseling, and there was no suggestion of prospective child abuse; however, there was a greater concern about husband's parenting skills. In re Yates, 148 P.3d 304 (Colo. App. 2006).

**Authority of court.** A court has authority under the uniform act to award custody of a natural child of one spouse to the other spouse who is neither a natural, nor adoptive, parent of that child. In re Tricamo, 42 Colo. App. 493, 599 P.2d 273 (1979).

A court has authority under the uniform act to order a change of name of a minor child. In re Nguyen, 684 P.2d 258 (Colo. App. 1983), cert. denied, 469 U.S. 1108, 105 S. Ct. 785, 83 L. Ed.2d 779 (1985).

**Custody cases are not adversary proceedings,** but hearings to determine what placement of the child will be in the child's best interests. Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973).

**The question as to whether a court may permit a child to be taken from the state first having jurisdiction to another jurisdiction** was, like all other questions affecting the welfare and best interests of the child, vested in the sound legal discretion of a trial court. Hayes v. Hayes, 134 Colo. 315, 303 P.2d 238 (1956).

**Policy of law in state is to permit removal of child from jurisdiction where it will serve the well-being and future interests of the child.** In re McGee, 44 Colo. App. 330, 613 P.2d 348 (1980).

**In an initial determination to allocate parental responsibilities, a court has no statutory authority to order a parent to live in a specific location.** The court, rather, must accept the location in which each party intends to live and allocate parental responsibilities accordingly in the best interests of the child. Spahmer v. Gullette, 113 P.3d 158 (Colo. 2005).

**Where the custody of a child was awarded in a divorce proceeding, the child became a ward of the court,** and it was against the policy of the law to permit its removal to another jurisdiction unless its well-being and future welfare were served thereby. Holland v. Holland, 150 Colo. 442, 373 P.2d 523 (1962).

**A change of custody should not be awarded as punishment for a parent's disregard of the**



court's orders prohibiting removal of the child from the jurisdiction, since the best interests of the child were paramount. *Holland v. Holland*, 150 Colo. 442, 373 P.2d 523 (1962).

**"Joint selection of schools" provision in separation agreement** is unenforceable because such a provision promotes discord between the parents and is not, therefore, "in the best interests of the child". Custodial parent retains the ultimate authority to select the child's school. *Griffin v. Griffin*, 699 P.2d 407 (Colo. 1985).

**Guardian ad litem represents wishes of child.** This section does not require representation of the child's wishes by an attorney chosen by the child rather than a court appointed guardian ad litem. In re *Hartley*, 886 P.2d 665 (Colo. 1994).

**Representation of child's wishes by attorney chosen by child unnecessary and duplicative.** The statutory safeguards inherent in the obligations of the guardian ad litem as well as the ability of the court to interview the child concerning the child's wishes provide sufficient opportunity for a child to be heard. In re *Hartley*, 886 P.2d 665 (Colo. 1994).

**Permanent orders restriction on religious upbringing of minor child in dissolution of marriage unconstitutional.** Permanent orders in a dissolution of marriage action that adopted the special advocate's recommendation to place a restriction on the mother's right to influence her child's upbringing, absent a finding of substantial harm to the child, violate the mother's constitutional right to free exercise of religion. In re *McSoud*, 131 P.3d 1208 (Colo. App. 2006).

**Absent a clear showing of substantial harm to the child, a parent who does not have decision-making authority with respect to religion nevertheless retains a constitutional right to educate the child in that parent's religion.** However, harm to the child will be found if one parent disparages the other parent's religion, thus justifying a limitation on that parent's right to religious education of the child. In re *McSoud*, 131 P.3d 1208 (Colo. App. 2006).

**Harm to the child from conflicting religious instructions or practices** must be demonstrated in detail and be substantial to warrant limitations on either parent's instructions or practices. In the absence of a demonstrated harm to the child, the best interests of the child standard is insufficient to serve as a compelling state interest that overrules the parents' fundamental rights to freedom of religion. In re *McSoud*, 131 P.3d 1208 (Colo. App. 2006).

#### B. Evidence.

**The court did not err in determining under the rules of civil procedure and by a preponderance of the evidence that the criminal child abuse statute was violated.** The use of

the preponderancy standard in domestic proceedings does not offend due process and is adequate to protect a parent from false accusations of child abuse while serving the strong societal interest in protecting children from abusive parents. In re *McCaulley-Elfert*, 70 P.3d 590 (Colo. App. 2003).

Although subsections (1.5)(a)(IX) and (1.5)(b)(IV) do not say a factor must be proven by a preponderance of the evidence, those subsections do state that it shall be "supported by credible evidence". "Supported by credible evidence" means no more than supported by a preponderance of the evidence. In re *McCaulley-Elfert*, 70 P.3d 590 (Colo. App. 2003).

**Because the presumption that a child's welfare is best served through custody of the natural parent is rebuttable,** and where the evidence establishes that the best interest of the child will not be promoted by such custody, it will not be granted. *Root v. Allen*, 151 Colo. 311, 377 P.2d 117 (1962).

**That the natural parents have a first and prior right to custody does not require that custody be awarded to the parent** or parents merely because the evidence shows fitness and ability to care for the child. *Coulter v. Coulter*, 141 Colo. 237, 347 P.2d 492 (1959); *Root v. Allen*, 151 Colo. 311, 377 P.2d 117 (1962).

**When considering non-parents' assertions of parental rights,** Colorado rejects a requirement that a parent be found unfit before interfering with the parent's parenting plan. In re *E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004).

**Proof that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child** establishes a compelling state interest sufficient to permit state interference with parental rights. In re *E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004).

**The fitness of the mother was not in issue** when it was not established that the welfare of her children would be better served by changing the custody back to her. *Munson v. Munson*, 155 Colo. 427, 395 P.2d 103 (1964).

**Where wife living with man to whom she is not married.** It is an abuse of discretion for the trial court to impose its own standard in regard to the wife living with a man to whom she is not married in the face of the clear and mandatory language of the statute, where there was no evidence to infer that such conduct was detrimental to the children's welfare. In re *Moore*, 35 Colo. App. 280, 531 P.2d 995 (1975).

**A natural father, shown to be a fit and proper person to have custody of his minor child, could have been denied custody** where findings of trial court, amply supported by evidence, determined that such custody would not be in the best interests of the child. *Root v. Allen*, 151 Colo. 311, 377 P.2d 117 (1962).

**Court presumed to disregard incompetent evidence.** The presumption is that in making its decision to award custody of a child, the trial court disregards any incompetent evidence, or additional information to which it might have had access. *Rayer v. Rayer*, 32 Colo. App. 400, 512 P.2d 637 (1973).

**Conduct of proposed custodian not affecting children is not to be considered.** The general assembly has directed that in determining child custody the court shall not consider conduct of a proposed custodian that does not affect the children. In *re Moore*, 35 Colo. App. 280, 531 P.2d 995 (1975).

**Inquiry into religious practices.** Evidence of a party's religious beliefs or practices is relevant and admissible in a custody proceeding if it is shown that such beliefs or practices are reasonably likely to present or future harm to the physical or mental development of the child. In *re Short*, 698 P.2d 1310 (Colo. 1985).

**Court order requiring children be returned to Colorado** one year following the dissolution of marriage decree cannot stand since court made no finding that such a move would be in the best interests of the children. In *re Hoffman*, 701 P.2d 129 (Colo. App. 1985).

**Record supported the trial court's determination that sole custody by mother was in children's best interests.** Among the factors favoring this determination were the mother's status as primary-caretaker and the parties' lack of communication and poor ability to agree with each other. In *re Lester*, 791 P.2d 1244 (Colo. App. 1990).

**It is not necessary that the trial court make specific findings on each and every factor included in subsection (1.5).** All that is required is an indication that the trial court considered those factors which were pertinent and that the findings are sufficient to enable this court to determine the grounds for the trial court's decision and whether the decision was supported by competent evidence. In *re Lester*, 791 P.2d 1244 (Colo. App. 1990); In *re Finer*, 920 P.2d 325 (Colo. App. 1996).

**It is not necessary that a trial court make specific findings on each and every factor included in the statute, but there must be some indication in the record that the trial court considered those factors that were pertinent.** In *re Garst*, 955 P.2d 1056 (Colo. App. 1998); In *re Custody of C.J.S.*, 37 P.3d 479 (Colo. App. 2001).

**A party is entitled to an evidentiary hearing** before a court may prohibit parenting time. In *re D.R.V-A*, 976 P.2d 881 (Colo. App. 1999).

**Trial court did not err in entering findings with respect to husband's stepdaughter even though it did not have jurisdiction over her.** Although the trial court had no jurisdiction over the stepdaughter, jurisdiction over the stepdaughter was not necessary for the trial court to

consider evidence of the husband's sexual misconduct regarding the stepdaughter in determining the parental responsibility issues raised with respect to husband's son. Nothing precludes the court's inquiry into alleged child abuse or neglect when determining the best interests of the child, even if the alleged abuse or neglect involves other children. In *re McCauley-Elfert*, 70 P.3d 590 (Colo. App. 2003).

**Trial court did not err in granting parental responsibilities to nonparent when trial court applied best interests standard and incorporated all relevant factors and further found clear and convincing evidence** that the parent filed for joint custody of the child with the nonparent, requested co-parenting responsibilities with the nonparent, entered into a plan for joint parenting with the nonparent, permitted the nonparent to jointly parent the child during the course of their relationship, and encouraged the nonparent's participation in raising the child and that the child equally recognizes both parties as her parents and is doing extremely well both academically and socially. In *re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004).

**Trial court's order granting the child's psychological parent, a nonparent, equal parental responsibilities was proper** when curtailment and eventual termination of parental responsibilities threatened emotional harm to the child and constituted a compelling state interest justifying modification of parent's proposed parenting plan by the court. In *re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004).

**Presumption favoring a parent's determination regarding the best interests of the child may be rebutted by proof by clear and convincing evidence of either:** (1) The parent's unfitness; or (2) the best interests of the child. In *re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006); In *re Reese*, 227 P.3d 900 (Colo. App. 2010).

**Nonparent need not show demonstrated harm to child to satisfy "special weight" accorded to parental determinations.** In *re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006); In *re Reese*, 227 P.3d 900 (Colo. App. 2010).

**Court may not allocate parental responsibilities to a nonparent unless it accords "special weight" to the parent's determination of the best interests of the child.** Application of the clear and convincing proof standard is necessary to accord special weight to a parent's determination of best interests. In *re Reese*, 227 P.3d 900 (Colo. App. 2010).

**A court meets the due process requirement in *Troxel v. Granville*, 530 U.S. 57 (2000), to accord "special weight" to a parent's determination of the best interests of a child by considering all relevant factors set forth in this section and entering findings based on clear and convincing proof that the best interests of the child justify the award of parental responsibilities**



ties to the nonparent. In re Reese, 227 P.3d 900 (Colo. App. 2010).

**The intrinsic threat of emotional harm to child from curtailment or termination of relationship with psychological parent** is not, in itself, sufficient to satisfy the requirement that the court give special weight to the presumption that a parent's determination is in the best interests of the child. This section identifies non-exclusive statutory factors courts should consider in determining the best interests of the child. In re Reese, 227 P.3d 900 (Colo. App. 2010).

#### C. Discretion of Court.

**Questions of custody must of necessity rest upon the judgment of the trier of facts; hence are best left in the hands of the trial court**, and its determination should not be disturbed if there is sufficient competent evidence to support its conclusion. Miller v. Miller, 129 Colo. 462, 271 P.2d 411 (1954); Harris v. Harris, 140 Colo. 591, 345 P.2d 1061 (1959); Parker v. Parker, 142 Colo. 416, 350 P.2d 1067 (1960); Jensen v. Jensen, 142 Colo. 420, 351 P.2d 387 (1960); Flor v. Flor, 148 Colo. 514, 366 P.2d 664 (1961); Root v. Allen, 151 Colo. 311, 377 P.2d 117 (1962); Smith v. Smith, 172 Colo. 516, 474 P.2d 619 (1970); Meene v. Meene, 194 Colo. 304, 572 P.2d 472 (1977).

The trial court is best able to appraise the circumstances of the parties and best fitted to make the factual determinations regarding custody. Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973).

The determination of custody is left to the discretion of the trial judge, and in the absence of an abuse of that discretion, an appellate court will not disturb these determinations. Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973); In re Dickman, 670 P.2d 20 (Colo. App. 1983).

Custody awards in dissolution of marriage proceedings are a matter to be determined within the sound discretion of the trial court. In re Armbeck, 33 Colo. App. 260, 518 P.2d 300 (1974).

Question of custody is a matter within the discretion of the trial court after taking into consideration the various factors outlined in this section for the purpose of determining the best interest of the child. Rhoades v. Rhoades, 188 Colo. 423, 535 P.2d 1122 (1975).

**In a custody and support proceeding, where a defendant presented his entire case and made no request for a further hearing**, fact that trial court did not hold additional hearing after indicating it might do so, did not deprive defendant of his day in court. Grosso v. Grosso, 149 Colo. 183, 368 P.2d 561 (1962).

**Prior to the enactment of subsection (1.5) in its present form, an imposition of joint custody over the objection of either parent**

**constituted an abuse of discretion.** However, that subsection now permits the trial court to order joint or sole custody after determining which form of custody is in the best interest of the child. In re Lester, 791 P.2d 1244 (Colo. App. 1990).

**The general assembly did not intend to state a preference or a mandate for joint custody under subsection (1.5).** In re Lester, 791 P.2d 1244 (Colo. App. 1990).

**Where one expert testified that he felt the mother to be the best guardian for the child at his current age of one year**, but felt that the mother's psychiatric problems would begin to tell on the child as he reached four or five, the trial court did not err in ruling that it must look at the whole picture, and decided that it would be best to merely allow the mother liberal visitation rights for the first few years. Smith v. Smith, 172 Colo. 516, 474 P.2d 619 (1970).

**Where the record revealed absolutely nothing as to the conditions in a home maintained by the paternal grandparents in New Jersey, or that the paternal grandparents ever desired custody** of their grandchild, there quite clearly was an abuse of discretion by the trial court in awarding them custody. Rippere v. Rippere, 157 Colo. 29, 400 P.2d 920 (1965).

**Where the trial court did not make any finding of fact or even assert the conclusion of law that the mother was unfit to have custody of the minor children** of the parties, and the findings were also deficient in that there were no facts set forth or determination made that it was for the best interests of the children that their custody be given to the father, the court could not have ordered an award of custody to any party, because such findings and conclusions were necessary. Cacic v. Cacic, 164 Colo. 103, 432 P.2d 768 (1967).

**A statement by a trial judge, disclosing that his decision in a custody matter was based largely on irritation and aggravation**, and not on the evidence, indicated such failure to exercise a sound judicial discretion as to require reversal. Crites v. Crites, 137 Colo. 220, 322 P.2d 1045 (1958).

**Court improperly restricted the visitation rights of the mother** where court made no finding that her instability was so severe as to endanger the child physically or impair his emotional development. In re Jarman, 752 P.2d 1068 (Colo. App. 1988).

**Visitation orders are within the sound discretion of the trial court.** This discretion must, however, be exercised consistently with the express public policy of encouraging contact between each parent and the children. In re Lester, 791 P.2d 1244 (Colo. App. 1990).

**The trial court abused its discretion by effectively reducing father's visitation rights** where court limited the father to four days per four-week period where he previously had por-

tions of eight days in any four-week period and there was no evidence that the children would benefit by this reduction in visitation. This restriction was both contrary to the public policy of encouraging frequent visitation and to the evidence in the record. *In re Lester*, 791 P.2d 1244 (Colo. App. 1990).

#### D. Custody and Visitation.

**Award of joint custody absent agreement of the parties** is contrary to the best interests of the child. *In re Lampton*, 677 P.2d 352 (Colo. App. 1983); *In re Posinoff*, 683 P.2d 377 (Colo. App. 1984) (decided prior to 1987 amendment).

**Joint custody warranted only in the most exceptional cases.** *In re Lampton*, 704 P.2d 847 (Colo. 1985) (decided prior to 1983 amendment).

**Division of the children between the parents was not generally proper unless the paramount interest of the children required it.** *Songster v. Songster*, 150 Colo. 466, 374 P.2d 197 (1962).

The trial court does not abuse its discretion in separating the children by awarding custody of the youngest son to the wife. *In re Dickey*, 658 P.2d 276 (Colo. App. 1982).

**General visitation order does not meet purposes for which visitation intended** when evidence shows a total lack of cooperation. *In re Plummer*, 709 P.2d 1388 (Colo. App. 1985).

**Although the stability of the environment** is a valid consideration in awarding custody, instability alone is not sufficient to justify a restriction on visitation. *In re Jarman*, 752 P.2d 1068 (Colo. App. 1988).

**Where evidence shows a lack of cooperation** between the parties or between the therapists for the mother and the child, the general visitation order does not meet the purposes for which the visitation was intended and is in essence a nullity. *In re Sepmeier*, 782 P.2d 876 (Colo. App. 1989).

**In determining custody in dependency and neglect hearing, juvenile court committed reversible error** by failing to consider any purposes of §19-1-101 et seq. and in relying solely on a limited number of purposes set forth in this section. *L.A.G. v. People in Interest of A.A.G.*, 912 P.2d 1385 (Colo. 1996).

**Where neither party submitted a plan for implementing previously ordered joint custody**, court acted properly in ordering the parties to contact a parenting-time coordinator to facilitate and improve the parties' communication in the exercise of joint custody and to establish father's parenting time, given mother's move out of state. *In re Garst*, 955 P.2d 1056 (Colo. App. 1998) (decided under former §14-10-123.5 prior to its 1999 repeal).

**Alienation is a significant and foreseeable harm.** When a psychotherapist of a divorced

mother, who sought counseling because she believed her ex-husband, the father of the mother's two children, had abused her children, sent a letter to the father and the new therapist for the mother and children opining the mother's conduct was alienating the father from the children, the psychotherapist did breach her duty to the mother. *Mitchell v. Ryder*, 20 P.3d 1229 (Colo. App. 2000).

**Applied in** *In re Murphy*, 834 P.2d 1287 (Colo. App. 1992).

### III. TENDER YEARS DOCTRINE.

**In its concern for children, particularly those of tender years, the supreme court formerly enunciated guides** for trial courts in the disposition of controversies regarding their custody. *Songster v. Songster*, 150 Colo. 466, 374 P.2d 197 (1962).

**Formerly, courts did not deprive the mother of the custody of her children of tender years**, unless it was clearly shown that she was so unfit a person as to endanger the welfare of the minors. *Hayes v. Hayes*, 134 Colo. 315, 303 P.2d 238 (1956); *Evans v. Evans*, 136 Colo. 6, 314 P.2d 291 (1957); *Green v. Green*, 139 Colo. 551, 342 P.2d 659 (1959).

**A mother's love, care, and affection for a child of tender years were considered the most unselfish of all factors in human relations**, and a child was not to be deprived thereof unless for a very good reason, founded on lack of moral fitness and proper home surroundings. *Hayes v. Hayes*, 134 Colo. 315, 303 P.2d 238 (1956).

**Mere fact of motherhood is not sufficient to give a mother any special standing in the proceeding or preference as to custody.** *Rayer v. Rayer*, 32 Colo. App. 400, 512 P.2d 637 (1973).

**Court's undue emphasis on motherly instincts reversible error.** Court's undue emphasis on "motherly instincts" constituted a presumption that the mother was better able to serve the best interests of the child because of her sex and was both an abuse of discretion and reversible error. *In re Miller*, 670 P.2d 819 (Colo. App. 1983).

**Sufficient findings unrelated to parental gender.** Although the court states that one of its considerations in making a custody award is a belief in the importance of a "meaningful relationship" between a father and son, the remark does not rise to the level of a presumption where the court makes sufficient findings unrelated to parental gender to support the award. *In re Clarke*, 671 P.2d 1334 (Colo. App. 1983).

### IV. JURISDICTION OF COURT.

**The trial court had a continuing jurisdiction and control based upon the welfare of the**



**child.** *Coulter v. Coulter*, 141 Colo. 237, 347 P.2d 492 (1959).

**Where the court could provide for custody of children by orders made "before or after" the entry of a final decree**, the trial court could provide for the custody of the child even though the subject was not mentioned in the original decree. *Kelley v. Kelley*, 161 Colo. 486, 423 P.2d 315 (1967).

**When the wife-defendant died before any divorce decree had entered, the divorce action thereupon abated**, and thereafter the court was without jurisdiction to enter any order concerning custody or right of visitation. *Wood v. Parkerson*, 163 Colo. 271, 430 P.2d 467 (1967).

**Contempt for failure to comply with custody order was not separate procedure**, but continuance of divorce action. *Brown v. Brown*, 31 Colo. App. 557, 506 P.2d 386 (1972).

**The district court in a divorce action could not acquire exclusive jurisdiction over custody of minor children residing in a foreign jurisdiction.** *Scheer v. District Court*, 147 Colo. 265, 363 P.2d 1059 (1961).

**A custody award entered by one court is not binding on courts of another state under the full faith and credit clause of the federal constitution** after the child has become domiciled in the latter state, because when a child's domicile is changed he is no longer subject to the control of the court which first awarded his custody. *Scheer v. District Court*, 147 Colo. 265, 363 P.2d 1059 (1961).

**A child's domicile is that of the parent with whom it lives.** *Scheer v. District Court*, 147 Colo. 265, 363 P.2d 1059 (1961).

## V. MOTIONS AND ORDERS.

**The court could make an order for the care and custody of minor children, and make provision for their maintenance**, and this in the same decree making an award for alimony.

**14-10-125. Temporary orders.** (1) A party to a proceeding concerning the allocation of parental responsibilities may move for a temporary order. The court may allocate temporary parental responsibilities, including temporary parenting time and temporary decision-making responsibility, after a hearing.

(2) If a proceeding for dissolution of marriage or legal separation is dismissed, any temporary order concerning the allocation of parental responsibilities is vacated unless a parent or the person allocated parental responsibilities moves that the proceeding continue as a proceeding concerning the allocation of parental responsibilities and the court finds, after a hearing, that the circumstances of the parents and the best interests of the child require that a decree concerning the allocation of parental responsibilities be issued.

(3) If a proceeding concerning the allocation of parental responsibilities commenced in the absence of a petition for dissolution of marriage or legal separation is dismissed, any temporary order concerning the allocation of parental responsibilities is vacated.

**Source:** L. 71: R&RE, p. 530, § 1. C.R.S. 1963: § 46-1-25. L. 84: (1) amended, p. 479, § 1, effective March 16. L. 98: Entire section amended, p. 1383, § 11, effective February 1, 1999.

*Brown v. Brown*, 131 Colo. 467, 283 P.2d 951 (1955).

**Motions for determination of custody of children are different in kind from actions to enforce wholly personal rights as property or alimony**, because the question of custody of children deals with a status and the issue on such a motion is the welfare of the children. *Kelley v. Kelley*, 161 Colo. 486, 423 P.2d 315 (1967).

**An order determining custody of children, like an order determining alimony**, was reviewable in the supreme court. *Miller v. Miller*, 129 Colo. 462, 271 P.2d 411 (1954).

**Trial court findings necessary for review.** While it is not necessary that a trial court make specific findings on each and every factor included in this section, there must be some indication in the record that the trial court considered such of those factors as were pertinent, and the findings thereon must be sufficient to enable this court to determine on what ground the trial court reached its decision, and whether that decision was supported by competent evidence. *In re Jaramillo*, 37 Colo. App. 171, 543 P.2d 1281 (1975).

**C.R.C.P. 52 is applicable to judgments in custody proceedings.** *In re Jaramillo*, 37 Colo. App. 171, 543 P.2d 1281 (1975).

**In a divorce action involving the custody of minor children, where no reporter was present and no record made of the evidence**, and the written conclusions of the trial judge indicate that the orders entered were arbitrary and unsupported by evidence, the judgment must be reversed. *Crites v. Crites*, 137 Colo. 220, 322 P.2d 1045 (1958).

**Where custodial orders of the trial court were silent on the question of character and fitness of either parent to have custody of the children**, the trial court should have made findings of fact thereon, because lacking such findings the supreme court was without compass to ascertain whether trial court acted properly. *Songster v. Songster*, 150 Colo. 466, 374 P.2d 197 (1962).

## ANNOTATION

**Temporary order is not “in any way res judicata” as to permanent order.** In re Lawson, 44 Colo. App. 105, 608 P.2d 378 (1980).

**Order granting temporary custody of children is not final** for purposes of appeal. In re Henne, 620 P.2d 62 (Colo. App. 1980).

**14-10-126. Interviews.** (1) The court may interview the child in chambers to ascertain the child’s wishes as to the allocation of parental responsibilities. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made, and it shall be made part of the record in the case.

(2) The court may seek the advice of professional personnel whether or not they are employed on a regular basis by the court. The advice given shall be in writing and shall be made available by the court to counsel of record, parties, and other expert witnesses upon request, but it shall otherwise be considered confidential and shall be sealed and shall not be open to inspection, except by consent of the court. Counsel may call for cross-examination any professional personnel consulted by the court.

**Source:** L. 71: R&RE, p. 530, § 1. C.R.S. 1963: § 46-1-26. L. 98: (1) amended, p. 1384, § 12, effective February 1, 1999.

## ANNOTATION

**Law reviews.** For article, “The Role of Children’s Counsel in Contested Child Custody, Visitation and Support Cases”, see 15 Colo. Law. 224 (1986). For article, “The Child’s Wishes in APR Proceedings: An Evidentiary Conundrum”, see 36 Colo. Law. 33 (January 2007).

**Section does not mandate interviews.** In re Rinow, 624 P.2d 365 (Colo. App. 1981); In re Turek, 817 P.2d 615 (Colo. App. 1991).

**Trial court did not abuse its discretion in refusing to interview child in chambers.** Court had the benefit of prior interview of child, reports filed with the court, and testimony during the hearing. In re Custody of C.J.S., 37 P.3d 479 (Colo. App. 2001).

**Parent may not cross-examine child at interview.** The father is not entitled, as a matter of law, to cross-examine the children at the time of the interview. In re Agner, 659 P.2d 53 (Colo. App. 1982).

**Making record is for benefit of parties.** Though the language of this section is mandatory in form, the obvious purpose of making a record is for the benefit of the parties. In re Armbeck, 33 Colo. App. 260, 518 P.2d 300 (1974).

**Requirement for record of interview concerning child’s preference not violated.**

Where the court conducted a 15-minute interview with the two minor children but did not inquire concerning their preference the requirement of this section for a record of an interview concerning the children’s preference was not violated. In re Short, 675 P.2d 323 (Colo. App. 1983), rev’d on other grounds, 698 P.2d 1310 (Colo. 1985).

**Requirement of making record may be waived.** The requirement of making a record, i.e., a verbatim transcript, of the interview between the court and child may be waived either expressly or by implication. In re Armbeck, 33 Colo. App. 260, 518 P.2d 300 (1974).

**Waiver of the requirement of making a record by implication held sufficient.** In re Armbeck, 33 Colo. App. 260, 518 P.2d 300 (1974).

**For the standard of the common law with respect to interviews,** see Rayer v. Rayer, 32 Colo. App. 400, 512 P.2d 637 (1973).

**Applied in** In re Schulke, 40 Colo. App. 473, 579 P.2d 90 (1978).

**14-10-127. Evaluation and reports - disclosure.** (1) (a) (I) In all proceedings concerning the allocation of parental responsibilities with respect to a child, the court shall, upon motion of either party or upon its own motion, order the court probation department, any county or district social services department, or a licensed mental health professional qualified pursuant to subsection (4) of this section to perform an evaluation and file a written report concerning the disputed issues relating to the allocation of parental responsibilities for the child, unless such motion by either party is made for the purpose of delaying the proceedings. Any court or social services department personnel appointed by the court to do such evaluation shall be qualified pursuant to subsection (4) of this section. When a mental health professional performs the evaluation, the court shall appoint or approve the selection of the mental health professional. Within seven days after the



appointment, the evaluator shall comply with the disclosure provisions of subsection (1.2) of this section. The court shall, at the time of the appointment of the evaluator, order one or more of the parties to deposit a reasonable sum with the court to pay the cost of the evaluation. The court may order the reasonable charge for such evaluation and report to be assessed as costs between the parties at the time the evaluation is completed.

(I.5) A party may request a supplemental evaluation to the evaluation ordered pursuant to subparagraph (I) of this paragraph (a). The court shall appoint another mental health professional to perform the supplemental evaluation at the initial expense of the moving party. The person appointed to perform the supplemental evaluation shall comply with the disclosure provisions of subsection (1.2) of this section. The court shall not order a supplemental evaluation if it determines that any of the following applies, based on motion and supporting affidavits:

(A) Such motion is interposed for purposes of delay;

(B) A party objects, and the party who objects or the child has a physical or mental condition that would make it harmful for such party or the child to participate in the supplemental evaluation;

(C) The purpose of such motion is to harass or oppress the other party;

(D) The moving party has failed or refused to cooperate with the first evaluation;

(E) The weight of the evidence other than the evaluation concerning the allocation of parental responsibilities or parenting time by the mental health professional demonstrates that a second evaluation would not be of benefit to the court in determining the allocation of parental responsibilities and parenting time; or

(F) In addition to the evaluation ordered pursuant to subparagraph (I) of this paragraph (a), there has been an investigation and report prepared by a child and family investigator pursuant to section 14-10-116.5, and the court finds that a supplemental evaluation concerning parental responsibilities will not serve the best interests of the child.

(II) Each party and the child shall cooperate in the supplemental evaluation. If the court finds that the supplemental evaluation was necessary and materially assisted the court, the court may order the costs of such supplemental evaluation to be assessed as costs between the parties. Except as otherwise provided in this section, such report shall be considered confidential and shall not be available for public inspection unless by order of court. The cost of each probation department or department of human services evaluation shall be based on an ability to pay and shall be assessed as part of the costs of the action or proceeding, and, upon receipt of such sum by the clerk of court, it shall be transmitted to the department or agency performing the evaluation.

(b) The person signing a report or evaluation and supervising its preparation shall be a licensed mental health professional. The mental health professional may have associates or persons working under him or her who are unlicensed.

(1.2) (a) Within seven days after his or her appointment, the evaluator shall disclose to each party, attorneys of record, and the court any familial, financial, or social relationship that the evaluator has or has had with the child, either party, the attorneys of record, or the judicial officer and, if a relationship exists, the nature of the relationship.

(b) Based on the disclosure required pursuant to paragraph (a) of this subsection (1.2), the court may, in its discretion, terminate the appointment and appoint a different evaluator in the proceedings. A party has seven days from the date of the disclosure to object to the appointment based upon information contained in the disclosure. If a party objects to the appointment, the court shall appoint a different person or confirm the appointment within seven days after the date of the party's objection. If no party timely objects to the appointment, then the appointment is deemed confirmed.

(2) In preparing the report concerning a child, the evaluator may consult any person who may have information about the child and the child's potential parenting arrangements. Upon order of the court, the evaluator may refer the child to other professional personnel for diagnosis. The evaluator may consult with and obtain information from medical, mental health, educational, or other expert persons who have served the child in the past without obtaining the consent of the parent or the person allocated parental responsibilities for the child; but the child's consent must be obtained if the child has reached the age of fifteen years unless the court finds that the child lacks mental capacity to consent. If the

requirements of subsections (3) to (7) of this section are fulfilled, the evaluator's report may be received in evidence at the hearing.

(3) The evaluator shall mail the report to the court and to counsel and to any party not represented by counsel at least twenty-one days prior to the hearing. The evaluator shall make available to counsel and to any party not represented by counsel his or her file of underlying data and reports, complete texts of diagnostic reports made to the evaluator pursuant to the provisions of subsections (2), (5), and (6) of this section, and the names and addresses of all persons whom the evaluator has consulted. Any party to the proceeding may call the evaluator and any person with whom the evaluator has consulted for cross-examination. No party may waive his or her right of cross-examination prior to the hearing.

(4) A person shall not be allowed to testify regarding a parental responsibilities or parenting time evaluation that the person has performed pursuant to this section unless the court finds that the person is qualified as competent, by training and experience, in the areas of:

- (a) The effects of divorce and remarriage on children, adults, and families;
- (b) Appropriate parenting techniques;
- (c) Child development, including cognitive, personality, emotional, and psychological development;

- (d) Child and adult psychopathology;
  - (e) Applicable clinical assessment techniques; and
  - (f) Applicable legal and ethical requirements of parental responsibilities evaluation.
- (5) If evaluation is indicated in an area which is beyond the training or experience of the evaluator, the evaluator shall consult with a mental health professional qualified by training or experience in that area. Such areas may include, but are not limited to, domestic violence, child abuse, alcohol or substance abuse, or psychological testing.

(6) (a) A mental health professional may make specific recommendations when the mental health professional has interviewed and assessed all parties to the dispute, assessed the quality of the relationship, or the potential for establishing a quality relationship, between the child and each of the parties, and had access to pertinent information from outside sources.

(b) A mental health professional may make recommendations even though all parties and the child have not been evaluated by the same mental health professional in the following circumstances if the mental health professional states with particularity in his or her opinion the limitations of his or her findings and recommendations:

- (I) Any of the parties reside outside Colorado and it would not be feasible for all parties and the child to be evaluated by the same mental health professional; or
- (II) One party refuses or is unable to cooperate with the court-ordered evaluation; or
- (III) The mental health professional is a member of a team of professionals that performed the evaluation and is presenting recommendations of the team that has interviewed and assessed all parties to the dispute.

(7) (a) A written report of the evaluation shall be provided to the court and to the parties pursuant to subsection (3) of this section.

(b) The report of the evaluation shall include, but need not be limited to, the following information:

- (I) A description of the procedures employed during the evaluation;
- (II) A report of the data collected;
- (III) A conclusion that explains how the resulting recommendations were reached from the data collected, with specific reference to criteria listed in section 14-10-124 (1.5), and, if applicable, to the criteria listed in section 14-10-131, and their relationship to the results of the evaluation;
- (IV) Recommendations concerning the allocation of parental responsibilities for the child, including decision-making responsibility, parenting time, and other considerations; and

(V) An explanation of any limitations in the evaluations or any reservations regarding the resulting recommendations.

(8) All evaluations and reports, including but not limited to supplemental evaluations and related medical and mental health information, that are submitted to the court pursuant



to this section shall be deemed confidential without the necessity of filing a motion to seal or otherwise limit access to the court file under the Colorado rules of civil procedure. An evaluation or report that is deemed confidential under this subsection (8) shall not be made available for public inspection without an order of the court authorizing public inspection.

**Source:** **L. 71:** R&RE, p. 530, § 1. **C.R.S. 1963:** § 46-1-27. **L. 76:** (1) amended, p. 529, § 1, effective April 16. **L. 79:** (1)-amended, p. 646, § 1, effective March 2. **L. 83:** Entire section amended, p. 649, § 1, effective June 10. **L. 88:** Entire section amended, p. 639, § 1, effective May 11. **L. 93:** IP(1)(a)(I), IP(4), and (7)(b)(IV) amended, p. 577, § 10, effective July 1. **L. 94:** (1)(a)(II) amended, p. 2645, § 108, effective July 1. **L. 96:** (1)(b) amended, p. 1287, § 1, effective January 1, 1997. **L. 98:** IP(1)(a)(I), (2), (3), (4), (6)(b), and (7) amended, p. 1384, § 13, effective February 1, 1999. **L. 2005:** (1)(a) amended, p. 1224, § 1, effective June 3; (1)(a)(I.5)(F) amended, p. 963, § 10, effective July 1. **L. 2006:** (8) added, p. 447, § 1, effective April 13. **L. 2012:** (1)(a)(I) and IP(1)(a)(I.5) amended and (1.2) added, (SB 12-056), ch. 108, p. 368, § 3, effective July 1; (3) amended, (SB 12-175), ch. 208, p. 832, § 30, effective July 1.

**Editor's note:** (1) Section 6 of chapter 108, Session Laws of Colorado 2012, provides that the act amending subsection (1)(a)(I) and the introductory portion to subsection (1)(a)(I.5) and adding subsection (1.2) applies to court appointments made on or after July 1, 2012.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** (1) For the licensing of mental health professionals, see article 43 of title 12.

(2) For the legislative declaration contained in the 1993 act amending the introductory portions to subsections (1)(a)(I) and (4) and subsection (7)(b)(IV), see section 1 of chapter 165, Session Laws of Colorado 1993. For the legislative declaration contained in the 1994 act amending subsection (1)(a)(II), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declarations contained in the 2005 act amending subsection (1)(a)(I.5)(F), see sections 1 and 3 of chapter 244, Session Laws of Colorado 2005.

## ANNOTATION

**Law reviews.** For article, "Therapist Privilege in Custody Cases", see 15 Colo. Law. 47 (1986). For article, "Helping a Client Handle a Child Custody Evaluation", see 16 Colo. Law. 991 (1987). For article, "Custody Evaluations in Colorado", see 18 Colo. Law. 1523 (1989). For article, "Evaluating Child Custody Evaluations", see 22 Colo. Law. 2541 (1993). For article, "Considerations Regarding the Role of the Special Advocate", see 29 Colo. Law. 107 (July 2000). For article, "Tips for Working With Evidence in Domestic Relations Cases", see 31 Colo. Law. 87 (June 2002). For article, "The Child's Wishes in APR Proceedings: An Evidentiary Conundrum", see 36 Colo. Law. 33 (January 2007). For article, "CFIs and APR Evaluators—Similarities and Differences", see 37 Colo. Law. 31 (January 2008). For article, "Evaluating the Evaluators: Work Product Reviews as Evidence", see 40 Colo. Law. 35 (May 2011).

**Annotator's note.** Since § 14-10-127 is similar to repealed § 46-1-5 (7), C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

**The purpose of the legislation providing for the preparation and filing of reports in**

custody proceedings is to make the information contained therein available to assist the court in determining what is in the best interest of the children concerned. *Pacheco v. Pacheco*, 38 Colo. App. 181, 554 P.2d 720 (1976).

**The purpose of the legislation providing for court assistants in the capacity of investigators of domestic relations cases to assist the court in the transaction of the judicial business of said court** was obviously to assist the court and not to replace it. The general assembly would have no power to substitute an investigator for a judge, and neither would such legislation authorize a trial court to deny to the parties any of the usual attributes of a fair trial in open court upon due notice. *Anderson v. Anderson*, 167 Colo. 88, 445 P.2d 397 (1968).

**Provisions of this section do not apply to custody determination in a dependency proceeding under the Children's Code.** *People in Interest of D.C.*, 851 P.2d 291 (Colo. App. 1993).

**Provisions of this section do not apply to the child's treating therapist** who was designated as a witness to testify as to her observations of the minor child. *In re Woolley*, 25 P.3d 1284 (Colo. App. 2001).

The act of the general assembly (§ 46-1-5 (7), C.R.S. 1963), which purported to authorize the trial court to call upon the probation department for a report concerning "the ability of each party to serve the best interest of the child", and further directing that "Each report shall be considered by the court" could not be so construed as to deny due process which includes the right to be heard in open court and to have a determination of issues based upon competent evidence offered by persons who submit themselves to cross examination. *Anderson v. Anderson*, 167 Colo. 88, 445 P.2d 397 (1968).

A probation officer, or other persons, who have been designated to investigate and report to the court in custody hearings matters involving the ability or fitness of parents to best serve the interests of their children, are subject to examination as witnesses concerning matters contained in their reports. *Saucerman v. Saucerman*, 170 Colo. 318, 461 P.2d 18 (1969).

However, touching upon matters related to them in confidence, the trial court should preliminarily rule in each instance what matters are in fact confidential, and whether the public interest requires the confidence to be preserved, and no examination of the officer should be permitted with respect to such confidential matters. *Saucerman v. Saucerman*, 170 Colo. 318, 461 P.2d 18 (1969).

Where the trial court received in evidence the investigative reports of welfare and health department employees in reference to conditions found in the respective homes of the two contestants, and in reference to the psychological effects living with the father or the mother might have on one of the children, and the record indicated that at one hearing after the reports were filed the individuals who made the reports were either in court or could have been made available to the parties for cross-examination, there was no unfairness nor a denial of due process. *Aylor v. Aylor*, 173 Colo. 294, 478 P.2d 302 (1970).

**Opportunity to test report's reliability and offer evidence exists.** Because any party has the right to call for cross-examination of the investigator and any person he has consulted, and because the investigator's file is available to counsel, ample opportunity exists for a party to test the reliability of the report and to offer evidence in explanation of or to disprove any statements or conclusions based on hearsay. *Pacheco v. Pacheco*, 38 Colo. App. 181, 554 P.2d 720 (1976).

In making an order changing the custody of children, the trial court is actually making the decision, though such order is based on the recommendations of a psychiatrist and welfare personnel whose reports constitute nothing more than recommendations. *Aylor v. Aylor*, 173 Colo. 294, 478 P.2d 302 (1970).

Court did not improperly utilize an investigative report made by an officer of the juvenile probation department in arriving at its decision relative to custody, for while it is true that the investigative report was not formally offered and received in evidence, the report was made a part of the record and had been furnished previously to both parties, and although she did not choose to do so, the wife had the right to call and examine the author of the report. *Rayer v. Rayer*, 32 Colo. App. 400, 512 P.2d 637 (1973); *In re Lorenzo*, 721 P.2d 155 (Colo. App. 1986).

The reports simply furnish specific information of a specialized nature for aid and assistance to the trial court, but in the final analysis the judge makes the decision, and whatever recommendations may be made to the judge, be they by experts or counsel, are merely recommendations and nothing more. *Aylor v. Aylor*, 173 Colo. 294, 478 P.2d 302 (1970).

Where objections and exceptions were filed to the report of the probation department, since it was a hearsay document, if the conclusions reached therein were objected to by either party, it would be necessary that competent evidence, upon which the conclusions were based, be presented in open court. *Anderson v. Anderson*, 167 Colo. 88, 445 P.2d 397 (1968).

**Waiver of objections to admission of report.** Unless a party notifies the court and the opposing party within 10 days after receipt of a copy of the report (or if a copy has not been received at least 10 days prior to the hearing day, then at or prior to the commencement of the hearing at which the report may be used) that he intends to object to the admission of the report on the grounds of noncompliance with the 10-day rule or the hearsay nature of the report, any such objections are waived. *Pacheco v. Pacheco*, 38 Colo. App. 181, 554 P.2d 720 (1976).

Where a copy of the report was received by counsel a reasonable time prior to the hearing and no objection was made thereto until after the commencement of the hearing, objections as to hearsay and the 10-day rule were waived. *Pacheco v. Pacheco*, 38 Colo. App. 181, 554 P.2d 720 (1976).

**Effect of valid objection.** If a valid objection is made within the period specified above, then, on motion of either party or of the court, the court shall grant a reasonable continuance of the custody hearing date in order that the parties may obtain appropriate testimony. *Pacheco v. Pacheco*, 38 Colo. App. 181, 554 P.2d 720 (1976).

The trial court erred in relying upon the probation report where it afforded no opportunity for the husband to offer evidence in explanation thereof, or to disprove any conclusions based on hearsay that were contained therein. *Anderson v. Anderson*, 167 Colo. 88, 445 P.2d 397 (1968).



It was not prejudicial error for the trial court to have received in evidence the hearsay reports of the case worker of the welfare department in custody proceedings, since the nature of the "report" was such that the father could not possibly have been prejudiced by anything contained therein, and furthermore, it affirmatively appeared from the court's decree that it did not in any manner enter into the court's thinking to the prejudice of the father. *Suzuki v. Suzuki*, 162 Colo. 204, 425 P.2d 44 (1967).

**Compliance with the 10-day provisions of this section is not a condition precedent** to the reception of the report. *Pacheco v. Pacheco*, 38 Colo. App. 181, 554 P.2d 720 (1976).

**Effect of noncompliance.** Noncompliance with the 10-day rule merely prohibits the court from proceeding with a hearing wherein the report can be considered absent consent of or waiver by the parties. *Pacheco v. Pacheco*, 38 Colo. App. 181, 554 P.2d 720 (1976).

**Communications disclosed pursuant to this section are not privileged under § 13-90-107** since the information was necessary to make an evaluation for the court, not to treat the person disclosing the information. *Anderson v. Glismann*, 577 F. Supp. 1506 (D. Colo. 1984).

**Actions of a court-appointed expert are made under the authority of the state**, but not on behalf of the state, and will not sustain a cause of action under 42 U.S.C. § 1983. *Anderson v. Glismann*, 577 F. Supp. 1506 (D. Colo. 1984).

**The language that "the court shall" order an evaluation** or a supplemental evaluation is mandatory unless the express conditions apply, and a trial court must make specific findings to support its denial of any requested evaluation in order to insure effective and meaningful review. *In re Sepmeier*, 782 P.2d 876 (Colo. App. 1989).

**14-10-128. Hearings.** (1) Proceedings concerning the allocation of parental responsibilities with respect to a child shall receive priority in being set for hearing.

(2) The court may tax as costs the payment of necessary travel and other expenses incurred by any person whose presence at the hearing the court deems necessary to determine the best interests of the child.

(3) The court without a jury shall determine questions of law and fact. If it finds that a public hearing may be detrimental to the child's best interests, the court may exclude the public from a hearing concerning the allocation of parental responsibilities but may admit any person who has a direct and legitimate interest in the particular case or a legitimate educational or research interest in the work of the court.

(4) If the court finds it necessary in order to protect the child's welfare that the record of any interview, report, investigation, or testimony in a proceeding concerning the allocation of parental responsibilities be kept secret, the court shall make an appropriate order sealing the record.

**Source:** L. 71: R&RE, p. 531, § 1. C.R.S. 1963: § 46-1-28. L. 98: (1), (3), and (4) amended, p. 1386, § 14, effective February 1, 1999.

**Trial court erred when it denied petitioner's request for an evaluation.** This section applies to both the determination of parenting time and the allocation of parental decision-making when a court is asked to rule on the intended relocation of one of the parents. Because the statute is mandatory, a trial court must order an evaluation pursuant to this section when requested by either party when one party seeks to relocate. *In re Hall*, 241 P.3d 540 (Colo. 2010).

**The trial court must make specific findings to support its denial of any requested evaluation.** *In re Chatten*, 967 P.2d 206 (Colo. App. 1998).

**Denial of supplemental custody evaluation appropriate where** court found that a further delay in the resolution of the custody motion would cause emotional stress to the child and that discussions mother had had with the child as to where she was going to live and attend school had already contributed to the child's anxiety, stress, and resulting stomach aches. *In re Chatten*, 967 P.2d 206 (Colo. App. 1998).

**"Custody proceedings" does not automatically include a motion to modify custody.** The threshold requirements of § 14-10-132 must be met before a custody proceeding is established. *In re Michie*, 844 P.2d 1325 (Colo. App. 1992).

**Denying petitioner's motion for custody evaluation based upon inability to pay was abuse of discretion by court.** *Hernandez v. District Ct.*, 814 P.2d 379 (Colo. 1991).

**Court properly balanced its obligation to accord mother due process against its need to efficiently manage the case when it denied mother's last minute request to call 40 witnesses** without providing prior notice to father. *In re Hatton*, 160 P.3d 326 (Colo. App. 2007).

**Applied in** *In re Schulke*, 40 Colo. App. 473, 579 P.2d 90 (1978); *In re Agner*, 659 P.2d 53 (Colo. App. 1982); *In re Kasten*, 814 P.2d 11 (Colo. App. 1991).

## ANNOTATION

**Award for fees of eight witnesses without specific finding of their necessity held to be error in child custody hearing.** *Weber v. Wallace*, 789 P.2d 427 (Colo. App. 1989).

**Applied in** *In re Agner*, 659 P.2d 53 (Colo. App. 1982).

**14-10-128.1. Appointment of parenting coordinator - disclosure.** (1) Pursuant to the provisions of this section, at any time after the entry of an order concerning parental responsibilities and upon notice to the parties, the court may, on its own motion, a motion by either party, or an agreement of the parties, appoint a parenting coordinator as a neutral third party to assist in the resolution of disputes between the parties concerning parental responsibilities, including but not limited to implementation of the court-ordered parenting plan. The parenting coordinator shall be a neutral person with appropriate training and qualifications and an independent perspective acceptable to the court. Within seven days after the appointment, the appointed person shall comply with the disclosure provisions of subsection (2.5) of this section.

(2) (a) Absent agreement of the parties, a court shall not appoint a parenting coordinator unless the court makes the following findings:

(I) That the parties have failed to adequately implement the parenting plan;

(II) That mediation has been determined by the court to be inappropriate, or, if not inappropriate, that mediation has been attempted and was unsuccessful; and

(III) That the appointment of a parenting coordinator is in the best interests of the child or children involved in the parenting plan.

(b) In addition to making the findings required pursuant to paragraph (a) of this subsection (2), prior to appointing a parenting coordinator, the court may consider the effect of any claim or documented evidence of domestic violence, as defined in section 14-10-124 (1.3) (a), by the other party on the parties' ability to engage in parent coordination.

(2.5) (a) Within seven days after his or her appointment, the appointed person shall disclose to each party, attorneys of record, and the court any familial, financial, or social relationship that the appointed person has or has had with the child, either party, the attorneys of record, or the judicial officer and, if a relationship exists, the nature of the relationship.

(b) Based on the disclosure required pursuant to paragraph (a) of this subsection (2.5), the court may, in its discretion, terminate the appointment and appoint a different person in the proceedings. A party has seven days from the date of the disclosure to object to the appointment based upon information contained in the disclosure. If a party objects to the appointment, the court shall appoint a different person or confirm the appointment within seven days after the date of the party's objection. If no party timely objects to the appointment, then the appointment is deemed confirmed.

(3) A parenting coordinator shall assist the parties in implementing the terms of the parenting plan. Duties of a parenting coordinator include, but are not limited to, the following:

(a) Assisting the parties in creating an agreed-upon, structured guideline for implementation of the parenting plan;

(b) Developing guidelines for communication between the parties and suggesting appropriate resources to assist the parties in learning appropriate communication skills;

(c) Informing the parties about appropriate resources to assist them in developing improved parenting skills;

(d) Assisting the parties in realistically identifying the sources and causes of conflict between them, including but not limited to identifying each party's contribution to the conflict, when appropriate; and

(e) Assisting the parties in developing parenting strategies to minimize conflict.

(4) (a) The court may not appoint a person pursuant to this section to serve in a case as a parenting coordinator if the person has served or is serving in the same case as an evaluator pursuant to section 14-10-127 or a representative of the child pursuant to section 14-10-116. After appointing a person pursuant to this section to serve as a parenting



coordinator in a case, the court may not subsequently appoint the person to serve in the same case as an evaluator pursuant to section 14-10-127 or a representative of the child pursuant to section 14-10-116.

(b) The court may appoint a person who has served or is serving in a case as a child and family investigator pursuant to section 14-10-116.5 to serve in the same case as the parenting coordinator, upon the agreement of the parties. After appointing a person pursuant to this section to serve as a parenting coordinator in a case, the court may not subsequently appoint the person to serve as a child and family investigator in the same case pursuant to section 14-10-116.5.

(5) A court order appointing a parenting coordinator shall be for a specified term; except that the court order shall not appoint a parenting coordinator for a period of longer than two years. If an order fails to specify the length of the court-ordered appointment, it shall be construed to be two years from the date of appointment. Upon agreement of the parties, the court may extend, modify, or terminate the appointment, including extending the appointment beyond two years from the date of the original appointment. The court may terminate the appointment of the parenting coordinator at any time for good cause. The court shall allow the parenting coordinator to withdraw at any time.

(6) A court order appointing a parenting coordinator shall include apportionment of the responsibility for payment of all of the parenting coordinator's fees between the parties. The state shall not be responsible for payment of fees to a parenting coordinator appointed pursuant to this section.

(7) (a) A parenting coordinator appointed by the court pursuant to this section shall be immune from civil liability in any claim for injury that arises out of an act or omission of the parenting coordinator occurring on or after April 16, 2009, during the performance of his or her duties or during the performance of any act that a reasonable parenting coordinator would believe was within the scope of his or her duties unless the act or omission causing the injury was willful and wanton.

(b) Nothing in this subsection (7) shall be construed to bar a party from asserting a claim:

(I) Based upon a parenting coordinator's failure to comply with the provision set forth in subsection (8) of this section;

(II) Related to the reasonableness or accuracy of any fee charged or time billed by a parenting coordinator; or

(III) Based upon a negligent act or omission involving the operation of a motor vehicle by a parenting coordinator.

(c) (I) In a judicial proceeding, administrative proceeding, or other similar proceeding between the parties to the action, a parenting coordinator shall not be competent to testify and may not be required to produce records as to any statement, conduct, or decision that occurred during the parenting coordinator's appointment to the same extent as a judge of a court of this state acting in a judicial capacity.

(II) This paragraph (c) shall not apply:

(A) To the extent testimony or production of records by the parenting coordinator is necessary to determine a claim of the parenting coordinator against a party; or

(B) To the extent testimony or production of records by the parenting coordinator is necessary to determine a claim of a party against a parenting coordinator; or

(C) When both parties have agreed, in writing, to authorize the parenting coordinator to testify.

(d) If a person commences a civil action against a parenting coordinator arising from the services of the parenting coordinator, or if a person seeks to compel a parenting coordinator to testify or produce records in violation of paragraph (c) of this subsection (7), and the court determines that the parenting coordinator is immune from civil liability or that the parenting coordinator is not competent to testify, the court shall award to the parenting coordinator reasonable attorney fees and reasonable expenses of litigation.

(8) The parenting coordinator shall comply with any applicable provisions set forth in chief justice directives and any other practice or ethical standards established by rule, statute, guideline, or licensing board that regulates the parenting coordinator.

**Source:** **L. 2005:** Entire section added, p. 952, § 1, effective June 2; (4)(b) amended, p. 963, § 11, effective July 1. **L. 2009:** (7) and (8) amended, (SB 09-069), ch. 121, p. 502, § 1, effective April 16. **L. 2012:** (1) and (2)(b) amended and (2.5) added, (SB 12-056), ch. 108, p. 369, § 4, effective July 1.

**Editor's note:** Section 6 of chapter 108, Session Laws of Colorado 2012, provides that the act amending subsections (1) and (2)(b) and adding subsection (2.5) applies to court appointments made on or after July 1, 2012.

**Cross references:** For the legislative declarations contained in the 2005 act amending subsection (4)(b), see sections 1 and 3 of chapter 244, Session Laws of Colorado 2005.

## ANNOTATION

**Law reviews.** For article, "Privatizing Family Law Adjudications: Issues and Procedures", see 34 Colo. Law. 95 (August 2005). For article, "Parenting Coordinator: Understanding This New Role", see 35 Colo. Law. 31 (February 2006). For article, "A Brief Overview of Parenting Coordination", see 38 Colo. Law. 61 (July 2009).

**This section does not permit the parenting coordinator to make decisions or resolve disputes that the parents are unable to resolve.** A grant of decision-making authority to the parenting coordinator is contrary to subsection (3). In re Dauwe, 148 P.3d 282 (Colo. App. 2006).

**This section and § 13-22-313 are in conflict and cannot be harmonized with respect to the standards for the appointment of a parenting coordinator if abuse is alleged by one parent by the other.** Although § 13-22-313 bars the court from referring a case to any ancillary form

of alternative dispute resolution if one of the parties claims abuse by the other party, under this section, a mere claim of abuse by one parent is insufficient to bar the appointment of a parenting coordinator. Even documented evidence of domestic violence does not automatically bar such an appointment. Rather, the court is required only to consider the effect of the evidence on the parties' ability to engage in parenting coordination. In re Rozzi, 190 P.3d 815 (Colo. App. 2008).

**Court erred in directing that the parenting coordinator should assume the duties of a special master** and follow the procedures set forth in C.R.C.P. 53. However, the court was proper in providing that the parenting coordinator may make nonbinding recommendations to the parties in the event that they are unable to resolve a dispute themselves. In re Rozzi, 190 P.3d 815 (Colo. App. 2008).

**14-10-128.3. Appointment of decision-maker - disclosure.** (1) In addition to the appointment of a parenting coordinator pursuant to section 14-10-128.1 or an arbitrator pursuant to section 14-10-128.5, at any time after the entry of an order concerning parental responsibilities and upon written consent of both parties, the court may appoint a qualified domestic relations decision-maker and grant to the decision-maker binding authority to resolve disputes between the parties as to implementation or clarification of existing orders concerning the parties' minor or dependent children, including but not limited to disputes concerning parenting time, specific disputed parental decisions, and child support. A decision-maker shall have the authority to make binding determinations to implement or clarify the provisions of a pre-existing court order in a manner that is consistent with the substantive intent of the court order. The decision-maker appointed pursuant to the provisions of this section may be the same person as the parenting coordinator appointed pursuant to section 14-10-128.1. At the time of the appointment, the appointed person shall comply with the disclosure provisions of subsection (4.5) of this section.

(2) The decision-maker's procedures for making determinations shall be in writing and shall be approved by the parties prior to the time the decision-maker begins to resolve a dispute of the parties. If a party is unable or unwilling to agree to the decision-maker's procedures, the decision-maker shall be allowed to withdraw from the matter.

(3) All decisions made by the decision-maker pursuant to this section shall be in writing, dated, and signed by the decision-maker. Decisions of the decision-maker shall be filed with the court and mailed to the parties or to counsel for the parties, if any, no later than twenty days after the date the decision is issued. All decisions shall be effective immediately upon issuance and shall continue in effect until vacated, corrected, or modified by the decision-maker or until an order is entered by a court pursuant to a de novo hearing under subsection (4) of this section.



(4) (a) A party may file a motion with the court requesting that a decision of the decision-maker be modified by the court pursuant to a de novo hearing. A motion for a de novo hearing shall be filed no later than thirty-five days after the date the decision is issued pursuant to subsection (3) of this section.

(b) If a court, in its discretion based on the pleadings filed, grants a party's request for a de novo hearing to modify the decision of the decision-maker and the court substantially upholds the decision of the decision-maker, the party that requested the de novo hearing shall pay the fees and costs of the other party and shall pay the fees and costs incurred by the decision-maker in connection with the request for de novo hearing, unless the court finds that it would be manifestly unjust.

(4.5) (a) Within seven days after his or her appointment, the appointed person shall disclose to each party, attorneys of record, and the court any familial, financial, or social relationship that the appointed person has or has had with the child, either party, the attorneys of record, or the judicial officer and, if a relationship exists, the nature of the relationship.

(b) Based on the disclosure required pursuant to paragraph (a) of this subsection (4.5), the court may, in its discretion, terminate the appointment and appoint a different person in the proceedings. A party has seven days from the date of the disclosure to object to the appointment based upon information contained in the disclosure. If a party objects to the appointment, the court shall appoint a different person or confirm the appointment within seven days after the date of the party's objection. If no party timely objects to the appointment, then the appointment is deemed confirmed.

(5) A court order appointing a decision-maker shall be for a specified term; except that the court order shall not appoint a decision-maker for a period of longer than two years. If an order fails to specify the length of the court-ordered appointment, it shall be construed to be two years from the date of appointment. Upon agreement of the parties, the court may extend, modify, or terminate the appointment, including extending the appointment beyond two years from the date of the original appointment. The court may terminate the appointment of the decision-maker at any time for good cause. The court shall allow the decision-maker to withdraw at any time.

(6) A court order appointing a decision-maker shall include apportionment of the responsibility for payment of all of the decision-maker's fees between the parties. The state shall not be responsible for payment of fees to a decision-maker appointed pursuant to this section.

(7) (a) A decision-maker shall be immune from liability in any claim for injury that arises out of an act or omission of the decision-maker occurring during the performance of his or her duties or during the performance of an act that the decision-maker reasonably believed was within the scope of his or her duties unless the act or omission causing such injury was willful and wanton.

(b) Nothing in this subsection (7) shall be construed to bar a party from asserting a claim related to the reasonableness or accuracy of any fee charged or time billed by a decision-maker.

(c) (I) In a judicial proceeding, administrative proceeding, or other similar proceeding, a decision-maker shall not be competent to testify and may not be required to produce records as to any statement, conduct, or decision, that occurred during the decision-maker's appointment, to the same extent as a judge of a court of this state acting in a judicial capacity.

(II) This paragraph (c) shall not apply:

(A) To the extent testimony or production of records by the decision-maker is necessary to determine the claim of the decision-maker against a party; or

(B) To the extent testimony or production of records by the decision-maker is necessary to determine a claim of a party against a decision-maker; or

(C) When both parties have agreed, in writing, to authorize the decision-maker to testify.

(d) If a person commences a civil action against a decision-maker arising from the services of the decision-maker, or if a person seeks to compel a decision-maker to testify or produce records in violation of paragraph (c) of this subsection (7), and the court decides

that the decision-maker is immune from civil liability or that the decision-maker is not competent to testify, the court shall award to the decision-maker reasonable attorney fees and reasonable expenses of litigation.

(8) The decision-maker shall comply with any applicable provisions set forth in chief justice directives and any other practice or ethical standards established by rule, statute, or licensing board that regulates the decision-maker.

**Source:** **L. 2005:** Entire section added, p. 954, § 1, effective June 2. **L. 2012:** (1) amended and (4.5) added, (SB 12-056), ch. 108, p. 370, § 5, effective July 1; (4)(a) amended, (SB 12-175), ch. 208, p. 832, § 31, effective July 1.

**Editor's note:** (1) Section 6 of chapter 108, Session Laws of Colorado 2012, provides that the act amending subsection (1) and adding subsection (4.5) applies to court appointments made on or after July 1, 2012.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (4)(a) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

#### ANNOTATION

**Law reviews.** For article, "Privatizing Family Law Adjudications: Issues and Procedures", see 34 Colo. Law. 95 (August 2005). For article, "Parenting Coordinator: Understanding This New Role", see 35 Colo. Law. 31 (February 2006).

**14-10-128.5. Appointment of arbitrator - de novo hearing of award.** (1) With the consent of all parties, the court may appoint an arbitrator to resolve disputes between the parties concerning the parties' minor or dependent children, including but not limited to parenting time, nonrecurring adjustments to child support, and disputed parental decisions. Notwithstanding any other provision of law to the contrary, all awards entered by an arbitrator appointed pursuant to this section shall be in writing. The arbitrator's award shall be effective immediately upon entry and shall continue in effect until vacated by the arbitrator pursuant to part 2 of article 22 of title 13, C.R.S., modified or corrected by the arbitrator pursuant to part 2 of article 22 of title 13, C.R.S., or modified by the court pursuant to a de novo hearing under subsection (2) of this section.

(2) Any party may apply to have the arbitrator's award vacated, modified, or corrected pursuant to part 2 of article 22 of title 13, C.R.S., or may move the court to modify the arbitrator's award pursuant to a de novo hearing concerning such award by filing a motion for hearing no later than thirty-five days after the date of the award. In circumstances in which a party moves for a de novo hearing by the court, if the court, in its discretion based on the pleadings filed, grants the motion and the court substantially upholds the decision of the arbitrator, the party that requested the de novo hearing shall be ordered to pay the fees and costs of the other party and the fees of the arbitrator incurred in responding to the application or motion unless the court finds that it would be manifestly unjust.

**Source:** **L. 97:** Entire section added, p. 33, § 2, effective July 1. **L. 2004:** Entire section amended, p. 1731, § 3, effective August 4. **L. 2005:** Entire section amended, p. 956, § 2, effective June 2. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 833, § 32, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

#### ANNOTATION

**Law reviews.** For article, "Child Custody: The Right Choice at the Right Price", see 26 Colo. Law. 67 (August 1997). For article, "Use of a Parenting Coordinator in Domestic Cases",



see 27 Colo. Law. 53 (May 1998). For article, "Privatizing Family Law Adjudications: Issues and Procedures", see 34 Colo. Law. 95 (August 2005). For article, "Parenting Coordinator: Understanding This New Role", see 35 Colo. Law. 31 (February 2006).

**While issues of child custody, visitation, child support, and other matters relating to the children are arbitrable, the trial court retains jurisdiction** to decide all issues relating to the children de novo upon the request of either party. In re Popack, 998 P.2d 464 (Colo. App. 2000).

**Because there was no arbitration award issued pursuant to this section**, mother was not entitled to a trial de novo. Although the order of appointment clothed the parenting coordinator with arbitration power, the court found no arbit-

ration occurred. In re Kniskern, 80 P.3d 939 (Colo. App. 2003).

**Trial court is not required to conduct an evidentiary hearing on an arbitrator's request for payment of fees.** Although the necessity or reasonableness of an arbitrator's fees may be subject to dispute, the parties' due process rights to litigate the scope of the services and the amounts requested are well protected by written motion practice. In re Eggert, 53 P.3d 794 (Colo. App. 2002).

**Requests for de novo review must be filed within 30 days after the arbitrator's ruling.** This conclusion is consistent with the plain meaning of the statute since it specifically refers to the Uniform Arbitration Act of 1975 that creates the 30-day time frame. In re Schmitt, 89 P.3d 510 (Colo. App. 2004).

**14-10-129. Modification of parenting time.** (1) (a) (I) Except as otherwise provided in subparagraph (I) of paragraph (b) of this subsection (1), the court may make or modify an order granting or denying parenting time rights whenever such order or modification would serve the best interests of the child.

(II) In those cases in which a party with whom the child resides a majority of the time is seeking to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party, the court, in determining whether the modification of parenting time is in the best interests of the child, shall take into account all relevant factors, including those enumerated in paragraph (c) of subsection (2) of this section. The party who is intending to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party shall provide the other party with written notice as soon as practicable of his or her intent to relocate, the location where the party intends to reside, the reason for the relocation, and a proposed revised parenting time plan. A court hearing on any modification of parenting time due to an intent to relocate shall be given a priority on the court's docket.

(b) (I) The court shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger the child's physical health or significantly impair the child's emotional development. Nothing in this section shall be construed to affect grandparent visitation granted pursuant to section 19-1-117, C.R.S.

(II) The provisions of subparagraph (I) of this paragraph (b) shall not apply in those cases in which a party with whom the child resides a majority of the time is intending to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party.

(1.5) If a motion for a substantial modification of parenting time which also changes the party with whom the child resides a majority of the time has been filed, whether or not it has been granted, no subsequent motion may be filed within two years after disposition of the prior motion unless the court decides, on the basis of affidavits, that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development or that the party with whom the child resides a majority of the time is intending to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party.

(2) The court shall not modify a prior order concerning parenting time that substantially changes the parenting time as well as changes the party with whom the child resides a majority of the time unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or the party with whom the child resides the majority of the time and that the modification is necessary to serve the best interests of the child. In applying these standards, the court shall retain the parenting time schedule established in the prior decree unless:

(a) The parties agree to the modification; or

(b) The child has been integrated into the family of the moving party with the consent of the other party; or

(c) The party with whom the child resides a majority of the time is intending to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party. A court hearing on any modification of parenting time due to an intent to relocate shall be given a priority on the court's docket. In determining whether the modification of parenting time is in the best interests of the child, the court shall take into account all relevant factors, including whether a party has been a perpetrator of domestic violence as that term is defined in section 14-10-124 (1.3), which factor shall be supported by a preponderance of the evidence, whether such domestic violence occurred before or after the prior decree, and all other factors enumerated in section 14-10-124 (1.5) (a) and:

- (I) The reasons why the party wishes to relocate with the child;
- (II) The reasons why the opposing party is objecting to the proposed relocation;
- (III) The history and quality of each party's relationship with the child since any previous parenting time order;
- (IV) The educational opportunities for the child at the existing location and at the proposed new location;
- (V) The presence or absence of extended family at the existing location and at the proposed new location;
- (VI) Any advantages of the child remaining with the primary caregiver;
- (VII) The anticipated impact of the move on the child;
- (VIII) Whether the court will be able to fashion a reasonable parenting time schedule if the change requested is permitted; and
- (IX) Any other relevant factors bearing on the best interests of the child; or

(d) The child's present environment endangers the child's physical health or significantly impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

(3) (a) If a parent has been convicted of any of the crimes listed in paragraph (b) of this subsection (3) or convicted in another state or jurisdiction, including but not limited to a military or federal jurisdiction, of an offense that, if committed in Colorado, would constitute any of the crimes listed in paragraph (b) of this subsection (3), or convicted of any crime in which the underlying factual basis has been found by the court on the record to include an act of domestic violence, as defined in section 18-6-800.3 (1), C.R.S., that constitutes a potential threat or endangerment to the child, the other parent, or any other person who has been granted custody of or parental responsibility for the child pursuant to court order may file an objection to parenting time with the court. The other parent or other person having custody or parental responsibility shall give notice to the offending parent of such objection as provided by the Colorado rules of civil procedure, and the offending parent shall have twenty-one days from such notice to respond. If the offending parent fails to respond within twenty-one days, the parenting time rights of such parent shall be suspended until further order of the court. If such parent responds and objects, a hearing shall be held within thirty-five days of such response. The court may determine that any offending parent who responds and objects shall be responsible for the costs associated with any hearing, including reasonable attorney fees incurred by the other parent. In making such determination, the court shall consider the criminal record of the offending parent and any actions to harass the other parent and the children, any mitigating actions by the offending parent, and whether the actions of either parent have been substantially frivolous, substantially groundless, or substantially vexatious. The offending parent shall have the burden at the hearing to prove that parenting time by such parent is in the best interests of the child or children.

(b) The provisions of paragraph (a) of this subsection (3) shall apply to the following crimes:

- (I) Murder in the first degree, as defined in section 18-3-102, C.R.S.;
- (II) Murder in the second degree, as defined in section 18-3-103, C.R.S.;
- (III) Enticement of a child, as defined in section 18-3-305, C.R.S.;
- (IV) (A) Sexual assault, as described in section 18-3-402, C.R.S.; and



(B) Sexual assault in the first degree, as described in section 18-3-402, C.R.S., as it existed prior to July 1, 2000;

(V) Sexual assault in the second degree, as described in section 18-3-403, C.R.S., as it existed prior to July 1, 2000;

(VI) (A) Unlawful sexual contact if the victim is compelled to submit, as described in section 18-3-404 (2), C.R.S.; and

(B) Sexual assault in the third degree if the victim is compelled to submit, as described in section 18-3-404 (2), C.R.S., as it existed prior to July 1, 2000;

(VII) Sexual assault on a child, as defined in section 18-3-405, C.R.S.;

(VIII) Incest, as described in section 18-6-301, C.R.S.;

(IX) Aggravated incest, as described in section 18-6-302, C.R.S.;

(X) Child abuse, as described in section 18-6-401 (7) (a) (I) to (7) (a) (IV), C.R.S.;

(XI) Trafficking in children, as defined in section 18-3-502, C.R.S.;

(XII) Sexual exploitation of children, as defined in section 18-6-403, C.R.S.;

(XIII) Procurement of a child for sexual exploitation, as defined in section 18-6-404, C.R.S.;

(XIV) Soliciting for child prostitution, as defined in section 18-7-402, C.R.S.;

(XV) Pandering of a child, as defined in section 18-7-403, C.R.S.;

(XVI) Procurement of a child, as defined in section 18-7-403.5, C.R.S.;

(XVII) Keeping a place of child prostitution, as defined in section 18-7-404, C.R.S.;

(XVIII) Pimping of a child, as defined in section 18-7-405, C.R.S.;

(XIX) Inducement of child prostitution, as defined in section 18-7-405.5, C.R.S.;

(XX) Patronizing a prostituted child, as defined in section 18-7-406, C.R.S.

(c) If the party was convicted in another state or jurisdiction of an offense that, if committed in Colorado, would constitute an offense listed in subparagraphs (III) to (XX) of paragraph (b) of this subsection (3), the court shall order that party to submit to a sex-offense-specific evaluation and a parental risk assessment in Colorado and the court shall consider the recommendations of the evaluation and the assessment in any order the court makes relating to parenting time or parental contact. The convicted party shall pay for the costs of the evaluation and the assessment.

(4) A motion to restrict parenting time or parental contact with a parent which alleges that the child is in imminent physical or emotional danger due to the parenting time or contact by the parent shall be heard and ruled upon by the court not later than seven days after the day of the filing of the motion. Any parenting time which occurs during such seven-day period after the filing of such a motion shall be supervised by an unrelated third party deemed suitable by the court or by a licensed mental health professional, as defined in section 14-10-127 (1) (b). This subsection (4) shall not apply to any motion which is filed pursuant to subsection (3) of this section.

(5) If the court finds that the filing of a motion under subsection (4) of this section was substantially frivolous, substantially groundless, or substantially vexatious, the court shall require the moving party to pay the reasonable and necessary attorney fees and costs of the other party.

**Source:** L. 71: R&RE, p. 531, § 1. C.R.S. 1963: § 46-1-29. L. 73: p. 554, § 11. L. 88: (3) added, p. 643, § 1, effective March 15. L. 89: (4) and (5) added, p. 803, § 2, effective April 27. L. 90: (3)(a) amended, p. 902, § 1, effective March 16. L. 91: (2) amended, p. 261, § 2, effective May 31. L. 93: (1), (2), (3)(a), and (4) amended, p. 578, § 11, effective July 1. L. 98: (1), (2), and (3)(a) amended and (1.5) added, p. 1387, § 15, effective February 1, 1999. L. 2000: (3)(b)(IV), (3)(b)(V), and (3)(b)(VI) amended, p. 701, § 21, effective July 1. L. 2001: (1), (1.5), and (2) amended, p. 761, § 1, effective September 1. L. 2008: (3)(a) amended and (3)(c) added, p. 1636, § 1, effective May 29. L. 2010: (3)(b)(XI) amended, (SB 10-140), ch. 156, p. 537, § 3, effective April 21; IP(2)(c) amended, (HB 10-1135), ch. 87, p. 291, § 2, effective July 1. L. 2012: (3)(a) amended, (SB 12-175), ch. 208, p. 833, § 33, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3)(a) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For the legislative declaration contained in the 1993 act amending subsections (1), (2), (3)(a), and (4), see section 1 of chapter 165, Session Laws of Colorado 1993.

## ANNOTATION

**Law reviews.** For article, "Moving the Children Out of State", see 12 Colo. Law. 1450 (1983). For article, "Dealing with Sexual Abuse Allegations in Custody and Visitation Disputes — Parts I and II", see 16 Colo. Law. 1005 and 1225 (1987). For article, "Custody Evaluations in Colorado", see 18 Colo. Law. 1523 (1989). For article, "Addressing New Standards for Modification Under the Parental Responsibility Act", see 28 Colo. Law. 67 (June 1999). For article, "Parenting Time in Divorce", see 31 Colo. Law. 25 (October 2002). For article, "Relocation in Family Law Cases", see 35 Colo. Law. 47 (March 2006). For article, "Dissolution of Marriage and Domestic Violence: Considerations for the Family Law Practitioner", see 37 Colo. Law. 43 (October 2008).

**Annotator's note.** Cases relevant to § 14-10-129 decided prior to its earliest source, L. 71, p. 531, § 1, have been included in the annotations to this section.

**Best interests of child must predominate** in any custody determination. In re McGee, 44 Colo. App. 330, 613 P.2d 348 (1980).

**The court did not abuse its discretion in adopting an agreement and modifying the parenting time** despite the fact that the agreement was not reduced to writing or signed. This section allows the trial court to modify parenting time whenever doing so would be in the child's best interests. In re Barker, 251 P.3d 591 (Colo. App. 2010).

**Determining whether to apply the best-interests standard or the endangerment standard** may involve inquiry into both the quantitative and the qualitative aspects of the proposed change to parenting time, as well as the reason or reasons advanced for the change. In re West, 94 P.3d 1248 (Colo. App. 2004).

While endangerment will necessarily encompass best interests, few best interests arguments will show endangerment. In re West, 94 P.3d 1248 (Colo. App. 2004).

**Before parenting time may be completely eliminated, court must consider both the endangerment standard and the best interests of the child.** Although trial court may allocate parenting time substantially to one parent under the endangerment standard, it may not completely deny other parent parenting time under the best interests standard without express consideration of whether doing so is the least detrimental alternative. In re Hatton, 160 P.3d 326 (Colo. App. 2007).

**A reduction in parenting time resulting from the other parent's relocation with the child is not to be construed as a restriction requiring the court to apply the endangerment standard set forth in subsection (1)(b).** In re DeZalia, 151 P.3d 647 (Colo. App. 2006).

**This section eliminates the In re Francis test in relocation cases, including the presumption in favor of the majority-time parent.** The trial court, however, abused its discretion in applying this section to the facts of this case, and such abuse of discretion unconstitutionally infringed upon mother's right to travel. In re Ciesluk, 113 P.3d 135 (Colo. 2005).

**The well-being of child rather than reward or punishment of parent** ought to guide every aspect of a custody determination, including visitation. In re McGee, 44 Colo. App. 330, 613 P.2d 348 (1980).

**In the best interests of a minor child, a trial court may deny visitation rights.** Grosso v. Grosso, 149 Colo. 183, 368 P.2d 561 (1962).

**Both parents' constitutional interests, the right to travel and the right to the care and control of the child, as well as the best interests of the child, will be best protected if each parent shares equally in the burden of demonstrating how the child's best interests will be affected by a proposed relocation.** In re Ciesluk, 113 P.3d 135 (Colo. 2005).

This procedure applies to a parent who shares parenting time equally with the other parent but who desires to relocate with the child and to modify parenting time so as to become the majority time parent. In re DeZalia, 151 P.3d 647 (Colo. App. 2006).

**It is incumbent upon the trial court to consider all the relevant factors to determine what arrangement will serve the child's best interests.** Though the best interests of the child are of primary importance in making this determination, they do not automatically overcome the constitutional interests of the parents, which must be weighed against each other in the best-interests analysis. In re Ciesluk, 113 P.3d 135 (Colo. 2005); In re Newell, 192 P.3d 529 (Colo. App. 2008).

**Presumption that parent has "first and prior" right to custody of children is not implicated when dispute is between mother and father and not mother and stepmother.** As between two fit parents, duty of court is to weigh the wishes of both to determine what is in



the best interests of the children. In re DePalma, 176 P.3d 829 (Colo. App. 2007).

**Where a parent's role as day-to-day caregiver of a minor is relinquished** through contested or uncontested judicial proceedings and with no indication by the court that the relinquishment was intended to be temporary, the parent has enjoyed and exercised his or her fundamental rights. In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

**Subsequent application of the statutory standards for terminating guardianships or modifying allocations of parental responsibility**, which standards certainly allow a court to consider the relationship between the biological parent and the child, does not violate the parent's constitutional rights. In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

To hold otherwise would effectively afford a parent who relinquishes his or her day-to-day parenting responsibilities through judicial processes a substantial, if not automatic, right to terminate a guardianship or modify an allocation of parental rights with no regard for the perhaps significant impact on his or her children. In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

Where father wished to delegate his parenting time to his new wife while deployed in Iraq, the court did not err by considering first the presumption that father was acting in the best interests of the children because father was not attempting to impermissibly establish parental rights for his new wife over the established parental rights of the children's mother. In re DePalma, 176 P.3d 829 (Colo. App. 2007).

**Trial court abused its discretion when it prematurely concluded that it would be in the child's best interests to remain in close proximity to both parents.** The effect of this conclusion was to create a presumption in father's favor contrary to the legislative intent of subsection (2)(c). In re Ciesluk, 113 P.3d 135 (Colo. 2005).

**It is against the policy of the law in Colorado to permit the removal of a child from the jurisdiction**, unless his best interests would be served thereby. Tanttila v. Tanttila, 152 Colo. 445, 382 P.2d 798 (1963); In re McGee, 44 Colo. App. 330, 613 P.2d 348 (1980).

**Before a court may allow a majority-time parent to relocate with the child, subsection (2)(c) dictates that the court must consider 21 relevant factors**, including 11 factors listed in § 14-10-124 (1.5)(a), and nine factors in subsection (2)(c) specifically tailored to modification proceedings arising out of a majority-time parent's desire to relocate. In re Ciesluk, 113 P.3d 135 (Colo. 2005).

**Where it was established that removal of the child from the jurisdiction would be conducive to the child's best interests**, then the court should have permitted removal from the

jurisdiction. Tanttila v. Tanttila, 152 Colo. 445, 382 P.2d 798 (1963).

**In determining what was for the best welfare of a child of tender years, the courts considered not only food, clothing, shelter, care, education, and environment**, but also kept in mind that every such child was entitled to the love, nurture, advice, and training of both father and mother, and to deny to the child an opportunity to know, associate with, love, and be loved by either parent may have been a more serious ill than to refuse him in some part those things which money can buy. Tanttila v. Tanttila, 152 Colo. 445, 382 P.2d 798 (1963).

**Trial court need not make specific findings on each factor** when considering the statutory factors that affect the child's best interest, so long as the court's findings indicate the court considered all pertinent factors and enable the appellate court to understand the basis of the trial court's order. In re Ciesluk, 100 P.3d 527 (Colo. App. 2004), rev'd on other grounds, 113 P.3d 135 (Colo. 2005).

**Trial court can determine relative weight to be given each relevant factor** in making a decision regarding parenting time. As decisions regarding parenting time are matters within the sound discretion of the trial court, it follows that it is within the discretion of the trial court to determine the weight to be given to each relevant factor in making a decision regarding the effect relocation of the primary residential parent and the child would have on the parenting time of the other parent. In re Ciesluk, 100 P.3d 527 (Colo. App. 2004), rev'd on other grounds, 113 P.3d 135 (Colo. 2005).

**Where the trial court specifically found that the best interests of the child would be served in permitting her removal to California**, and there was evidence to support this finding, a change in the father's visitation privileges was an unfortunate, but not unusual, result of a broken marriage. Nelson v. Card, 162 Colo. 274, 425 P.2d 276 (1967).

**Determination of whether a child should relocate with one parent or remain in Colorado with another depends on assessment of the child's best interests**, and the court's decision, based on special advocate's research and opinions concerning the factors specified in § 14-10-124, was supported by the record. In re Graham, 121 P.3d 279 (Colo. App. 2005).

**Where, for all practical purposes, an order authorizing removal of the children of the parties to another state eliminated any opportunity for visitation** by the father, except during summer vacations, and there was no showing of any substantial reasons of health, cultural opportunities, or other advantages contributing to the best interests of the children justifying such removal, such order was erroneous. Tanttila v. Tanttila, 152 Colo. 445, 382 P.2d 798 (1963).

**The suggestion, advanced for the first time in the supreme court, that defendant having been denied visitation rights should be relieved of the duty to support his minor child was without merit.** *Grosso v. Grosso*, 149 Colo. 183, 368 P.2d 561 (1962).

**Parent seeking enlarged visitation rights need not establish that child's present circumstances are harmful.** When the issue is whether visitation rights should be enlarged, the suggestion that a parent seeking greater visitation rights must establish that the child's present circumstances are harmful is not only not authorized by this section but, if adopted, would defeat the legislative policy. *In re Adamson*, 626 P.2d 739 (Colo. App. 1981).

**Evidence sufficient for denial of motion to reduce father's visitation rights.** Where the court found that the visitation rights previously granted to the father would not endanger the children's physical health or significantly impair their emotional development, this was sufficient to warrant denial of mother's motion which sought to reduce father's visitation rights. *Manson v. Manson*, 35 Colo. App. 144, 529 P.2d 1345 (1974).

**Motion under subsection (4) does not require any third party verification.** A party's verification suffices under the statute, therefore the trial court erred in dismissing father's motion under subsection (4) without a hearing. *In re Slowinski*, 199 P.3d 48 (Colo. App. 2008).

**Visitation rights within sound discretion of court.** The question of visitation rights is within the sound discretion of the district court, taking into account the best interests of the children. *In re Mann*, 655 P.2d 814 (Colo. 1982); *In re Schenck*, 39 P.3d 1250 (Colo. App. 2001).

**Visitation orders are within the sound discretion of the trial court.** This discretion must, however, be exercised consistently with the express public policy of encouraging contact between each parent and the children. *In re Lester*, 791 P.2d 1244 (Colo. App. 1990).

The determination of parenting time is a matter within the sound discretion of the trial court, taking into consideration the child's best interests and the policy of encouraging the parent-child relationship. *In re Velasquez*, 773 P.2d 635 (Colo. App. 1989); *In re Finer*, 920 P.2d 325 (Colo. App. 1996).

**Even a parent who is unfit to be the custodial parent may be entitled to liberal visitation rights.** *In re Jarman*, 752 P.2d 1068 (Colo. App. 1988).

**Subsection (3)(a) does not usurp the court's authority to make an individualized determination of the best interests of the child after a hearing.** Thus, it does not presume that termination of parenting time and contact is in the best interests of every sexually abused child, nor does it require that the court give greater weight to any particular opinion or tes-

timony. *People ex rel. A.R.D.*, 43 P.3d 632 (Colo. App. 2001).

**Permanent orders that substantially reduce the amount of parenting time originally specified in the temporary orders are not subject to the endangerment standard but rather the best interests of the child standard.** *In re Fickling*, 100 P.3d 571 (Colo. App. 2004).

**Trial court should have applied the standard for an original determination of visitation, which is based on the best interests of the child,** where the order awarding parenting time to stepfather was a temporary order. Although paternity decree operated as a final order and permanent allocation as to paternity and custody, its award of parenting time to stepfather was a temporary order because the parties had not reached an agreement on a permanent parenting time schedule but had agreed to maintain the interim schedule and work toward a permanent one. The fact that the parties adhered to the schedule for nearly three years did not change the nature of the order. *In re C.T.G.*, 179 P.3d 213 (Colo. App. 2007).

**Trial court erred by failing to afford parents their due process rights because court did not presume parents were acting in the child's best interests,** but instead placed upon them the burden of demonstrating that visitation with stepfather would endanger the child; the court did not find that "special circumstances" existed which justified the intrusion on the parents' rights; and the court did not apply a clear and convincing evidence standard. *In re C.T.G.*, 179 P.3d 213 (Colo. App. 2007).

**Even if stepfather was a psychological parent, stepfather failed to present evidence to rebut presumption that parents were acting in their child's best interests** by terminating stepfather's visitation and failed to show or proffer evidence of special circumstances that would justify trial court's order allowing visitation against the wishes of the parents. The visitation order infringed upon parents' fundamental right to direct the upbringing of their child. *In re C.T.G.*, 179 P.3d 213 (Colo. App. 2007).

**The court did not err in applying the best interests standard set forth in subsection (1)(a)(II) and considering the factors mandated under that subsection rather than applying the endangerment standard set forth in subsection (1)(b)(I) to mother's motion to relocate the children where children did not reside with either parent a majority of the time.** *In re DeZalia*, 151 P.3d 647 (Colo. App. 2006).

**Court abused its discretion in limiting father's visitation rights.** Where the trial court found that the father was fit and proper to be a custodial parent and there was no finding by the court, nor anything in the record to indicate that reasonable visitation by the father would endanger the child's physical health or significantly impair her emotional development, visitation



limited to one week per year to be held in jurisdiction of mother's residence was unreasonable and an abuse of discretion. In re McGee, 44 Colo. App. 330, 613 P.2d 348 (1980).

The trial court's order limiting visitation to two days per month during the school year amounted to an abuse of discretion since it reduced the father's visitation rights and was contrary to the public policy of encouraging frequent visitation. In re Velasquez, 773 P.2d 635 (Colo. App. 1989).

Trial court's order granting wife parenting time with child only for one week at Christmas and four weeks each summer is unreasonable considering wife's extensive time spent with the child prior to the entry of permanent orders. In re Finer, 920 P.2d 325 (Colo. App. 1996).

**Modification of parenting plan to return to supervised visits required a finding of endangerment** by the trial court, which it failed to do. In re Parr, 240 P.3d 509 (Colo. App. 2010).

**Trial court had no authority to delegate to the child's psychiatrist the decision when overnight visitation could begin to occur.** In re Elmer, 936 P.2d 617 (Colo. App. 1997).

**It was improper for trial court to delegate decisions regarding parenting time to the guardian and the therapist, and then, when the guardian withdrew, to the therapist, alone.** Trial court's order that effectively defers to the family therapist the trial court's decisions as to when the mother should be allowed to participate in family therapy or to exercise unsupervised parenting time constitutes an improper delegation of the court's authority. In re D.R.V-A, 976 P.2d 881 (Colo. App. 1999).

**Trial court may not delegate to one parent or a third party decision-making responsibility regarding other parent's exercise of parenting time,** even assuming that parent or third party were to rely on professionals for reasonable advice in his or her decisions. Decisions regarding the exercise of parenting time are the sole discretion of the court and may not be allocated to a third party, even a parent. In re Hatton, 160 P.3d 326 (Colo. App. 2007).

**But a court's discretion to impose conditions precedent to the exercise of parenting time is distinguishable from the improper delegation of decision-making authority.** Court did not err when it limited father's right to file motion for modification of parenting time until after he completed sex offender treatment program. Such limitation did not deny the father access to the courts. People ex rel. A.R.D., 43 P.3d 632 (Colo. App. 2001).

**Award of custody to breastfeeding mother not sex bias.** Sex bias is not readily found in a visitation order awarding custody to a mother who is breastfeeding her child. In re Norton, 640 P.2d 254 (Colo. App. 1981).

**Two-year rule in § 14-10-131 does not apply to motions for modification of visitation**

**rights under this section.** Manson v. Manson, 35 Colo. App. 144, 529 P.2d 1345 (1974).

**In a dissolution of marriage proceeding, the trial court may grant visitation privileges to a stepparent or surrogate parent under the following conditions:** (1) The nonparent is jurisdictionally capable of litigating custody under § 14-10-123 (1); (2) the nonparent has acted in a custodial and parental capacity toward the minor child; and (3) visitation would be in the minor child's best interest. In re Duren, 854 P.2d 1352 (Colo. App. 1992).

**A court lacks authority to proceed under subsection (4) after failing to conduct the hearing as required by statute.** Therefore, the automatic sanction of supervised visitation terminates as a result of failing to conduct a timely hearing. In re Slowinski, 199 P.3d 48 (Colo. App. 2008).

**The trial court abused its discretion by effectively reducing father's visitation rights** where court limited the father to four days per four-week period where he previously had portions of eight days in any four-week period and there was no evidence that the children would benefit by this reduction in visitation. This restriction was both contrary to the public policy of encouraging frequent visitation and to the evidence in the record. In re Lester, 791 P.2d 1244 (Colo. App. 1990).

**Where trial court made no finding that father's conduct in his homosexual lifestyle endangered the child physically or impaired the child's emotional development,** father could not be precluded from having overnight guests during his parenting time or taking child to gay environment of father's church. In re Dorworth, 33 P.3d 1260 (Colo. App. 2001).

**Parenting time issues related to guardianship may be determined in accordance with this section by the probate court in which the guardianship was established.** People ex rel. A.R.D., 43 P.3d 632 (Colo. App. 2001).

**Entry of permanent orders does not trigger the start of the two-year period during which motions for modification of parenting time are limited.** The initial order concerning parenting time is not a motion seeking "substantial modification of parenting time". In re F.A.G., 148 P.3d 375 (Colo. App. 2006).

**Order allowing father to delegate his parenting time to new wife during his deployment to Iraq does not violate mother's constitutional right to care, custody, or control of the children** because it does not provide the stepmother with any legal rights. In re DePalma, 176 P.3d 829 (Colo. App. 2007).

**Right of first refusal in parties' parenting plan not violated by allowing father to offer time to stepmother before offering it to mother if inconsistent with the parenting plan as a whole.** Here, where father wished to delegate his parenting time to stepmother while he

was deployed in Iraq, the court held that given the circumstances and evidence presented, requiring him to offer children to mother during that time would be inconsistent with the parenting plan as a whole and not in the children's best interests. In re DePalma, 176 P.3d 829 (Colo. App. 2007).

**Prohibition on use of medical marijuana while parenting** constitutes a modification to existing parenting plan rather than a restriction that requires a finding of endangerment. Be-

cause the prohibition is consistent with the parenting plan and did not present a qualitative change in the nature of the father's parenting time, it does not constitute a restriction of parenting time. In re Parr, 240 P.3d 509 (Colo. App. 2010).

**Applied** in Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981); In re Brown, 626 P.2d 755 (Colo. App. 1981); In re Casida v. Casida, 659 P.2d 56 (Colo. App. 1982).

**14-10-129.5. Disputes concerning parenting time.** (1) Within thirty-five days after the filing of a verified motion by either parent or upon the court's own motion alleging that a parent is not complying with a parenting time order or schedule and setting forth the possible sanctions that may be imposed by the court, the court shall determine from the verified motion, and response to the motion, if any, whether there has been or is likely to be substantial or continuing noncompliance with the parenting time order or schedule and either:

- (a) Deny the motion, if there is an inadequate allegation; or
  - (b) Set the matter for hearing with notice to the parents of the time and place of the hearing as expeditiously as possible; or
  - (c) Require the parties to seek mediation and report back to the court on the results of the mediation within sixty-three days. Mediation services shall be provided in accordance with section 13-22-305, C.R.S. At the end of the mediation period, the court may approve an agreement reached by the parents or shall set the matter for hearing.
- (2) After the hearing, if a court finds that a parent has not complied with the parenting time order or schedule and has violated the court order, the court, in the best interests of the child, shall issue an order that may include but not be limited to one or more of the following orders:

- (a) An order imposing additional terms and conditions that are consistent with the court's previous order; except that the court shall separate the issues of child support and parenting time and shall not condition child support upon parenting time;
- (b) An order modifying the previous order to meet the best interests of the child;
- (b.3) An order requiring either parent or both parents to attend a parental education program as described in section 14-10-123.7, at the expense of the noncomplying parent;
- (b.7) An order requiring the parties to participate in family counseling pursuant to section 13-22-313, C.R.S., at the expense of the noncomplying parent;
- (c) An order requiring the violator to post bond or security to insure future compliance;
- (d) An order requiring that makeup parenting time be provided for the aggrieved parent or child under the following conditions:
  - (I) That such parenting time is of the same type and duration of parenting time as that which was denied, including but not limited to parenting time during weekends, on holidays, and on weekdays and during the summer;
  - (II) That such parenting time is made up within six months after the noncompliance occurs, unless the period of time or holiday can not be made up within six months in which case the parenting time shall be made up within one year after the noncompliance occurs;
  - (III) That such parenting time takes place at the time and in the manner chosen by the aggrieved parent if it is in the best interests of the child;
- (e) An order finding the parent who did not comply with the parenting time schedule in contempt of court and imposing a fine or jail sentence;
- (e.5) An order imposing on the noncomplying parent a civil fine not to exceed one hundred dollars per incident of denied parenting time;
- (f) An order scheduling a hearing for modification of the existing order concerning custody or the allocation of parental responsibilities with respect to a motion filed pursuant to section 14-10-131;
- (g) (Deleted by amendment, L. 97, p. 970, § 1, effective August 6, 1997.)



(h) Any other order that may promote the best interests of the child or children involved.

(3) Any civil fines collected as a result of an order entered pursuant to paragraph (e.5) of subsection (2) of this section shall be transmitted to the state treasurer, who shall credit the same to the dispute resolution fund created in section 13-22-310, C.R.S.

(4) In addition to any other order entered pursuant to subsection (2) of this section, the court shall order a parent who has failed to provide court-ordered parenting time or to exercise court-ordered parenting time to pay to the aggrieved party, attorney's fees, court costs, and expenses that are associated with an action brought pursuant to this section. In the event the parent responding to an action brought pursuant to this section is found not to be in violation of the parenting time order or schedule, the court may order the petitioning parent to pay the court costs, attorney fees, and expenses incurred by such responding parent. Nothing in this section shall preclude a party's right to a separate and independent legal action in tort.

**Source:** **L. 87:** Entire section added, p. 578, § 1, effective July 1. **L. 93:** IP(1) and (2) amended, p. 579, § 12, effective July 1. **L. 97:** Entire section amended, p. 970, § 1, effective August 6. **L. 98:** IP(2) and (2)(f) amended, p. 1388, § 16, effective February 1, 1999. **L. 2012:** IP(1) and (1)(c) amended, (SB 12-175), ch. 208, p. 833, § 34, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (1) and subsection (1)(c) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For the legislative declaration contained in the 1993 act amending the introductory portion to subsection (1) and subsection (2), see section 1 of chapter 165, Session Laws of Colorado 1993.

## ANNOTATION

**Law reviews.** For article, "Parenting Time in Divorce", see 31 Colo. Law. 25 (October 2002). For article, "Enforcing Family Law Orders Through Contempt Proceedings Under C.R.C.P. 107", see 332 Colo. Law. 75 (March 2003).

**Notice of potential punitive sanctions is all the notice required to satisfy due process under section.** Notice of possible remedial orders of the court is not required. In re Herrera, 772 P.2d 676 (Colo. App. 1989).

**Wages lost by parent for attending contempt proceedings under section are a reimbursable expense.** In re Herrera, 772 P.2d 676 (Colo. App. 1989).

**Bond required to insure future compliance of parent need not be dismissed by court upon dismissal of contempt citation.** In re Herrera, 772 P.2d 676 (Colo. App. 1989).

**The plain language of this section requires, upon the filing of a motion to clarify visitation, that the court deny the motion, conduct a hearing, or refer the matter to mediation. Where cross motions of mother and father sought to modify father's visitation, the trial court erred in granting the father's motion and denying the mother's motion.** In re Williams-Off, 867 P.2d 205 (Colo. App. 1993).

**Trial court erred in imposing sanctions based upon an unverified motion.** In re Slowinski, 199 P.3d 48 (Colo. App. 2008).

**The trial court abused its discretion by conditioning child support on an anticipated lack of parenting time** when mother was planning to move to Singapore with children and father was entitled to "reasonable and liberal" parenting time. In re Hoffman, 878 P.2d 103 (Colo. App. 1994).

**Order of abatement of child support was not proper as an award of actual travel expenses** when the abatement order was not premised on any actual expenses incurred as a result of the mother's failure to provide parenting time but only on anticipated future expenses. In re Hoffman, 878 P.2d 103 (Colo. App. 1994).

**If a parenting time dispute gives rise to a tort claim for damages, that claim must be brought, not in the dissolution court (which is authorized to award only attorney's fees, court costs, and expenses), but in a court that has jurisdiction over the parties and subject matter.** Therefore, the court erred in dismissing father's tort claims under C.R.C.P. 12(b)(1). The court had subject matter jurisdiction over those claims, even though the claims arose from a dispute over parenting time. Marshall v. Marshall, 183 P.3d 699 (Colo. App. 2008).

**14-10-130. Judicial supervision.** (1) Except as otherwise agreed by the parties in writing at the time of the decree concerning the allocation of parental responsibilities with respect to a child, the person or persons with responsibility for decision-making may determine the child's upbringing, including his or her education, health care, and religious training, unless the court, after hearing and upon motion by the other party, finds that, in the absence of a specific limitation of the person's or persons' decision-making authority, the child's physical health would be endangered or the child's emotional development significantly impaired.

(2) If both parties or all contestants agree to the order or if the court finds that in the absence of the order the child's physical health would be endangered or the child's emotional development significantly impaired, the court may order the county or district welfare department or the court's probation department to exercise continuing supervision over the case to assure that the terms relating to the allocation of parental responsibilities with respect to the child or parenting time terms of the decree are carried out.

**Source:** L. 71: R&RE, p. 531, § 1. C.R.S. 1963: § 46-1-30. L. 93: (2) amended, p. 580, § 13, effective July 1. L. 98: Entire section amended, p. 1388, § 17, effective February 1, 1999.

**Cross references:** For the legislative declaration contained in the 1993 act amending subsection (2), see section 1 of chapter 165, Session Laws of Colorado 1993.

## ANNOTATION

**Law reviews.** For article, "Moving the Children Out of State", see 12 Colo. Law. 1450 (1983). For article, "Family Law and Juvenile Delinquency", see 37 Colo. Law. 61 (October 1988).

**Section does not deny noncustodial parent equal protection.** The contention that this section, which gives the custodial parent the right to determine the child's upbringing, "including his education, health care, and religious training", denies to a noncustodial parent the equal protection of the law is totally without merit. *Rhoades v. Rhoades*, 188 Colo. 423, 535 P.2d 1122 (1975).

**Premarital agreements concerning religious training of unborn children are unenforceable in courts.** In re Wolfert, 42 Colo. App. 433, 598 P.2d 524 (1979).

**"Joint selection of schools" provision in separation agreement is unenforceable and the custodial parent retains the ultimate authority to select the child's school.** *Griffin v. Griffin*, 699 P.2d 407 (Colo. 1985).

**Section does not deny noncustodial parent first amendment rights** where noncustodial

parent does not allege physical or emotional harm to child and custodial parent approves and ratifies court's order specifying terms of mental health counseling for child. In re Jaeger, 883 P.2d 577 (Colo. App. 1994).

**Ability to permit child to initiate litigation is within authority of custodial parent only.** *Montoya by Montoya v. Bebensee*, 761 P.2d 285 (Colo. App. 1988).

**Order allowing noncustodial grandparent to take children to church was invalid** where unsupported by any finding that, absent order, children's physical or mental health would be at risk. In re Oswald, 847 P.2d 251 (Colo. App. 1993).

**Grandparent visitation statute does not authorize an order impinging on custodial parent's rights under this section.** In re Oswald, 847 P.2d 251 (Colo. App. 1993).

**Order tending to negate custodial parent's preference concerning religion is unconstitutional,** even if parent chooses to provide no religious instruction at all. In re Oswald, 847 P.2d 251 (Colo. App. 1993).

**14-10-131. Modification of custody or decision-making responsibility.** (1) If a motion for modification of a custody decree or a decree allocating decision-making responsibility has been filed, whether or not it was granted, no subsequent motion may be filed within two years after disposition of the prior motion unless the court decides, on the basis of affidavits, that there is reason to believe that a continuation of the prior decree of custody or order allocating decision-making responsibility may endanger the child's physical health or significantly impair the child's emotional development.

(2) The court shall not modify a custody decree or a decree allocating decision-making responsibility unless it finds, upon the basis of facts that have arisen since the prior decree



or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or the child's custodian or party to whom decision-making responsibility was allocated and that the modification is necessary to serve the best interests of the child. In applying these standards, the court shall retain the allocation of decision-making responsibility established by the prior decree unless:

- (a) The parties agree to the modification;
- (b) The child has been integrated into the family of the petitioner with the consent of the other party and such situation warrants a modification of the allocation of decision-making responsibilities;
- (b.5) There has been a modification in the parenting time order pursuant to section 14-10-129, that warrants a modification of the allocation of decision-making responsibilities;
- (b.7) A party has consistently consented to the other party making individual decisions for the child which decisions the party was to make individually or the parties were to make mutually; or
- (c) The retention of the allocation of decision-making responsibility would endanger the child's physical health or significantly impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

**Source:** L. 71: R&RE, p. 532, § 1. C.R.S. 1963: § 46-1-31. L. 83: (1) and IP(2) amended, p. 648, § 5, effective June 10. L. 98: Entire section amended, p. 1389, § 18, effective February 1, 1999.

**Cross references:** For the "Uniform Child-custody Jurisdiction and Enforcement Act", see article 13 of this title.

## ANNOTATION

- I. General Consideration.
- II. Procedure.
- III. Change of Circumstances.
  - A. In General.
  - B. Evidence.
  - C. Discretion of Court.
- IV. Jurisdiction of Court.
- V. Appellate Review.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State", see 46 U. Colo. L. Rev. 495 (1974-75). For article, "Legislative Update", see 12 Colo. Law. 1257 (1983). For article, "Moving the Children Out of State", see 12 Colo. Law. 1450 (1983). For article, "Custody Evaluations in Colorado", see 18 Colo. Law. 1523 (1989). For article, "Removal Issues and Standards for Modification of Custody", see 24 Colo. Law. 1045 (1995). For article, "Addressing New Standards for Modification Under the Parental Responsibility Act", see 28 Colo. Law. 67 (June 1999).

**Annotator's note.** Cases relevant to § 14-10-131 decided prior to its earliest source, L. 71, p. 532, § 1, have been included in the annotations to this section.

**This section applies only where there is motion filed by noncustodial parent seeking a**

change of permanent custody. In re Lawson, 44 Colo. App. 105, 608 P.2d 378 (1980).

**This section does not apply to modification of child support.** In re Jones, 703 P.2d 1328 (Colo. App. 1985).

**This section applies only in cases where a noncustodial parent is seeking a change of custody.** In re Dickman, 670 P.2d 20 (Colo. App. 1983).

Where the parties share custody of the child, and both seek sole custody, the statutory criteria for modification in this section are inapplicable. In re Dickman, 670 P.2d 20 (Colo. App. 1983).

**The "best interests" standard is governing standard for modification of parental responsibilities** where the parents equally share joint legal and physical custody under the original decree and where the permanent orders did not designate a residential parent. In re Stewart, 43 P.3d 740 (Colo. App. 2002).

**This section is limited to those cases where a parent has been awarded sole custody and the noncustodial parent is seeking sole custody.** Where a parent seeks a change in custody from sole custody to joint custody, § 14-10-131.5 (4) provides the correct standards for determining whether joint custody shall be granted. In re Wall, 868 P.2d 387 (Colo. 1994) (disapproving In re Murphy, 834 P.2d 1287 (Colo. App. 1992), to the extent it holds that § 14-10-131 applies to a motion for a change in

the prior order of sole custody to that of joint custody).

**When modifying sole custody from one parent to another would result in a residential change in custody, then the “endangerment” standard should apply.** In re Francis, 919 P.2d 776 (Colo. 1996).

When the court is considering a removal motion that involves a change in the residential custody of the children, it must similarly apply the “endangerment” standard of this section. In re Francis, 919 P.2d 776 (Colo. 1996).

In a modification of sole to joint custody, the “best interest of the child” standard of § 14-10-131.5 should apply only to those situations where only modification of legal custody and not residential custody is at stake. In re Francis, 919 P.2d 776 (Colo. 1996).

**In amending § 14-10-129 in 2001, the general assembly intended to eliminate the three-part test set forth in In re Francis in relocation cases, including the presumption in favor of the majority-time parent seeking to relocate.** In re Ciesluk, 113 P.3d 135 (Colo. 2005).

**Both prongs of subsection (2)(c) must be established to warrant a change in custody or relocation.** In re Steving, 980 P.2d 540 (Colo. App. 1999) (decided under law in effect prior to 1998 amendment).

**The endangerment standard applies** when removal is sought by a party who shares joint legal custody. In re Garst, 955 P.2d 1056 (Colo. App. 1998).

**Where the separation agreement addressed the consequences of mother’s continued alienation of the children from father, the father’s motion was in the nature of enforcement rather than modification.** Given that there was no modification, the court correctly ruled that the endangerment or removal standard was inapplicable and that the parenting plan in the decree had already been reviewed under the best interests standard. In re Kniskern, 80 P.3d 939 (Colo. App. 2003).

**Two-year rule in this section does not apply to motions for modification of visitation rights** under § 14-10-129. Manson v. Manson, 35 Colo. App. 144, 529 P.2d 1345 (1974).

**Application where original custody order entered before article enacted.** This article does not apply to proceedings between parents to change custody of children when the original order relative to custody was entered pursuant to Colorado statutes in effect prior to this article. Spurling v. Spurling, 34 Colo. App. 341, 526 P.2d 671 (1974).

**Subsection (2) is constitutional.** Ford v. Ford, 194 Colo. 134, 571 P.2d 717 (1977).

**Change in physical custody is tantamount to modification of custody.** McGraw v. District Court, 198 Colo. 489, 601 P.2d 1383 (1979); Darnier v. District Court, 680 P.2d 235 (Colo. 1984).

**Parties may not alter requirements of this section** through an agreement incorporated into the decree of dissolution. In re Johnson, 42 Colo. App. 198, 591 P.2d 1043 (1979).

**“Joint selection of schools” provision in separation agreement** is unenforceable and the custodial parent retains the ultimate authority to select the child’s school. Griffin v. Griffin, 699 P.2d 407 (Colo. 1985).

**There was nothing irrevocable about a custody order.** Wiederspahn v. Wiederspahn, 146 Colo. 214, 361 P.2d 125 (1961).

**Section does not apply** since request was not for decree to place sole custody with a different parent but for change from sole to joint custody. Section 14-10-131.5 applies. In re Wall, 851 P.2d 224 (Colo. App. 1992).

**Trial court should have applied the standard for an original determination of visitation, which is based on the best interests of the child,** where the order awarding parenting time to stepfather was a temporary order. Although paternity decree operated as a final order and permanent allocation as to paternity and custody, its award of parenting time to stepfather was a temporary order because the parties had not reached an agreement on a permanent parenting time schedule but had agreed to maintain the interim schedule and work toward a permanent one. The fact that the parties adhered to the schedule for nearly three years did not change the nature of the order. In re C.T.G., 179 P.3d 213 (Colo. App. 2007).

**Applied in** In re Rinow, 624 P.2d 365 (Colo. App. 1981); In re Eckman, 645 P.2d 866 (Colo. App. 1982); In re Davis, 656 P.2d 42 (Colo. App. 1982).

## II. PROCEDURE.

**An ex parte order of court changing the custody of children was void because a parent cannot be deprived of the custody of his or her children without the notice required by due process of law.** Parker v. Parker, 142 Colo. 416, 350 P.2d 1067 (1960); Ashlock v. District Court, 717 P.2d 483 (Colo. 1986).

**Section limits scope of inquiry.** For the sake of continuity and stability, this section limits the scope of inquiry to the change in circumstances of the child or the custodial parent, and dictates that “the court shall retain the custodian established by the prior decree” absent the showing required by subsection (2)(c). In re Larrison, 38 Colo. App. 408, 561 P.2d 17 (1976).

## III. CHANGE OF CIRCUMSTANCES.

### A. In General.

**Repeated decisions of the supreme court authorized a modification of a custodial order** where there was a change in circumstances and



conditions, and the modification would have been beneficial to the minor. *Bird v. Bird*, 132 Colo. 116, 285 P.2d 816 (1955); *Coulter v. Coulter*, 141 Colo. 237, 347 P.2d 492 (1959); *Wiederspahn v. Wiederspahn*, 146 Colo. 214, 361 P.2d 125 (1961); *Deines v. Deines*, 157 Colo. 363, 402 P.2d 602 (1965).

**A change in circumstances alone does not compel award of custody.** *Coulter v. Coulter*, 141 Colo. 237, 347 P.2d 492 (1959).

The mere fact that the mother's circumstances may have changed for the better does not constitute a sufficient basis for changing the original custody order. In re *Larington*, 38 Colo. App. 408, 561 P.2d 17 (1976).

A mere change of circumstances alone is insufficient to justify a change of custody. *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973).

**The interest and welfare of the children was the primary and controlling consideration** of the court in ordering the change of custody. *Aylor v. Aylor*, 173 Colo. 294, 478 P.2d 302 (1970).

**Subsection (2)(c) recognizes that a modification of custody is likely to result in some harm to the child involved.** *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973).

**In determining the issue of integration, the trial court should consider the totality of the circumstances, including:** (1) The frequency, duration, and quality of the child's contacts with the custodial parent and the proposed custodial parent; (2) the identity of the person making the primary decisions with respect to health care, education, religious training, and the child's general welfare; and (3) the views of the child as to which environment constitutes his or her "home". In re *Chatten*, 967 P.2d 206 (Colo. App. 1998).

**The consent requirement is satisfied when** the custodian has voluntarily placed the child with the noncustodial parent and willingly permitted the child to become integrated into the new family. In re *Chatten*, 967 P.2d 206 (Colo. App. 1998).

**Consent of the custodial parent may be implied** from a voluntary transfer of custody that results in the child's integration into the family of the noncustodial parent. In re *Chatten*, 967 P.2d 206 (Colo. App. 1998).

## B. Evidence.

**Strong showing needed to justify modification of custody.** The public policy of this state as expressed in this section favors retention of the child in a stable atmosphere, thus requiring a strong showing, including a change in circumstances, to justify modification of custody. The protection for children created by this statute would be defeated by allowing parents to determine independently that a lesser showing is

sufficient grounds for changing custody arrangements. In re *Johnson*, 42 Colo. App. 198, 591 P.2d 1043 (1979).

**To support the trial court's finding of a sufficient change in circumstances to justify changing the custody of the children,** it was necessary to show a change of circumstances or new facts which were not in existence at the time of the prior order. *Aylor v. Aylor*, 173 Colo. 294, 478 P.2d 302 (1970).

**Noncustodial parent must demonstrate change of circumstances necessitating change of custody,** and change of custody may not be based solely on custodial parent's misconduct. *Ashlock v. District Court*, 717 P.2d 483 (Colo. 1986).

**When the power of the court is invoked to place an infant into the custody of its parents and to withdraw such child from other persons,** the court will scrutinize all the circumstances and ascertain if a change of custody would be disadvantageous to the infant; if so, the change will not be made, and it matters not whether it is through the fault or the mere misfortune of the legal guardian that the infant has come to be out of his custody. *Root v. Allen*, 151 Colo. 311, 377 P.2d 117 (1962).

**Party seeking modification of prior custody decree has burden** of proving that the statutory standards justifying the change are present. In re *Davis*, 43 Colo. App. 302, 602 P.2d 904 (1979).

**Evidence of events which occurred prior to the original custody order, unless such were unknown to the trial court at the time the original order was entered,** or unless the trial court was in some fashion imposed upon through fraud and concealment, may not be basis for a modification of the earlier custody order, because there must be proof of a change of circumstances in order to justify any modification of the order and decree awarding custody. *Deines v. Deines*, 157 Colo. 363, 402 P.2d 602 (1965).

**In the hearing of a petition for the modification of a decree awarding custody of a minor child in a divorce proceeding,** the contention that the court erred in considering evidence of matters that occurred prior to the entry of the original decree, overruled. *Ross v. Ross*, 89 Colo. 536, 5 P.2d 246 (1931).

**Where the custody of a child was awarded in a divorce proceeding, the child became the ward of the court, and it was against the policy of the law to permit its removal to another jurisdiction unless its well-being and future welfare could have been better served thereby.** *Holland v. Holland*, 150 Colo. 442, 373 P.2d 523 (1962).

**Fact that mother who had been awarded custody was undergoing a transsexual change** from female to male was not sufficient for changing custody in view of uncontradicted evidence of the high quality of the environment

and home life between mother and children and in absence of a showing that the mother's relationship with the children had been adversely affected or that their emotional development had been impaired. *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973).

**Evidence of ex-wife's inability to properly supervise older children is relevant to the determination of a motion to modify custody of the youngest child.** In *re Pilcher*, 628 P.2d 126 (Colo. App. 1980).

**Evidence of sexual abuse in record is sufficient to justify change of custody.** In *re Utzinger*, 721 P.2d 703 (Colo. App. 1986).

**Even though a court could modify an earlier decree to insure the carrying out of provisions for the best interests of the child, and violation of a decree was a good ground to file a motion to modify, nevertheless, a change of custody should not have been awarded as punishment for a parent's unwarranted acts, for the best interest of the child was paramount.** *Holland v. Holland*, 150 Colo. 442, 373 P.2d 523 (1962); *Heckel v. Heckel*, 156 Colo. 20, 396 P.2d 602 (1964).

**Although the mother sought to prevent the father from visiting the children by hiding them, this alone, unaccompanied by other evidence, did not constitute sufficient grounds for a change in custody of the children because the father did not produce evidence of changed circumstances and produced nothing to show that the change would have been in the best interests of his two children, and the evidence, therefore, was legally insufficient to support the change of custody.** *Deines v. Deines*, 157 Colo. 363, 402 P.2d 602 (1965).

**When a parent showed little or no regard for the legitimate order of a court relating to custody, that fact was certainly one factor for the court to weigh in considering suitability of who should have custody of a child along with other facts such as the consequences of removal to a foreign jurisdiction, and this was true no matter how laudable the desire of the offending parent.** *Holland v. Holland*, 150 Colo. 442, 373 P.2d 523 (1962).

**While it was true that custody of children of tender years was ordinarily given to the mother, and that custody of several children would normally not be split between the parents, it was also clear that the overriding concern of the court should have been for the welfare of the children.** *Kelley v. Kelley*, 161 Colo. 486, 423 P.2d 315 (1967).

**A new family situation of the mother was sufficient to justify a change of custody from the father to the mother providing always that the interest and welfare of the children was the primary and controlling consideration of the trial court in ordering such change of custody.** *Aylor v. Aylor*, 173 Colo. 294, 478 P.2d 302 (1970).

**In the absence of a clear showing to the contrary, decisions of custodial parent reasonably made in a good faith attempt to fulfill the responsibility imposed by award of custody should be presumed to have been made in the best interests of children.** *Bernick v. Bernick*, 31 Colo. App. 485, 505 P.2d 14 (1972).

**The authority that must be exercised and the decisions that must be made by a custodial parent, both on a daily and long term basis, in carrying out the responsibility of custody of minor children, are entitled to the support of the court which initially awarded custody to the parent.** *Bernick v. Bernick*, 31 Colo. App. 485, 505 P.2d 14 (1972).

**Custodial parent has great latitude in carrying out custodial responsibilities.** Absent some restrictive conditions in the applicable dissolution decree or separation agreement, a custodial parent is permitted great latitude in carrying out the custodial responsibilities of providing a primary home for the minor children of the parties. In *re Casida*, 659 P.2d 56 (Colo. App. 1982).

**Custodial discretion may include the removal of the child from the jurisdiction of the court which entered the permanent orders.** In *re Casida*, 659 P.2d 56 (Colo. App. 1982).

#### C. Discretion of Court.

**In sound exercise of its discretion, a trial court has authority to modify its previous orders relative to custody and visitation upon a showing of circumstances warranting a change in the best interests of the children.** *Bird v. Bird*, 132 Colo. 116, 285 P.2d 816 (1955); *Bernick v. Bernick*, 31 Colo. App. 485, 505 P.2d 14 (1972).

**In awarding custody, the trial court has the advantage of personal contact with the parties, to appraise the worth of their testimony, and consider the circumstances involved, and if desirable to interview the subject child.** *Coulter v. Coulter*, 141 Colo. 237, 347 P.2d 492 (1959); *Schlabach v. Schlabach*, 155 Colo. 377, 394 P.2d 844 (1964).

**Where the one parent acts in disregard of the decree so as to deny the other parent the rights he had under it, the court was not limited to mere punitive measures, but could modify the decree in such a way as to insure the carrying out of those provisions which it conceived to be for the best interests of the child.** *Holland v. Holland*, 150 Colo. 442, 373 P.2d 523 (1962).

**The trial court erred in using a custodial change to punish the mother for her unjustified actions in secreting the children to prevent visitation.** *Pearson v. Pearson*, 141 Colo. 336, 347 P.2d 779 (1959).

#### IV. JURISDICTION OF COURT.

**Trial court has continuing jurisdiction by implication.** Under former § 46-1-5(4), C.R.S.



1963, the trial court was specifically granted continuing jurisdiction "of the action" for the purpose of revising orders determining child custody. This article does not expressly grant such jurisdiction, but, since it contains a section permitting modification of child custody orders, it does give continuing jurisdiction by implication. *Dockum v. Dockum*, 34 Colo. App. 98, 522 P.2d 744 (1974).

**Although juvenile court has exclusive jurisdiction** to make custody determinations with respect to a child who is the subject of a valid petition in dependency and neglect, juvenile court cannot retain jurisdiction of a motion for modification of custody filed pursuant to this section once it has been determined that the child is not dependent and neglected. *People in Interest of T.R.W.*, 759 P.2d 768 (Colo. App. 1988).

**A court had continuing authority to modify existing orders or enter additional orders** to minimize any detrimental effect of a move upon the relationship between a noncustodial parent and his children. *Johnson v. Black*, 137 Colo. 119, 322 P.2d 99 (1958); *Aylor v. Aylor*, 173 Colo. 294, 478 P.2d 302 (1970); *Bernick v. Bernick*, 31 Colo. App. 485, 505 P.2d 14 (1972); *Wood v. District Court*, 181 Colo. 95, 508 P.2d 134 (1973).

**Where the original custody award of a child and a subsequent habeas corpus proceeding were in the same state**, but in different courts, although the habeas corpus court would not have jurisdiction to test the wisdom of or to modify the custody decree, it could and should have made the writ permanent to enforce the decree, and should have ordered the child returned to the one lawfully entitled to custody. *Wood v. District Court*, 181 Colo. 95, 508 P.2d 134 (1973).

**The trial court which acquired personal jurisdiction over party in divorce proceedings had continuing in personam jurisdiction** to modify child support orders and to enforce original custody orders through the exercise power of contempt, therefore, personal service on a party out of state was sufficient and party's failure to appear did not deprive court of jurisdiction or power to punish for contempt. *Brown v. Brown*, 31 Colo. App. 557, 506 P.2d 386 (1972).

**Well-established was the rule that when a child from another state became domiciled in Colorado, and there was a material change in the circumstances** of the divorced parents which would have justified modification of the rights to custody of the child, the Colorado courts could have and did take jurisdiction of the custody proceedings and enter appropriate orders based on conditions as they then appeared, and in such a case the supreme court held that the custody provisions of a decree rendered by the court of former domicile was subject to

modification in Colorado if there was a change in conditions arising after the decree in the foreign state, which could not have been considered by that court in making the award. *Petition of Kraudel v. Benner*, 148 Colo. 525, 366 P.2d 667 (1961).

**Factors listed in this section are not relevant in determining custody in a dependency proceeding under the Children's Code.** *People in Interest of R.E.*, 721 P.2d 1233 (Colo. App. 1986).

**Applied in** *In re Murphy*, 834 P.2d 1287 (Colo. App. 1992).

## V. APPELLATE REVIEW.

**Any final order in a custody proceeding regardless of the label placed upon it by the trial court** was appealable as a matter of law. *Aylor v. Aylor*, 173 Colo. 294, 478 P.2d 302 (1970).

**On appellate review of such an order modifying a previous order relative to custody and visitation, every presumption will be made in favor of the validity** of the trial court's decision and only where a clear abuse of discretion can be shown will an appellate court interfere with orders of a trial court delineating visitation rights and awarding custody. *Bernick v. Bernick*, 31 Colo. App. 485, 505 P.2d 14 (1972).

In reviewing an order affecting the custody of a child, appellate courts will make every reasonable presumption in favor of the action of the trial court. *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973).

Questions of custody must of necessity rest upon the judgment of the trier of fact, and its determination will not be disturbed if there is evidence to support its conclusion. *In re Trouth*, 631 P.2d 1183 (Colo. App. 1981); *In re Agner*, 659 P.2d 53 (Colo. App. 1982); *In re Utzinger*, 721 P.2d 703 (Colo. App. 1986).

Appellate courts are reluctant to disturb rulings of the trial court in custody matters, absent circumstances clearly disclosing an abuse of discretion. *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973).

The modification of a divorce decree with respect to custody of minor children lies within the sound discretion of the trial court and will be disturbed on review only if clear abuse of discretion is shown. *Dockum v. Dockum*, 34 Colo. App. 98, 522 P.2d 744 (1974); *In re Utzinger*, 721 P.2d 703 (Colo. App. 1986).

**Change of custody in violation of subsection (2) cannot stand.** Although appellate courts are reluctant to disturb the trial court's ruling in a custody matter, subsection (2) is clear and the trial court must comply with its provisions. If the trial court's findings show no indication of endangered physical health or impairment of emotional development, an order

changing custody cannot stand. In re Harris, 670 P.2d 446 (Colo. App. 1983).

**Trial court must comply with section.** Although appellate courts are reluctant to disturb

rulings of the trial court in custody matters, this section is clear, and the trial court must comply with its provisions. In re Larington, 38 Colo. App. 408, 561 P.2d 17 (1976).

**14-10-131.3. Modification of the allocation of parental responsibilities and parenting time based upon military service - legislative declaration - definitions.** (1) (a) The general assembly hereby finds that:

(I) An armed forces reserve or state National Guard member who is called to active duty faces unique challenges with respect to parenting his or her child while at the same time meeting his or her obligation to serve in the military;

(II) The allocation of parental responsibilities and the parenting plan for a child is often modified as a result of a parent being deployed or called to federal active duty. It is important that service members, children, and other parents share the same expectation as to what the parental responsibilities and parenting time orders will be when the service member parent returns and that the relationship between a service member parent and his or her child will not be unfairly impacted due to military service.

(b) The general assembly therefore finds that the interests of the parents and the child are best served when:

(I) Modifications of parental responsibilities and parenting time that are based solely upon the deployment or federal active duty of reserve or National Guard members are limited in duration; and

(II) Upon the service member parent's return from deployment or active duty, the allocation of parental responsibilities and parenting time reverts to the orders in place at the time the service member was deployed or called to federal active duty.

(2) As used in this section, unless the context otherwise requires:

(a) "Active duty" means full-time service in:

(I) A reserve component of the armed forces; or

(II) The National Guard for a period that exceeds thirty consecutive days in a calendar year.

(b) "Armed forces" includes the reserve components of the United States Army, Navy, Marine Corps, Air Force, and Coast Guard.

(c) "Parent" means parent, legal guardian, or person awarded parental decision-making responsibilities or parenting time.

(d) "Service member" means a member of a reserve component of the United States armed forces or a member of a state National Guard.

(3) (a) If a motion to modify an order concerning the allocation of parental responsibilities or parenting time is filed either prior to or during a service member parent's active duty deployment, and the court finds that the service member parent's active duty deployment is the sole basis for the modification, any resulting order shall be an interim order.

(b) Upon a service member parent's filing of written notice with the court of his or her return to Colorado from active duty deployment, and service of the notice on the other parent, the interim orders are vacated, and the orders concerning the allocation of parental responsibilities and parenting time that were in effect at the time the interim orders were entered shall be immediately reinstated without the need for court action.

(4) Nothing in this section restricts the right of a parent to:

(a) Consent to a modification of the allocation of parental responsibilities or parenting time that continues beyond the end of the service member parent's active duty deployment; or

(b) File a motion, pursuant to applicable law, seeking a modification of the allocation of parental responsibilities or parenting time after the interim orders are vacated.

(5) A service member parent's agreement to a modification of parental responsibilities or parenting time on an interim basis, due to his or her active duty deployment, shall not be considered agreement to a modification or consent to the integration of the child into the other parent's household for the purpose of a motion filed pursuant to section 14-10-129 (2) or 14-10-131 (2).



(6) Modification of child support may be appropriate when an interim order is entered based upon a service member parent's active duty deployment. In any motion filed pursuant to this section, it is the parties' responsibility to address child support at that time pursuant to sections 14-10-115 and 14-10-122.

(7) Motions filed pursuant to this section shall not qualify as motions filed for purposes of the two-year limitation on motions contained in sections 14-10-129 and 14-10-131.

**Source:** L. 2008: Entire section added, p. 331, § 1, effective August 5.

#### ANNOTATION

**Law reviews.** For article, "An Introduction to Family Law and the Military", see 37 Colo. Law. 69 (October 2008).

#### **14-10-131.5. Joint custody modification - termination. (Repealed)**

**Source:** L. 83: Entire section added, p. 646, § 2, effective June 10. L. 98: Entire section repealed, p. 1390, § 19, effective February 1, 1999.

**14-10-131.7. Designation of custody for the purpose of other state and federal statutes.** For purposes of all other state and federal statutes that require a designation or determination of custody, the parenting plan set forth in the court's order shall identify the responsibilities of each of the parties.

**Source:** L. 98: Entire section added, p. 1390, § 20, effective February 1, 1999.

**14-10-131.8. Construction of 1999 revisions.** The enactment of the 1999 revisions to this article does not constitute substantially changed circumstances for the purposes of modifying decrees involving child custody, parenting time, or grandparent visitation. Any action to modify any decree involving child custody, parenting time, grandparent visitation, or a parenting plan shall be governed by the provisions of this article.

**Source:** L. 98: Entire section added, p. 1390, § 20, effective February 1, 1999.

**14-10-132. Affidavit practice.** A party seeking the modification of a custody decree or a decree concerning the allocation of parental responsibilities shall submit, together with his or her moving papers, an affidavit setting forth facts supporting the requested modification and shall give notice, together with a copy of his or her affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested modification should not be granted.

**Source:** L. 71: R&RE, p. 532, § 1. C.R.S. 1963: § 46-1-32. L. 84: Entire section amended, p. 479, § 2, effective March 16. L. 98: Entire section amended, p. 1390, § 21, effective February 1, 1999.

#### ANNOTATION

**An ex parte order changing custody of a child without notice** to the custodial parent violates due process and is, therefore, void. *Ashlock v. District Court*, 717 P.2d 483 (Colo. 1986).

**Verified motion for modification does not change burden of proof.** A verified motion for modification of a prior custody decree, alleging various changes of circumstances for the mother, the father and the children, does not

place the burden of proof or of going forward on the custodial parent. In re Davis, 43 Colo. App. 302, 602 P.2d 904 (1979).

**Where affidavits show noncooperation** which renders the general order for visitation, in essence, a nullity, adequate cause for a hearing is established and the court should set a date for a hearing to show cause why the requested modification should not be granted. In re Sepmeier, 782 P.2d 876 (Colo. App. 1989).

**Motion to modify custody that was unverified and not supported by any factual aver-**

**ments failed to meet the threshold requirement.** A claim contesting the court's denial of the motion on the ground that it failed to meet the threshold was without merit. In re Michie, 844 P.2d 1325 (Colo. App. 1992).

**This section does not apply to modification of child support.** In re Jones, 703 P.2d 1328 (Colo. App. 1985).

**Applied** in McGraw v. District Court, 198 Colo. 489, 601 P.2d 1383 (1979).

**14-10-133. Effective date - applicability.** This article shall take effect January 1, 1972, and shall apply only to actions affected by this article which are commenced on or after such date; and all such actions commenced prior to said date shall be governed by the laws then in effect.

**Source:** L. 71: p. 532, § 3. C.R.S. 1963: § 46-1-33.

ANNOTATION

**Although the agreement and the decree refer to "alimony" rather than to "maintenance" payments,** the Uniform Dissolution of Marriage Act governs these proceedings because the petition for dissolution was filed subsequent to the effective date of that statute. In re Udis, 780 P.2d 499 (Colo. 1989).

**Applied** in Wilkinson v. Wilkinson, 41 Colo. App. 364, 585 P.2d 599 (1978); Bradshaw v. Bradshaw, 626 P.2d 752 (Colo. App. 1981); In re Perlmutter, 772 P.2d 621 (Colo. 1989).

ARTICLE 10.5

Parenting Time Enforcement Act

- |              |                          |              |                            |
|--------------|--------------------------|--------------|----------------------------|
| 14-10.5-101. | Short title.             | 14-10.5-104. | Parenting time enforcement |
| 14-10.5-102. | Legislative declaration. |              | program - authorization.   |
| 14-10.5-103. | Definition. (Repealed)   |              |                            |

**14-10.5-101. Short title.** This article shall be known and may be cited as the "Colorado Parenting Time Enforcement Act".

**Source:** L. 97: Entire article added, p. 972, § 2, effective August 6.

**14-10.5-102. Legislative declaration.** (1) The general assembly hereby finds and declares that in most situations it is important to the healthy development of children that the children spend quality time with both parents. The general assembly further finds that due to dissolution of marriage, legal separation, and out-of-wedlock births, families are often divided and as a result, many children do not have the opportunity to spend the time with both parents that a court may have determined is in their best interests.

(2) The general assembly further finds that the federal "Personal Responsibility and Work Opportunity Reconciliation Act of 1996", Public Law 104-193, allows states to seek grants of federal funds for the establishment and administration of programs and to support and facilitate children's access to time with their noncustodial parent.

(3) It is the purpose of this article to enhance children's opportunities for access to their parent with whom the child does not reside the majority of the time pursuant to court order in compliance with any orders entered in that regard. To that end, the general assembly hereby determines that it is appropriate for the state to seek the federal grant described in section 391 of the federal "Personal Responsibility and Work Opportunity Reconciliation



Act of 1996", Public Law 104-193, in order to explore alternative methods by which to support and facilitate a child's access to and time with his or her parent with whom the child does not reside the majority of the time in contested parenting time proceedings.

**Source:** **L. 97:** Entire article added, p. 972, § 2, effective August 6. **L. 98:** (3) amended, p. 1400, § 47, effective February 1, 1999.

#### **14-10.5-103. Definition. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 973, § 2, effective August 6. **L. 98:** Entire section repealed, p. 1400, § 48, effective February 1, 1999.

**14-10.5-104. Parenting time enforcement program - authorization.** (1) (a) The appropriate state agency, as determined by the governor, is hereby authorized to develop a parenting time enforcement program. The program, if developed, shall comply with all requirements and restrictions, if any, set forth in federal law or in federal regulation promulgated by the secretary of the federal department of health and human services and, if in compliance with federal law and regulation, shall address the enhancement and facilitation of children's access to the parents with whom such children reside less than the majority of the time by any one or any combination of the following methods:

- (I) Mediation, both voluntary and mandatory;
  - (II) Family counseling;
  - (III) Parental education;
  - (IV) Development of parenting plans;
  - (V) Parenting time enforcement procedures, including monitored parenting time, supervised parenting time, or neutral drop-off and pickup locations;
  - (VI) Parenting time guidelines;
  - (VII) Alternative arrangements with respect to parental responsibilities.
- (b) The parenting time enforcement program, if developed, may be operated on a statewide basis or on a representative pilot basis.

(2) The selected state agency shall monitor, evaluate, and report on the parenting time enforcement program, if developed, in accordance with the regulations prescribed by the secretary of the federal department of health and human services. Such agency shall also evaluate and report on the effectiveness of the amendments made to section 14-10-129.5, as contained in House Bill 97-1164.

**Source:** **L. 97:** Entire article added, p. 973, § 2, effective August 6. **L. 98:** IP(1)(a) and (1)(a)(VII) amended, p. 1400, § 49, effective February 1, 1999.

## **ARTICLE 11**

### **Actions Originating in Other Jurisdictions**

14-11-101. Foreign decrees - how handled.

**14-11-101. Foreign decrees - how handled.** (1) Upon the docketing in a court of competent jurisdiction in this state of exemplified copies of all the written pleadings and court orders, judgments, and decrees in a case of divorce, separate maintenance, or annulment, or for support of minor children or a spouse, or for a protection order or other court order issued for the protection of a party or parties, or for a combination of the same entered in any court of competent jurisdiction in any other state or jurisdiction having reciprocal provisions for a like enforcement of orders, judgments, or decrees entered in the state of Colorado and upon obtaining jurisdiction by personal service of process as provided by the Colorado rules of civil procedure, said court in this state shall have jurisdiction over

the subject matter and of the person in like manner as if the original suit or action had been commenced in this state, and is empowered to amend, modify, set aside, and make new orders as the court may find necessary and proper so as to do justice and equity to all parties to the action according to the public policy of this state, and has the same right, power, and authority to enter orders for temporary alimony, support money, and attorney fees as in similar actions originating in this state.

(2) The courts of this state in cases of dissolution of marriage, legal separation, or declaration of invalidity of marriage, or for support of minor children or a spouse, or for the protection of a party or parties by means of a protection order, however styled or designated, or for any combination of the same, where the action originated in this state, have the power to enforce the decrees, judgments, and orders of other states or jurisdictions made pursuant to statutes similar to this statute, or to amend the same, or to enter new orders to the same extent and in the same manner as though such decrees, judgments, and orders were entered in the courts of this state.

(3) Notwithstanding the provisions of this article, a restraining or protection order issued by a court of any state, any Indian tribe, or any United States territory shall be enforced pursuant to section 13-14-104, C.R.S.

(4) Notwithstanding the provisions of this article, a child-custody determination, as that term is defined in section 14-13-102 (3), issued by a court of another state shall be registered in accordance with section 14-13-305.

**Source:** L. 47: pp. 398, 399, §§ 1, 2. CSA: C. 56, § 39. CRS 53: § 46-4-1. C.R.S. 1963: § 46-4-1. L. 75: Entire section amended, p. 210, § 26, effective July 16. L. 94: Entire section amended, p. 2034, § 11, effective July 1. L. 98: (3) added, p. 1235, § 7, effective July 1. L. 2000: (4) added, p. 1538, § 4, effective July 1. L. 2003: (1) and (2) amended, p. 1012, § 18, effective July 1. L. 2005: (3) amended, p. 765, § 23, effective June 1.

**Cross references:** For procedure in pleading a foreign judgment or decree, see C.R.C.P. 9(e); for enforcement of foreign judgments, see article 53 of title 13; for the "Uniform Child-custody Jurisdiction and Enforcement Act", see article 13 of this title.

## ANNOTATION

**Law reviews.** For article, "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For article, "Constitutional Law", see 32 Dicta 397 (1955). For "Interstate Modification of Support Decrees", see 28 Rocky Mt. L. Rev. 355 (1956). For article, "Interstate Family Law Jurisdiction: Simplifying Complex Questions", see 31 Colo. Law. 77 (September 2002).

**Annotator's note.** Since § 14-11-101 is similar to repealed § 46-4-1, CRS 53, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**General assembly, in reenacting section, granted state courts power to modify or alter foreign judgment for child support** and such legislation does not offend the full faith and credit clause of the United States constitution. *Glickman v. Mesigh*, 200 Colo. 320, 615 P.2d 23 (1980).

**This section confers subject matter jurisdiction** with respect to the issue of enforcement of the foreign orders of Nebraska for support but in personam jurisdiction can be exercised by the

state of Colorado only if defendant has "minimum contacts" with the state. In *re Ness*, 759 P.2d 844 (Colo. App. 1988).

**Section reflects legislative effort to prevent state from becoming haven for parent** against whom minimal or no support orders have been entered in the jurisdiction of rendition by granting Colorado courts explicit authority to enter appropriate orders in a manner consistent with the full faith and credit clause. *Glickman v. Mesigh*, 200 Colo. 320, 615 P.2d 23 (1980); *Gonzales v. District Court*, 629 P.2d 1074 (Colo. 1981).

**The former § 46-4-1, CRS 53, was held unconstitutional** as in violation of the full faith and credit clause of the federal constitution. *Minnear v. Minnear*, 131 Colo. 319, 281 P.2d 517 (1955).

**Where the issue of alleged fraud in the procurement of the divorce decree either was, or could have been, litigated in a foreign court** where it was raised by the wife, the disposition made of that issue in the sister state was res judicata in Colorado. *Petition of Kraudel v. Benner*, 148 Colo. 525, 366 P.2d 667 (1961).



**The argument that the divorce decree of a sister state should not have been recognized in Colorado because personal service of process was not made upon the wife** in the action was without merit where it was disclosed by the record that she was a resident of the sister state temporarily residing in Colorado at the time of service of process upon her, and service of process upon her was effected by publication and mailing under the practice and procedure of the sister state, and the record showed that she had actual notice of the pendency of the divorce action, but chose not to appear or to contest it. *Petition of Kraudel v. Benner*, 148 Colo. 525, 366 P.2d 667 (1961).

**The former CSA, C. 56, § 30 disclosed the general intent of the general assembly regarding foreign divorces as being allowed to affect decrees of separate maintenance**, it being stated therein that they were not to be admitted in evidence in any proceedings to enforce, or concerning, affecting or involving in any way, such marriage settlement, separate maintenance agreement, or decree of separate maintenance. *Johnson v. Johnson*, 119 Colo. 551, 206 P.2d 597 (1949).

**"Other jurisdictions" construed.** The reference to "other jurisdictions", in subsection (2), denotes only foreign jurisdictions which, although not states, are empowered to enter orders entitled to full faith and credit under art. IV, § 1, U.S. Const. *Gonzales v. District Court*, 629 P.2d 1074 (Colo. 1981).

**In situations where a child support order was entered in another state, the obligee is a resident of this state, and the obligor is a nonresident, the Uniform Interstate Family Support Act (UIFSA) controls** to the extent the requirements for modification of child support in UIFSA and the remedy allowed by this section differ. *In re Hillstrom*, 126 P.3d 315 (Colo. App. 2005).

**Subsection (2) has no intrastate application.** Because "other jurisdictions" do not refer to other judicial districts within the state of Colorado, subsection (2) has no intrastate application and confers no jurisdiction on a district court to try a contempt committed against another district court. *Gonzales v. District Court*, 629 P.2d 1074 (Colo. 1981).

**State courts need not give conclusive effect to foreign decree** when that decree is subject to modification by the courts of the rendering state. *Glickman v. Mesigh*, 200 Colo. 320, 615 P.2d 23 (1980).

Where California decree expressly provided for modification upon changed circumstances, Colorado courts had as much leeway to modify

or alter the California decree as did the California court which rendered it. *Glickman v. Mesigh*, 200 Colo. 320, 615 P.2d 23 (1980).

Where Texas court had both personal and subject-matter jurisdiction, the full faith and credit clause required this state to enforce the Texas order to the extent that it was final and not modifiable. *Stevens v. Stevens*, 44 Colo. App. 252, 611 P.2d 590 (1980).

**Exemplified copies of all written pleadings and court orders on foreign action must be filed with state court** in order to come within the purview of this section. *Malmgren v. Malmgren*, 628 P.2d 164 (Colo. App. 1981).

**Section requires docketing of exemplified copies of all written pleadings and court orders, judgments, and decrees** for a court to obtain subject matter jurisdiction over a foreign decree. *In re Orr*, 36 P.3d 194 (Colo. App. 2001).

**If an unfulfilled statutory requirement implicates the court's actual subject matter jurisdiction, no attempt to cure the defect will retroactively create jurisdiction**, because the court would have been entirely without power to entertain any aspect of the claim until the requirement was fulfilled. *In re Orr*, 36 P.3d 194 (Colo. App. 2001).

**Foreign custody decree could be modified by a Colorado court** where the decree has been docketed in Colorado and Colorado is now the home state of the children. *In re Whitley*, 775 P.2d 95 (Colo. App. 1989).

**Even if jurisdiction attaches under this section, if there is a proceeding pending in a foreign court**, the trial court has discretion to decline to determine an issue that could easily and efficiently be addressed by a foreign court. *Matter of C.G.G.*, 946 P.2d 603 (Colo. App. 1997).

**Court erred in granting wife's motion for summary judgment** in declaratory judgment action in which wife challenged validity of Wyoming dissolution decree on grounds of insufficient service of process where court's analysis did not reach husband's equitable defenses. *In re Lockwood*, 857 P.2d 557 (Colo. App. 1993).

**Trial court properly declined to recognize and enforce Mexican decree** under doctrine of comity when record failed to establish how service was to be made under the circumstances and failed to demonstrate that the notice allegedly given to wife provided her with an adequate opportunity to litigate and defend the significant issues of maintenance and distribution of property implicated in the termination of the marriage. *In re Seewald*, 22 P.3d 580 (Colo. App. 2001).

**Applied** in *In re Clark*, 616 P.2d 1010 (Colo. App. 1980).

## ARTICLE 12

## Marriage Counseling

14-12-101.	Legislative declaration.	private - communications confidential.
14-12-102.	Domestic relations counselor - assistants - term.	14-12-106.
14-12-103.	Offices - qualifications - salaries. (Repealed)	Court may appoint marriage counselor in any county or judicial district where the population is under one hundred thousand. (Repealed)
14-12-104.	Duties of domestic relations counselors.	
14-12-105.	Counseling proceedings to be	

**14-12-101. Legislative declaration.** It is the declared public policy of this state to maintain desirable marital and family relations; to promote and foster the marriage relationship and reconciliation of estranged spouses; and to take reasonable measures to preserve marriages, particularly where minor children are involved, in the interest of strengthening the family life foundation of our society, and in reducing the economic and social costs to the state resulting from broken homes. In furtherance of this policy, it is the purpose of this article to make competent marriage counseling services available through the district courts of the state to spouses involved in domestic difficulties.

**Source:** L. 60: p. 131, § 1. CRS 53: § 46-5-1. C.R.S. 1963: § 46-5-1.

## ANNOTATION

**The creation of a "marriage relationship" is a fundamental right** in this jurisdiction. *Beeson v. Kiowa County Sch. Dist.* RE-1, 39 Colo. App. 174, 567 P.2d 801 (1977).

**Support during reconciliation attempt constituted maintenance payments.** Where the parties made a good faith although unsuccessful attempt at reconciliation and where the husband supported the family during this time, the sup-

port paid and contributed by the husband constituted payment of the maintenance installments accruing during the period they were living together. This conforms to the public policy in the state "to promote and foster the marriage relationship and reconciliation of estranged spouses". In *re Peterson*, 40 Colo. App. 115, 572 P.2d 849 (1977).

**14-12-102. Domestic relations counselor - assistants - term.** Subject to the provisions of section 13-3-105, C.R.S., the chief judge of any judicial district may appoint one or more domestic relations counselors and such other persons as assistants and clerks as may be deemed necessary to serve during the pleasure of the appointing power.

**Source:** L. 60: p. 131, § 1. CRS 53: § 46-5-2. C.R.S. 1963: § 46-5-2. L. 79: Entire section R&RE, p. 602, § 29, effective July 1. L. 80: Entire section amended, p. 519, § 1, effective January 29.

**14-12-103. Offices - qualifications - salaries. (Repealed)**

**Source:** L. 60: p. 132, § 1. CRS 53: § 46-5-3. C.R.S. 1963: § 46-5-3. L. 79: Entire section repealed, p. 602, § 30, effective July 1.

**14-12-104. Duties of domestic relations counselors.** (1) Domestic relations counselors shall, under the supervision of and as directed by the judge of the district court in which they are serving, perform the following duties:

(a) Promptly consider all requests for counseling for the purpose of disposing of such requests pursuant to this article;

(b) Counsel husband or wife or both under a schedule of fees set by the judge of the district court wherein the case is heard, said fee to be paid by either the husband or wife or



jointly by the husband and wife, as determined by the court, whether or not a petition for dissolution of marriage, declaration of invalidity of marriage, or legal separation has been filed, if the spouses have marital difficulties which may lead to a termination of the marriage relationship;

(c) If, in the judgment of the counselor, prolonged counseling is necessary or if it appears that medical, psychiatric, or religious assistance is indicated, refer the husband or wife or both to a physician, psychiatrist, psychologist, social service agency, or clergyman of any religious denomination to which the parties may belong.

**Source:** L. 60: p. 132, § 1. CRS 53: § 46-5-4. C.R.S. 1963: § 46-5-4.

**14-12-105. Counseling proceedings to be private - communications confidential.** All counseling proceedings, interviews, or conferences shall be held in private. All communications, oral or written, from the parties to a domestic relations counselor in a counseling or conciliation proceedings shall be deemed to be made to such counsel in official confidence by a privileged communication and shall not be admissible or usable for any purpose in any dissolution of marriage hearing or any other proceedings. Any papers or records of the counselor relating to counseling proceedings under this article shall be confidential.

**Source:** L. 60: p. 133, § 1. CRS 53: § 46-5-6. C.R.S. 1963: § 46-5-6.

**Cross references:** For other privileged communications, see §§ 13-90-107 and 13-90-108.

**14-12-106. Court may appoint marriage counselor in any county or judicial district where the population is under one hundred thousand. (Repealed)**

**Source:** L. 60: p. 133, § 1. CRS 53: § 46-5-7. C.R.S. 1963: § 46-5-7. L. 79: Entire section repealed, p. 602, § 30, effective July 1.

## ARTICLE 13

### Uniform Child-custody Jurisdiction and Enforcement Act

**Editor's note:** This article was numbered as article 6 of chapter 46, C.R.S. 1963. The provisions of this article were repealed and reenacted in 2000, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 2000, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers for sections that were relocated as a part of the repeal and reenactment are shown in editor's notes following each section.

**Law reviews:** For comment, "Temporary Custody Under the Uniform Child Custody Jurisdiction Act: Influence Without Modification", see 48 U. Colo. L. Rev. 603 (1977); for article, "The Role of Children's Counsel in Contested Child Custody, Visitation and Support Cases", see 15 Colo. Law. 224 (1986); for article, "Waking the Dormant PKPA in Colorado", see 21 Colo. Law. 2209 (1992); for article, "Nuts and Bolts of the PKPA", see 22 Colo. Law. 2397 (1993); for article, "The Uniform Child Custody Jurisdiction Enforcement Act: Part I", see 29 Colo. Law. 73 (September 2000); for article, "The Uniform Child Custody Jurisdiction Enforcement Act: Part II", see 29 Colo. Law. 81 (October 2000); for article, "Interstate Family Law Jurisdiction: Simplifying Complex Questions", see 31 Colo. Law. 77 (September 2002); for article, "Colorado's Uniform Interstate Family Support Act: 2004 Changes and Clarifications", see 33 Colo. Law. 99 (November 2004); for article, "An Introduction to Family Law and the Military", see 37 Colo. Law. 69 (October 2008).

Uniform Child-custody Jurisdiction  
and Enforcement Act

PART 1

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PART 2

JURISDICTION

- 14-13-201. Initial child-custody jurisdiction.
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PART 1

GENERAL PROVISIONS

ARTICLE 13. UNIFORM CHILD CUSTODY JURISDICTION  
PREFATORY NOTE

This Act, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), revisits the problem of the interstate child almost thirty years after the Conference promulgated the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJEA accomplishes two major purposes.

First, it revises the law on child custody jurisdiction in light of federal enactments and almost thirty years of inconsistent case law. Part 2 of this Act provides clearer standards for which States can exercise original jurisdiction over a child custody determination. It also, for

the first time, enunciates a standard of continuing jurisdiction and clarifies modification jurisdiction. Other aspects of the part harmonize the law on simultaneous proceedings, clean hands, and forum non conveniens.

Second, this Act provides in Part 3 for a remedial process to enforce interstate child custody and visitation determinations. In doing so, it brings a uniform procedure to the law of interstate enforcement that is currently producing inconsistent results. In many respects, this Act accomplishes for custody and visitation determinations the same uniformity that has oc-



curred in interstate child support with the promulgation of the Uniform Interstate Family Support Act (UIFSA).

### **Revision of Uniform Child Custody Jurisdiction Act**

The UCCJA was adopted as law in all 50 States, the District of Columbia, and the Virgin Islands. A number of adoptions, however, significantly departed from the original text. In addition, almost thirty years of litigation since the promulgation of the UCCJA produced substantial inconsistency in interpretation by state courts. As a result, the goals of the UCCJA were rendered unobtainable in many cases.

In 1980, the federal government enacted the Parental Kidnaping Prevention Act (PKPA), 28 U.S.C. § 1738A, to address the interstate custody jurisdictional problems that continued to exist after the adoption of the UCCJA. The PKPA mandates that state authorities give full faith and credit to other states' custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements are similar to those in the UCCJA. There are, however, some significant differences. For example, the PKPA authorizes continuing exclusive jurisdiction in the original decree State so long as one parent or the child remains there and that State has continuing jurisdiction under its own law. The UCCJA did not directly address this issue. To further complicate the process, the PKPA partially incorporates state UCCJA law in its language. The relationship between these two statutes became "technical enough to delight a medieval property lawyer." Homer H. Clark, *Domestic Relations* § 12.5 at 494 (2d ed. 1988).

As documented in an extensive study by the American Bar Association's Center on Children and the Law, *Obstacles to the Recovery and Return of Parentally Abducted Children* (1993) (*Obstacles Study*), inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity among the States. The *Obstacles Study* suggested a number of amendments which would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.

The revisions of the jurisdictional aspects of the UCCJA eliminate the inconsistent state interpretations and can be summarized as follows:

**1. Home state priority.** The PKPA prioritizes "home state" jurisdiction by requiring that full faith and credit cannot be given to a child custody determination by a State that exercises initial jurisdiction as a "significant connection state" when there is a "home State." Initial custody determinations based on "significant

connections" are not entitled to PKPA enforcement unless there is no home State. The UCCJA, however, specifically authorizes four independent bases of jurisdiction without prioritization. Under the UCCJA, a significant connection custody determination may have to be enforced even if it would be denied enforcement under the PKPA. The UCCJA prioritizes home state jurisdiction in Section 201.

### **2. Clarification of emergency jurisdiction.**

There are several problems with the current emergency jurisdiction provision of the UCCJA § 3(a)(3). First, the language of the UCCJA does not specify that emergency jurisdiction may be exercised only to protect the child on a temporary basis until the court with appropriate jurisdiction issues a permanent order. Some courts have interpreted the UCCJA language to so provide. Other courts, however, have held that there is no time limit on a custody determination based on emergency jurisdiction. Simultaneous proceedings and conflicting custody orders have resulted from these different interpretations.

Second, the emergency jurisdiction provisions predated the widespread enactment of state domestic violence statutes. Those statutes are often invoked to keep one parent away from the other parent and the children when there is a threat of violence. Whether these situations are sufficient to invoke the emergency jurisdiction provision of the UCCJA has been the subject of some confusion since the emergency jurisdiction provision does not specifically refer to violence directed against the parent of the child or against a sibling of the child.

The UCCJA contains a separate section on emergency jurisdiction at Section 14-13-204 which addresses these issues.

### **3. Exclusive continuing jurisdiction for the State that entered the decree.**

The failure of the UCCJA to clearly enunciate that the decree-granting State retains exclusive continuing jurisdiction to modify a decree has resulted in two major problems. First, different interpretations of the UCCJA on continuing jurisdiction have produced conflicting custody decrees. States also have different interpretations as to how long continuing jurisdiction lasts. Some courts have held that modification jurisdiction continues until the last contestant leaves the State, regardless of how many years the child has lived outside the State or how tenuous the child's connections to the State have become. Other courts have held that continuing modification jurisdiction ends as soon as the child has established a new home State, regardless of how significant the child's connections to the decree State remain. Still other States distinguish between custody orders and visitation orders. This divergence of views leads to simultaneous proceedings and conflicting custody orders.

The second problem arises when it is necessary to determine whether the State with continuing jurisdiction has relinquished it. There should be a clear basis to determine when that court has relinquished jurisdiction. The UCCJA provided no guidance on this issue. The ambiguity regarding whether a court has declined jurisdiction can result in one court improperly exercising jurisdiction because it erroneously believes that the other court has declined jurisdiction. This caused simultaneous proceedings and conflicting custody orders. In addition, some courts have declined jurisdiction after only informal contact between courts with no opportunity for the parties to be heard. This raised significant due process concerns. The UCCJEA addresses these issues in Sections 14-13-110, 14-13-202, and 14-13-206.

**4. Specification of what custody proceedings are covered.** The definition of custody proceeding in the UCCJA is ambiguous. States have rendered conflicting decisions regarding certain types of proceedings. There is no general agreement on whether the UCCJA applies to neglect, abuse, dependency, wardship, guardianship, termination of parental rights, and protection from domestic violence proceedings. The UCCJEA includes a sweeping definition that, with the exception of adoption, includes virtually all cases that can involve custody of or visitation with a child as a "custody determination."

**5. Role of "Best Interests."** The jurisdictional scheme of the UCCJA was designed to promote the best interests of the children whose custody was at issue by discouraging parental abduction and providing that, in general, the State with the closest connections to, and the most evidence regarding, a child should decide that child's custody. The "best interest" language in the jurisdictional sections of the UCCJA was not intended to be an invitation to address the merits of the custody dispute in the jurisdictional determination or to otherwise provide that "best interests" considerations should override jurisdictional determinations or provide an additional jurisdictional basis.

The UCCJEA eliminates the term "best interests" in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children.

**6. Other Changes.** This draft also makes a number of additional amendments to the UCCJA. Many of these changes were made to harmonize the provisions of this Act with those of the Uniform Interstate Family Support Act. One of the policy bases underlying this Act is to make uniform the law of interstate family proceedings to the extent possible, given the very different jurisdictional foundations. It simplifies the life of the family law practitioner when the same or similar provisions are found in both Acts.

## Enforcement Provisions

One of the major purposes of the revision of the UCCJA was to provide a remedy for interstate visitation and custody cases. As with child support, state borders have become one of the biggest obstacles to enforcement of custody and visitation orders. If either parent leaves the State where the custody determination was made, the other parent faces considerable difficulty in enforcing the visitation and custody provisions of the decree. Locating the child, making service of process, and preventing adverse modification in a new forum all present problems.

There is currently no uniform method of enforcing custody and visitation orders validly entered in another State. As documented by the *Obstacles Study*, despite the fact that both the UCCJA and the PKPA direct the enforcement of visitation and custody orders entered in accordance with mandated jurisdictional prerequisites and due process, neither act provides enforcement procedures or remedies.

As the *Obstacles Study* pointed out, the lack of specificity in enforcement procedures has resulted in the law of enforcement evolving differently in different jurisdictions. In one State, it might be common practice to file a Motion to Enforce or a Motion to Grant Full Faith and Credit to initiate an enforcement proceeding. In another State, a Writ of Habeas Corpus or a Citation for Contempt might be commonly used. In some States, Mandamus and Prohibition also may be utilized. All of these enforcement procedures differ from jurisdiction to jurisdiction. While many States tend to limit considerations in enforcement proceedings to whether the court which issued the decree had jurisdiction to make the custody determination, others broaden the considerations to scrutiny of whether enforcement would be in the best interests of the child.

Lack of uniformity complicates the enforcement process in several ways: (1) It increases the costs of the enforcement action in part because the services of more than one lawyer may be required one in the original forum and one in the State where enforcement is sought; (2) It decreases the certainty of outcome; (3) It can turn enforcement into a long and drawn out procedure. A parent opposed to the provisions of a visitation determination may be able to delay implementation for many months, possibly even years, thereby frustrating not only the other parent, but also the process that led to the issuance of the original court order.

The provisions of Part 3 provide several remedies for the enforcement of a custody determination. First, there is a simple procedure for registering a custody determination in another State. This will allow a party to know in advance whether that State will recognize the party's custody determination. This is extremely important in estimating the risk of the child's non-



return when the child is sent on visitation. The provision should prove to be very useful in international custody cases.

Second, the Act provides a swift remedy along the lines of habeas corpus. Time is extremely important in visitation and custody cases. If visitation rights cannot be enforced quickly, they often cannot be enforced at all. This is particularly true if there is a limited time within which visitation can be exercised such as may be the case when one parent has been granted visitation during the winter or spring holiday period. Without speedy consideration and resolution of the enforcement of such visitation rights, the ability to visit may be lost entirely. Similarly, a custodial parent must be able to obtain prompt enforcement when the noncustodial parent refuses to return a child at the end of authorized visitation, particularly when a summer visitation extension will infringe on the school year. A swift enforcement mechanism is desirable for violations of both custody and visitation provisions.

The scope of the enforcing court's inquiry is limited to the issue of whether the decree court had jurisdiction and complied with due process in rendering the original custody decree. No further inquiry is necessary because neither Part 2 nor the PKPA allows an enforcing court to modify a custody determination.

Third, the enforcing court will be able to utilize an extraordinary remedy. If the enforcing court is concerned that the parent, who has physical custody of the child, will flee or harm

the child, a warrant to take physical possession of the child is available.

Finally, there is a role for public authorities, such as prosecutors, in the enforcement process. Their involvement will encourage the parties to abide by the terms of the custody determination. If the parties know that public authorities and law enforcement officers are available to help in securing compliance with custody determinations, the parties may be deterred from interfering with the exercise of rights established by court order.

The involvement of public authorities will also prove more effective in remedying violations of custody determinations. Most parties do not have the resources to enforce a custody determination in another jurisdiction. The availability of the public authorities as an enforcement agency will help ensure that this remedy can be made available regardless of income level. In addition, the public authorities may have resources to draw on that are unavailable to the average litigant.

This Act does not authorize the public authorities to be involved in the action leading up to the making of the custody determination, except when requested by the court, when there is a violation of the Hague Convention on the Civil Aspects of International Child Abduction, or when the person holding the child has violated a criminal statute. The Act does not mandate that public authorities be involved in all cases. Not all States, or local authorities, have the funds necessary for an effective custody and visitation enforcement program.

**14-13-101. Short title.** This article shall be known and may be cited as the "Uniform Child-custody Jurisdiction and Enforcement Act".

**Source:** L. 2000: Entire article R&RE, p. 1519, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-101 as it existed prior to 2000.

#### OFFICIAL COMMENT

Section 1 of the UCCJA was a statement of the purposes of the Act. Although extensively cited by courts, it was eliminated because Uniform Acts no longer contain such a section. Nonetheless, this Act should be interpreted according to its purposes which are to:

(1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;

(2) Promote cooperation with the courts of other States to the end that a custody decree is

rendered in that State which can best decide the case in the interest of the child;

(3) Discourage the use of the interstate system for continuing controversies over child custody;

(4) Deter abductions of children;

(5) Avoid relitigation of custody decisions of other States in this State;

(6) Facilitate the enforcement of custody decrees of other States.

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under this section as it existed prior to its 2000 repeal and reenactment.

**Because federal Parental Kidnapping Prevention Act of 1980 governs decisions made under the Act,** it applies to custody determinations made during child dependency and neglect proceedings. *People in Interest of K.G.*, 876 P.2d 1 (Colo. App. 1993).

**The UCCJA was enacted to extend the notion of full faith and credit to child custody**

**decrees and its provisions seek to limit the exercise of jurisdiction over custody decrees to one state thereby eliminating forum shopping.** *In re Custody of K.R.*, 897 P.2d 896 (Colo. App. 1995).

**Applied in** *In re Bechard*, 40 Colo. App. 516, 577 P.2d 778 (1978); *County of Clearwater v. Petrash*, 198 Colo. 231, 598 P.2d 138 (1979).

**14-13-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained eighteen years of age.

(3) "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody or physical custody of a child or allocating parental responsibilities with respect to a child or providing for visitation, parenting time, or grandparent visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(4) "Child-custody proceeding" means a proceeding in which legal custody or physical custody with respect to a child or the allocation of parental responsibilities with respect to a child or visitation, parenting time, or grandparent visitation with respect to a child is an issue. The term includes a proceeding for divorce, dissolution of marriage, legal separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence and domestic abuse, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under part 3 of this article.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child-custody determination.

(7) (a) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least one hundred eighty-two consecutive days immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (7), "home state" does not mean a state in which a child lived with a parent or a person acting as a parent on a temporary basis as the result of an interim order entered pursuant to section 14-10-131.3.

(8) "Initial determination" means the first child-custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child-custody determination for which enforcement is sought under this article.

(10) "Issuing state" means the state in which a child-custody determination is made.

(11) "Modification" means a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:



(a) Has physical custody of the child or has had physical custody for a period of one hundred eighty-two consecutive days, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and

(b) Has been awarded legal custody or allocated parental responsibilities with respect to a child by a court or claims a right to legal custody or parental responsibilities under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

**Source:** L. 2000: Entire article R&RE, p. 1519, § 1, effective July 1. L. 2008: (7) amended, p. 333, § 2, effective August 5. L. 2012: (7)(a) and (13)(a) amended, (SB 12-175), ch. 208, p. 834, § 35, effective July 1.

**Editor's note:** (1) This section is similar to former § 14-13-103 as it existed prior to 2000.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (7)(a) and (13)(a) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## OFFICIAL COMMENT

The UCCJA did not contain a definition of "child." The definition here is taken from the PKPA.

The definition of "child-custody determination" now closely tracks the PKPA definition. It encompasses any judgment, decree or other order which provides for the custody of, or visitation with, a child, regardless of local terminology, including such labels as "managing conservatorship" or "parenting plan."

The definition of "child-custody proceeding" has been expanded from the comparable definition in the UCCJA. These listed proceedings have generally been determined to be the type of proceeding to which the UCCJA and PKPA are applicable. The list of examples removes any controversy about the types of proceedings where a custody determination can occur. Proceedings that affect access to the child are subject to this Act. The inclusion of proceedings related to protection from domestic violence is necessary because in some States domestic violence proceedings may affect custody of and visitation with a child. Juvenile delinquency or proceedings to confer contractual rights are not "custody proceedings" because they do not relate to civil aspects of access to a child. While a determination of paternity is covered under the Uniform Interstate Family Support Act, the custody and visitation aspects of paternity cases are custody proceedings. Cases involving the Hague Convention on the Civil Aspects of International Child Abduction have not been included at this point because custody of the child is not determined in a proceeding under the International Child Abductions Remedies Act. Those pro-

ceedings are specially included in the part 3 enforcement process.

"Commencement" has been included in the definitions as a replacement for the term "pending" found in the UCCJA. Its inclusion simplifies some of the simultaneous proceedings provisions of this Act.

The definition of "home State" has been reworded slightly. No substantive change is intended from the UCCJA.

The term "issuing State" is borrowed from UIFSA. In UIFSA, it refers to the court that issued the support or parentage order. Here, it refers to the State, or the court, which made the custody determination that is sought to be enforced. It is used primarily in part 3.

The term "person" has been added to ensure that the provisions of this Act apply when the State is the moving party in a custody proceeding or has legal custody of a child. The definition of "person" is the one that is mandated for all Uniform Acts.

The term "person acting as a parent" has been slightly redefined. It has been broadened from the definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as a person who currently has physical custody of the child. In addition, a person acting as a parent must either have legal custody or claim a right to legal custody under the law of this State. The reference to the law of this State means that a court determines the issue of whether someone is a "person acting as a parent" under its own law. This reaffirms the traditional view that a court in

a child custody case applies its own substantive law. The court does not have to undertake a choice-of-law analysis to determine whether the individual who is claiming to be a person acting as a parent has standing to seek custody of the child.

The definition of "tribe" is the one mandated for use in Uniform Acts. Should a State choose to apply this Act to tribal adjudications, this definition should be enacted as well as the entirety of Section 104. (Note: Section 104 of the Act deals with the application to Indian tribes. Colorado did not adopt this section of the Act.)

## ANNOTATION

**Law reviews.** For article, "The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State", see 46 U. Colo. L. Rev. 495 (1974-75).

**Annotator's note.** Since § 14-13-102 is similar to § 14-13-103 as it existed prior to the 2000 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**"Custody determination" does not include decision relating to child support.** County of Clearwater v. Petrash, 41 Colo. App. 143, 589 P.2d 1370 (1978), *aff'd* in part and *rev'd* on other grounds, 198 Colo. 231, 598 P.2d 138 (1979).

Modification of visitation rights is a "custody determination" under subsection (2), and so, pursuant to § 14-13-104(1)(b), where a child and his parents have been living in this state for over a year, a trial court of this state has the jurisdiction to modify a foreign child visitation order. In re Bechard, 40 Colo. App. 516, 577 P.2d 778 (1978).

**A temporary restraining order constitutes a "child-custody determination" within the meaning of the UCCJEA.** People ex rel. M.C., 94 P.3d 1220 (Colo. App. 2004).

**"Custody proceeding" interpreted.** In re Barden, 678 P.2d 1031 (Colo. App. 1983); Barden v. Blau, 712, P.2d 481 (Colo. 1986).

**The definition of "home state" refers to the child's physical residence,** not his legal residence or domicile. McCarron v. District Court

The term "contestant" as has been omitted from this revision. It was defined in the UCCJA § 2(1) as "a person, including a parent, who claims a right to custody or visitation rights with respect to a child." It seems to have served little purpose over the years, and whatever function it once had has been subsumed by state laws on who has standing to seek custody of or visitation with a child. In addition UCCJA § 2(5) of the which defined "decree" and "custody decree" has been eliminated as duplicative of the definition of "custody determination."

ex rel. County of Jefferson, 671 P.2d 953 (Colo. 1983).

**Trial court properly held that Colorado is child's home state** since she maintained significant connections here. She has lived with her mother and attended school in Colorado for years, and both her guardian ad litem and therapist are here. In re Dickson, 983 P.2d 44 (Colo. App. 1998) (decided prior to 2000 repeal and reenactment).

**Even though a petition is brought by the state and is not a private action brought by a parent or other party seeking custody,** the act governs a custody determination made during a child neglect and dependency proceeding. People in Interest of K.G., 876 P.2d 1 (Colo. App. 1993).

**The provisions of the UCCJA are implicated whenever the court makes a custody determination,** which under this section means a court decision and court orders and instructions providing for the custody of a child, including visitation rights. In re Custody of K.R., 897 P.2d 896 (Colo. App. 1995).

**Applied in** Zumbun v. Zumbun, 42 Colo. App. 37, 592 P.2d 16 (1978); Roberts v. District Court, 198 Colo. 231, 596 P.2d 65 (1979); In re Tricamo, 42 Colo. App. 493, 599 P.2d 273 (1979); Lopez v. District Court, 199 Colo. 207, 606 P.2d 853 (1980); In re Nicholson, 648 P.2d 681 (Colo. App. 1982); In re Tatum, 653 P.2d 74 (Colo. App. 1982); In re Tonnessen, 937 P.2d 863 (Colo. App. 1996).

**14-13-103. Proceedings governed by other law.** This article does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

**Source:** L. 2000: Entire article R&RE, p. 1521, § 1, effective July 1.

## OFFICIAL COMMENT

Two proceedings are governed by other acts. Adoption cases are excluded from this Act because adoption is a specialized area which is

thoroughly covered by the Uniform Adoption Act (UAA) (1994). Most States either will adopt that Act or will adopt the jurisdictional provi-



sions of that Act. Therefore the jurisdictional provisions governing adoption proceeding are generally found elsewhere.

However, there are likely to be a number of instances where it will be necessary to apply this Act in an adoption proceeding. For example, if a State adopts the UAA then Section 3-101 of the Act specifically refers in places to the Uniform Child Custody Jurisdiction Act which will become a reference to this Act. Second, the UAA requires that if an adoption is denied or set aside, the court is to determine the child's custody. UAA § 3-704. Those custody proceedings would be subject to this Act. See Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 Fam.L.Q. 345 (1996).

Children that are the subject of interstate placements for adoption or foster care are governed by the Interstate Compact on the Place-

ment of Children (ICPC). The UAA § 2-107 provides that the provisions of the compact, although not jurisdictional, supply the governing rules for all children who are subject to it. As stated in the Comments to that section: "Once a court exercises jurisdiction, the ICPC helps determine the legality of an interstate placement." For a discussion of the relationship between the UCCJA and the ICPC see *J.D.S. v. Franks*, 893 P.2d 732 (Ariz. 1995).

Proceedings pertaining to the authorization of emergency medical care for children are outside the scope of this Act since they are not custody determinations. All States have procedures which allow the State to temporarily supersede parental authority for purposes of emergency medical procedures. Those provisions will govern without regard to this Act.

### ANNOTATION

**Specific language of statute precludes UCCJEA application to failed adoption proceedings**, however, exclusion of jurisdiction of adoption proceedings relied upon expectation that states would adopt the Uniform Adoption Act and enter a final custody order after a failed adoption based on the best interests of the child. *People ex rel. A.J.C.*, 88 P.3d 599 (Colo. 2004), cert. denied, 543 U.S. 987, 125 S. Ct. 495, 160 L. Ed. 2d 371 (2004).

**In case involving failed adoption and resulting litigation with mother located in Missouri, a UCCJA state, and child and potential adoptive parents residing in Colorado, a UCCJEA state, it was proper for Colorado court to exercise jurisdiction** over question of custody of the child after Missouri court dismissed petition for adoption and ordered child to be returned to the mother's custody for the following reasons: (1) Under provisions of the UCCJA, a court of a second state can exercise jurisdiction after an initial custody decree has been entered if the court of the first state declined to exercise jurisdiction; (2) Missouri court's failure to determine custody of child according to child's best interest was akin to

declining to exercise jurisdiction over custody issues, and Colorado was therefore not obligated to give full faith and credit to Missouri court's order concerning custody of the child; (3) in both Missouri and Colorado, there are provisions that authorize the court, subsequent to a failed adoption, to provide for the care and custody of the child according to the child's best interests, including a custody request from a nonparent; (4) the UCCJEA's exclusion of adoption was based on the expectation that states enacting the UCCJEA would adopt the Uniform Adoption Act, and the Uniform Adoption Act contemplates that when an adoption fails after a child has been with the prospective parents for a period of time, the court must take into account the best interests of the child in making determinations about continuing placement; and (5) Missouri does not retain jurisdiction over the case under the interstate compact on the placement of children (ICPC) since under the facts of the case, there was no proper request pursuant to the ICPC to return the child to Missouri. *People ex rel. A.J.C.*, 88 P.3d 599 (Colo. 2004), cert. denied, 543 U.S. 987, 125 S. Ct. 495, 160 L. Ed. 2d 371 (2004).

**14-13-104. International application of article.** (1) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this part 1 and part 2 of this article.

(2) Except as otherwise provided in subsection (3) of this section, a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this article must be recognized and enforced under part 3 of this article.

(3) A court of this state need not apply this article if the child-custody law of a foreign country violates fundamental principles of human rights.

**Source:** L. 2000: Entire article R&RE, p. 1521, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-124 as it existed prior to 2000.

## OFFICIAL COMMENT

The provisions of this Act have international application to child custody proceedings and determinations of other countries. Another country will be treated as if it were a State of the United States for purposes of applying parts 1 and 2 of this Act. Custody determinations of other countries will be enforced if the facts of the case indicate that jurisdiction was in substantial compliance with the requirements of this Act.

In this section, the term “child-custody determination” should be interpreted to include proceedings relating to custody or analogous institutions of the other country. See generally, Article 3 of The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. 35 I.L.M. 1391 (1996).

A court of this State may refuse to apply this Act when the child custody law of the other

country violates basic principles relating to the protection of human rights and fundamental freedoms. The same concept is found in of the Section 20 of the Hague Convention on the Civil Aspects of International Child Abduction (return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms). In applying subsection (3), the court’s scrutiny should be on the child custody law of the foreign country and not on other aspects of the other legal system. This Act takes no position on what laws relating to child custody would violate fundamental freedoms. While the provision is a traditional one in international agreements, it is invoked only in the most egregious cases.

This section is derived from Section 23 of the UCCJA.

## ANNOTATION

**Law reviews.** For article, “The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act”, see 11 Colo. Law. 1224 (1982). For article, “Interstate Custody Problems Revisited”, see 11 Colo. Law. 2596 (1982).

**Annotator’s note.** Since § 14-13-104 is similar to § 14-13-124 as it existed prior to the 2000 repeal and reenactment of this article, rel-

evant cases construing that provision have been included in the annotations to this section.

**The general policies of the UCCJA apply to recognition and enforcement of custody decrees from other countries.** In re Jeffers and Makropoulos, 992 P.2d 686 (Colo. App. 1999).

**Applied in** Woodhouse v. District Court, 196 Colo. 558, 587 P.2d 1199 (1978).

**14-13-105. Effect of child-custody determination.** A child-custody determination made by a court of this state that had jurisdiction under this article binds all persons who have been served in accordance with the laws of this state or notified in accordance with section 14-13-108 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

**Source:** L. 2000: Entire article R&RE, p. 1521, § 1, effective July 1.

**Editor’s note:** This section is similar to former § 14-13-113 as it existed prior to 2000.

## OFFICIAL COMMENT

No substantive changes have been made to this section which was Section 12 of the UCCJA.

**14-13-106. Priority.** If a question of existence or exercise of jurisdiction under this article is raised in a child-custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

**Source:** L. 2000: Entire article R&RE, p. 1521, § 1, effective July 1.

**Editor’s note:** This section is similar to former § 14-13-125 as it existed prior to 2000.



## OFFICIAL COMMENT

No substantive change was made to this section which was Section 24 of the UCCJA. The section is placed toward the beginning of part 1 to emphasize its importance.

The language change from "case" to "question" is intended to clarify that it is the jurisdictional issue which must be expedited and not the entire custody case. Whether the entire custody case should be given priority is a matter of local law.

**14-13-107. (Reserved)**

**Source: L. 2000:** Entire article R&RE, p. 1521, § 1, effective July 1.

**14-13-108. Notice to persons outside state.** (1) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(2) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(3) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

**Source: L. 2000:** Entire article R&RE, p. 1522, § 1, effective July 1.

**Editor's note:** This section is similar to former §§ 14-13-105 and 14-13-106 as they existed prior to 2000.

**Cross references:** For manner of giving notice through service by mail or publication, see C.R.C.P. 4(g); for manner of giving notice through personal service outside state, see C.R.C.P. 4(e).

## OFFICIAL COMMENT

This section authorizes notice and proof of service to be made by any method allowed by either the State which issues the notice or the State where the notice is received. This eliminates the need to specify the type of notice in the Act and therefore the provisions of Section 5 of the UCCJA which specified how notice was to be accomplished were eliminated. The change reflects an approach in this Act to use local law to determine many procedural issues. Thus, service by facsimile is permissible if allowed by local rule in either State. In addition, where special service or notice rules are available for some procedures, in either jurisdiction, they could be utilized under this Act. For example, if

a case involves domestic violence and the statute of either State would authorize notice to be served by a peace officer, such service could be used under this Act.

Although section 14-13-104 requires foreign countries to be treated as States for purposes of this Act, attorneys should be cautioned about service and notice in foreign countries. Countries have their own rules on service which must usually be followed. Attorneys should consult the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 36, T.I.A.S. 6638 (1965).

## ANNOTATION

**Law reviews.** For article, "The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act", see 11 Colo. Law. 1224 (1982). For article, "Interstate Custody Problems Revisited", see 11 Colo. Law. 2596 (1982).

**Annotator's note.** Since § 14-13-108 is similar to §§ 14-13-105 and 14-13-106 as they

existed prior to the 2000 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

**Notice by publication controlled by C.R.C.P. 4(h).** Since subsection (1)(d) does not specify the number of times that publication is required to effect notice under the act, C.R.C.P.

4(h) controls. In re Blair, 42 Colo. App. 270, 592 P.2d 1354 (1979) (decided under former § 14-13-106).

**In the best interests of the child, the hearing in a custody action should be swiftly concluded.** Nelson v. District Court, 186 Colo. 381, 527 P.2d 811 (1974).

**The custody hearing may be properly made part of a habeas corpus proceeding,** which is considered to be a suit in equity. Nelson

v. District Court, 186 Colo. 381, 527 P.2d 811 (1974).

**Determination that court lacks jurisdiction not “decree”.** A determination by a court that it lacks jurisdiction to entertain a petition for custody is not a decree such as is contemplated by this section. Clark v. Kendrick, 670 P.2d 32 (Colo. App. 1983).

**14-13-109. Appearance and limited immunity.** (1) A party to a child-custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child-custody determination, is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(2) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(3) The immunity granted by subsection (1) of this section does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this article committed by an individual while present in this state.

**Source:** L. 2000: Entire article R&RE, p. 1522, § 1, effective July 1.

## OFFICIAL COMMENT

This section establishes a general principle that participation in a custody proceeding does not, by itself, give the court jurisdiction over any issue for which personal jurisdiction over the individual is required. The term “participate” should be read broadly. For example, if jurisdiction is proper under part 2, a respondent in an original custody determination, or a party in a modification determination, should be able to request custody without this constituting the seeking of affirmative relief that would waive personal jurisdictional objections. Once jurisdiction is proper under part 2, a party should not be placed in the dilemma of choosing between seeking custody or protecting a right not to be subject to a monetary judgment by a court with no other relationship to the party.

This section is comparable to the immunity provision of UIFSA § 314. A party who is otherwise not subject to personal jurisdiction can appear in a custody proceeding or an enforcement action without being subject to the general jurisdiction of the State by virtue of the appearance. However, if the petitioner would otherwise be subject to the jurisdiction of the State, appearing in a custody proceeding or filing an enforcement proceeding will not provide immunity. Thus, if the non-custodial parent moves from the State that decided the custody determination, that parent is still subject to the state’s jurisdiction for enforcement of child support if the child or an individual obligee continues to

reside there. See UIFSA § 205. If the non-custodial parent returns to enforce the visitation aspects of the custody determination, the State can utilize any appropriate means to collect the back-due child support. However, the situation is different if both parties move from State A after the determination, with the custodial parent and the child establishing a new home State in State B, and the non-custodial parent moving to State C. The non-custodial parent is not, at this point, subject to the jurisdiction of State B for monetary matters. See *Kulko v. Superior Court*, 436 U.S. 84 (1978). If the non-custodial parent comes into State B to enforce the visitation aspects of the determination, the non-custodial parent is not subject to the jurisdiction of State B for those proceedings and issues requiring personal jurisdiction by filing the enforcement action.

A party also is immune from service of process during the time in the State for an enforcement action except for those claims for which jurisdiction could be based on contacts other than mere physical presence. Thus, when the non-custodial parent comes into State B to enforce the visitation aspects of the decree, State B cannot acquire jurisdiction over the child support aspects of the decree by serving the non-custodial parent in the State. Cf. UIFSA § 611 (personally serving the obligor in the State of the residence of the obligee is not by itself a sufficient jurisdictional basis to authorize a mod-



ification of child support). However, a party who is in this State and subject to the jurisdiction of another State may be served with process to appear in that State, if allowable under the laws of that State.

As the Comments to UIFSA § 314 note, the immunity provided by this section is limited. It

does not provide immunity for civil litigation unrelated to the enforcement action. For example, a party to an enforcement action is not immune from service regarding a claim that involves an automobile accident occurring while the party is in the State.

**14-13-110. Communication between courts.** (1) A court of this state may communicate with a court in another state concerning a proceeding arising under this article.

(2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(3) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(4) Except as otherwise provided in subsection (3) of this section, a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**Source:** L. 2000: Entire article R&RE, p. 1522, § 1, effective July 1.

#### OFFICIAL COMMENT

This section emphasizes the role of judicial communications. It authorizes a court to communicate concerning any proceeding arising under this Act. This includes communication with foreign tribunals and tribal courts. Communication can occur in many different ways such as by telephonic conference and by on-line or other electronic communication. The Act does not preclude any method of communication and recognizes that there will be increasing use of modern communication techniques.

Communication between courts is required under Sections 14-13-204, 14-13-206, and 14-13-306 and strongly suggested in applying Section 14-13-207. Apart from those sections, there may be less need under this Act for courts to communicate concerning jurisdiction due to the prioritization of home state jurisdiction. Communication is authorized, however, whenever the court finds it would be helpful. The court may authorize the parties to participate in the communication. However, the Act does not mandate participation. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls often have to be made after-hours or when-ever the schedules of judges allow.

This section does require that a record be made of the conversation and that the parties have access to that record in order to be in-

formed of the content of the conversation. The only exception to this requirement is when the communication involves relatively inconsequential matters such as scheduling, calendars, and court records. Included within this latter type of communication would be matters of cooperation between courts under Section 14-13-112. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

The second sentence of subsection (2) protects the parties against unauthorized ex parte communications. The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not to be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made. This may be done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

## ANNOTATION

**Because this section does not specify which court must make a record, the statute is satisfied if either the Colorado or the non-Colorado court makes a record.** People ex rel. D.P., 181 P.3d 403 (Colo. App. 2008).

**Trial court erred when judge allowed law clerk to conduct telephone conference with non-Colorado court.** However, such error was harmless and does not warrant reversal. People ex rel. D.P., 181 P.3d 403 (Colo. App. 2008).

**Prior to assuming jurisdiction to modify an out-of-state custody order,** the court must communicate with the state that initially issued the custody order and conduct a hearing at which both sides are allowed to present evidence concerning any disputed residency issue. The burden of proof is on the parent who petitioned the court to assume jurisdiction. In re Brandt, 2012 CO 3, 268 P.3d 406.

**14-13-111. Taking testimony in another state.** (1) In addition to other procedures available to a party, a party to a child-custody proceeding or other legal representative of the child may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(2) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

**Source: L. 2000:** Entire article R&RE, p. 1523, § 1, effective July 1. **L. 2005:** (1) amended, p. 962, § 7, effective July 1.

**Editor's note:** This section is similar to former § 14-13-119 as it existed prior to 2000.

**Cross references:** (1) For manner of giving notice through service by mail or publication, see C.R.C.P. 4(g); for manner of giving notice through personal service outside state, see C.R.C.P. 4(e).

(2) For the legislative declarations contained in the 2005 act amending subsection (1), see sections 1 and 3 of chapter 244, Session Laws of Colorado 2005.

## OFFICIAL COMMENT

No substantive changes have been made to subsection (1) which was Section 18 of the UCCJA.

Subsections (2) and (3) merely provide that modern modes of communication are permissi-

ble in the taking of testimony and the transmittal of documents. See UIFSA § 316.

## ANNOTATION

**Law reviews.** For article, "The Rights of Children and the Crisis in Custody Litigation:

Modification of Custody in and out of State", see 46 U. Colo. L. Rev. 495 (1974-75).

**14-13-112. Cooperation between courts - preservation of records.** (1) A court of this state may request the appropriate court of another state to:

- (a) Hold an evidentiary hearing;
- (b) Order a person to produce or give evidence pursuant to procedures of that state;
- (c) Order that an evaluation be made with respect to the custody or allocation of parental responsibilities with respect to a child involved in a pending proceeding;
- (d) Forward to the court of this state a certified copy of the transcript of the record of



the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and

(e) Order a party to a child-custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(2) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (1) of this section.

(3) Travel and other necessary and reasonable expenses incurred under subsections (1) and (2) of this section may be assessed against the parties according to the law of this state.

(4) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child-custody proceeding until the child attains eighteen years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records.

**Source: L. 2000:** Entire article R&RE, p. 1523, § 1, effective July 1.

### OFFICIAL COMMENT

This section is the heart of judicial cooperation provision of this Act. It provides mechanisms for courts to cooperate with each other in order to decide cases in an efficient manner without causing undue expense to the parties. Courts may request assistance from courts of other States and may assist courts of other States.

The provision on the assessment of costs for travel provided in the UCCJA § 19 has been changed. The UCCJA provided that the costs may be assessed against the parties or the State or county. Assessment of costs against a government entity in a case where the government is not involved is inappropriate and therefore that provision has been removed. In addition, if the

State is involved as a party, assessment of costs and expenses against the State must be authorized by other law. It should be noted that the term "expenses" means out-of-pocket costs. Overhead costs should not be assessed as expenses.

No other substantive changes have been made. The term "social study" as used in the UCCJA was replaced with the modern term: "custody evaluation." The Act does not take a position on the admissibility of a custody evaluation that was conducted in another State. It merely authorizes a court to seek assistance of, or render assistance to, a court of another State.

This section combines the text of Sections 19-22 of the UCCJA.

## PART 2

### JURISDICTION

**14-13-201. Initial child-custody jurisdiction.** (1) Except as otherwise provided in section 14-13-204, a court of this state has jurisdiction to make an initial child-custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within one hundred eighty-two days before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) A court of another state does not have jurisdiction under a provision of law adopted by that state that is in substantial conformity with paragraph (a) of this subsection (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under a provision of law adopted by that state that is in substantial conformity with section 14-13-207 or 14-13-208, and:

(I) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(II) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) All courts having jurisdiction under a provision of law adopted by that state that is in substantial conformity with paragraph (a) or (b) of this subsection (1) have declined to

exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under a provision of law adopted by that state that is in substantial conformity with section 14-13-207 or 14-13-208; or

(d) No court of any other state would have jurisdiction under the criteria specified in a provision of law adopted by that state that is in substantial conformity with paragraph (a), (b), or (c) of this subsection (1).

(2) Subsection (1) of this section is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

**Source:** L. 2000: Entire article R&RE, p. 1524, § 1, effective July 1. L. 2012: (1)(a) amended, (SB 12-175), ch. 208, p. 834, § 36, effective July 1.

**Editor's note:** (1) This section is similar to former § 14-13-104 as it existed prior to 2000.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(a) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

### OFFICIAL COMMENT

This section provides mandatory jurisdictional rules for the original child custody proceeding. It generally continues the provisions of the UCCJA § 3. However, there have been a number of changes to the jurisdictional bases.

**1. Home State Jurisdiction.** The jurisdiction of the home State has been prioritized over other jurisdictional bases. Section 3 of the UCCJA provided four independent and concurrent bases of jurisdiction. The PKPA provides that full faith and credit can only be given to an initial custody determination of a "significant connection" State when there is no home State. This Act prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any potential conflict between the two acts.

The six-month extended home state provision of subsection (1)(a) has been modified slightly from the UCCJA. The UCCJA provided that home state jurisdiction continued for six months when the child had been removed by a person seeking the child's custody or for other reasons and a parent or a person acting as a parent continues to reside in the home State. Under this Act, it is no longer necessary to determine why the child has been removed. The only inquiry relates to the status of the person left behind. This change provides a slightly more refined home state standard than the UCCJA or the PKPA, which also requires a determination that the child has been removed "by a contestant or for other reasons." The scope of the PKPA's provision is theoretically narrower than this Act. However, the phrase "or for other reasons" covers most fact situations where the child is not in the home State and, therefore, the difference has no substantive effect.

In another sense, the six-month extended home state jurisdiction provision in this Act is narrower than the comparable provision in the

PKPA. The PKPA's definition of extended home State is more expansive because it applies whenever a "contestant" remains in the home State. That class of individuals has been eliminated in this Act. This Act retains the original UCCJA classification of "parent or person acting as parent" to define who must remain for a State to exercise the six-month extended home state jurisdiction. This eliminates the undesirable jurisdictional determinations which would occur as a result of differing state substantive laws on visitation involving grandparents and others. For example, if State A's law provided that grandparents could obtain visitation with a child after the death of one of the parents, then the grandparents, who would be considered "contestants" under the PKPA, could file a proceeding within six months after the remaining parent moved and have the case heard in State A. However, if State A did not provide that grandparents could seek visitation under such circumstances, the grandparents would not be considered "contestants" and State B where the child acquired a new home State would provide the only forum. This Act bases jurisdiction on the parent and child or person acting as a parent and child relationship without regard to grandparents or other potential seekers of custody or visitation. There is no conflict with the broader provision of the PKPA. The PKPA in § (c)(1) authorizes States to narrow the scope of their jurisdiction.

**2. Significant connection jurisdiction.** This jurisdictional basis has been amended in four particulars from the UCCJA. First, the "best interest" language of the UCCJA has been eliminated. This phrase tended to create confusion between the jurisdictional issue and the substantive custody determination. Since the language was not necessary for the jurisdictional issue, it has been removed.



Second, the UCCJA based jurisdiction on the presence of a significant connection between the child and the child's parents or the child and at least one contestant. This Act requires that the significant connections be between the child, the child's parents or the child and a person acting as a parent.

Third, a significant connection State may assume jurisdiction only when there is no home State or when the home State decides that the significant connection State would be a more appropriate forum under Section 14-13-207 or 14-13-208. Fourth, the determination of significant connections has been changed to eliminate the language of "present or future care." The jurisdictional determination should be made by determining whether there is sufficient evidence in the State for the court to make an informed custody determination. That evidence might relate to the past as well as to the "present or future."

Emergency jurisdiction has been moved to a separate section. This is to make it clear that the power to protect a child in crisis does not include the power to enter a permanent order for that child except as provided by that section.

Paragraph (1)(c) provides for jurisdiction when all States with jurisdiction under paragraphs (1)(a) and (b) determine that this State is a more appropriate forum. The determination would have to be made by all States with jurisdiction under subsection (1)(a) and (b). Jurisdiction would not exist under this paragraph because the home State determined it is a more appropriate place to hear the case if there is another State that could exercise significant connection jurisdiction under subsection (1)(b).

Paragraph (1)(d) retains the concept of jurisdiction by necessity as found in the UCCJA and in the PKPA. This default jurisdiction only occurs if no other State would have jurisdiction under subsections (1)(a) through (1)(c).

Subsections (2) and (3) clearly State the relationship between jurisdiction under this Act and other forms of jurisdiction. Personal jurisdiction over, or the physical presence of, a parent or the child is neither necessary nor required under this Act. In other words neither minimum contacts nor service within the State is required for the court to have jurisdiction to make a custody determination. Further, the presence of minimum contacts or service within the State does not confer jurisdiction to make a custody determination. Subject to Section 14-13-204, satisfaction of the requirements of subsection (1) is mandatory.

The requirements of this section, plus the notice and hearing provisions of the Act, are all that is necessary to satisfy due process. This Act, like the UCCJA and the PKPA is based on Justice Frankfurter's concurrence in *May v. Anderson*, 345 U.S. 528 (1953). As pointed out by Professor Bodenheimer, the reporter for the UCCJA, no "workable interstate custody law could be built around [Justice] Burton's plurality opinion ... ." Bridgette Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand.L.Rev. 1207, 1233 (1969). It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective.

## ANNOTATION

**Law reviews.** For article, "The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State", see 46 U. Colo. L. Rev. 495 (1974-75). For article, "The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act", see 11 Colo. Law. 1224 (1982). For article, "Interstate Custody Problems Revisited", see 11 Colo. Law. 2596 (1982). For article, "Waking the Dormant PKPA in Colorado", see 21 Colo. Law. 2209 (1992). For article, "Nuts and Bolts of the PKPA", see 22 Colo. Law. 2397 (1993).

**Annotator's note.** Cases relevant to § 14-13-104 decided prior to its earliest source, L. 73, p. 557, § 1, have been included in the annotations to this section. Since § 14-13-201 is similar to § 14-13-104 as it existed prior to the 2000 repeal and reenactment of this article, relevant cases construing that provision also have been included in the annotations to this section.

**Section must be read in conjunction with other provisions of act.** In order to effectuate

the general purposes of this act and to deter jurisdictional fishing with children as bait, this section must be read in conjunction with other provisions of the act. *Brock v. District Court*, 620 P.2d 11 (Colo. 1980).

**Primary purposes of act are to avoid jurisdictional conflicts with other states over child custody issues,** to discourage parents from "jurisdictional fishing," and to ensure that the state making the custody decision is the state with the closest connection to the child and the child's family. *Nistico v. District Ct.*, 791 P.2d 1128 (Colo. 1990); *L.G. v. People in Interest of K.G.*, 890 P.2d 647 (Colo. 1995); *G.B. v. Arapahoe County Ct.*, 890 P.2d 1153 (Colo. 1995).

**The uniform act was enacted to extend full faith and credit to child custody decrees,** and therefore discourage the noncustodial parent from kidnapping and forum shopping. *L.G. v. People*, 890 P.2d 647 (Colo. 1995).

**Court not required to exercise jurisdiction.** A court which has jurisdiction over a custody

issue is not required to exercise its jurisdiction. In *re* Nicholson, 648 P.2d 681 (Colo. App. 1982).

The question of whether jurisdiction exists is distinct from the question of whether it should be exercised. Even if a determination that jurisdiction exists is made, the court may decline to exercise jurisdiction, or it may stay the proceedings upon the condition that custody proceedings be initiated in another state. *Johnson v. District Court*, 654 P.2d 827 (Colo. 1982); *Barden v. Blau*, 712 P.2d 481 (Colo. 1986).

**Section neither grants courts of state right, nor imposes upon them duty, to modify out-of-state custody decrees** under any and all circumstances merely because of a claimed emergency and a threshold showing that some form of judicial intervention might be appropriate. *Brock v. District Court*, 620 P.2d 11 (Colo. 1980).

**State courts authorized to exercise jurisdiction over custody matters in emergency situations** when the child is physically present in the state and is threatened with mistreatment, abuse, or is otherwise neglected or dependent even if its orders contravene those of a sister state that still retains jurisdiction over custody. *Brock v. District Court*, 620 P.2d 11 (Colo. 1980).

**Finding of either "significant connection" or "emergency" sufficient for jurisdiction.** The "significant connection" and "substantial evidence" ground for jurisdiction of subsection (1)(b) is different from the "emergency" ground of subsection (1)(c), and a finding of either is sufficient to bestow jurisdiction. *Johnson v. District Court*, 654 P.2d 827 (Colo. 1982).

**Jurisdiction conferred on court where matter first raised.** Where two states could exercise jurisdiction, this article establishes the rule that exclusive jurisdiction is conferred on the court in which the matter is first raised. In *re* Edison, 637 P.2d 362 (Colo. 1981); *People in Interest of K.G.*, 876 P.2d 1 (Colo. App. 1993).

**Court entering dissolution decree always has jurisdiction.** A court which enters a dissolution decree, where custody is one of the issues in that proceeding, will always have jurisdiction as to the custody issue, even where the parties and the child have left the state. In *re* Nicholson, 648 P.2d 681 (Colo. App. 1982), overruled in *Barden v. Blau*, 712 P.2d 481 (Colo. 1986).

Holding that court always has jurisdiction is overly broad and overlooks the intent and purposes of the uniform act that under certain circumstances the state of original jurisdiction can and should lose jurisdiction. In *re* Dunn, 701 P.2d 158 (Colo. App. 1985).

In deciding whether to entertain a child custody proceeding, the court shall conduct a two-pronged inquiry. It must first be determined whether jurisdiction exists in this state and if so, then whether jurisdiction should be exercised.

*Barden v. Blau*, 712 P.2d 481 (Colo. 1986); In *re* Nielsen, 782 P.2d 868 (Colo. 1989).

**Instances giving rise to subject matter jurisdiction.** The uniform act attempts to limit custody determination jurisdiction to only one state. Thus, this section confines subject matter jurisdiction to: (a) The home state of at least one parent, and of the child for the last six months; or (b) the state where there are other strong contacts with the child and his family and it is in the child's best interest; or (c) the state where the child is present if the child has been abandoned, or if there is an emergency case of child neglect; or (d) the state of the forum if it is in the child's best interest and no other state could or would assume jurisdiction. In *re* Glass, 36 Colo. App. 91, 537 P.2d 1092 (1975).

**Court had jurisdiction to modify an existing Oklahoma custody decree based on the home state provision of subsection (1)(a)** where the child resided in Colorado for thirteen months before the alleged incident of sexual molestation by the child's father. *People in Interest of K.G.*, 876 P.2d 1 (Colo. App. 1993).

**Two-step analysis.** Where Colorado has jurisdiction as a matter of law, the court must then determine whether its jurisdiction is exclusive or nonexclusive, and, if nonexclusive, the court must determine whether or not it should defer to another state's jurisdiction. *Lynch v. Lynch*, 770 P.2d 1383 (Colo. App. 1989); *People in Interest of K.G.*, 876 P.2d 1 (Colo. App. 1993); *L.G. v. People*, 890 P.2d 647 (Colo. 1995).

**Serving best interests of children where parents are located in separate jurisdictions.** The best interests of children who are subjects of contested custody where the parents are located in separate jurisdictions are served when the forum determining custody has a significant connection and optimum access to relevant evidence about them. *Wheeler v. District Court*, 186 Colo. 218, 526 P.2d 658 (1974).

**Jurisdictional considerations under subsection (1)(b)** are governed by the best interest of the child and by the child's connections to the prospective forum state rather than the best interests of the feuding parties or the parties' connections to a prospective forum state. *Nistico v. District Court*, 791 P.2d 1128 (Colo. 1990).

**The trial court had jurisdiction even though the mother had abducted the child,** because this article provides that unclean hands do not deprive the trial court of jurisdiction. *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974).

**Improper retention of the child should affect only the court's decision to exercise its jurisdiction.** *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974).

**Exercise of parens patriae jurisdiction under subsection (1)(c) is reserved for extraordinary circumstances.** In *re* Glass, 36 Colo.



App. 91, 537 P.2d 1092 (1975); *Barden v. Blau*, 712 P.2d 481 (Colo. 1986).

**Jurisdiction when domicile changes.** Under subsection (1)(a), where mother and child have moved to another state after a dissolution of marriage proceeding in a court of this state, jurisdiction over issues of child custody is with the state that is the home state of the child at the commencement of the custody proceeding then pending before the court. *Barden v. Blau*, 712 P.2d 481 (Colo. 1986).

Where the child lived in Michigan during the six-month period preceding the filing of the father's motion of schedule visitation, Colorado does not have home state jurisdiction under subsection (1)(a). *Barden v. Blau*, 712 P.2d 481 (Colo. 1986).

**Loss of jurisdiction of original state.** While the intent of the uniform act is that the original state shall have continuing jurisdiction under § 14-13-115, such jurisdiction can be lost by the erosion of a child's and parents' significant connections with the state. *McCarron v. District Court ex rel. County of Jefferson*, 671 P.2d 953 (Colo. 1983); *Barden v. Blau*, 712 P.2d 481 (Colo. 1986).

**No authority to modify unless other court without jurisdiction.** A Colorado court is not authorized to modify an existing custody decree from another state even in an emergency unless the court which rendered that decree no longer has, or has declined to assume, jurisdiction of the matter. *In re Thomas*, 36 Colo. App. 96, 537 P.2d 1095 (1975).

**Modification authorized where Colorado is home state.** When Colorado is the home state of the children, Colorado has the jurisdiction to modify a sister state's decree in the best interests of the children. *Kudler v. Smith*, 643 P.2d 783 (Colo. App. 1981).

**State court had jurisdiction.** Where all of the individuals who had an interest in the child's future care, well-being, and custody were either domiciled in Colorado or sought to enforce their legal rights by way of habeas corpus or permanent custody petitions in the courts of Colorado, and sufficient evidence was available in Colorado from which the trial court could have concluded that the Colorado court could best resolve the issues relating to the child's future care and training, the trial court had jurisdiction to decide the issues raised in a petition for permanent custody although the child's domicile was not in Colorado. *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974).

Trial court properly held that Colorado is child's home state since she maintained significant connections here. Child has lived with her mother and attended school in Colorado for years, and both her guardian ad litem and therapist are here. Furthermore, the California courts in two districts both declined to exercise jurisdiction, which satisfies one of the alterna-

tive requirements of former § 14-13-04 (1)(d). *In re Dickson*, 983 P.2d 44 (Colo. App. 1998) (decided prior to 2000 repeal and reenactment).

Colorado court had jurisdiction in proceeding brought by children's mother to enforce a custody decree rendered in a sister state, which had originally given custody of the children to the father and had allowed the father to move the children to Colorado, where the children and the father were domiciled in Colorado and the children attended Colorado schools. *Wheeler v. District Court*, 186 Colo. 218, 526 P.2d 658 (1974).

**Allegations by parents against each other do not justify jurisdiction.** Although the allegations of both the father and the mother may indicate that the best interests of the child mandate judicial review of the fitness of each parent to have custody of the child, that does not necessarily justify the exercise of jurisdiction by the courts of this state. *Roberts v. District Court*, 198 Colo. 79, 596 P.2d 65 (1979).

**Jurisdiction to modify foreign visitation order.** A modification of visitation rights is a "custody determination" under § 14-13-103(2), and so, pursuant to this section, where a child and his parents have been living in this state for over a year, a trial court of this state has the jurisdiction to modify a foreign child visitation order. *In re Bechard*, 40 Colo. App. 516, 577 P.2d 778 (1978).

**Foreign state without jurisdiction.** Foreign state court which originally granted temporary custody to the petitioner, a paternal aunt, has lost jurisdiction since the residence of the parties in the foreign state was premised solely on a military assignment, and both the father and the mother have returned to the site of their domicile — Denver, Colorado — and the child's natural father, mother, and grandparents are all residents of Colorado and have significant connections to Colorado. *Nelson v. Schweitzer*, 189 Colo. 511, 542 P.2d 382 (1975).

**Court lacked basis to grant noncustodial parent temporary custody of wrongfully retained minor child.** Where no compelling reason exists for the exercise of *parens patriae* jurisdiction, and the child has been retained in this state by the noncustodial parent after the term of visitation has expired, the court has no basis in fact or law to grant the noncustodial parent temporary custody of the minor child. *Brock v. District Court*, 620 P.2d 11 (Colo. 1980).

**Colorado without jurisdiction.** Where, on the date father filed his complaint in Colorado, all significant connections of child and mother were with Kansas and child's contacts with Colorado were minimal, Kansas had jurisdiction to make a custody determination. Hence, pursuant to § 14-13-115 (1), the Colorado court could not modify the existing Kansas custody decree. *In re Thomas*, 36 Colo. App. 96, 537 P.2d 1095 (1975).

To interpret § 14-13-115 as a prohibition against a Colorado court's exercise of jurisdiction to enter temporary and protective custody orders in order to protect children endangered by their surroundings would, in effect, vitiate the very purpose of the *parens patriae* jurisdiction granted by this section. *E.P. v. District Court*, 696 P.2d 254 (Colo. 1985).

Where on the date the Colorado petition for permanent custody of a child was filed by the father, a Colorado resident, in Colorado, and the uniform act was operable in California, and on that date, the mother was still a domiciliary of California, the child's home state under the uniform act was and is California, and, for all but the last three months before the petition was filed, the child lived with his mother and grandparents in California and had only minimal contacts with Colorado, therefore, California had jurisdiction to make a custody determination under the uniform act. Hence, by virtue of § 14-13-115(1), the Colorado court could not modify the existing California custody decree. In re *Glass*, 36 Colo. App. 91, 537 P.2d 1092 (1975).

A parent's self-serving statements that his child appeared unwell are not enough to confer jurisdiction, under subdivision (1)(c), on a district court in this state while a foreign court has continuing jurisdiction over the child. *Woodhouse v. District Court*, 196 Colo. 558, 587 P.2d 1199 (1978).

In a continuing custody dispute where none of the parties still live in Colorado, the fact that any proceedings related to custody inherently arise from an initial custody order, which was made by Colorado courts, does not necessarily give Colorado continuing jurisdictional authority. In re *Pritchett*, 80 P.3d 918 (Colo. App. 2003).

Under the uniform act, the Colorado court was without jurisdiction to resolve a second contempt proceeding once it had relinquished jurisdiction over all matters except the first contempt proceeding, and the North Dakota court was properly exercising jurisdiction. In re *Pritchett*, 80 P.3d 918 (Colo. App. 2003).

"The time of commencement of the proceeding" means the pending motion affecting custody or visitation rather than the initial dissolution action which resulted in the rendition of the custody decree. *Barden v. Blau*, 712 P.2d 481 (Colo. 1986).

Declining jurisdiction over controversy held not error. *Garcia v. Martinez*, 642 P.2d 53 (Colo. App. 1982).

Where both states had jurisdiction over child and trial court found that South Carolina was "home state" of child, trial court did not err in declining to exercise continuing jurisdiction. *People in Interest of S.B.*, 742 P.2d 935 (Colo. App. 1987), cert. denied, 754 P.2d 1177 (Colo. 1988).

Under the doctrine of *parens patriae*, where an emergency existed concerning the immediate needs and welfare of a child within this state, our courts could have in such circumstances, entered custodial orders for the protection of such child, notwithstanding the child's domicile elsewhere and the existence of otherwise valid orders to the contrary theretofore entered in a sister state having jurisdiction of the parties, and such power could have been exercised not only in ordinary custody proceedings, but also in habeas corpus proceedings. *Wilson v. Wilson*, 172 Colo. 566, 474 P.2d 789 (1970).

Where the father alleged the existence of an emergency situation which he claimed required the Colorado court to intervene and modify the Kansas divorce decree, under such circumstances, the Colorado court, under its general *parens patriae* jurisdiction over a child physically present in the state, could properly make a temporary order to protect the child. In re *Thomas*, 36 Colo. App. 96, 537 P.2d 1095 (1975).

The forum of the domicile where the parties were known, where the matrimonial difficulties occurred, and where the evidence was available, was most likely to make just decisions of such issues, and it promoted neither justice nor respect for the courts to permit a spouse in prospect of an unfavorable decision to find sanctuary in another jurisdiction where adverse evidence was not available and the other spouse may not be able to appear. *Evans v. Evans*, 136 Colo. 6, 314 P.2d 291 (1957); *Petition of Kraudel v. Benner*, 148 Colo. 525, 366 P.2d 667 (1961).

The courts of this state had jurisdiction, in a proper case, to hear all relevant testimony offered by either party in regard to the custody of a minor child domiciled in this state, and enter such judgment as would have been for the best interests of the minor, even though the judgment be different from that entered by a sister state, where it was shown to the courts of this state that the condition of the parties had so changed since the entry of the judgment by the sister state that the welfare of the minor required that the courts of this state hear and determine the question presented. *Evans v. Evans*, 136 Colo. 6, 314 P.2d 291 (1957); *Petition of Kraudel v. Benner*, 148 Colo. 525, 366 P.2d 667 (1961).

State exercising jurisdiction under the uniform act should be state with closest connection to the child and the child's family and with access to the maximum amount of evidence concerning the child's residence. *L.G. v. People*, 890 P.2d 647 (Colo. 1995).

After a final decree in divorce, either party could change domicile at will, and the child's domicile then changed with that of the parent in whose custody he had been placed and the court of new domicile had jurisdiction over pro-



ceedings as to custody. *Evans v. Evans*, 136 Colo. 6, 314 P.2d 291 (1957).

**After a change of domicile it was held that any modification of the provisions of the final decree as to custody** by the court of the former domicile was without extraterritorial effect in Colorado. *Evans v. Evans*, 136 Colo. 6, 314 P.2d 291 (1957).

**Award of custody by a court having jurisdiction should be recognized by other states** and the facts upon which the award is based held res judicata. *Evans v. Evans*, 136 Colo. 6, 314 P.2d 291 (1957); *Petition of Kraudel v. Benner*, 148 Colo. 525, 366 P.2d 667 (1961); *Wilson v. Wilson*, 172 Colo. 566, 474 P.2d 789 (1970).

**Where the primary and controlling issue was the welfare of the child, and that issue was considered and determined by the court** of another state, it could not and should not have been readjudicated in Colorado. *Evans v. Evans*, 136 Colo. 6, 314 P.2d 291 (1957).

**While the custody issue may be decided in another state**, there is no legal basis for a trial court to defer to another state on issues of maintenance and child support. *In re Doria*, 855 P.2d 28 (Colo. App. 1993).

**Colorado courts do not have jurisdiction** in case in which child was born in California and continued to reside there. The record suggests that California, not Colorado, is the state containing substantial evidence concerning the child's present or future care, protection, training, and personal relationships. *Nistico v. District Court*, 791 P.2d 1128 (Colo. 1990).

**The district court did not abuse its discretion in exercising jurisdiction**, even though it did not make findings as to the basis for its exercise of jurisdiction, where Colorado had jurisdiction based on the home state provision of the act and Oklahoma met none of the criteria outlined in either the Colorado or the substantially similar Oklahoma jurisdictional prerequisite provisions. *People in Interest of K.G.*, 876 P.2d 1 (Colo. App. 1993).

**Even though Colorado both had jurisdiction and could have exercised that jurisdiction under the act to modify an Oklahoma custody decree, under the federal parental kidnapping prevention act of 1980, the Colorado court was required to decline jurisdiction** in favor of Oklahoma because Oklahoma was the state of the original custody determination and, therefore, had continuing jurisdiction under Oklahoma law since the father remained a resident of Oklahoma and he had exercised his visitation rights in Oklahoma. Therefore, the portion of the Colorado court's judgment that modified mother's custody and father's visita-

tion rights under the Oklahoma custody determination could not stand. *People in Interest of K.G.*, 876 P.2d 1 (Colo. App. 1993).

**Foreign custody decree could be modified by a Colorado court** where the decree has been docketed in Colorado and Colorado is now the home state of the children. *In re Whitley*, 775 P.2d 95 (Colo. App. 1989).

**Colorado not required to give full faith and credit to another state's custody order if order was not entered in compliance with the PKPA.** Under the PKPA, a state's custody determination is in conformance with the PKPA if the court of the state has jurisdiction under its own law and the exercise of jurisdiction meets one of the conditions set forth in the PKPA. Because Nebraska, like Colorado, has adopted the UCCJEA, and the UCCJEA is substantively identical to the PKPA, the provisions of Nebraska's state law conform to the PKPA. Therefore, because Nebraska lacked jurisdiction to enter the custody order under its own law, it lacked jurisdiction to enter the order under the PKPA and Colorado is not required to recognize and enforce the order pursuant to the PKPA. *In re L.S.*, 257 P.3d 201 (Colo. 2011).

Where New York family court referee determined that it lacked exclusive, continuing jurisdiction to modify New York custody order and declined jurisdiction, a New York Supreme Court (trial court) lacked jurisdiction to enter order in a subsequent motion to modify custody. New York has adopted the UCCJEA and, therefore, the jurisdictional provisions of New York law are substantially identical to the PKPA. Consequently, because the second New York court did not have jurisdiction over the matter under New York law, the PKPA does not require that Colorado accord full faith and credit to the second court's custody modification order and the Colorado court erred in enforcing the New York order modifying custody. *In re Dedie & Springston*, 255 P.3d 1142 (Colo. 2011).

**When the parties to a divorce remarry each other**, the court's jurisdiction over the parties is terminated and the provisions of the prior decree for matters of child support, custody, and maintenance are nullified. *In re Doria*, 855 P.2d 28 (Colo. App. 1993).

**Applied in** *Zumbrun v. Zumbrun*, 42 Colo. App. 37, 592 P.2d 16 (1978); *In re Tricamo*, 42 Colo. App. 493, 599 P.2d 273 (1979); *Lopez v. District Court*, 199 Colo. 207, 606 P.2d 853 (1980); *In re Severn*, 44 Colo. App. 109, 608 P.2d 381 (1980); *In re Johnson*, 634 P.2d 1034 (Colo. App. 1981); *In re Tatum*, 653 P.2d 74 (Colo. App. 1982); *Bakke v. District Court*, 719 P.2d 313 (Colo. 1986); *In re Tonnessen*, 937 P.2d 863 (Colo. App. 1996).

**14-13-202. Exclusive, continuing jurisdiction.** (1) Except as otherwise provided in section 14-13-204, a court of this state that has made a child-custody determination consistent with section 14-13-201 or 14-13-203 has exclusive, continuing jurisdiction over

the determination until:

(a) A court of this state determines that the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

(2) A court of this state that has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under section 14-13-201.

**Source:** L. 2000: Entire article R&RE, p. 1525, § 1, effective July 1.

#### OFFICIAL COMMENT

This is a new section addressing continuing jurisdiction. Continuing jurisdiction was not specifically addressed in the UCCJA. Its absence caused considerable confusion, particularly because the PKPA, § 1738(d), requires other States to give Full Faith and Credit to custody determinations made by the original decree State pursuant to the decree State's continuing jurisdiction so long as that State has jurisdiction under its own law and remains the residence of the child or any contestant.

This section provides the rules of continuing jurisdiction and borrows from UIFSA as well as recent UCCJA case law. The continuing jurisdiction of the original decree State is exclusive. It continues until one of two events occurs:

1. If a parent or a person acting as a parent remains in the original decree State, continuing jurisdiction is lost when neither the child, the child and a parent, nor the child and a person acting as a parent continue to have a significant connection with the original decree State and there is no longer substantial evidence concerning the child's care, protection, training and personal relations in that State. In other words, even if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction, so long as the general requisites of the "substantial connection" jurisdiction provisions of Section 14-13-201 are met. If the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

The use of the phrase "a court of this State" under subsection (1)(a) makes it clear that the original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.

2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original

decree State. The exact language of subparagraph (1)(b) was the subject of considerable debate. Ultimately the Conference settled on the phrase that "a court of this State or a court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State" to determine when the exclusive, continuing jurisdiction of a State ended. The phrase is meant to be identical in meaning to the language of the PKPA which provides that full faith and credit is to be given to custody determinations made by a State in the exercise of its continuing jurisdiction when that "State remains the residence of ... ." The phrase is also the equivalent of the language "continues to reside" which occurs in UIFSA § 205(a)(1) to determine the exclusive, continuing jurisdiction of the State that made a support order. The phrase "remains the residence of" in the PKPA has been the subject of conflicting case law. It is the intention of this Act that paragraph (1)(b) of this section means that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.

The phrase "do not presently reside" is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.

If the child, the parents, and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive, continuing jurisdiction.

The continuing jurisdiction provisions of this section are narrower than the comparable provi-



sions of the PKPA. That statute authorizes continuing jurisdiction so long as any “contestant” remains in the original decree State and that State continues to have jurisdiction under its own law. This Act eliminates the contestant classification. The Conference decided that a remaining grandparent or other third party who claims a right to visitation, should not suffice to confer exclusive, continuing jurisdiction on the State that made the original custody determination after the departure of the child, the parents and any person acting as a parent. The significant connection to the original decree State must relate to the child, the child and a parent, or the child and a person acting as a parent. This revision does not present a conflict with the PKPA. The PKPA’s reference in § 1738(d) to § 1738 (c)(1) recognizes that States may narrow the class of cases that would be subject to exclusive, continuing jurisdiction. However, during the transition from the UCCJA to this Act, some States may continue to base continuing jurisdiction on the continued presence of a contestant, such as a grandparent. The PKPA will require that such decisions be enforced. The problem will disappear as States adopt this Act to replace the UCCJA.

Jurisdiction attaches at the commencement of a proceeding. If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 14-13-207.

Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns. As subsection (2) provides, once a State has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of Section 14-13-201. If another State acquires exclusive continuing jurisdiction under this section, then its orders cannot be modified even if this State has once again become the home State of the child.

In accordance with the majority of UCCJA case law, the State with exclusive, continuing jurisdiction may relinquish jurisdiction when it determines that another State would be a more convenient forum under the principles of Section 14-13-207.

#### ANNOTATION

**In a continuing custody dispute where none of the parties still live in Colorado, the fact that any proceedings related to custody inherently arise from an initial custody order,** which was made by Colorado courts, does not necessarily give Colorado continuing jurisdictional authority. In re Pritchett, 80 P.3d 918 (Colo. App. 2003).

**“Presently reside” is not equivalent to “currently reside” or “physical presence”.** “Presently reside” is not confined only to a party’s physical presence within the borders of a state, but necessitates an inquiry broader than technical domicile into the totality of the circumstances that make up domicile—that is, a person’s permanent home to which he or she intends to return to and remain. In re Brandt, 2012 CO 3, 268 P.3d 406.

**Totality of the circumstance test to determine if a party “presently resides”** is a mixed question of fact and law and includes, but is not limited to, the length and reasons for the parents’ and the child’s absence from the state of initial jurisdiction; their intent in departing from the state and returning to it; reserve and active military assignments affecting one or both parents; where they maintain a home, car, driver’s license, job, professional licensure, and voting registration; where they pay state taxes; the initial state’s determination of residency based on the facts and that state’s law; and any other circumstances demonstrated by evidence in the case. In re Brandt, 2012 CO 3, 268 P.3d 406.

**14-13-203. Jurisdiction to modify determination.** (1) Except as otherwise provided in section 14-13-204, a court of this state may not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under section 14-13-201 (1) (a) or 14-13-201 (1) (b) and:

(a) The court of the other state determines it no longer has exclusive, continuing jurisdiction under a provision of law adopted by that state that is in substantial conformity with section 14-13-202 or that a court of this state would be a more convenient forum under a provision of law adopted by that state that is in substantial conformity with section 14-13-207; or

(b) A court of this state or a court of the other state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the other state.

**Source:** L. 2000: Entire article R&RE, p. 1525, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-115 as it existed prior to 2000.

### OFFICIAL COMMENT

This section complements Section 14-13-202 and is addressed to the court that is confronted with a proceeding to modify a custody determination of another State. It prohibits a court from modifying a custody determination made consistently with this Act by a court in another State unless a court of that State determines that it no longer has exclusive, continuing jurisdiction under Section 14-13-202 or that this State would be a more convenient forum under Section 14-

13-207. The modification State is not authorized to determine that the original decree State has lost its jurisdiction. The only exception is when the child, the child's parents, and any person acting as a parent do not presently reside in the other State. In other words, a court of the modification State can determine that all parties have moved away from the original State. The court of the modification State must have jurisdiction under the standards of Section 14-13-201.

### ANNOTATION

**Law reviews.** For article, "The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State", see 46 U. Colo. L. Rev. 495 (1974-75). For article, "The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act", see 11 Colo. Law. 1224 (1982). For article, "Waking the Dormant PKPA in Colorado", see 21 Colo. Law. 2209 (1992). For article, "Nuts and Bolts of the PKPA", see 22 Colo. Law. 2397 (1993).

**Annotator's note.** Since § 14-13-203 is similar to § 14-13-115 as it existed prior to the 2000 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Intent of child custody jurisdiction act.** The uniform child custody jurisdiction act attempts to guarantee reasonable security and continuity of environment to children by discouraging their unilateral removal from one state to another to avoid obeying custodial orders. Kraft v. District Court, 197 Colo. 10, 593 P.2d 321 (1979).

**The uniform act establishes additional conditions and restrictions before Colorado courts can modify existing foreign custody decrees.** In re Glass, 36 Colo. App. 91, 537 P.2d 1092 (1975).

A Colorado court must recognize and refrain from modifying a custody decree of another state where the sister state had jurisdiction at the time its decree was entered and has continuing jurisdiction at the time the action to modify is instituted in this state. Fry v. Ball, 190 Colo. 128, 544 P.2d 402 (1975).

**No authority to modify unless foreign state without jurisdiction.** A Colorado court is not authorized to modify an existing custody decree from another state even in an emergency unless the court which rendered that decree no longer has or has declined to assume jurisdiction of the matter. In re Thomas, 36 Colo. App. 96, 537 P.2d 1095 (1975).

To interpret this section as a prohibition against a Colorado court's exercise of jurisdiction to enter temporary and protective custody orders in order to protect children endangered by their surroundings would, in effect, vitiate the very purpose of the parens patriae jurisdiction granted by § 14-13-104. E.P. v. District Court, 696 P.2d 254 (Colo. 1985).

Section 14-13-114 and this section require a court to recognize the valid custody decrees of other jurisdictions and not to modify such decrees unless the rendering state no longer has jurisdiction or has declined to exercise jurisdiction. Woodhouse v. District Court, 196 Colo. 558, 587 P.2d 1199 (1978).

Absent exceptional circumstances, a Colorado court must refrain from modifying another state's custody decree if that state has continuing jurisdiction over the custody matter at the time the action to modify is instituted in Colorado. Kraft v. District Court, 197 Colo. 10, 593 P.2d 321 (1979).

**Colorado courts are free to determine whether another court's proceedings are substantially in conformity with our act,** and must do so if the issue is raised. Lynch v. Lynch, 770 P.2d 1383 (Colo. App. 1989).

**Loss of jurisdiction of original state.** While the intent of the uniform act is that the original state shall have continuing jurisdiction under this section, such jurisdiction can be lost by the erosion of a child's and parents' significant connections with the state. McCarron v. District Court ex rel. County of Jefferson, 671 P.2d 953 (Colo. 1983).

**When Colorado is the home state of the children,** Colorado has the jurisdiction to modify a sister state's decree in the best interests of the children. Kudler v. Smith, 643 P.2d 783 (Colo. App. 1981).

**Application of parens patriae jurisdiction.** Where the father alleged the existence of an



emergency situation which he claimed required the Colorado court to intervene and modify the Kansas divorce decree, under such circumstances, the Colorado court, under its general *parens patriae* jurisdiction over a child physically present in the state, could properly make a temporary order to protect the child. In re Thomas, 36 Colo. App. 96, 537 P.2d 1095 (1975).

**Foreign court's jurisdiction over custody preclude Colorado court's exercise of jurisdiction.** If the courts of another state have continuing jurisdiction over custody and have not declined to exercise that jurisdiction, then a Colorado court is precluded by § 14-13-114 and this section from exercising jurisdiction in the case, at least in the absence of a grave emergency. Brock v. District Court, 620 P.2d 11 (Colo. 1980).

**Judicial relief may extend beyond issuance of temporary orders for compelling reasons only.** Generally, judicial relief should not extend beyond the issuance of temporary protective orders pending the application to the court of the rendering state for appropriate modification of the custody decree. Only when there are compelling reasons, articulated in the record, that render such out-of-state application impractical, should a Colorado court grant anything but temporary relief under its *parens patriae* jurisdiction. Brock v. District Court, 620 P.2d 11 (Colo. 1980).

**A Colorado trial court cannot modify a California custody order unless and until the court has determined whether the California court would continue to exercise jurisdiction.** The burden was on the prospective adoptive parents to establish by competent evidence all facts essential to jurisdiction. In re Custody of K.R., 897 P.2d 896 (Colo. App. 1995).

**District court held to have properly concluded that it lacked jurisdiction** to modify another state's custody decree. Clark v. Kendrick, 670 P.2d 32 (Colo. App. 1983).

**14-13-204. Temporary emergency jurisdiction.** (1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(2) If there is no previous child-custody determination that is entitled to be enforced under this article and a child-custody proceeding has not been commenced in a court of a state having jurisdiction under a provision of law adopted by that state that is in substantial conformity with sections 14-13-201 to 14-13-203, a child-custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under a provision of law adopted by that state that is in substantial conformity with sections 14-13-201 to 14-13-203. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under a provision of law adopted by that state that is in substantial conformity with sections 14-13-201 to 14-13-203, a child-custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

(3) If there is a previous child-custody determination that is entitled to be enforced

**Determination that a court of another state had jurisdiction held not erroneous.** In re Edilson, 637 P.2d 362 (Colo. 1981).

**"Presently reside" is not equivalent to "currently reside" or "physical presence".** "Presently reside" is not confined only to a party's physical presence within the borders of a state, but necessitates an inquiry broader than technical domicile into the totality of the circumstances that make up domicile—that is, a person's permanent home to which he or she intends to return to and remain. In re Brandt, 2012 CO 3, 268 P.3d 406.

**More than a perfunctory determination of residence** is required to divest an issuing state of its jurisdiction. In re Brandt, 2012 CO 3, 268 P.3d 406.

**Totality of the circumstance test to determine if a party "presently resides"** is a mixed question of fact and law and includes, but is not limited to, the length and reasons for the parents' and the child's absence from the state of initial jurisdiction; their intent in departing from the state and returning to it; reserve and active military assignments affecting one or both parents; where they maintain a home, car, driver's license, job, professional licensure, and voting registration; where they pay state taxes; the initial state's determination of residency based on the facts and that state's law; and any other circumstances demonstrated by evidence in the case. In re Brandt, 2012 CO 3, 268 P.3d 406.

**The burden of proof when applying the totality of the circumstance test** lies with the parent who is petitioning to modify jurisdiction. In re Brandt, 2012 CO 3, 268 P.3d 406.

**The preference for "home state" pertains only to jurisdiction to enter an initial child custody order,** not jurisdiction to modify an order that has already been entered by another state. In re Brandt, 2012 CO 3, 268 P.3d 406.

**Applied** in Zumbrun v. Zumbrun, 42 Colo. App. 37, 592 P.2d 16 (1978); Roberts v. District Court, 198 Colo. 231, 596 P.2d 65 (1979).

under this article, or a child-custody proceeding has been commenced in a court of a state having jurisdiction under a provision of law adopted by that state that is in substantial conformity with sections 14-13-201 to 14-13-203, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under a provision of law adopted by that state that is in substantial conformity with sections 14-13-201 to 14-13-203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(4) A court of this state that has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a state having jurisdiction under a provision of law adopted by that state that is in substantial conformity with sections 14-13-201 to 14-13-203, shall immediately communicate with the other court. A court of this state that is exercising jurisdiction pursuant to sections 14-13-201 to 14-13-203, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

**Source:** L. 2000: Entire article R&RE, p. 1525, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-104 as it existed prior to 2000.

#### OFFICIAL COMMENT

The provisions of this section are an elaboration of what was formerly Section 3(a)(3) of the UCCJA. It remains, as Professor Bodenheimer's comments to that section noted, "an extraordinary jurisdiction reserved for extraordinary circumstances."

This section codifies and clarifies several aspects of what has become common practice in emergency jurisdiction cases under the UCCJA and PKPA. First, a court may take jurisdiction to protect the child even though it can claim neither home State nor significant connection jurisdiction. Second, the duties of States to recognize, enforce and not modify a custody determination of another State do not take precedence over the need to enter a temporary emergency order to protect the child.

Third, a custody determination made under the emergency jurisdiction provisions of this section is a temporary order. The purpose of the order is to protect the child until the State that has jurisdiction under Sections 14-13-201 to 14-13-203 enters an order.

Under certain circumstances, however, subsection (2) provides that an emergency custody determination may become a final custody determination. If there is no existing custody determination, and no custody proceeding is filed in a State with jurisdiction under Sections 14-13-201 to 14-13-203, an emergency custody determination made under this section becomes a final determination, if it so provides, when the State that issues the order becomes the home State of the child.

Subsection (3) is concerned with the temporary nature of the order when there exists a prior custody order that is entitled to be enforced under this Act or when a subsequent custody proceeding is filed in a State with jurisdiction under Sections 14-13-201 to 14-13-203. Subsection (3) allows the temporary order to remain in effect only so long as is necessary for the person who obtained the determination under this section to present a case and obtain an order from the State with jurisdiction under Sections 14-13-201 to 14-13-203. That time period must be specified in the order. If there is an existing order by a State with jurisdiction under Sections 14-13-201 to 14-13-203, that order need not be reconfirmed. The temporary emergency determination would lapse by its own terms at the end of the specified period or when an order is obtained from the court with jurisdiction under Sections 14-13-202 to 14-13-203. The court with appropriate jurisdiction also may decide, under the provisions of 207, that the court that entered the emergency order is in a better position to address the safety of the person who obtained the emergency order, or the child, and decline jurisdiction under Section 14-13-207.

Any hearing in the State with jurisdiction under Sections 14-13-201 to 14-13-203 on the temporary emergency determination is subject to the provisions of Sections 14-13-111 and 14-13-112. These sections facilitate the presentation of testimony and evidence taken out of State. If there is a concern that the person obtaining the temporary emergency determination



under this section would be in danger upon returning to the State with jurisdiction under Sections 14-13-201 to 14-13-203, these provisions should be used.

Subsection (4) requires communication between the court of the State that is exercising jurisdiction under this section and the court of another State that is exercising jurisdiction under Sections 14-13-201 to 14-13-203. The pleading rules of Section 14-13-209 apply fully to determinations made under this section. Therefore, a person seeking a temporary emergency custody determination is required to inform the court pursuant to Section 14-13-209 (4) of any proceeding concerning the child that has been commenced elsewhere. The person commencing the custody proceeding under Sections 14-13-201 to 14-13-203 is required under Section 14-13-209 (1) to inform the court about the temporary emergency proceeding. These pleading requirements are to be strictly followed so that the courts are able to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

**Relationship to the PKPA.** The definition of emergency has been modified to harmonize it with the PKPA. The PKPA's definition of emergency jurisdiction does not use the term "neglect." It defines an emergency as "mistreatment or abuse." Therefore "neglect" has been eliminated as a basis for the assumption of temporary emergency jurisdiction. Neglect is so elastic a concept that it could justify taking emergency jurisdiction in a wide variety of cases. Under the PKPA, if a State exercised temporary emergency jurisdiction based on a finding that the child was neglected without a finding of mistreatment or abuse, the order would not be entitled to federal enforcement in other States.

**Relationship to Protective Order Proceedings.** The UCCJA and the PKPA were enacted long before the advent of state procedures on the use of protective orders to alleviate problems of domestic violence. Issues of custody and visitation often arise within the context of protective order proceedings since the protective order is

often invoked to keep one parent away from the other parent and the children when there is a threat of violence. This Act recognizes that a protective order proceeding will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction when the child's parent or sibling has been subjected to or threatened with mistreatment or abuse.

In order for a protective order that contains a custody determination to be enforceable in another State it must comply with the provisions of this Act and the PKPA. Although the Violence Against Women's Act (VAWA), 18 U.S.C. § 2265, does provide an independent basis for the granting of full faith and credit to protective orders, it expressly excludes "custody" orders from the definition of "protective order," 22 U.S.C. § 2266.

Many States authorize the issuance of protective orders in an emergency without notice and hearing. This Act does not address the propriety of that procedure. It is left to local law to determine the circumstances under which such an order could be issued, and the type of notice that is required, in a case without an interstate element. However, an order issued after the assumption of temporary emergency jurisdiction is entitled to interstate enforcement and nonmodification under this Act and the PKPA only if there has been notice and a reasonable opportunity to be heard as set out in Section 14-13-205. Although VAWA does require that full faith and credit be accorded to ex parte protective orders if notice will be given and there will be a reasonable opportunity to be heard, it does not include a "custody" order within the definition of "protective order."

VAWA does play an important role in determining whether an emergency exists. That Act requires a court to give full faith and credit to a protective order issued in another State if the order is made in accordance with the VAWA. This would include those findings of fact contained in the order. When a court is deciding whether an emergency exists under this section, it may not relitigate the existence of those factual findings.

## ANNOTATION

**Annotator's note.** Section 14-13-204 is similar to § 14-13-104 (1)(c) as it existed prior to the 2000 repeal and reenactment of this article. Relevant cases construing § 14-13-104 have been included in the annotations under § 14-13-201.

**Despite the fact that Texas court had made child-custody determination, temporary emergency jurisdiction was proper when**

**child's father was jailed during a child's visit with mother in Colorado;** except that only temporary emergency jurisdiction for a specified period to allow father to seek an order from Texas court was proper, and magistrate's order terminating the parental rights of both parents exceeded Colorado's temporary emergency jurisdiction. *People ex rel. M.C.*, 94 P.3d 1220 (Colo. App. 2004).

**14-13-205. Notice - opportunity to be heard - joinder.** (1) Before a child-custody determination is made under this article, notice and an opportunity to be heard in accordance with the standards of section 14-13-108 must be given to all persons entitled to notice under the law of this state as in child-custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

(2) This article does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.

(3) The obligation to join a party and the right to intervene as a party in a child-custody proceeding under this article are governed by the law of this state as in child-custody proceedings between residents of this state.

**Source:** L. 2000: Entire article R&RE, p. 1526, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-105 as it existed prior to 2000.

### OFFICIAL COMMENT

This section generally continues the notice provisions of the UCCJA. However, it does not attempt to dictate who is entitled to notice. Local rules vary with regard to persons entitled to seek custody of a child. Therefore, this section simply indicates that persons entitled to seek custody should receive notice but leaves the rest of the determination to local law. Parents whose parental rights have not been previously terminated and persons having physical custody of the child are specifically mentioned as persons who must be given notice. The PKPA, § 1738A(e), requires that they be given notice in order for the custody determination to be entitled to full faith and credit under that Act.

State laws also vary with regard to whether a court has the power to issue an enforceable temporary custody order without notice and hearing in a case without any interstate element. Such temporary orders may be enforceable, as against due process objections, for a short period of time if issued as a protective order or a temporary restraining order to protect a child from harm. Whether such orders are enforceable

locally is beyond the scope of this Act. Subsection (2) clearly provides that the validity of such orders and the enforceability of such orders is governed by the law which authorizes them and not by this Act. An order is entitled to interstate enforcement and nonmodification under this Act only if there has been notice and an opportunity to be heard. The PKPA, § 1738A(e), also requires that a custody determination is entitled to full faith and credit only if there has been notice and an opportunity to be heard.

Rules requiring joinder of people with an interest in the custody of and visitation with a child also vary widely throughout the country. The UCCJA has a separate section on joinder of parties which has been eliminated. The issue of who is entitled to intervene and who must be joined in a custody proceeding is to be determined by local state law.

A sentence of the UCCJA § 4 which indicated that persons outside the State were to be given notice and an opportunity to be heard in accordance with the provision of that Act has been eliminated as redundant.

### ANNOTATION

**Annotator's note.** Section 14-13-205 is similar to § 14-13-105 as it existed prior to the 2000 repeal and reenactment of this article. Rel-

evant cases construing § 14-13-105 have been included in the annotations under § 14-13-108.

**14-13-206. Simultaneous proceedings.** (1) Except as otherwise provided in section 14-13-204, a court of this state may not exercise its jurisdiction under this part 2 if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this article, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under a provision of law adopted by that state that is in substantial conformity with section 14-13-207.

(2) Except as otherwise provided in section 14-13-204, a court of this state, before hearing a child-custody proceeding, shall examine the court documents and other informa-



tion supplied by the parties pursuant to section 14-13-209. If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with a provision of law adopted by that state that is in substantial conformity with this article, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this article does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child-custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child-custody determination has been commenced in another state, the court of this state may:

- (a) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;
- (b) Enjoin the parties from continuing with the proceeding for enforcement; or
- (c) Proceed with the modification under conditions it considers appropriate.

**Source:** L. 2000: Entire article R&RE, p. 1527, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-107 as it existed prior to 2000.

#### OFFICIAL COMMENT

This section represents the remnants of the simultaneous proceedings provision of the UCCJA § 6. The problem of simultaneous proceedings is no longer a significant issue. Most of the problems have been resolved by the prioritization of home state jurisdiction under Section 14-13-201; the exclusive, continuing jurisdiction provisions of Section 14-13-202; and the prohibitions on modification of Section 14-13-203. If there is a home State, there can be no exercise of significant connection jurisdiction in an initial child custody determination and, therefore, no simultaneous proceedings. If there is a State of exclusive, continuing jurisdiction, there cannot be another State with concurrent jurisdiction and, therefore, no simultaneous proceedings. Of course, the home State, as well as the State with exclusive, continuing jurisdiction, could defer to another State under Section 14-13-207. However, that decision is left entirely to the home State or the State with exclusive, continuing jurisdiction.

Under this Act, the simultaneous proceedings problem will arise only when there is no home State, no State with exclusive, continuing jurisdiction and more than one significant connection State. For those cases, this section retains the "first in time" rule of the UCCJA. Subsection (2) retains the UCCJA's policy favoring judicial communication. Communication between courts is required when it is determined that a proceeding has been commenced in another State.

Subsection (3) concerns the problem of simultaneous proceedings in the State with mod-

ification jurisdiction and enforcement proceedings under part 3. This section authorizes the court with exclusive, continuing jurisdiction to stay the modification proceeding pending the outcome of the enforcement proceeding, to enjoin the parties from continuing with the enforcement proceeding, or to continue the modification proceeding under such conditions as it determines are appropriate. The court may wish to communicate with the enforcement court. However, communication is not mandatory. Although the enforcement State is required by the PKPA to enforce according to its terms a custody determination made consistently with the PKPA, that duty is subject to the decree being modified by a State with the power to do so under the PKPA. An order to enjoin the parties from enforcing the decree is the equivalent of a temporary modification by a State with the authority to do so. The concomitant provision addressed to the enforcement court is Section 14-13-306 of this Act. That section requires the enforcement court to communicate with the modification court in order to determine what action the modification court wishes the enforcement court to take.

The term "pending" that was utilized in the UCCJA section on simultaneous proceeding has been replaced. It has caused considerable confusion in the case law. It has been replaced with the term "commencement of the proceeding" as more accurately reflecting the policy behind this section. The latter term is defined in Section 14-13-102 (5).

## ANNOTATION

**Law reviews.** For article, "The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act", see 11 Colo. Law. 1224 (1982). For article, "Interstate Custody Problems Revisited", see 11 Colo. Law. 2596 (1982).

**Annotator's note.** Since § 14-13-206 is similar to § 14-13-107 as it existed prior to the 2000 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Provisions of § 14-13-123 are not jurisdictional** but are to assist the trial court in undertaking the investigation required under the circumstances set forth in subsection (3) concerning proceedings pending in another state. *Zimmerman v. Evans*, 749 P.2d 1008 (Colo. App. 1987).

**When communication with other court required.** The requirement for communication with the other court is appropriate if the trial court is unsure of whether to accept jurisdiction and is seeking information as to the most appropriate forum, but where the trial court is not uncertain as to the more appropriate forum for resolution of the issues, communication is not required. In *re Edilson*, 637 P.2d 362 (Colo. 1981).

**Communication with the trial court in another jurisdiction is required only if the trial court is unsure whether to accept jurisdiction and seeks information as to the more appropriate forum.** In *re Custody of K.R.*, 897 P.2d 896 (Colo. App. 1995).

**When civil case deemed "pending."** Under the common law of this state a civil case is deemed "pending" until final determination on appeal. In *re Rector*, 39 Colo. App. 111, 565 P.2d 950 (1977).

If, at the time of filing, another state is exercising continuing jurisdiction substantially in conformity with the act, a Colorado court is prohibited from exercising jurisdiction. *People in Interest of K.G.*, 876 P.2d 1 (Colo. App. 1993).

**There is no pending proceeding in a court of another state where** a stipulation of the parties is not made an order of the court, or where the stipulation expires by its own terms. *McCarron v. District Court ex rel. County of Jefferson*, 671 P.2d 953 (Colo. 1983).

The existence or non-existence of orders in the other state is not a factor critical to invocation of this section; rather, communication between courts of different states is required if "proceedings are pending". In *re Olmo*, 701 P.2d 866 (Colo. App. 1984).

**The appeal of a child custody order in the Kansas courts was a "pending" proceeding** within the meaning of subsection (1). In *re Rector*, 39 Colo. App. 111, 565 P.2d 950 (1977).

**Action by father in California deemed "pending" for purposes of this section** although Colorado grandparents, who had physical charge of the child, had not been notified of the California action when they brought a subsequent custody suit in Colorado. *Lopez v. District Court*, 199 Colo. 207, 606 P.2d 853 (1980).

**Procedure when case pending in court of another state.** Where the rendering court in another state initially had jurisdiction of a child custody case and the case is still pending in that judicial system, the proper course of action in seeking change of custody in this state is to request a stay from the court in which the case is pending. In *re Rector*, 39 Colo. App. 111, 565 P.2d 950 (1977).

**Because child-custody proceeding, in the form of a restraining order issued against mother, was pending in Texas when Colorado court filed dependency and neglect action and because child-custody proceeding had not been terminated or stayed by the court in Texas, Colorado court only properly had temporary emergency jurisdiction.** *People ex rel. M.C.*, 94 P.3d 1220 (Colo. App. 2004).

**Court to determine conformity with the Colorado custody act.** Although this section prohibits a court from proceeding with a petition concerning child custody where the court of another state is "exercising jurisdiction substantially in conformity with this article" and the other court refuses to stay its proceedings, Colorado trial courts are free to determine whether the other court's proceedings are substantially in conformity with the Colorado custody act. *Bakke v. District Court*, 719 P.2d 313 (Colo. 1986).

**Where there was no custody proceeding pending in sister state which had granted the original custody decree,** this section was not a bar to a Colorado court hearing challenge to sister state's subsequent decree ordering that father, who had custody of the children and who was domiciled in Colorado for over a year, return the children to their mother. *Wheeler v. District Court*, 186 Colo. 218, 526 P.2d 658 (1974).

This section, which generally favors exercise of jurisdiction in the state where custody is pending, does not apply where jurisdiction had never existed in this state. Colorado did not have priority jurisdiction merely because simultaneous proceedings were commenced first in this state where the children were born in another state and had always lived in another state. In *re Tonnesen*, 937 P.2d 863 (Colo. App. 1996).

**In a continuing custody dispute where none of the parties still live in Colorado, the fact that any proceedings related to custody inherently arise from an initial custody order, which was made by Colorado courts, does not**



necessarily give **Colorado continuing jurisdictional authority**. In re Pritchett, 80 P.3d 918 (Colo. App. 2003).

**Applied in** In re Baisley, 749 P.2d 446 (Colo. App. 1987); G.B. v. Arapahoe County Ct., 890 P.2d 1153 (Colo. 1995).

**14-13-207. Inconvenient forum.** (1) A court of this state that has jurisdiction under this article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) Whether domestic violence or domestic abuse has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under this article if a child-custody determination is incidental to an action for divorce, dissolution of marriage, or another proceeding while still retaining jurisdiction over the divorce, dissolution of marriage, or other proceeding.

**Source:** L. 2000: Entire article R&RE, p. 1527, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-108 as it existed prior to 2000.

## OFFICIAL COMMENT

This section retains the focus of Section 7 of the UCCJA. It authorizes courts to decide that another State is in a better position to make the custody determination, taking into consideration the relative circumstances of the parties. If so, the court may defer to the other State.

The list of factors that the court may consider has been updated from the UCCJA. The list is not meant to be exclusive. Several provisions require comment. Subparagraph (2)(a) is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different States because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which State can

best protect the victim from further violence or abuse.

In applying subparagraph (2)(c), courts should realize that distance concerns can be alleviated by applying the communication and cooperation provisions of Sections 14-13-111 and 14-13-112.

In applying subsection (2)(g) on expeditious resolution of the controversy, the court could consider the different procedural and evidentiary laws of the two States, as well as the flexibility of the court dockets. It also should consider the ability of a court to arrive at a solution to all the legal issues surrounding the family. If one State has jurisdiction to decide both the custody and support issues, it would be desirable to determine that State to be the most convenient forum. The same is true when children of the same

family live in different States. It would be inappropriate to require parents to have custody proceedings in several States when one State could resolve the custody of all the children.

Before determining whether to decline or retain jurisdiction, the court of this State may communicate, in accordance with Section 14-13-110, with a court of another State and exchange information pertinent to the assumption of jurisdiction by either court.

There are two departures from Section 7 of the UCCJA. First, the court may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the State that

has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated State, dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a court of the other State refuses to take the case.

Second, UCCJA, § 7(g) which allowed the court to assess fees and costs if it was a clearly inappropriate court, has been eliminated. If a court has jurisdiction under this Act, it could not be a clearly inappropriate court.

### ANNOTATION

**Law reviews.** For article, "The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act", see 11 Colo. Law. 1224 (1982). For article, "Interstate Custody Problems Revisited", see 11 Colo. Law. 2596 (1982).

**Annotator's note.** Since § 14-13-207 is similar to § 14-13-108 as it existed prior to the 2000 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Provisions of this section are discretionary,** and their application is best left to the judgment of the trial court. In re Edilson, 637 P.2d 362 (Colo. 1981).

**Trial court held not to abuse its discretion** in concluding that Colorado was an inconvenient forum. In re Tatum, 653 P.2d 74 (Colo. App. 1982).

**Payment of attorney fees.** Before a court can award attorney fees as a necessary expense,

there should be a showing that the fee has been paid or agreed upon and that the amount is reasonable. In re Thomas, 36 Colo. App. 96, 537 P.2d 1095 (1975).

Where there was no evidence presented as to the award of attorney fees, the matter must be remanded for hearing and for judgment to be entered in the amount found to be reasonable under the circumstances of the case and of the parties thereto. In re Thomas, 36 Colo. App. 96, 537 P.2d 1095 (1975).

**Award of attorney fees upheld.** In the absence of such transcript or other matters of record, the trial court's award of expenses and attorney fees must be presumed to be reasonable and correct. In re Tatum, 653 P.2d 74 (Colo. App. 1982).

**Applied in** In re Nicholson, 648 P.2d 681 (Colo. App. 1982); Johnson v. District Court, 654 P.2d 827 (Colo. 1982).

**14-13-208. Jurisdiction declined by reason of conduct.** (1) Except as otherwise provided in section 14-13-204, or by other law of this state, if a person seeking to invoke the jurisdiction of a court of this state under this article has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) A court of the state otherwise having jurisdiction under a provision of law adopted by that state that is in substantial conformity with sections 14-13-201 to 14-13-203 determines that this state is a more appropriate forum under a provision of law adopted by that state that is in substantial conformity with section 14-13-207; or

(c) No court of any other state would have jurisdiction under the criteria specified in a provision of law adopted by that state that is in substantial conformity with sections 14-13-201 to 14-13-203.

(2) If a court of this state declines to exercise its jurisdiction pursuant to subsection (1) of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under a provision of law adopted by that state that is in substantial conformity with sections 14-13-201 to 14-13-203.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (1) of this section, it shall assess against the party



seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this article.

**Source:** L. 2000: Entire article R&RE, p. 1528, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-109 as it existed prior to 2000.

### OFFICIAL COMMENT

The "Clean Hands" section of the UCCJA has been truncated in this Act. Since there is no longer a multiplicity of jurisdictions which could take cognizance of a child-custody proceeding, there is less of a concern that one parent will take the child to another jurisdiction in an attempt to find a more favorable forum. Most of the jurisdictional problems generated by abducting parents should be solved by the prioritization of home State in Section 14-13-201; the exclusive, continuing jurisdiction provisions of Section 14-13-202; and the ban on modification in Section 14-13-203. For example, if a parent takes the child from the home State and seeks an original custody determination elsewhere, the stay-at-home parent has six months to file a custody petition under the extended home state jurisdictional provision of Section 14-13-201, which will ensure that the case is retained in the home State. If a petitioner for a modification determination takes the child from the State that issued the original custody determination, another State cannot assume jurisdiction as long as the first State exercises exclusive, continuing jurisdiction.

Nonetheless, there are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. This section ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties. For example, if one parent abducts the child pre-decree and establishes a new home State, that jurisdiction will decline to hear the case. There are exceptions. If the other party has acquiesced in the court's jurisdiction, the court may hear the case. Such acquiescence may occur by filing a pleading submitting to the jurisdiction, or by not filing in the court that would otherwise have jurisdiction under this Act. Similarly, if the court that would have jurisdiction finds that the court of this State is a more appropriate forum, the court may hear the case.

This section applies to those situations where jurisdiction exists because of the unjustified

conduct of the person seeking to invoke it. If, for example, a parent in the State with exclusive, continuing jurisdiction under Section 14-13-202 has either restrained the child from visiting with the other parent, or has retained the child after visitation, and seeks to modify the decree, this section is inapplicable. The conduct of restraining or retaining the child did not create jurisdiction. Jurisdiction existed under this Act without regard to the parent's conduct. Whether a court should decline to hear the parent's request to modify is a matter of local law.

The focus in this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section.

Subsection (2) authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the unjustified conduct. Thus, it would be appropriate for the court to notify the other parent and to provide for foster care for the child until the child is returned to the other parent. The court could also stay the proceeding and require that a custody proceeding be instituted in another State that would have jurisdiction under this Act. It should be noted that the court is not making a *forum non conveniens* analysis in this section. If the conduct is unjustifiable, it must decline jurisdiction. It may, however, retain jurisdiction until a custody proceeding is commenced in the appro-

priate tribunal if such retention is necessary to prevent a repetition of the wrongful conduct or to ensure the safety of the child.

The attorney's fee standard for this section is patterned after the International Child Abduc-

tion Remedies Act, 42 U.S.C. § 11607(b)(3). The assessed costs and fees are to be paid to the respondent who established that jurisdiction was based on unjustifiable conduct.

## ANNOTATION

**Law reviews.** For article, "The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act", see 11 Colo. Law. 1224 (1982).

**Annotator's note.** Since § 14-13-208 is similar to § 14-13-109 as it existed prior to the 2000 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Paramount consideration must be the best interests of the child,** not the wrongdoing of the parent. *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974).

In a habeas corpus hearing on behalf of a child, the court is by no means limited to an inquiry into the legal right by which the child is held, but must determine the broad question of what will best serve the child's interest. *Nelson v. Schweitzer*, 189 Colo. 511, 542 P.2d 382 (1975).

**Jurisdiction not mandatory under subsection (1).** This section does not prohibit the court from exercising jurisdiction if the children have been wrongfully taken to Colorado from another state but merely gives the court discretion to decline if just and proper under the circumstances. In *re Severn*, 44 Colo. App. 109, 608 P.2d 381 (1980).

**Discretion to decline jurisdiction limited.** A Colorado court's discretion to decline jurisdic-

tion is limited by whether another state has jurisdiction to decide custody, whether it is in the best interests of the children that the Colorado court assume jurisdiction, and whether declining jurisdiction would be just and proper under the circumstances. *Bakke v. district Court*, 719 P.2d 313 (Colo. 1986).

**Court lacks basis to grant noncustodial parent temporary custody of wrongfully retained minor.** Where no compelling reason exists for the exercise of *parens patriae* jurisdiction, and the child has been retained in this state by the noncustodial parent after the term of visitation has expired, the court has no basis in fact or law to grant the noncustodial parent temporary custody of the minor child. *Brock v. District Court*, 620 P.2d 11 (Colo. 1980).

**The trial court had jurisdiction even though the mother had abducted the child,** because this article provides that unclean hands do not deprive the trial court of jurisdiction. *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974).

**Improper retention of the child should affect only the court's decision to exercise its jurisdiction.** *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974).

**Applied in** *Woodhouse v. District Court*, 196 Colo. 558, 587 P.2d 1199 (1978); In *re Johnson*, 634 P.2d 1034 (Colo. App. 1981).

**14-13-209. Information to be submitted to court.** (1) Subject to a court order allowing a party to maintain the confidentiality of addresses and other identifying information and to subsection (5) of this section, in a child-custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath, as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(a) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation or parenting time with the child and, if so, identify the court, the case number, and the date of the child-custody determination, if any;

(b) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence or domestic abuse, protective orders or restraining orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and

(c) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of parental responsibilities or legal custody or physical custody of, or visitation or parenting time with, the child and, if so, the names and addresses of those persons.

(2) If the information required by subsection (1) of this section is not furnished, the



court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(3) If the declaration as to any of the items described in paragraphs (a) to (c) of subsection (1) of this section is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(4) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(5) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

**Source:** L. 2000: Entire article R&RE, p. 1529, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-110 as it existed prior to 2000.

#### OFFICIAL COMMENT

The pleading requirements from Section 9 of the UCCJA are generally carried over into this Act. However, the information is made subject to local law on the protection of names and other identifying information in certain cases. A number of States have enacted laws relating to the protection of victims in domestic violence and child abuse cases which provide for the confidentiality of victims names, addresses, and other information. These procedures must be followed if the child-custody proceeding of the State requires their applicability. See, e.g., California Family Law Code § 3409(a). If a State does not have local law that provides for protecting names and addresses, then subsection (5) or a similar provision should be adopted. Subsection (5) is based on the National Council of Juvenile and Family Court Judge's, Model Code on Domestic and Family Violence § 304(c). There are other models to choose from, in particular UIFSA § 312.

In subsection (1)(b), the term "proceedings" should be read broadly to include more than custody proceedings. Thus, if one parent was being criminally prosecuted for child abuse or custodial interference, those proceedings should be disclosed. If the child is subject to the Interstate Compact on the Placement of Children, facts relating to compliance with the Compact should be disclosed in the pleading or affidavit.

Subsection (1)(b) has been added. It authorizes the court to stay the proceeding until the information required in subsection (1)(a) has been disclosed, although failure to provide the information does not deprive the court of jurisdiction to hear the case. This follows the majority of jurisdictions which held that failure to comply with the pleading requirements of the UCCJA did not deprive the court of jurisdiction to make a custody determination.

**14-13-210. Appearance of parties and child.** (1) In a child-custody proceeding in this state, the court may order a party to the proceeding who is in this state to appear before the court in person with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear in person with the child.

(2) If a party to a child-custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to section 14-13-108 include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(3) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(4) If a party to a child-custody proceeding who is outside this state is directed to appear under subsection (2) of this section or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

**Source:** L. 2000: Entire article R&RE, p. 1530, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-112 as it existed prior to 2000.

### OFFICIAL COMMENT

No major changes have been made to this section which was Section 11 of the UCCJA. Language was added to subsection (1) to authorize the court to require a non-party who has physical custody of the child to produce the child.

Subsection (3) authorizes the court to enter orders providing for the safety of the child and the person ordered to appear with the child. If

safety is a major concern, the court, as an alternative to ordering a party to appear with the child, could order and arrange for the party's testimony to be taken in another State under Section 14-13-111. This alternative might be important when there are safety concerns regarding requiring victims of domestic violence or child abuse to travel to the jurisdiction where the abuser resides.

### ANNOTATION

**Law reviews.** For article, "The Rights of Children and the Crisis in Custody Litigation:

Modification of Custody in and out of State", see 46 U. Colo. L. Rev. 495 (1974-75).

## PART 3

### ENFORCEMENT

**14-13-301. Definitions.** As used in this part 3, unless the context otherwise requires:

(1) "Petitioner" means a person who seeks enforcement of an order for the return of a child under the "Hague Convention on the Civil Aspects of International Child Abduction" or enforcement of a child-custody determination.

(2) "Respondent" means a person against whom a proceeding has been commenced for enforcement of an order for the return of a child under the "Hague Convention on the Civil Aspects of International Child Abduction" or enforcement of a child-custody determination.

**Source:** L. 2000: Entire article R&RE, p. 1530, § 1, effective July 1.

### OFFICIAL COMMENT

For purposes of this part, "petitioner" and "respondent" are defined. The definitions clar-

ify certain aspects of the notice and hearing sections.

**14-13-302. Enforcement under Hague Convention.** Under this part 3 a court of this state may enforce an order for the return of the child made under the "Hague Convention on the Civil Aspects of International Child Abduction" as if it were a child-custody determination.

**Source:** L. 2000: Entire article R&RE, p. 1531, § 1, effective July 1.

### OFFICIAL COMMENT

This section applies the enforcement remedies provided by this part to orders requiring the return of a child issued under the authority of the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et seq., implementing the Hague Convention on the Civil

Aspects of International Child Abduction. Specific mention of ICARA proceedings is necessary because they often occur prior to any formal custody determination. However, the need for a speedy enforcement remedy for an order to return the child is just as necessary.



**14-13-303. Duty to enforce.** (1) A court of this state shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this article or the determination was made under factual circumstances meeting the jurisdictional standards of this article and the determination has not been modified in accordance with this article.

(2) A court of this state may utilize any remedy available under other law of this state to enforce a child-custody determination made by a court of another state. The remedies provided in this part 3 are cumulative and do not affect the availability of other remedies to enforce a child-custody determination.

**Source:** L. 2000: Entire article R&RE, p. 1531, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-114 as it existed prior to 2000.

### OFFICIAL COMMENT

This section is based on Section 13 of the UCCJA which contained the basic duty to enforce. The language of the original section has been retained and the duty to enforce is generally the same.

Enforcement of custody determinations of issuing States is also required by federal law in the PKPA, 28 U.S.C. § 1738A(a). The changes made in Part 2 of this Act now make a State's duty to enforce and not modify a child custody determination of another State consistent with the enforcement and nonmodification provisions of the PKPA. Therefore custody determinations made by a State pursuant to the UCCJA that would be enforceable under the PKPA will generally be enforced under this Act. However, if a State custody determination made pursuant to the UCCJA would not be enforceable under the PKPA, it will also not be enforceable under this Act. Thus a custody determination made by a "significant connection" jurisdiction when there is a home State is not enforceable under the PKPA regardless of whether a proceeding was ever commenced in the home State. Even though such a determination would be enforceable under the UCCJA with its four concurrent bases of jurisdiction, it would not be enforceable under this Act. This carries out the policy of the PKPA of strongly discouraging a State from exercising its concurrent "significant connec-

tion" jurisdiction under the UCCJA when another State could exercise "home state" jurisdiction.

This section also incorporates the concept of Section 15 of the UCCJA to the effect that a custody determination of another State will be enforced in the same manner as a custody determination made by a court of this State. Whatever remedies are available to enforce a local determination can be utilized to enforce a custody determination of another State. However, it remains a custody determination of the State that issued it. A child-custody determination of another State is not subject to modification unless the State would have jurisdiction to modify the determination under Part 2.

The remedies provided by this part for the enforcement of a custody determination will normally be used. This part does not detract from other remedies available under other local law. There is often a need for a number of remedies to ensure that a child-custody determination is obeyed. If other remedies would easily facilitate enforcement, they are still available. The petitioner, for example, can still cite the respondent for contempt of court or file a tort claim for intentional interference with custodial relations if those remedies are available under local law.

### ANNOTATION

**Law reviews.** For article, "The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State", see 46 U. Colo. L. Rev. 495 (1974-75). For article, "The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act", see 11 Colo. Law. 1224 (1982). For article, "Interstate Custody Problems Revisited", see 11 Colo. Law. 2596 (1982).

**Annotator's note.** Since § 14-13-303 is similar to § 14-13-114 as it existed prior to the 2000 repeal and reenactment of this article, rel-

evant cases construing that provision have been included in the annotations to this section.

**Intent of child custody jurisdiction act.** The uniform act attempts to guarantee reasonable security and continuity of environment to children by discouraging their unilateral removal from one state to another to avoid obeying custodial orders. *Kraft v. District Court*, 197 Colo. 10, 593 P.2d 321 (1979).

**Section 14-13-115 and this section require court to recognize valid custody decrees of other jurisdictions and not to modify such de-**

crees unless the rendering state no longer has jurisdiction or has declined to exercise jurisdiction. *Woodhouse v. District Court*, 196 Colo. 558, 587 P.2d 1199 (1978).

If the courts of another state have continuing jurisdiction over custody and have not declined to exercise that jurisdiction, then a Colorado court is precluded by this section and § 14-13-115 from exercising jurisdiction in the case, at least in the absence of a grave emergency. *Brock v. District Court*, 620 P.2d 11 (Colo. 1980).

**The uniform act establishes additional conditions and restrictions before Colorado courts can modify existing foreign custody decrees.** In *re Glass*, 36 Colo. App. 91, 537 P.2d 1092 (1975).

**If the state which rendered the custody decree still has jurisdiction, other states cannot modify the decree.** *Fry v. Ball*, 190 Colo. 128, 544 P.2d 402 (1975).

A Colorado court must recognize and refrain from modifying a custody decree of another state where the sister state had jurisdiction at the time its decree was entered and has continuing jurisdiction at the time the action to modify is instituted in this state. *Fry v. Ball*, 190 Colo. 128, 544 P.2d 402 (1975).

**If, at the time of filing, another state is exercising continuing jurisdiction** substantially in conformity with the act, a Colorado court is prohibited from exercising jurisdiction. *People in Interest of K.G.*, 876 P.2d 1 (Colo. App. 1993).

**Recognition of modification decree of another state.** Jurisdiction to determine child custody may change to another state, and when that occurs the courts of this state must recognize the modification decree if the modifying state assumed jurisdiction under statutory provisions substantially in accordance with the uniform child custody jurisdiction act or under factual circumstances meeting the jurisdictional standards of this article. *County of Clearwater v. Petrash*, 41 Colo. App. 143, 589 P.2d 1370 (1978), *aff'd in part and rev'd on other grounds*, 198 Colo. 231, 598 P.2d 138 (1979).

**Mere conclusory ruling of jurisdiction by foreign court need not bind Colorado court,** and the Colorado court should seek information to determine the most appropriate forum by communicating with the foreign court. *Lynch v. Lynch*, 770 P.2d 1383 (Colo. App. 1989).

**Colorado not required to give full faith and credit to another state's custody order if order was not entered in compliance with the**

**PKPA.** Under the PKPA, a state's custody determination is in conformance with the PKPA if the court of the state has jurisdiction under its own law and the exercise of jurisdiction meets one of the conditions set forth in the PKPA. Because Nebraska, like Colorado, has adopted the UCCJEA, and the UCCJEA is substantively identical to the PKPA, the provisions of Nebraska's state law conform to the PKPA. Therefore, because Nebraska lacked jurisdiction to enter the custody order under its own law, it lacked jurisdiction to enter the order under the PKPA and Colorado is not required to recognize and enforce the order pursuant to the PKPA. In *re L.S.*, 257 P.3d 201 (Colo. 2011).

Where New York family court referee determined that it lacked exclusive, continuing jurisdiction to modify New York custody order and declined jurisdiction, a New York Supreme Court (trial court) lacked jurisdiction to enter order in a subsequent motion to modify custody. New York has adopted the UCCJEA and, therefore, the jurisdictional provisions of New York law are substantively identical to the PKPA. Consequently, because the second New York court did not have jurisdiction over the matter under New York law, the PKPA does not require that Colorado accord full faith and credit to the second court's custody modification order and the Colorado court erred in enforcing the New York order modifying custody. In *re Dedie & Springston*, 255 P.3d 1142 (Colo. 2011).

**Recognition of decrees of states not adopting act.** Although a state has not adopted the uniform child and custody jurisdiction act, Colorado will recognize the custody decree issued by a court of that state if it has assumed jurisdiction under the standards of the act. *Kraft v. District Court*, 197 Colo. 10, 593 P.2d 321 (1979).

**Court may grant other than temporary relief where out-of-state application impractical.** Generally, judicial relief should not extend beyond the issuance of temporary protective orders pending the application to the court of the rendering state for appropriate modification of the custody decree. Only when there are compelling reasons, articulated in the record, that render such out-of-state application impractical, should a Colorado court grant anything but temporary relief under its *parens patriae* jurisdiction. *Brock v. District Court*, 620 P.2d 11 (Colo. 1980).

**Applied in** *In re Edison*, 637 P.2d 362 (Colo. 1981); *McCarron v. District Court ex rel. County of Jefferson*, 671 P.2d 953 (Colo. 1983).

**14-13-304. Temporary visitation or parenting time.** (1) A court of this state that does not have jurisdiction to modify a child-custody determination may issue a temporary order enforcing:

- (a) A visitation or parenting time schedule made by a court of another state; or
- (b) The visitation or parenting time provisions of a child-custody determination of another state that does not provide for a specific visitation or parenting time schedule.



(2) If a court of this state makes an order under paragraph (b) of subsection (1) of this section, it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under criteria substantially in conformity with those criteria specified in part 2 of this article. The order remains in effect until an order is obtained from the other court or the period expires.

**Source: L. 2000:** Entire article R&RE, p. 1531, § 1, effective July 1.

#### OFFICIAL COMMENT

This section authorizes a court to issue a temporary order if it is necessary to enforce visitation rights without violating the rules on nonmodification contained in Section 14-13-303. Therefore, if there is a visitation schedule provided in the custody determination that was made in accordance with Part 2, a court can issue an order under this section implementing the schedule. An implementing order may include make-up or substitute visitation.

A court may also issue a temporary order providing for visitation if visitation was authorized in the custody determination, but no specific schedule was included in the custody determination. Such an order could include a

substitution of a specific visitation schedule for "reasonable and seasonable."

However, a court may not, under subsection (1)(b) provide for a permanent change in visitation. Therefore, requests for a permanent change in the visitation schedule must be addressed to the court with exclusive, continuing jurisdiction under Section 14-13-202 or modification jurisdiction under Section 14-13-203. As under Section 14-13-204, subsection (2) of this section requires that the temporary visitation order stay in effect only long enough to allow the person who obtained the order to obtain a permanent modification in the State with appropriate jurisdiction under Part 2.

**14-13-305. Registration of child-custody determination.** (1) A child-custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the appropriate district court in this state:

- (a) A letter or other document requesting registration;
- (b) Two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and
- (c) Except as otherwise provided in section 14-13-209, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody, allocated parental responsibilities, or granted visitation or parenting time in the child-custody determination sought to be registered.

(2) On receipt of the documents required by subsection (1) of this section, the registering court shall:

- (a) Cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and
- (b) Serve notice upon the persons named pursuant to paragraph (c) of subsection (1) of this section and provide them with an opportunity to contest the registration in accordance with this section.
- (3) The notice required by paragraph (b) of subsection (2) of this section must state that:
  - (a) A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;
  - (b) A hearing to contest the validity of the registered determination must be requested within twenty-one days after service of notice; and
  - (c) Failure to contest the registration will result in confirmation of the child-custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(4) A person seeking to contest the validity of a registered order must request a hearing within twenty days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(a) The issuing court did not have jurisdiction under a provision of law adopted by that state that is in substantial conformity with part 2 of this article;

(b) The child-custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under part 2 of this article; or

(c) The person contesting registration was entitled to notice, but notice was not given in accordance with standards substantially in conformity with the standards set forth in section 14-13-108, in the proceedings before the court that issued the order for which registration is sought.

(5) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served must be notified of the confirmation.

(6) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

**Source:** L. 2000: Entire article R&RE, p. 1531, § 1, effective July 1. L. 2012: (3)(b) amended, (SB 12-175), ch. 208, p. 834, § 37, effective July 1.

**Editor's note:** (1) This section is similar to former § 14-13-117 as it existed prior to 2000.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3)(b) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

#### OFFICIAL COMMENT

This remainder of this part provides enforcement mechanisms for interstate child custody determinations.

This section authorizes a simple registration procedure that can be used to predetermine the enforceability of a custody determination. It parallels the process in UIFSA for the registration of child support orders. It should be as much of an aid to pro se litigants as the registration procedure of UIFSA.

A custody determination can be registered without any accompanying request for enforcement. This may be of significant assistance in

international cases. For example, the custodial parent under a foreign custody order can receive an advance determination of whether that order would be recognized and enforced before sending the child to the United States for visitation. Article 26 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 I.L.M. 1391 (1996), requires those States which accede to the Convention to provide such a procedure.

**14-13-306. Enforcement of registered determination.** (1) A court of this state may grant any relief normally available under the law of this state to enforce a registered child-custody determination made by a court of another state.

(2) A court of this state shall recognize and enforce, but may not modify, except in accordance with part 2 of this article, a registered child-custody determination of a court of another state.

**Source:** L. 2000: Entire article R&RE, p. 1533, § 1, effective July 1.

**Editor's note:** This section is similar to former §§ 14-13-115 and 14-13-116, as they existed prior to 2000.

#### OFFICIAL COMMENT

A registered child-custody determination can be enforced as if it was a child-custody determination of this State. However, it remains a custody determination of the State that issued it.

A registered custody order is not subject to modification unless the State would have jurisdiction to modify the order under Part 2.



### ANNOTATION

**Law reviews.** For article, "The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State", see 46 U. Colo. L. Rev. 495 (1974-75). For article, "Recovering the Parentally Kidnapped Child", see 12 Colo. Law. 1798 (1983).

**Annotator's note.** Section 14-13-306 is similar to §§ 14-13-115 and 14-13-116 as they existed prior to the 2000 repeal and reenactment of this article. Relevant cases construing § 14-

13-116 have been included in the annotations to this section. Cases construing § 14-13-115 have been included under § 14-13-203.

A **certified copy of a foreign decree** that is introduced into evidence and considered by the jury must be recognized with respect to its effect on defendant's conduct in this state. *People v. Haynie*, 826 P.2d 371 (Colo. App. 1991).

**Applied** in *In re Bechard*, 40 Colo. App. 516, 577 P.2d 778 (1978).

**14-13-307. Simultaneous proceedings.** If a proceeding for enforcement under this part 3 is commenced in a court of this state and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under a provision of law adopted by that state that is in substantial conformity with part 2 of this article, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

**Source:** L. 2000: Entire article R&RE, p. 1533, § 1, effective July 1.

**Editor's note:** This section is similar to former § 14-13-107 as it existed prior to 2000.

### OFFICIAL COMMENT

The pleading rules of Section 14-13-308, require the parties to disclose any pending proceedings. Normally, an enforcement proceeding will take precedence over a modification action since the PKPA requires enforcement of child custody determinations made in accordance with its terms. However, the enforcement court must communicate with the modification court in order to avoid duplicative litigation. The courts might decide that the court with jurisdiction under Part 2 shall continue with the modification action and stay the enforcement proceeding. Or they might decide that the enforcement proceeding shall go forward. The ultimate decision rests with the court having

exclusive, continuing jurisdiction under Section 14-13-202, or if there is no State with exclusive, continuing jurisdiction, then the decision rests with the State that would have jurisdiction to modify under Section 14-13-203. Therefore, if that court determines that the enforcement proceeding should be stayed or dismissed, the enforcement court should stay or dismiss the proceeding. If the enforcement court does not do so, the court with exclusive, continuing jurisdiction under Section 14-13-202, or with modification jurisdiction under Section 14-13-203, could enjoin the parties from continuing with the enforcement proceeding.

### ANNOTATION

**Annotator's note.** Section 14-13-307 is similar to § 14-13-107 as it existed prior to the 2000 repeal and reenactment of this article. Rel-

evant cases construing § 14-13-107 have been included in the annotations under § 14-13-206.

**14-13-308. Expedited enforcement of child-custody determination.** (1) A petition under this part 3 in which the petitioner is seeking expedited enforcement pursuant to this section must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(2) A petition for expedited enforcement of a child-custody determination pursuant to this section must state:

(a) Whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(b) Whether the determination for which enforcement is sought has been vacated,

stayed, or modified by a court whose decision must be enforced under this article and, if so, the identity of the court, the case number, and the nature of the proceeding;

(c) Whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence or domestic abuse, protective orders or restraining orders, termination of parental rights, and adoptions and, if so, the identity of the court, the case number, and the nature of the proceeding;

(d) The present physical address of the child and the respondent, if known;

(e) Whether relief in addition to the immediate physical custody of the child and attorney's fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and

(f) If the child-custody determination has been registered and confirmed under section 14-13-305, the date and place of registration.

(3) Upon the filing of a petition for expedited enforcement pursuant to this section, the court shall issue an order directing the respondent to appear in person at a hearing, with or without the child, and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(4) An order issued under subsection (3) of this section must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs, and expenses under section 14-13-312, and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(a) The child-custody determination has not been registered and confirmed under section 14-13-305 and that:

(I) The issuing court did not have jurisdiction under a provision of law adopted by that state that is in substantial conformity with part 2 of this article;

(II) The child-custody determination for which enforcement is sought has been vacated, stayed, or modified by a court having jurisdiction to do so under a provision of law adopted by that state that is in substantial conformity with part 2 of this article;

(III) The respondent was entitled to notice, but notice was not given in accordance with the standards substantially in conformity with the standards of section 14-13-108, in the proceedings before the court that issued the order for which enforcement is sought; or

(b) The child-custody determination for which enforcement is sought was registered and confirmed under a provision of law adopted by that state that is in substantial conformity with section 14-13-304, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under a provision of law adopted by that state that is in substantial conformity with part 2 of this article.

**Source:** L. 2000: Entire article R&RE, p. 1533, § 1, effective July 1.

#### OFFICIAL COMMENT

This section provides the normal remedy that will be used in interstate cases: the production of the child in a summary, remedial process based on habeas corpus.

The petition is intended to provide the court with as much information as possible. Attaching certified copies of all orders sought to be enforced allows the court to have the necessary information. Most of the information relates to the permissible scope of the court's inquiry. The petitioner has the responsibility to inform the court of all proceedings that would affect the current enforcement action. Specific mention is made of certain proceedings to ensure that they are disclosed. A "procedure relating to domestic

violence" includes not only protective order proceedings but also criminal prosecutions for child abuse or domestic violence.

The order requires the respondent to appear at a hearing on the next judicial day. The term "next judicial day" in this section means the next day when a judge is at the courthouse. At the hearing, the court will order the child to be delivered to the petitioner unless the respondent is prepared to assert that the issuing State lacked jurisdiction, that notice was not given in accordance with Section 14-13-108, or that the order sought to be enforced has been vacated, modified, or stayed by a court with jurisdiction to do so under Part 2. The court is also to order



payment of the fees and expenses set out in Section 14-13-312. The court may set another hearing to determine whether additional relief available under this state's law should be granted.

If the order has been registered and confirmed in accordance with Section 14-13-304, the only

defense to enforcement is that the order has been vacated, stayed or modified since the registration proceeding by a court with jurisdiction to do so under Part 2.

**14-13-309. Service of petition and order.** Except as otherwise provided in section 14-13-311, the petition and order must be served, by any method authorized by the law of this state, upon respondent and any person who has physical custody of the child.

**Source: L. 2000:** Entire article R&RE, p. 1535, § 1, effective July 1.

#### OFFICIAL COMMENT

In keeping with other sections of this Act, the question of how the petition and order should be served is left to local law.

**14-13-310. Hearing and order.** (1) Unless the court issues a temporary emergency order pursuant to section 14-13-204, upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(a) The child-custody determination has not been registered and confirmed under section 14-13-305 and that:

(I) The issuing court did not have jurisdiction under part 2 of this article;

(II) The child-custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under a provision of law adopted by that state that is in substantial conformity with part 2 of this article; or

(III) The respondent was entitled to notice, but notice was not given in accordance with standards in substantial conformity with the standards set forth in section 14-13-108, in the proceedings before the court that issued the order for which enforcement is sought; or

(b) The child-custody determination for which enforcement is sought was registered and confirmed under section 14-13-305 but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under part 3 of this article.

(2) The court shall award the fees, costs, and expenses authorized under section 14-13-312 and may grant additional relief, including a request for the assistance of law enforcement officials, and set a further hearing to determine whether additional relief is appropriate.

(3) If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(4) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under this part 3.

**Source: L. 2000:** Entire article R&RE, p. 1535, § 1, effective July 1.

#### OFFICIAL COMMENT

The scope of inquiry for the enforcing court is quite limited. Federal law requires the court to enforce the custody determination if the issuing state's decree was rendered in compliance with

the PKPA, 28 U.S.C. § 1738A(a). This Act requires enforcement of custody determinations that are made in conformity with Part 2's jurisdictional rules.

The certified copy, or a copy of the certified copy, of the custody determination entitling the petitioner to the child is prima facie evidence of the issuing court's jurisdiction to enter the order. If the order is one that is entitled to be enforced under Part 2 and if it has been violated, the burden shifts to the respondent to show that the custody determination is not entitled to enforcement.

It is a defense to enforcement that another jurisdiction has issued a custody determination that is required to be enforced under Part 2. An example is when one court has based its original custody determination on the UCCJA § 3(a)(2) (significant connections) and another jurisdiction has rendered an original custody determination based on the UCCJA § 3(a)(1) (home State). When this occurs, Part 2 of this Act, as well as the PKPA, mandate that the home state determination be enforced in all other States, including the State that rendered the significant connections determination.

Lack of notice in accordance with Section 14-13-108 by a person entitled to notice and opportunity to be heard at the original custody determination is a defense to enforcement of the custody determination. The scope of the defense under this Act is the same as the defense would be under the law of the State that issued the notice. Thus, if the defense of lack of notice would not be available under local law if the

respondent purposely hid from the petitioner, took deliberate steps to avoid service of process or elected not to participate in the initial proceedings, the defense would also not be available under this Act.

There are no other defenses to an enforcement action. If the child would be endangered by the enforcement of a custody or visitation order, there may be a basis for the assumption of emergency jurisdiction under Section 14-13-204 of this Act. Upon the finding of an emergency, the court issues a temporary order and directs the parties to proceed either in the court that is exercising continuing jurisdiction over the custody proceeding under Section 14-13-202, or the court that would have jurisdiction to modify the custody determination under Section 14-13-203.

The court shall determine at the hearing whether fees should be awarded under Section 14-13-312. If so, it should order them paid. The court may determine if additional relief is appropriate, including requesting law enforcement officers to assist the petitioner in the enforcement of the order. The court may set a hearing to determine whether further relief should be granted.

The remainder of this section is derived from UIFSA § 316 with regard to the privilege of self-incrimination, spousal privileges, and immunities. It is included to keep parallel the procedures for child support and child custody proceedings to the extent possible.

**14-13-311. Warrant to take physical custody of child.** (1) Upon the filing of a petition seeking enforcement of a child-custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this state.

(2) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by section 14-13-308 (2).

(3) A warrant to take physical custody of a child must:

(a) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(b) Direct law enforcement officers to take physical custody of the child immediately; and

(c) Provide for the placement of the child pending final relief.

(4) The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody.

(5) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(6) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.



## OFFICIAL COMMENT

The section provides a remedy for emergency situations where there is a reason to believe that the child will suffer imminent, serious physical harm or be removed from the jurisdiction once the respondent learns that the petitioner has filed an enforcement proceeding. If the court finds such harm exists, it should temporarily waive the notice requirements and issue a warrant to take physical custody of the child. Immediately after the warrant is executed, the respondent is to receive notice of the proceedings.

The term "harm" cannot be totally defined and, as in the issuance of temporary restraining orders, the appropriate issuance of a warrant is left to the circumstances of the case. Those circumstances include cases where the respondent is the subject of a criminal proceeding as well as situations where the respondent is secreting the child in violation of a court order, abusing the child, a flight risk and other circumstances that the court concludes make the issuance of notice a danger to the child. The court must hear the testimony of the petitioner or another witness prior to issuing the warrant. The testimony may be heard in person, via telephone, or by any other means acceptable under local law. The court must State the reasons for the issuance of the warrant. The warrant can be

enforced by law enforcement officers wherever the child is found in the State. The warrant may authorize entry upon private property to pick up the child if no less intrusive means are possible. In extraordinary cases, the warrant may authorize law enforcement to make a forcible entry at any hour.

The warrant must provide for the placement of the child pending the determination of the enforcement proceeding. Since the issuance of the warrant would not occur absent a risk of serious harm to the child, placement cannot be with the respondent. Normally, the child would be placed with the petitioner. However, if placement with the petitioner is not indicated, the court can order any other appropriate placement authorized under the laws of the court's State. Placement with the petitioner may not be indicated if there is a likelihood that the petitioner also will flee the jurisdiction. Placement with the petitioner may not be practical if the petitioner is proceeding through an attorney and is not present before the court.

This section authorizes the court to utilize whatever means are available under local law to ensure the appearance of the petitioner and child at the enforcement hearing. Such means might include cash bonds, a surrender of a passport, or whatever the court determines is necessary.

**14-13-312. Costs, fees, and expenses.** (1) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the prevailing party, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(2) The court may not assess fees, costs, or expenses against a state unless authorized by law other than this article.

**Source:** L. 2000: Entire article R&RE, p. 1536, § 1, effective July 1.

## OFFICIAL COMMENT

This section is derived from the International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)(3). Normally the court will award fees and costs against the non-prevailing party. Included as expenses are the amount of investigation fees incurred by private persons or by public officials as well as the cost of child placement during the proceedings.

The non-prevailing party has the burden of showing that such an award would be clearly inappropriate. Fees and costs may be inappropriate if their payment would cause the parent and child to seek public assistance.

This section implements the policies of Section 8(c) of Pub.L. 96-611 (part of the PKPA) which provides that:

In furtherance of the purposes of section 1738A of title 28, United States Code [this section], as added by subsection (1) of this section, State courts are encouraged to —

(2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A [this section], necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination ...

The term "prevailing party" is not given a special definition for this Act. Each State will apply its own standard.

Subsection (2) was added to ensure that this

section would not apply to the State unless otherwise authorized. The language is taken from UIFSA § 313 (court may assess costs

against obligee or support enforcement agency only if allowed by local law).

**14-13-313. Recognition and enforcement.** A court of this state shall accord full faith and credit to an order issued by another state and consistent with this article that enforces a child-custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under a provision of law adopted by that state that is in substantial conformity with part 2 of this article.

**Source: L. 2000:** Entire article R&RE, p. 1537, § 1, effective July 1.

#### OFFICIAL COMMENT

The enforcement order, to be effective, must also be enforced by other States. This section requires courts of this State to enforce and not

modify enforcement orders issued by other States when made consistently with the provisions of this Act.

**14-13-314. Appeals.** An appeal may be taken from a final order in a proceeding under this part 3 in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under section 14-13-204, the enforcing court may not stay an order enforcing a child-custody determination pending appeal.

**Source: L. 2000:** Entire article R&RE, p. 1537, § 1, effective July 1.

#### OFFICIAL COMMENT

The order may be appealed as an expedited civil matter. An enforcement order should not be stayed by the court. Provisions for a stay would defeat the purpose of having a quick enforcement procedure. If there is a risk of serious mistreatment or abuse to the child, a petition to assume emergency jurisdiction must be filed under Section 14-13-204. This section leaves intact the possibility of obtaining an extraordinary remedy such as mandamus or prohibition

from an appellate court to stay the court's enforcement action. In many States, it is not possible to limit the constitutional authority of appellate courts to issue a stay. However, unless the information before the appellate panel indicates that emergency jurisdiction would be assumed under Section 14-13-204, there is no reason to stay the enforcement of the order pending appeal.

### PART 4

#### MISCELLANEOUS PROVISIONS

**14-13-401. Application and construction.** In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source: L. 2000:** Entire article R&RE, p. 1537, § 1, effective July 1.

**14-13-402. Severability clause.** If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article that can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

**Source: L. 2000:** Entire article R&RE, p. 1537, § 1, effective July 1.



**14-13-403. Transitional provision.** A motion or other request for relief made in a child-custody proceeding or to enforce a child-custody determination that was commenced before July 1, 2000, is governed by the law in effect at the time the motion or other request was made.

**Source: L. 2000:** Entire article R&RE, p. 1537, § 1, effective July 1.

## OFFICIAL COMMENT

A child custody proceeding will last throughout the minority of the child. The commencement of a child custody proceeding prior to this Act does not mean that jurisdiction will continue to be governed by prior law. The provisions

of this act apply if a motion to modify an existing determination is filed after the enactment of this Act. A motion that is filed prior to enactment may be completed under the rules in effect at the time the motion is filed.

## ARTICLE 13.5

### Uniform Child Abduction Prevention Act

14-13.5-101.	Short title.		prevent abduction.
14-13.5-102.	Definitions.	14-13.5-109.	Warrant to take physical custody of child.
14-13.5-103.	Cooperation and communication among courts.	14-13.5-110.	Duration of abduction prevention order.
14-13.5-104.	Actions for abduction prevention measures.	14-13.5-111.	Uniformity of applications and construction.
14-13.5-105.	Jurisdiction.	14-13.5-112.	Relation to electronic signatures in global and national commerce act.
14-13.5-106.	Contents of petition.		
14-13.5-107.	Factors to determine risk of abduction.		
14-13.5-108.	Provisions and measures to		

### Prefatory Note

Child abduction is a serious problem both in scope and effect. A study commissioned by the Office of Juvenile Justice and Delinquency Prevention estimated that 262,100 children were abducted in 1999; 203,900 (78 per cent) of them were abducted by a parent or family member; approximately 1000 of the abductions were international.<sup>1</sup>

The purpose of the Uniform Child Abduction Prevention Act is to deter both predecree and postdecree domestic and international child abductions by parents, persons acting on behalf of a parent or others. Family abductions may be preventable through the identification of risk factors and the imposition of appropriate preventive measures.

The Uniform Child Abduction Prevention Act<sup>2</sup> is premised on the general principle that preventing an abduction is in a child's best interests. Abducted children may suffer long-lasting harm. Federal law recognizes that parental abduction is harmful to children.<sup>3</sup> Child abductions can occur before or after entry of a child-custody determination. This Act allows the court to impose abduction prevention measures at any time.

Many abductions occur before a court has had the opportunity to enter a child-custody determination. Children at the center of custody disputes are at the highest risk for potential abductions.<sup>3</sup> Jurisdictional laws help deter abductions by specifying the proper state to handle custody litigation. The Uniform Child Custody Jurisdiction Act<sup>4</sup> sets out four concurrent bases for jurisdiction. Congress passed the Parental Kidnapping Prevention Act of 1980 to deter abduction.

Many abductions occur before a court has had the opportunity to enter a child-custody determination. Children at the center of custody disputes are at the highest risk for potential abductions.<sup>3</sup> Jurisdictional laws help deter abductions by specifying the proper state to handle custody litigation. The Uniform Child Custody Jurisdiction Act<sup>4</sup> sets out four concurrent bases for jurisdiction. Congress passed the Parental Kidnapping Prevention Act of 1980 to deter abduction.

<sup>1</sup> See David Finkelhor, Heather Hammer & Andrea J. Sedlak, National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children, Children Abducted by Family Members: National Estimate and Characteristics (Oct. 2002).

<sup>2</sup> International Child Abduction Remedies Act, 42 U.S.C. § 11601(a)(1) ("The Congress makes the following findings: (1) The international abduction or wrongful retention of children is harmful to their well-being . . ."). See also Dorothy S. Huntington, Parental Kidnapping: A New Form of Child Abuse, available at [http://www.hiltonhouse.com/articles/child\\_abuse-huntington.txt](http://www.hiltonhouse.com/articles/child_abuse-huntington.txt) (characterizing child abduction as abuse).

<sup>3</sup> America's Hidden Crime: When the Kidnapper is Kin 10- 11 (Polly Klaas Foundation 2004). See also Janet R. Johnston et al., Early Identification of Risk Factors for Parental Abduction (OJJDP March 2001) (indicating that men are more likely to abduct before an order is entered while women are more likely to abduct after a child custody determination).

<sup>4</sup> 9 Unif. L. Ann. Part I 115 (1988).

tions, discourage interstate conflicts, and promote cooperation between states about custody matters by resolving jurisdictional conflicts.<sup>5</sup> The Parental Kidnapping Prevention Act prioritizes the state in which the child has lived for six months preceding the filing of the petition (the home state) as the place for custody litigation<sup>6</sup> and prohibits a second state from assuming jurisdiction if there is an action pending in the state that has proper jurisdiction.<sup>7</sup> The Uniform Child Custody Jurisdiction and Enforcement Act,<sup>8</sup> now in 45 jurisdictions, also prioritizes home state jurisdiction notwithstanding the child's absence. Jurisdictional laws do not provide prevention measures for abduction.

Post-decree abductions often occur because the existing child-custody determinations lack sufficient protective provisions to prevent an abduction. An award of joint physical custody without a designation of specific times; a vague order granting "reasonable visitation"; or the lack any restrictions on custody and visitation make orders hard to enforce. The awareness of abduction risk factors and preventive measures available can reduce the threat of abduction by giving the court the tools to make the initial child-custody determination clearer, more specific, and more easily enforceable.

If an abduction occurs after a child-custody determination, all states have enforcement remedies. Forty-six jurisdictions use the procedures in Article 3 of the Uniform Child Custody Jurisdiction and Enforcement Act. In addition, courts can punish abductors for contempt and allow tort actions for custodial interference. Several federal laws help locate missing children<sup>9</sup> and criminalize international parental kidnapping.<sup>10</sup> While there is no federal law criminalizing interstate parental kidnapping, there is a mechanism for apprehending persons who vio-

late state parental kidnapping laws and travel across state lines.<sup>11</sup> While every state criminally forbids custodial interference by parents or relatives of the child, the laws differ as to the elements of the offenses, the punishments given, and whether a child-custody determination must exist for a violation to occur.<sup>12</sup>

If the abduction is international, the Hague Convention on the Civil Aspects of International Child Abduction, currently in effect between the United States and fifty-five countries, facilitates the return of an abducted child to the child's habitual residence.<sup>13</sup> Many countries, however, have not ratified the Hague Convention on the Civil Aspects of International Child Abduction, the United States has not accepted all nations' accessions, and some countries that have ratified do not comply with the treaty obligations.

This Act is civil law and complements existing state law. This Act does not limit, contradict, or supercede the Uniform Child Custody Jurisdiction and Enforcement Act or the Uniform Child Custody Jurisdiction Act. This Act is not meant to prevent a legitimate relocation action filed in accordance with the law of the state having jurisdiction to make a child-custody determination nor to prevent a victim of domestic violence from escaping abuse.

The Uniform Child Abduction Prevention Act applies to predecree and intrastate cases, to emergency situations, and to cases in which risk factors exist and the current child-custody determination lacks abduction prevention measures. Only three states have enacted comprehensive child abduction prevention statutes;<sup>14</sup> two other states include provisions to reduce the risk of abduction.<sup>15</sup> This Act will fill a void in the majority of states by identifying circumstances indicating a risk of abduction and providing measures to prevent the abduction of children, predecree or postdecree.

<sup>5</sup> Pub. L. No. 96-611, note 7 to 28 U.S.C. § 1738A.

<sup>6</sup> 28 U.S.C. Section 1738A(c).

<sup>7</sup> 28 U.S.C.A. Section 1738A(g).

<sup>8</sup> 9 Unif. L. Ann. Part I 657 (1999).

<sup>9</sup> Missing Children Act, 28 U.S.C. § 534 (1982); Missing Children Search Assistance Act and the National Child Search Assistance Act, 42 U.S.C. § 5779 & § 5780 (1990); and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. 108-21, 117 Stat. 650 (AMBER Alert Program).

<sup>10</sup> See International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204; The Fugitive Felon Act, 18 U.S.C. § 1073; and The Extradition Treaties Interpretation Act of 1998, 18 U.S.C. § 3181.

<sup>11</sup> Unlawful Flight to Avoid Prosecution, 18 U.S.C. § 1204; The Fugitive Felon Act, 18 U.S.C. § 1073. When enacting the Parental Kidnapping Prevention Act, Congress declared that the Unlawful Flight to Avoid Prosecution provision applies to cases involving parental kidnapping and interstate or international flight to avoid prosecution. Pub. L. No. 96-611, 10(a).

<sup>12</sup> Appendix A. Citation List of State Parental Kidnapping Statutes, National Clearinghouse for the Defense of Battered Women, The Impact of Parental Kidnapping Laws and Practice on Domestic Violence Survivors 32 (2005).

<sup>13</sup> See The Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. § 10494 et seq. (1986); the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610. For a current list of United States treaty partners, visit [www.travel.state.gov/family/abduction/hague\\_issues/hague\\_issues\\_1487.html](http://www.travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html).

<sup>14</sup> See Ark. Stat. Ann. § 9-13-401-407 (2005); Cal. Fam. Code § 3048 (2004); Tex. Fam. Code § 153.501-153.503 (2003).

<sup>15</sup> See Fla. Stat. § 61.45 (2005); Or. Rev. Stat. § 109.035 (2005).



**14-13.5-101. Short title.** This article may be cited as the “Uniform Child Abduction Prevention Act”.

**Source: L. 2007:** Entire article added, p. 767, § 1, effective May 14.

**14-13.5-102. Definitions.** In this article:

- (1) “Abduction” means the wrongful removal or wrongful retention of a child.
- (2) “Child” means an unemancipated individual who is less than 18 years of age.
- (3) “Child-custody determination” means a judgment, decree, or other order of a court providing for the legal custody or physical custody of a child, allocating parental responsibilities with respect to a child, or providing for visitation or parenting time with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.
- (4) “Child-custody proceeding” means a proceeding in which the legal custody or physical custody of a child, the allocation of parental responsibilities with respect to a child, or visitation or parenting time with respect to a child is at issue. The term includes a proceeding for divorce, dissolution of marriage, legal separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, or protection from domestic violence or domestic abuse. The term does not include a proceeding involving juvenile delinquency or contractual emancipation.
- (5) “Court” means an entity authorized under the law of a state to establish, enforce, or modify a child-custody determination.
- (6) “Petition” includes a motion or its equivalent.
- (7) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (8) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or nation.
- (9) “Travel document” means records relating to a travel itinerary, including travel tickets, passes, reservations for transportation, or accommodations. The term does not include a passport or visa.
- (10) “Wrongful removal” means the taking of a child that breaches rights of custody or orders concerning the allocation of parental responsibilities or breaches rights of visitation or parenting time given or recognized under the law of this state.
- (11) “Wrongful retention” means the keeping or concealing of a child that breaches rights of custody or orders concerning the allocation of parental responsibilities or breaches rights of visitation or parenting time given or recognized under the law of this state.

**Source: L. 2007:** Entire article added, p. 767, § 1, effective May 14.

## OFFICIAL COMMENT

To the extent possible, the definitions track the Uniform Child Custody Jurisdiction and Enforcement Act [section 14-13-101, et. seq., C.R.S.]. The definition of a child as a person under age 18 is the same as in Section 102(2) of the Uniform Child Custody Jurisdiction and Enforcement Act [section 14-13-102 (2), C.R.S.]. State law determines when a child becomes emancipated before age 18. This Act is limited to the abduction of minors even though the risk of abduction may apply to a disabled adult who has an appointed adult guardian.

The definition of “child-custody determination” is the same as the definition in Section

102(3) of the Uniform Child Custody Jurisdiction and Enforcement Act [section 14-13-102 (3), C.R.S.]. This Act uses the traditional terminology of “custody” and “visitation” because that is the language used in the Uniform Child Custody Jurisdiction and Enforcement Act although local terminology may differ. The definition of a child-custody proceeding differs insignificantly from Section 102(4) of the Uniform Child Custody Jurisdiction and Enforcement Act [section 14-13-102 (4), C.R.S.].

The definition of abduction covers wrongful removal or wrongful retention. The definition is broad enough to encompass not only an abduc-

tion committed by either parent or a person acting on behalf of the parent but also other abductions. Generally both parents have the right to companionship and access to their child unless a court states otherwise. Abductions can occur against an individual or other entity with custody rights, as well as against an individual with visitation or access rights. A parent with joint legal or physical custody rights, by operation of law, court order, or legally binding agreement, commits an abduction by wrongfully in-

terfering with the other parent's rights. A removal or retention of a child can be "wrongful" predecree or postdecree. An abduction is wrongful where it is in breach of an existing "child-custody determination" or, if predecree, in violation of rights attributed to a person by operation of law. The term "breaches rights of custody" tracks Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction.

**14-13.5-103. Cooperation and communication among courts.** Sections 14-13-110, 14-13-111, and 14-13-112 shall apply to cooperation and communications among courts in proceedings under this article.

**Source: L. 2007:** Entire article added, p. 768, § 1, effective May 14.

#### OFFICIAL COMMENT

It is possible, even likely, that abduction situations will involve more than one state. Thus, there is a need for mechanisms for communication among courts, for testimony to be obtained quickly by means other than physical presence, and for cooperation between courts in different states. Sections 110, 111, and 112 of the Uniform Child Custody Jurisdiction and Enforce-

ment Act [sections 14-13-110, 14-13-111, and 14-13-112, C.R.S.] provide mechanisms to deal with these issues. States that do not have the Uniform Child Custody Jurisdiction and Enforcement Act may want to include these provisions or use some similar provision of existing state law.

**14-13.5-104. Actions for abduction prevention measures.** (1) A court on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child.

(2) A party to a child-custody determination or another individual or entity having a right under the law of this state or any other state to seek a child-custody determination for the child may file a petition seeking abduction prevention measures to protect the child under this article.

**Source: L. 2007:** Entire article added, p. 768, § 1, effective May 14.

#### OFFICIAL COMMENT

An abduction may occur before a child-custody proceeding has commenced, after the filing but before entry of a child-custody determination, or in violation of an existing child-custody determination. To obtain abduction prevention measures, either the court on its own may impose the measures or a party to a child custody proceeding or an individual or entity having the right to seek custody may file a petition seeking abduction prevention measures.

A court hearing a child custody case may determine that the evidence shows a credible risk of abduction. Therefore, even without a

party filing a petition under this Act, the court on its own motion can impose appropriate abduction prevention measures. Usually, however, a parent who fears that the other parent or family members are preparing to abduct the child will file a petition in an existing custody dispute. An individual or other entity, such as the state child welfare agency, which has a right to lawful custody may file a petition alleging a risk of abduction and seeking prevention measures with respect to a child who is not yet the subject of a child-custody determination.

**14-13.5-105. Jurisdiction.** (1) A petition under this article may be filed only in a court that has jurisdiction to make a child-custody determination with respect to the child at issue under the "Uniform Child-custody Jurisdiction and Enforcement Act", article 13 of this title.



(2) A court of this state has temporary emergency jurisdiction under section 14-13-204, if the court finds a credible risk of abduction.

**Source:** L. 2007: Entire article added, p. 769, § 1, effective May 14.

#### OFFICIAL COMMENT

This Act complements, but does not limit, contradict, or supercede the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. Part I 657 (1999), or the Uniform Child Custody Jurisdiction Act, 9 U.L.A. Part I 115 (1988). A court must have jurisdiction sufficient to make an initial child-custody determination, a modification, or temporary emergency jurisdiction to issue prevention measures under this Act.

The Parental Kidnapping Prevention Act prioritizes the child's home state as the primary jurisdictional basis; prohibits a court in one state from exercising jurisdiction if a valid custody proceeding is already pending in another state; and requires that states give full faith and credit to sister state decrees made in accordance with its principles. The Uniform Child Custody Jurisdiction and Enforcement Act follows the Parental Kidnapping Prevention Act.

A court has temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act only if the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. This Act

equates a credible risk of abduction with threatened mistreatment or abuse for emergency jurisdiction purposes.

If a state would be able to exercise emergency jurisdiction under Section 204 the Uniform Child Custody Jurisdiction and Enforcement Act [section 14-13-204, C.R.S.], it can do so even if another court has issued a child-custody determination and has continuing exclusive jurisdiction. The reference to Section 204 brings in all of its provisions that include communication, length of time of temporary orders, and the like.

Under Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act [section 14-13-208, C.R.S.], if a court has jurisdiction because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction. However, as the comment to Section 208 explains, domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence. Domestic violence also shall be considered in a court's inconvenient forum analysis under Section 207(b)(1) of the Uniform Child Custody Jurisdiction and Enforcement Act [section 14-13-207 (2) (a), C.R.S.].

**14-13.5-106. Contents of petition.** (1) A petition under this article must be verified and include a copy of any existing child-custody determination, if available. The petition must specify the risk factors for abduction, including the relevant factors described in section 14-13.5-107. Subject to section 14-13-209, if reasonably ascertainable, the petition must contain:

- (a) The name, date of birth, and gender of the child;
- (b) The customary address and current physical location of the child;
- (c) The identity, customary address, and current physical location of the respondent;
- (d) A statement of whether a prior action to prevent abduction, domestic violence, or domestic abuse has been filed by a party or other individual or entity having custody of the child, and the date, location, and disposition of the action;
- (e) A statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking, or child abuse or neglect and the date, location, and disposition of the case; and
- (f) Any other information required to be submitted to the court for a child-custody determination under section 14-13-209.

**Source:** L. 2007: Entire article added, p. 769, § 1, effective May 14.

#### OFFICIAL COMMENT

The contents of the petition follow those for pleadings under Section 209 of the Uniform Child Custody Jurisdiction and Enforcement Act

[section 14-13-209, C.R.S.]. The information is made subject to state law [section 14-13-209 (5), C.R.S.] on the protection of names or identify-

ing information in certain cases. A number of states have enacted laws relating to the protection of victims in domestic violence and child abuse cases by keeping confidential the victims' names, addresses, and other information. These procedures must be followed if the state law requires their applicability.

The requirement for information on domestic violence or child abuse is to alert the court to the possibility that a batterer or abuser is attempting to use the Act. Domestic violence underlies large numbers of parental kidnapping. One study found that approximately one half of abductors had been violent toward the other parent during the marriage or relationship. Some batterers abduct their children during or after custody litigation; others abduct before initiating legal proceedings. The court should not al-

low a batterer to use this Act to gain temporary custody or additional visitation in an uncontested hearing. A person who has committed domestic violence or child abuse poses a risk of harm to the child. Such a person, however, may still seek relief in a contested hearing where the issues can be fully examined by the court. In order to screen for domestic violence or child abuse, the petition requires disclosure of all relevant information and the court can inquire about domestic violence at any hearing.

Notice and opportunity to be heard should be given according to the law of the state and may be by publication if other means are not effective. See Section 108(a) of the Uniform Child Custody Jurisdiction and Enforcement Act [section 14-13-108, C.R.S.].

**14-13.5-107. Factors to determine risk of abduction.** (1) In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent:

- (a) Has previously abducted or attempted to abduct the child;
- (b) Has threatened to abduct the child;
- (c) Has recently engaged in activities that may indicate a planned abduction, including:
  - (I) Abandoning employment;
  - (II) Selling a primary residence;
  - (III) Terminating a lease;
  - (IV) Closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities;
  - (V) Applying for a passport or visa or obtaining travel documents for the respondent, a family member, or the child; or
  - (VI) Seeking to obtain the child's birth certificate or school or medical records;
- (d) Has engaged in domestic violence, domestic abuse, stalking, or child abuse or neglect;
- (e) Has refused to follow a child-custody determination;
- (f) Lacks strong familial, financial, emotional, or cultural ties to the state or the United States;
- (g) Has strong familial, financial, emotional, or cultural ties to another state or country;
- (h) Is likely to take the child to a country that:
  - (I) Is not a party to the "Hague Convention on the Civil Aspects of International Child Abduction" and does not provide for the extradition of an abducting parent or for the return of an abducted child;
  - (II) Is a party to the "Hague Convention on the Civil Aspects of International Child Abduction" but:
    - (A) The "Hague Convention on the Civil Aspects of International Child Abduction" is not in force between the United States and that country;
    - (B) Is noncompliant according to the most recent compliance report issued by the United States department of state; or
    - (C) Lacks legal mechanisms for immediately and effectively enforcing a return order under the "Hague Convention on the Civil Aspects of International Child Abduction";
  - (III) Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;
- (IV) Has laws or practices that would:
  - (A) Enable the respondent, without due cause, to prevent the petitioner from contacting the child;
  - (B) Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status, or religion; or



(C) Restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality, or religion;

(V) Is included by the United States department of state on a current list of state sponsors of terrorism;

(VI) Does not have an official United States diplomatic presence in the country; or

(VII) Is engaged in active military action or war, including a civil war, to which the child may be exposed;

(i) Is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally;

(j) Has had an application for United States citizenship denied;

(k) Has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the United States government;

(l) Has used multiple names to attempt to mislead or defraud; or

(m) Has engaged in any other conduct the court considers relevant to the risk of abduction.

(2) In the hearing on a petition under this article, the court shall consider any evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child.

**Source:** L. 2007: Entire article added, p. 769, § 1, effective May 14.

#### OFFICIAL COMMENT

The list of risk factors constitutes a summary of the wide variety of types of behaviors and characteristics that researchers have found to be present. The risk factors are based on research that has been done during the last twelve years. Research also shows that abducting parents dismiss the value of the other parent in the child's life; have young children or children vulnerable to influence; and often have the support of their family and others. Parents who have made credible threats to abduct a child or have a history are particularly high risk especially when accompanied by other factors, such as quitting a job, selling a home, and moving assets. See Janet Johnston & Linda Girdner, *Family Abductions: Descriptive Profiles and Preventative Interventions* (U.S. Dep't of Justice, OJJDP 2001 NCJ 182788); ABA, *Early Identification of Risk Factors for Parental Abduction* (NCJ185026). The more of these factors that are present, the more likely the chance of an abduction. However, the mere presence of one or more of these factors does not mean that an abduction will occur just as the absence of these factors does not guarantee that no abduction will occur. Some conduct described in the factors can be done in conjunction with a relocation petition, which would negate an inference that the parent is planning to abduct the child.

International abductions pose more obstacles to return of a child than do abductions within the United States. Courts should consider evidence that the respondent was raised in another country and has family support there, has a legal right

to work in a foreign country and has the ability to speak that foreign language. There are difficulties associated with securing return of children from countries that are not treaty partners under the Hague Convention on the Civil Aspects of Child Abduction or are not compliant with the Convention. Compliance Reports are available at the United States Department of State website or may be obtained by contacting the Office of Children's Issues in Department of State.

Courts should be particularly sensitive to the importance of preventive measures where there is an identified risk of a child being removed to countries that are guilty of human rights violations, including arranged marriages of children, child labor, lack of child abuse laws, female genital mutilation, sexual exploitation, any form of child slavery, torture, and the deprivation of liberty. These countries pose potentially serious obstacles to return of a child and pose the possibility of harm.

Courts need to be sensitive to domestic violence issues. Batterers often abduct their children before as well as during and after custody litigation. However, courts also need to be aware of the dynamics of domestic violence. Rather than a vindictive reason for taking the child, a victim fleeing domestic violence may be attempting to protect the victim and the child. Almost half of the parents in one parental kidnapping study were victims of domestic violence and half of the parents who were contemplating abducting their children were motivated

by the perceived need to protect their child from physical, sexual, and emotional abuse. Geoffrey L. Greif & Rebecca L. Hegar, *When Parents Kidnap: The Families Behind the Headlines* 8 (1993). Some of the risk factors involve the same activities that might be undertaken by a victim of domestic violence who is trying to relocate or flee to escape violence. If the evidence shows that the parent preparing to leave is fleeing domestic violence, the court must consider that any order restricting departure or transferring custody may pose safety issues for the respondent and the child, and therefore, should be imposed only when the risk of abduction, the likely harm from the abduction, and the

chances of recovery outweigh the risk of harm to the respondent and the child.

The Uniform Child Custody Jurisdiction and Enforcement Act recognizes that domestic violence victims should be considered. The Comment to Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act [Jurisdiction Declined by Reason of Conduct] [section 14-13-208, C.R.S.] states that "Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. An inquiry must be made whether the flight was justified under the circumstances of the case."

**14-13.5-108. Provisions and measures to prevent abduction.** (1) If a petition is filed under this article, the court may enter an order that must include:

- (a) The basis for the court's exercise of jurisdiction;
- (b) The manner in which notice and opportunity to be heard were given to the persons entitled to notice of the proceeding;
- (c) A detailed description of each party's custody and visitation rights, residential arrangements for the child, and any child-custody determinations in effect;
- (d) A provision stating that a violation of the order may subject the party in violation to civil and criminal penalties; and
- (e) Identification of the child's country of habitual residence at the time of the issuance of the order.

(2) If, at a hearing on a petition under this article or on the court's own motion, the court after reviewing the evidence finds a credible risk of abduction of the child, the court shall enter an abduction prevention order. The order must include the provisions required by subsection (1) of this section and measures and conditions, including those in subsections (3), (4), and (5) of this section, that are reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties and the child-custody determinations in effect at the time of the filing of the petition under this article. The court shall consider the age of the child, the potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted, and the reasons for the potential abduction, including evidence of domestic violence, domestic abuse, stalking, or child abuse or neglect.

(3) An abduction prevention order may include one or more of the following:

- (a) An imposition of travel restrictions that require that a party traveling with the child outside a designated geographical area provide the other party with the following:
  - (I) The travel itinerary of the child;
  - (II) A list of physical addresses and telephone numbers at which the child can be reached at specified times; and
  - (III) Copies of all travel documents;
- (b) A prohibition of the respondent directly or indirectly from:
  - (I) Removing the child from this state, the United States, or another geographic area without permission of the court or the petitioner's written consent;
  - (II) Removing or retaining the child in violation of a child-custody determination;
  - (III) Removing the child from school or a child-care or similar facility; or
  - (IV) Approaching the child at any location other than a site designated for supervised visitation or supervised parenting time;
- (c) A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state;
- (d) With regard to the child's passport:
  - (I) A direction that the petitioner place the child's name in the United States department of state's child passport issuance alert program;



(II) A requirement that the respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and

(III) A prohibition upon the respondent from applying on behalf of the child for a new or replacement passport or visa;

(e) As a prerequisite to exercising custody, parental responsibilities, or visitation or parenting time, a requirement that the respondent provide:

(I) To the United States department of state office of children's issues and the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child;

(II) To the court:

(A) Proof that the respondent has provided the information in subparagraph (I) of this paragraph (e); and

(B) An acknowledgment in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child;

(III) To the petitioner, proof of registration with the United States embassy or other United States diplomatic presence in the destination country and with the central authority for the "Hague Convention on the Civil Aspects of International Child Abduction", if that convention is in effect between the United States and the destination country, unless one of the parties objects; and

(IV) A written waiver under the federal "Privacy Act of 1974", 5 U.S.C. Section 552a, with respect to any document, application, or other information pertaining to the child authorizing its disclosure to the court and the petitioner; and

(f) Upon the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the United States.

(4) In an abduction prevention order, the court may impose conditions on the exercise of custody, parental responsibilities, or visitation or parenting time that:

(a) Limit visitation or parenting time or require that visitation or parenting time with the child by the respondent be supervised until the court finds that supervision is no longer necessary and order the respondent to pay the costs of supervision;

(b) Require the respondent to post a bond or provide other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorneys fees and costs if there is an abduction; and

(c) Require the respondent to obtain education on the potentially harmful effects to the child from abduction.

(5) To prevent imminent abduction of a child, a court may:

(a) Issue a warrant to take physical custody of the child under section 14-13.5-109 or the law of this state other than this article;

(b) Direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child, or enforce a custody determination under this article or the law of this state other than this article; or

(c) Grant any other relief allowed under the law of this state other than this article.

(6) The remedies provided in this article are cumulative and do not affect the availability of other remedies to prevent abduction.

**Source: L. 2007:** Entire article added, p. 771, § 1, effective May 14.

#### OFFICIAL COMMENT

This act provides courts with a choice of remedies. Ideally the court will choose the least restrictive measures and conditions to maximize opportunities for continued parental contact while minimizing the opportunities for abduction. The most restrictive measures should be

used when there have been prior custody violations and overt threats to take the child; when the child faces substantial potential harm from an abducting parent who may have serious mental or personality disorder, history of abuse or violence or no prior relationship with the child;

or when the obstacles to recovering the child are formidable due to countries not cooperating and enforcing orders from the United States, not being signatories to the Hague Convention on the Civil Aspects of International Child Abduction or non-compliant. This section of the Act lists the possible prevention measures categorized as travel restrictions, conditions on the exercise of custody and visitation, and urgent measures when abduction is imminent or in progress.

If a person files a petition under this Act, even if the court decides not to order restrictive measures or impose conditions, the court may clarify and make more specific the existing child-custody determination. To enter an abduction prevention order, the court must have jurisdiction to make a child-custody determination even if it is emergency jurisdiction. The court should set out the basis for the court's exercise of jurisdiction. The more apparent on the face of the document that the court issuing the order had proper jurisdiction, the more likely courts in other states and countries are to recognize it as valid. The court should also include a statement showing that the parties were properly served and given adequate notice. This makes it apparent on the face of the order that due process was met. See Sections 108 and 205 of the Uniform Child Custody Jurisdiction and Enforcement Act [sections 14-13-108 and 14-13-205, C.R.S.]. States do not require personal jurisdiction to make a child-custody determination.

The court may make an existing child-custody order clearer and more specific. Vague orders are difficult to enforce without additional litigation. The term "reasonable visitation" can lead to conflicts between the parents and make it difficult for law enforcement officers to know if the order is being violated. The court may specify the dates and times for each party's custody and visitation, including holidays, birthdays, and telephone or Internet contact. Because joint custody arrangements create special enforcement problems, the court should ensure that the order specifies the child's residential placement at all times. Whenever possible, the residential arrangements should represent the parents' agreement. However, to prevent abductions, it is important for the court order to be specific as to the residential arrangements for the child. If there is a threat of abduction, awarding sole custody to one parent makes enforcement easier.

The court may also include language in the prevention order to highlight the importance of both parties complying with the court order by including in bold language: **"VIOLATION OF THIS ORDER MAY SUBJECT THE PARTY IN VIOLATION TO CIVIL AND CRIMINAL PENALTIES."**

Because every abduction case may be a potential international abduction case, the prevention order should identify the place of habitual

residence of a child. Although the Hague Convention on the Civil Aspects of International Child Abduction does not define "habitual residence" and the determination is made by the court in the country hearing a petition for return of a child, a statement in the child-custody determination or prevention order may help. A typical statement reads:

The State of \_\_\_\_\_,  
United States of America, is the habitual residence of the minor children within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.

If the court finds a credible risk of abduction, this Act provides numerous measures to prevent an abduction. Courts can require a party traveling outside a specified geographical area to provide the other party with all relevant information about where the child will be and how to contact the child. The court can impose travel restrictions prohibiting the respondent from leaving the United States or a specific geographical area; from removing the child from school, day care or other facilities, and can restrict contact other than as specified in the order. The court may also impose passport restrictions and require the respondent to provide assurances and safeguards as a condition of traveling with the child.

The court may also choose to impose restrictions on custody or visitation. The most common, and one of the most effective, restrictions is supervised visitation. Visitation should remain supervised until the court decides the threat of abduction has passed. In addition, the court may require the posting of a bond sufficient to serve both as a deterrent and as a source of funds for the cost of the return of the child. If domestic violence is present, the court may want to order the abusive person to obtain education, counseling or attend a batterers' intervention and prevention program.

Because of international abduction cases are the most complex and difficult, reasonable restrictions to prevent such abductions are necessary. If a credible risk of international abduction of the child exists, passport controls and travel restrictions may be indispensable. It may be advantageous in some cases to obtain a "mirror" or reciprocal order. Before exercising rights, the respondent would need to get a custody order from the country to which the respondent will travel that recognizes both the United States order and the court's continuing jurisdiction. The foreign court would need to agree to order return of the child if the child was taken in violation of the court order. This potentially expensive and time consuming remedy should only be ordered when likely to be of assistance. Because the foreign court may subsequently modify its order, problems can arise.



The court may do whatever is necessary to prevent an abduction, including using the warrant procedure under this act or under the law of the state. Many law enforcement officers are unclear about their role in responding to parental kidnapping cases. One study showed that 70 percent of law enforcement agencies reported that they did not have written policies and pro-

cedures governing child abduction cases. A provision in the custody order directing law enforcement officer to "accompany and assist" a parent to recover an abducted child may be useful but is not included in this Act.

The remedies provided in this Act are intended to supplement and complement existing law.

**14-13.5-109. Warrant to take physical custody of child.** (1) If a petition under this article contains allegations, and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed, the court may issue an ex parte warrant to take physical custody of the child.

(2) The respondent on a petition under subsection (1) of this section must be afforded an opportunity to be heard at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.

(3) An ex parte warrant under subsection (1) of this section to take physical custody of a child must:

(a) Recite the facts upon which a determination of a credible risk of imminent wrongful removal of the child is based;

(b) Direct law enforcement officers to take physical custody of the child immediately;

(c) State the date and time for the hearing on the petition; and

(d) Provide for the safe interim placement of the child pending further order of the court.

(4) If feasible, before issuing a warrant and before determining the placement of the child after the warrant is executed, the court may order a search of the relevant databases of the national crime information center system and similar state databases to determine if either the petitioner or respondent has a history of domestic violence, stalking, or child abuse or neglect.

(5) The petition and warrant must be served on the respondent when or immediately after the child is taken into physical custody.

(6) A warrant to take physical custody of a child, issued by this state or another state, is enforceable throughout this state. If the court finds that a less intrusive remedy will not be effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law enforcement officers to make a forcible entry at any hour.

(7) If the court finds, after a hearing, that a petitioner sought an ex parte warrant under subsection (1) of this section for the purpose of harassment or in bad faith, the court may award the respondent reasonable attorneys fees, costs, and expenses.

(8) This article does not affect the availability of relief allowed under the law of this state other than this article.

**Source: L. 2007:** Entire article added, p. 774, § 1, effective May 14.

#### OFFICIAL COMMENT

This section of the Act authorizes issuance of a warrant in an emergency situation, such as an allegation that the respondent is preparing to abduct the child to a foreign country and is on the way to the airport. The harm is the credible risk of imminent removal. If the court finds such a risk, the court should temporarily waive the notice requirements and issue a warrant to take physical custody of the child. Immediately after the warrant is executed, the respondent is to receive notice of the proceedings. This section mirrors Section 311 of the Uniform Child Cus-

tody Jurisdiction and Enforcement Act [section 14-13-311, C.R.S.] on warrants to pick up a child which are available when there is an existing child-custody determination. In many states, the term used in civil cases is "writ of attachment."

The court should hear the testimony of the petitioner or another witness before issuing the warrant. The testimony may be heard in person, by telephone, or by any other means acceptable under local law, which may include video conferencing or use of other technology.

Domestic violence includes “family” violence. Because some batterers may try to use the warrant procedure to prevent victims and the children from escaping domestic violence or child abuse, the court should check relevant state and national databases to see if either the petitioner or respondent’s name is listed or if relevant information exists that has not been disclosed before issuing the warrant and ordering placement. Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 73, 75 (2002)(indicating that most parental abductions take place in the context of a history of domestic violence because threatening to take the child from the mother is a form of control).

Some courts have computer terminals on the bench and a database search takes seconds. Courts without computer access can seek the assistance of law enforcement. Unless impracticable, the court should conduct a search of all person databases of the National Crime Information Center system, including the protection order file, the historical protection order file, the warrants file, the sex offender registry, and the persons on supervised release file. In addition, it is recommended that courts run searches in the National Law Enforcement Telecommunication System in the petitioner’s state of birth, current state of residence, and other recent states of residence. Civil courts are authorized by statute and National Crime Information Center policy to have access to information in several files for domestic violence and stalking cases. Because

child abduction involves family members and can harm children, and violence between the parents is often a factor leading to child abduction, cases in which a parent alleges a risk of wrongful removal should permit access to the relevant databases.

The court should also view comparable state databases, such as the state department of social service registry of persons found to have abused or neglected children. If the petitioner or respondent are listed for a reason related to a crime of domestic or family violence, the court may refuse to issue a warrant or order any appropriate placement authorized under the laws of the state. The warrant must provide for the placement of a child pending the hearing. Temporary placement will most often be with the petitioner unless the database check reveals the petitioner is a likely or known abuser.

The court must state the reasons for issuance of the warrant. The warrant can be enforced by law enforcement officers wherever the child is found in the state. The warrant may authorize entry upon private property to pick up the child if no less intrusive means are possible. In extraordinary cases, the warrant may authorize law enforcement to make a forcible entry at any hour. This section also authorizes law enforcement officers to enforce out of state warrants.

This section of the Act applies only to wrongful removals, not wrongful retentions. It does not hinder a court from issuing any other immediate ex parte relief to prevent a wrongful removal or retention as may be allowed under law other than this act.

**14-13.5-110. Duration of abduction prevention order.** (1) An abduction prevention order remains in effect until the earliest of:

- (a) The time stated in the order;
- (b) The emancipation of the child;
- (c) The child’s attaining eighteen years of age; or
- (d) The time the order is modified, revoked, vacated, or superseded by a court with jurisdiction under sections 14-13-201 to 14-13-203.

**Source:** L. 2007: Entire article added, p. 775, § 1, effective May 14.

**14-13.5-111. Uniformity of applications and construction.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source:** L. 2007: Entire article added, p. 775, § 1, effective May 14.

**14-13.5-112. Relation to electronic signatures in global and national commerce act.** This article modifies, limits, and supersedes the federal “Electronic Signatures in Global and National Commerce Act”, 15 U.S.C. sec. 7001, et seq., but does not modify, limit, or supersede section 101(c) of the act, 15 U.S.C. sec. 7001(c), of that act or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. sec. 7003(b).

**Source:** L. 2007: Entire article added, p. 775, § 1, effective May 14.



**CHILD SUPPORT****ARTICLE 14****Child Support Enforcement  
Procedures**

**Cross references:** For support proceedings under the “Colorado Children’s Code”, see article 6 of title 19; for the “Uniform Interstate Family Support Act”, see article 5 of this title; for nonsupport, see article 6 of this title; for support proceedings under the “Colorado Child Support Enforcement Act”, see article 13 of title 26.

**Law reviews:** For article, “The Nuts and Bolts of Collecting Support”, see 19 Colo. Law. 1595 (1990); for article, “Child Support Enforcement Remedies Available Through Child Support Enforcement Agencies”, see 33 Colo. Law. 57 (January 2004).

14-14-101.	Short title.	14-14-110.	Contempt of court.
14-14-102.	Definitions.	14-14-111.	Immediate deductions for family support obligations - legislative declaration - procedures - applicability. (Repealed)
14-14-103.	Additional remedies.		
14-14-104.	Recovery for child support debt.		
14-14-105.	Continuing garnishment.	14-14-111.5.	Income assignments for child support or maintenance.
14-14-106.	Interest.	14-14-112.	Deductions for health insurance.
14-14-107.	Wage assignment - applicability. (Repealed)	14-14-113.	Recordation of social security numbers in certain family matters.
14-14-108.	Child support debt offset. (Repealed)		
14-14-109.	Security, bond, or guarantee.		

**14-14-101. Short title.** This article shall be known and may be cited as the “Colorado Child Support Enforcement Procedures Act”.

**Source: L. 81:** Entire article added, p. 905, § 1, effective June 8.

**14-14-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Court” means any court in this state having jurisdiction to determine the liability of persons for the support of another person.

(2) “Delegate child support enforcement unit” means the unit of a county department of social services or its contractual agent which is responsible for carrying out the provisions of this article. The term “contractual agent” shall include a private child support collection agency, operating as an independent contractor with a county department of social services, or a district attorney’s office, that contracts to provide any services that the delegate child support enforcement unit is required by law to provide.

(3) “Dependent child” means any person who is legally entitled to or the subject of a court order for the provision of proper or necessary subsistence, education, medical care, or any other care necessary for his health, guidance, or well-being who is not otherwise emancipated, self-supporting, married, or a member of the armed forces of the United States.

(4) “Duty of support” means a duty of support imposed by law or by order, decree, or judgment of any court, whether interlocutory or final, or whether incidental to an action for divorce, separation, separate maintenance or otherwise. “Duty of support” includes the duty to pay arrearages of support past-due and unpaid.

(4.3) “Employer”, for purposes of income withholding pursuant to section 14-5-501, includes any person, company, or corporation, Pinnacol Assurance, or other insurance carrier paying any type of workers’ compensation benefits pursuant to articles 40 to 47 of title 8, C.R.S.

(4.5) “Family support registry” means a central registry maintained and operated by the state department of human services pursuant to section 26-13-114, C.R.S., that receives,

processes, disburses, and maintains a record of the payment of child support, child support when combined with maintenance, maintenance, child support arrears, or child support debt.

(4.7) "Health insurance" means medical insurance or medical and dental insurance coverage or both of human beings against bodily injury or illness. Such coverage may be provided through a parent's employer or may be acquired individually by the parent.

(5) "Obligee" means any person or agency to whom a duty of support is owed or any person or agency who has commenced a proceeding for the establishment or enforcement of an alleged duty of support.

(6) "Obligor" means any person owing a duty of support, or against whom a proceeding for the establishment or enforcement of a duty of support is commenced.

(6.5) "Plan" means a group health benefit plan or combination of plans, other than public assistance programs, that provides medical care or benefits for a child. "Plan" includes, but is not limited to, a health maintenance organization, self-funded group, state or local government group health plan, church group plan, medical or health service corporation, or other similar plan.

(7) "Public assistance" means assistance payments and social services provided to or on behalf of eligible recipients through programs administered or supervised by the state department of human services, either in cooperation with the federal government or independently without federal aid, pursuant to article 2 of title 26, C.R.S.

(8) "Support order" means any judgment, decree, or order of support in favor of an obligee, whether temporary or final or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered.

(9) "Wages" means income to an obligor in any form, including, but not limited to, actual gross income; compensation paid or payable for personal services, whether denominated as wages; earnings from an employer; salaries; payment to an independent contractor for labor or services; commissions; tips declared by the individual for purposes of reporting to the federal internal revenue service or tips imputed to bring the employee's gross earnings to the minimum wage for the number of hours worked, whichever is greater; rents; bonuses; severance pay; retirement benefits and pensions, including, but not limited to, those paid pursuant to articles 51, 54, 54.5, 54.6, and 54.7 of title 24, C.R.S., and article 30 of title 31, C.R.S.; workers' compensation benefits; social security benefits, including social security benefits actually received by a parent as a result of the disability of that parent or as the result of the death of the minor child's stepparent, but not including social security benefits received by a minor child or on behalf of a minor child as a result of the death or disability of a stepparent of the child; disability benefits; dividends; royalties; trust account distributions; any moneys drawn by a self-employed individual for personal use; funds held in or payable from any health, accident, disability, or casualty insurance to the extent that such insurance replaces wages or provides income in lieu of wages; monetary gifts; monetary prizes, excluding lottery winnings not required by the rules of the Colorado lottery commission to be paid only at the lottery office; taxable distributions from general partnerships, limited partnerships, closely held corporations, or limited liability companies; interest; trust income; annuities; payments received from a third party to cover the health care cost of the child but which payments have not been applied to cover the child's health care costs; state tax refunds; and capital gains. "Wages", for the purposes of child support enforcement, may also include unemployment compensation benefits, but only subject to the provisions and requirements of section 8-73-102 (5), C.R.S.

**Source:** L. 81: Entire article added, p. 905, § 1, effective June 8. L. 82: (3) amended, p. 281, § 4, effective April 2. L. 83: (3) amended, p. 651, § 1, effective March 3. L. 84: (9) added, p. 480, § 1, effective July 1. L. 87: (9) amended, p. 596, § 26, effective July 10. L. 89: (9) amended, p. 793, § 17, effective July 1. L. 90: (4.5) added, p. 1414, § 14, effective June 8; (2) and (9) amended, pp. 891, 564, §§ 12, 36, effective July 1. L. 92: (9) amended, p. 578, § 6, effective July 1; (4.7) added, p. 169, § 3, effective August 1. L. 93: (9) amended, p. 1872, § 6, effective June 1. L. 94: (9) amended, p. 1539, § 7, effective May 31; (4.5)(a) and (7) amended, p. 2646, § 109, effective July 1; (9) amended, p. 1253, § 7, effective July 1. L. 96: (4.5) and (9) amended, p. 599, § 9, effective July 1. L. 97:



(4.3) added, p. 562, § 7, effective July 1. **L. 98:** (9) amended, p. 921, § 8, effective July 1. **L. 99:** (9) amended, p. 621, § 16, effective August 4. **L. 2001:** (4.3) amended, p. 721, § 3, effective May 31. **L. 2002:** (4.3) amended, p. 1892, § 52, effective July 1; (6.5) added, p. 23, § 1, effective July 1. **L. 2003:** (2) amended, p. 1265, § 52, effective July 1. **L. 2004:** (4.5) amended, p. 387, § 3, effective July 1. **L. 2005:** (2) amended, p. 498, § 2, effective August 8. **L. 2009:** (9) amended, (SB 09-282), ch. 288, p. 1397, § 60, effective January 1, 2010.

**Editor's note:** Amendments to subsection (9) by Senate Bill 94-088 and House Bill 94-1345 were harmonized.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsections (4.5)(a) and (7), see section 1 of chapter 345, Session Laws of Colorado 1994.

**14-14-103. Additional remedies.** The remedies provided in this article are in addition to and not in substitution for any other remedies.

**Source:** **L. 81:** Entire article added, p. 906, § 1, effective June 8.

**14-14-104. Recovery for child support debt.** (1) Any payment of public assistance by a county department of social services made to or for the benefit of any dependent child or children creates a debt, which is due and owing to the county department of social services, recoverable by the county as a debt due to the state by the parent or parents who are responsible for support of the dependent child or children in an amount to be determined as follows:

(a) Where there has been a court order directed to a parent, the child support debt of that parent shall be an amount equal to the amount of public assistance paid to the extent of the full amount of arrearages under the order. However, the county department of social services through its delegate child support enforcement unit may petition for modification of the order on the same grounds as a party to the action.

(b) Where there has been no court or administrative order for child support, the county department of social services through its delegate child support enforcement unit may initiate a court or administrative action to establish the amount of child support debt accrued, and the court or delegate child support enforcement unit, after hearing or upon stipulation or upon a default order, shall enter an order for child support debt. The debt shall be based on the amount of current child support due, or which would have been due if there were an existing order for child support, under the current child support enforcement guidelines in effect on the date of the stipulation, default order, or hearing to establish the child support debt times the number of months the family received public assistance. The total amount of child support debt shall not exceed the total amount paid for public assistance. A child support debt established pursuant to this paragraph (b) shall be in addition to any subsequent child support debt accrued pursuant to paragraph (a) of this subsection (1).

(2) The county department of social services through its delegate child support enforcement unit shall be subrogated to the right of the dependent child or children or person having legal and physical custody of said child or children or having been allocated decision-making authority with respect to the child or children to pursue any child support action existing under the laws of this state to obtain reimbursement of public assistance expended. If a court enters a judgment for or orders the payment of any amount of child support to be paid by an obligor, the county department of social services shall be subrogated to the debt created by such judgment or order.

(3) No agreement between any one parent or custodial person or person allocated parental responsibilities and the obligor, either relieving the obligor of any duty of support or responsibility therefor or purporting to settle past, present, or future child support obligations either as settlement or as prepayment, shall act to reduce or terminate any rights of the county department of social services to recover from that obligor for any public assistance provided unless the county department of social services through its delegate

child support enforcement unit has consented to the agreement, in writing, and such written consent has been incorporated into and made a part of the agreement.

(4) Any parental rights with respect to custody or decision-making responsibility with respect to a child or parenting time that are granted by a court of competent jurisdiction or are subject to court review shall remain unaffected by the establishment or enforcement of a child support debt or obligation by the county department of social services or other person pursuant to the provisions of this article; and the establishment or enforcement of any such child support debt or obligation shall also remain unaffected by such parental rights with respect to custody or decision-making responsibility with respect to a child or parenting time.

(5) No child support debt under this section shall be created in the case of, or at any time collected from, a parent who receives assistance under the Colorado works program as described in part 7 of article 2 of title 26, C.R.S., for the period such parent is receiving such assistance, unless by order of a court of competent jurisdiction.

(6) Creation of a child support debt under this section shall not modify or extinguish any rights which the county department of social services has obtained or may obtain under an assignment of child support rights, including the right to recover and retain unreimbursed public assistance.

(7) When a portion of a public assistance grant, paid to or for the benefit of a dependent child, includes moneys paid to provide the custodial parent or the parent with whom the child resides the majority of the time or caretaker relative with necessities including but not limited to shelter, medical care, clothing, or transportation, then those moneys are deemed to be paid to or for the benefit of the dependent child.

(8) Notwithstanding rule 98 of the Colorado rules of civil procedure, venue for an action to establish child support debt is proper in any county where public assistance was or is being paid, in any county where the obligor parent resides, or in any county where the child resides.

(9) A copy of the computer printout obtained from the state department of human services of the record of payments of assistance under the Colorado works program as described in part 7 of article 2 of title 26, C.R.S., made on behalf of a child whose custodian has been receiving child support enforcement services pursuant to section 26-13-106, C.R.S., shall be admissible into evidence as proof of such payments in any proceeding to establish child support debt and shall be prima facie evidence of the amount of child support debt owing on behalf of said child.

**Source:** **L. 81:** Entire article added, p. 906, § 1, effective June 8. **L. 89:** (1)(b) amended and (8) added, p. 793, § 18, effective July 1. **L. 90:** (9) added, p. 891, § 13, effective July 1. **L. 91:** (8) amended, p. 253, § 9, effective July 1. **L. 93:** (1) amended, p. 1560, § 9, effective June 6; (4) amended, p. 581, § 17, effective July 1. **L. 94:** (9) amended, p. 2646, § 110, effective July 1. **L. 97:** (5) and (9) amended, p. 1241, § 38, effective July 1. **L. 98:** (2), (3), (4), and (7) amended, p. 1401, § 51, effective February 1, 1999. **L. 2007:** (1)(b) amended, p. 1652, § 8, effective May 31.

**Cross references:** For the legislative declaration contained in the 1993 act amending subsection (4), see section 1 of chapter 165, Session Laws of Colorado 1993. For the legislative declaration contained in the 1994 act amending subsection (9), see section 1 of chapter 345, Session Laws of Colorado 1994.

#### ANNOTATION

A determination of accrued child support debt of an absent parent when there has been no prior order of support does not violate due process or equal protection provisions of the constitution nor subject the obligor to an ex post facto law or a retrospective statute. People ex rel. J.A.E.S., 7 P.3d 1021 (Colo. App. 2000).

Guidelines must be applied to the parent's current income, rather than to the income at the time the debt arose. This does not implicate due process or equal protection, since the current income standards requires consideration of parent's current ability to repay the debt. Montezuma Dept. of Soc. Servs. v. Laner, 937 P.2d 903 (Colo. App. 1997).



**Trial court's ruling on the amount of debt could not stand** where court applied a previous version of the statute in effect when the debt arose. The current version of the statute should be applied to determine the amount of the debt as the bill enacting the new statute applied to orders establishing debt on or after the date the statute took effect. *Montezuma Dept. of Soc. Servs. v. Laner*, 937 P.2d 903 (Colo. App. 1997).

**A mother's assignment to department of social services of support rights against father** for period in which mother received public assistance was total and unconditional and mother had no entitlement to either support payments or any interest thereon, barring any reassignment back to her. *Edis v. Edis*, 742 P.2d 954 (Colo. App. 1987).

**In determining child support debt based on prior payments of public assistance**, the trial court must enter an order equal to or more than the amount of public assistance paid. *People in Interest of A.A.V. v. J.R.*, 815 P.2d 997 (Colo. App. 1991).

**Section requires court to enter order in favor of county department of social services against responsible parent in the exact amount of public assistance paid**, regardless of parent's ability to pay. *In re Ward*, 856 P.2d 67 (Colo. App. 1993).

**An obligor is liable to the county department of social services for an amount not exceeding the full amount of public assistance paid** during the period when no order for child support existed. *People ex rel. J.A.E.S.*, 7 P.3d 1021 (Colo. App. 2000).

**Subsection (2) provides that the county department of social services shall be subrogated** to the debt created by a judgment or order for payment of child support by an obligor and to the right of the dependent child or children or person having legal or physical custody of such child or children to pursue any child support action to obtain reimbursement of public assistance expended. *In re Cespedes*, 895 P.2d 1172 (Colo. App. 1995).

**Mother was a real party in interest and entitled to seek an increase in child support** since only part of the mother's right to receive child support had been assigned to the department of human services for purposes of receiving AFDC payments. *In re Cespedes*, 895 P.2d 1172 (Colo. App. 1995).

**Subsection (2) allows a custodial parent to seek an increase in child support that includes the amount of public assistance received**, provided that any such increase is subject to the state's right to subrogation. *In re Cespedes*, 895 P.2d 1172 (Colo. App. 1995).

**Even if it is assumed that the doctrine of laches applies against the department of social services**, the trial court had ample support for rejection of the defense. Social services acted as promptly as it could and pursued efforts to obtain reimbursement shortly after confirming father's address and income. *Montezuma Dept. of Soc. Servs. v. Laner*, 937 P.2d 903 (Colo. App. 1997).

**Applied** in *People in Interest of A.L.B.*, 683 P.2d 813 (Colo. App. 1984); *People in Interest of E.P.G.*, 732 P.2d 250 (Colo. App. 1986).

**14-14-105. Continuing garnishment.** (1) A writ of garnishment for the collection from earnings of judgments for arrearages for child support, for maintenance when combined with child support, for child support debts, or for maintenance shall be continuing; shall have priority over any garnishment, lien, or income assignment other than a writ previously served on the same garnishee pursuant to this subsection (1) or a wage assignment activated pursuant to section 14-14-107 or section 14-14-111, as those sections existed prior to July 1, 1996, or an income assignment activated pursuant to section 14-14-111.5; and shall require the garnishee to withhold, pursuant to section 13-54-104 (3), C.R.S., the portion of earnings subject to garnishment at each succeeding earnings disbursement interval until such judgment is satisfied or the garnishment is released by the court or in writing by the judgment creditor.

(2) No employer may discharge an employee solely for the reason that his earnings have been subjected to garnishment pursuant to this section. Any such discharge in violation of this subsection (2) shall subject the employer to liability for damages.

**Source:** **L. 81:** Entire article added, p. 907, § 1, effective June 8. **L. 86:** (1) amended, p. 725, § 4, effective July 1. **L. 87:** (1) amended, p. 591, § 10, effective July 10. **L. 96:** (1) amended, p. 600, § 10, effective July 1.

**Cross references:** For provisions concerning garnishment generally, see article 54.5 of title 13.

## ANNOTATION

**Writ of garnishment for child support has priority over attorney's lien.** *Rios v. Mireles*, 937 P.2d 840 (Colo. App. 1996).

**14-14-106. Interest.** Interest per annum at four percent greater than the statutory rate set forth in section 5-12-101, C.R.S., on any arrearages and child support debt due and owing may be compounded monthly and may be collected by the judgment creditor; however, such interest may be waived by the judgment creditor, and such creditor shall not be required to maintain interest balance due accounts.

**Source:** **L. 81:** Entire article added, p. 908, § 1, effective June 8. **L. 86:** Entire section amended, p. 725, § 5, effective July 1. **L. 88:** Entire section amended, p. 633, § 9, effective July 1. **L. 94:** Entire section amended, p. 1539, § 8, effective May 31. **L. 97:** Entire section amended, p. 1241, § 39, effective July 1. **L. 2003:** Entire section amended, p. 1266, § 53, effective July 1.

**Cross references:** For the statutory rate of interest, see § 5-12-102.

## ANNOTATION

**Law reviews.** For article, "An Update of Appendices from Collecting Pre-and Post-judgment Interest in Colorado", see 15 Colo. Law. 990 (1986).

**Interest on child support judgment.** Trial court is without discretion to deny interest. Therefore, interest on child support arrearages accruing from the date each installment became due shall be included in the judgment. In re Schutte, 721 P.2d 160 (Colo. App. 1986).

**This section is applicable only for support past due and unpaid by an obligor** and not available against the Denver department of social services for amounts collected from obligor which the court ordered paid to ex-wife. People

in Interest of D.C., 797 P.2d 840 (Colo. App. 1990).

**This section does not apply to retroactive modification of support**, since debt is not mature until after entry of order. In re Schutte, 721 P.2d 16 (Colo. App. 1986); In re Armit, 878 P.2d 101 (Colo. App. 1994).

**Court does not have discretion as to amount of interest or whether interest is compounded monthly.** Statute vests in the judgment creditor the option to collect the increased rate, to compound the interest monthly, and to waive the interest. In re Tognoni, \_\_ P.3d \_\_ (Colo. App. 2011).

**14-14-107. Wage assignment - applicability. (Repealed)**

**Source:** **L. 81:** Entire article added, p. 908, § 1, effective June 8. **L. 83:** (1)(a) and IP(3) amended and (2) R&RE, pp. 652, 653, §§ 1-3, effective June 1. **L. 84:** (1)(a), IP(2)(a), (2)(a)(III), (2)(a)(IV), (2)(b), and (2)(c) amended and (2)(a)(V) and (3.5) added, pp. 480, 481, §§ 2, 3, effective July 1. **L. 85:** (1)(a), (2)(a) to (2)(c), IP(3), (3)(a)(IV), (3)(c), (3.5), (4)(d), and (9) amended and (1)(d), (1.5), (3.4), (4)(e), and (10) to (13) added, pp. 592, 595, §§ 12-15, effective July 1. **L. 86:** (1)(a), (1)(b), (1.5)(a), (2)(a)(II), (2)(c), (3)(a)(I), (5), and (7) amended and (1)(e) to (1)(g) and (4)(f) added, pp. 725, 727, §§ 6-8, effective July 1. **L. 87:** Entire section R&RE, p. 580, § 1, effective July 10. **L. 88:** (5)(c)(IX), (5)(c)(XI), IP(7), (7)(d)(IV), and (9)(a) amended, p. 634, § 10, effective July 1. **L. 89:** (15) added, p. 810, § 2, effective June 5. **L. 90:** (2)(e), (5)(c)(VIII), (6)(b)(I), (7)(d)(III), (7)(d)(IV), and (7)(g) amended and (6)(b)(III) added, p. 1414, § 15, effective June 8; (15) amended, p. 892, § 14, effective July 1. **L. 92:** (2)(a), IP(7), (7)(c)(III), (7)(c)(IV), (9), and (11) amended and (7)(d.5) and (7)(d.6) added, p. 203, § 11, effective August 1. **L. 93:** (9) amended, p. 1561, § 10, effective September 1. **L. 94:** (9)(e), amended, p. 1539, § 9, effective May 31; IP(7) amended, p. 2048, § 8, effective June 3; (14) amended, p. 2646, § 111, effective July 1. **L. 96:** Entire section repealed, p. 600, § 11, effective July 1.



**14-14-108. Child support debt offset. (Repealed)**

**Source:** L. 83: Entire section added, p. 654, § 1, effective June 10. L. 85: Entire section repealed, p. 604, § 24, effective July 1.

**Cross references:** For present provisions concerning a state income tax refund offset for child support debts or child support arrearages, see § 26-13-111.

**14-14-109. Security, bond, or guarantee.** (1) In any action in which child support is ordered, an interested party may apply to the court for an order requiring that the obligor post security, a bond, or other form of guarantee to secure payment of the child support ordered. In considering such request, the court shall consider, among other factors, the nature of the obligor's employment and whether the obligor's income is unreachable by a wage assignment entered pursuant to section 14-14-107 prior to July 1, 1996, or by immediate deduction for a family support obligation pursuant to section 14-14-111 as it existed prior to July 1, 1996, or by an income assignment entered pursuant to section 14-14-111.5 on or after July 1, 1996.

(2) If the request to post security, a bond, or other guarantee is made subsequent to the issuance of a child support order, a copy of the request shall be sent to the obligor at his last-known address by certified mail no later than twenty days prior to the date set for a hearing on the issue. Such notice shall contain a statement of the obligor's rights to appear and contest the request.

(3) When a request to post security, a bond, or other guarantee is before the court, the court shall make findings on the appropriateness of the request based on the evidence presented, and shall then either grant or deny the request.

**Source:** L. 85: Entire section added, p. 595, § 16, effective July 1. L. 96: (1) amended, p. 622, § 32, effective July 1.

**14-14-110. Contempt of court.** (1) Evidence of noncompliance with an order for child support, or maintenance when combined with child support, in the form of an affidavit from the clerk of the court or in the form of a copy of the record of payments certified by the clerk of the court or in the form of a copy of the record of payment maintained by the family support registry is prima facie evidence of contempt of court.

(2) In determining whether or not the obligor is in contempt of court, the court may consider that the required payment has been made prior to the hearing to determine contempt or that owing to physical incapacity or other good cause the obligor was unable to furnish the support, care, and maintenance required by the order for the period of noncompliance alleged in the motion.

(3) If, after personal service of the citation and a copy of the motion and affidavit, the obligor fails to appear at the time so designated, the court may issue a warrant for the obligor's arrest. Upon issuance of the warrant, the court shall direct by endorsement thereon the amount of the bond required.

(4) Pursuant to subsection (3) of this section, where the obligor has been released upon deposit of cash, stocks, or bonds, or upon surety bond secured by property, if the obligor fails to appear in accordance with the primary condition of the bond, the court shall declare a forfeiture. Notice of the order of forfeiture shall be mailed immediately by the court to the obligor and sureties, if any, at the last-known address. If the obligor does not appear and surrender to the court having jurisdiction within thirty days after the date of the forfeiture, or within that period satisfy the court that appearance and surrender by the obligor is impossible and without the obligor's fault, the court shall enter judgment against the obligor and the sureties, if any, for the amount of the bail and costs of the court proceedings.

(5) Any moneys collected or paid upon any such execution or in any case upon said bond shall be turned over to the clerk of the court in which the bond is given to be applied to the child support obligation, including where the obligation is assigned to the department of human services pursuant to section 26-2-111 (3), C.R.S.

**Source:** **L. 86:** Entire section added, p. 730, § 1, effective May 1. **L. 93:** Entire section amended, p. 1561, § 11, effective September 1. **L. 94:** (1) amended, p. 1540, § 10, effective May 31; (5) amended, p. 2647, § 112, effective July 1. **L. 97:** (4) amended, p. 562, § 8, effective July 1; (5) amended, p. 1241, § 40, effective July 1.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (5), see section 1 of chapter 345, Session Laws of Colorado 1994.

**14-14-111. Immediate deductions for family support obligations - legislative declaration - procedures - applicability. (Repealed)**

**Source:** **L. 89:** Entire section added, p. 805, § 1, effective June 5. **L. 90:** (2)(b)(I), (4)(b)(IV)(B), (4)(b)(IV)(C), (4)(b)(IV)(D), (4)(b)(VII), and (11) amended, p. 1415, § 16, effective June 8; (2)(a) and (4)(b)(IV)(B) amended, p. 892, § 15, effective July 1. **L. 92:** (2)(b), (2)(c), (4)(b)(III)(C), (6), and (16) amended and (4)(b)(IV.5) and (4)(b)(IV.6) added, p. 207, § 12, effective August 1. **L. 93:** (2)(b) amended, p. 1562, § 12, effective September 1. **L. 94:** (4)(a) amended, p. 2049, § 9, effective June 3. **L. 96:** Entire section repealed, p. 600, § 11, effective July 1.

**14-14-111.5. Income assignments for child support or maintenance. (1) Legislative declaration.** The general assembly hereby finds and declares that, for the good of the children of Colorado and to promote family self-sufficiency, there is a need to strengthen Colorado's child support enforcement laws and to simplify, streamline, and clarify the existing laws relating to wage assignments previously provided for in section 14-14-107 and immediate deductions for family support obligations previously provided for in section 14-14-111. In support of this effort, the general assembly hereby adopts the term "income assignment" to be used to provide consistency and standardization of the process for collecting child support and maintenance.

(2) Notice requirements for income assignments. Notice of income assignments shall be given in accordance with the following provisions based upon the date on which the order sought to be enforced was entered:

(a) **Orders entered before July 10, 1987.** (I) For orders entered before July 10, 1987, that do not include an order for income assignment as described in paragraph (a) of subsection (3) of this section or an order for immediate deductions for family support obligations as described in former section 14-14-111, as it existed prior to July 1, 1996, a notice of pending income assignment shall be sent by certified mail to the last-known address of the obligor, or such notice shall be personally served upon the obligor prior to the activation of an income assignment; except that such notice shall not be required if the obligor was given such notice prior to July 10, 1987, and such notice was in substantial compliance with the requirements of this section. The notice shall be given by the obligee, the obligee's representative, or the delegate child support enforcement unit.

(II) The notice of pending income assignment shall include the following information:

(A) That an income assignment may be activated immediately or at any other time at the request of the obligor, by agreement of the parties, or at the request of an obligee who is receiving support enforcement services from a delegate child support enforcement unit pursuant to section 26-13-106, C.R.S., in accordance with state procedures. Such state procedures require that the obligee request an income assignment in writing and that, after the delegate child support enforcement unit receives the request, it shall review the case to determine if it meets the criteria for requiring income assignment, which criteria are that the obligor is not meeting the terms of a written agreement for an alternative arrangement, or that the reason for the original good cause determination no longer exists, or that the obligor is currently paying child support but has threatened to stop and the obligee documents and substantiates that there has been a change in the obligor's circumstances that will lead the obligor to stop paying child support. If none of the circumstances set forth in this sub-subparagraph (A) exists, then the income assignment shall remain pending unless the obligor fails to comply with the support order by not making a full payment on its due date.



(B) That the activation of an income assignment is the notification to the obligor's employer or employers, trustee, or other payor of funds to withhold income for payment of the support obligation and arrears, if any;

(C) That, if any arrears accrue or already have accrued, an additional payment on the arrears shall be added to the income assignment pursuant to subparagraph (V) of paragraph (b) of subsection (3) of this section;

(D) That the obligor has a right to object to the activation of the income assignment raising the defenses that are available pursuant to sub-subparagraph (B) of subparagraph (VII) of paragraph (b) of subsection (3) of this section;

(E) That the obligor shall notify the family support registry, if payments are required to be made through the registry, in writing, of any change of address or employment within ten days after the change.

(b) **Orders entered on or after July 10, 1987, and before January 1, 1990.** For orders entered on or after July 10, 1987, and before January 1, 1990, no notice of pending income assignment as described in paragraph (a) of this subsection (2) shall be required.

(c) **Orders entered in Title IV-D cases on or after January 1, 1990, and before January 1, 1994.** For orders entered on or after January 1, 1990, and before January 1, 1994, in cases in which the custodian of the child is receiving support enforcement services from a delegate child support enforcement unit pursuant to section 26-13-106, C.R.S., no notice of pending income assignment as described in paragraph (a) of this subsection (2) shall be required.

(d) **Orders entered in non-Title IV-D cases on or after July 10, 1987, and before January 1, 1994.** For orders entered on or after July 10, 1987, and before January 1, 1994, in cases in which the custodian of the child is not receiving support enforcement services from a delegate child support enforcement unit pursuant to section 26-13-106, C.R.S., no notice of pending income assignment as described in paragraph (a) of this subsection (2) shall be required.

(e) **Orders entered on or after January 1, 1994, and before July 1, 1996.** For orders entered on or after January 1, 1994, and before July 1, 1996, no notice of pending income assignment as described in paragraph (a) of this subsection (2) shall be required.

(f) **Orders entered on or after July 1, 1996.** (I) Whenever an obligation for child support, maintenance, child support when combined with maintenance, retroactive support, medical support, child support arrears, or child support debt is initially determined, whether temporary or permanent or whether modified, the amount of child support, maintenance, child support when combined with maintenance, retroactive support, medical support, child support arrears, or child support debt shall be ordered by the court or delegate child support enforcement unit to be activated immediately as an income assignment subject to section 13-54-104 (3), C.R.S., from the income, as defined in section 14-10-115 (3), that is due or is to become due in the future from the obligor's employer, employers, or successor employers or other payor of funds, regardless of the source, of the person obligated to pay the child support, maintenance, child support when combined with maintenance, retroactive support, medical support, child support arrears, or child support debt.

(II) Any order for support shall include the following, if available:

(A) The name, date of birth, and sex of each child for whom the support is ordered;

(B) The obligee's name, social security number, residential and mailing addresses, and date of birth;

(C) The total amount of current support to be paid monthly in each category of support;

(D) The date of commencement of the order and the date or dates of the month that the payments are due;

(E) The total amount of arrears that is due, if any, in each category of support as of the date of the order; and

(F) The obligor's name, social security number, residential and mailing addresses, and date of birth.

(G) (Deleted by amendment, L. 99, p. 1085, § 3, effective July 1, 1999.)

(3) **Activation of income assignment.** Income assignments shall be activated in accordance with the following provisions:

(a) **Immediate activation of income assignments.** (I) Upon entry of an order for child support, maintenance, child support when combined with maintenance, retroactive support, medical support, child support arrears, or child support debt during the time periods described in paragraph (c), (e), or (f) of subsection (2) of this section, the obligee, the obligee's representative, or the delegate child support enforcement unit shall cause a notice of income assignment to be served immediately as described in subsection (4) of this section.

(II) **Exceptions to immediate activation of income assignments.** Income shall not be subject to immediate activation of an income assignment under this paragraph (a) in any case in which:

(A) One of the parties demonstrates, and the court or the delegate child support enforcement unit finds in writing, that there is good cause not to require immediate activation of an income assignment. For the purposes of this sub-subparagraph (A), "good cause" means the following: There is a written determination and explanation by the court or delegate child support enforcement unit stating why implementing immediate activation of an income assignment would not be in the best interests of the child; and the obligor has signed a written agreement to keep the delegate child support enforcement unit, the obligee, or the obligee's representative informed of the obligor's current employer and information on any health insurance coverage to which the obligor has access; and proof is provided that the obligor made timely payments without the necessity of income assignment in previously ordered child support obligations.

(B) A written agreement is reached between both parties that provides for an alternative arrangement. For purposes of this sub-subparagraph (B), the delegate child support enforcement unit shall be considered a party in all cases in which the custodian of a child is receiving support enforcement services from a delegate child support enforcement unit pursuant to section 26-13-106 (1), C.R.S., and as such is required to consent to the alternative written agreement. In all cases in which the custodian of a child is receiving support enforcement services from a delegate child support enforcement unit pursuant to section 26-13-106 (2), C.R.S., the obligee or the obligee's representative shall provide the delegate child support enforcement unit with notice of any agreement reached between the parties pursuant to this sub-subparagraph (B).

(b) (I) **Activation of an income assignment following notice.** An income assignment based on an order entered during the time periods described in paragraph (a), (b), or (d) of subsection (2) of this section shall not be activated unless:

(A) The obligor requests that the income assignment be activated; or

(B) The parties agree at the time of the entry or modification of a support order, or at any other time, that the income assignment is to be activated; or

(C) The obligee files an advance notice of activation with any court having jurisdiction to enforce the support order because a payment was due under a support order and the obligor has failed to make a payment in full as ordered.

(II) **Notice of activation.** When an income assignment is activated pursuant to sub-subparagraph (C) of subparagraph (I) of this paragraph (b), a copy of the advance notice of activation and a form for the obligor to object to the activation listing the available defenses shall be mailed by the obligee or the obligee's representative to the obligor's last-known address. The notice of activation shall contain the following information:

(A) The court that issued the support order;

(B) The case number;

(C) The date of the support order;

(D) The facts establishing that a full support payment was not made on or before it became due;

(E) The amount of overdue support owed;

(F) The amount of income to be withheld for current support and the amount to be withheld for arrears per month;

(G) A statement that, if section 13-54-104 (3), C.R.S., applies, the employer may not withhold more than the limitations set by said section;



(H) The name and address of the obligor's most recently known employer and a statement that the obligor is required to inform the court or the family support registry, if payments are to be made through the registry, of any new employment;

(I) A statement of the obligor's right to object to the activation of the income assignment within fourteen days after the date the advance notice of activation is sent to the obligor and the procedures available for such objection;

(J) The available defenses to the activation;

(K) A statement that failure to object to the activation of an income assignment within fourteen days after the date the advance notice of activation was sent to the obligor will result in the activation of the income assignment pursuant to subsection (4) of this section;

(L) A statement of the procedures the court will follow when an objection is filed by the obligor;

(M) A statement that, if the court denies the objection of the obligor, the income assignment shall be activated pursuant to subsection (4) of this section;

(N) A statement that the income assignment is a continuing assignment; and

(O) A statement that, if arrears have accrued, an additional monthly payment shall be set pursuant to subparagraph (V) of this paragraph (b) and that this payment may be modified if additional arrears accrue.

**(III) Affidavit requirements.** The party activating an income assignment based on an order entered during the time periods described in paragraph (a), (b), or (d) of subsection (2) of this section shall prepare an affidavit of arrears, which shall state the type and amount of support ordered per month and the date upon which the payment was due and, if the payments were to be made into the court registry or the family support registry, state that the full payment was not received by the registry on or before the due date or, if the payments were to be made to the obligee directly, state that the obligee did not receive the full payment on or before the due date, the date and amount of any modifications of the order, the period or periods of time the arrears accrued, the total amount of support that should have been paid, the total amount actually paid, and the total arrears, plus interest, due. If the income assignment is being activated pursuant to sub-subparagraph (A) or (B) of subparagraph (I) of this paragraph (b), the affidavit shall be filed with the court at the time of activation. If payments were ordered to be made through the family support registry, a copy of the payment record maintained by the family support registry shall be sufficient proof of payments made, and no affidavit shall be required. If the income assignment is being activated pursuant to sub-subparagraph (C) of subparagraph (I) of this paragraph (b), the affidavit shall be filed with the advance notice of activation.

**(IV) Agreement to activate.** When an income assignment is activated pursuant to sub-subparagraph (A) or (B) of subparagraph (I) of this paragraph (b) and arrears are owed, as verified by the affidavit of arrears, the parties may agree to an amount of payment on the arrears, or the court may determine an appropriate amount for payment.

**(V) Arrears.** When an income assignment is activated pursuant to sub-subparagraph (C) of subparagraph (I) of this paragraph (b) and arrears are owed, as verified by the affidavit of arrears, the income assignment shall include a payment on the arrears in the amount of one-twenty-fourth of the total amount due up to the date of the activation of the income assignment. The payment on the arrears shall remain the same until the arrears, plus interest, are paid unless the parties subsequently agree to a larger or smaller arrears payment amount or further arrears accrue. The total arrears due, plus interest, may be updated periodically, and the amount of payment may be revised periodically, as appropriate.

**(VI)** A payment on arrears, plus interest, for support, if any, shall be included in an activated income assignment; however, the combined payment on current support and arrears is subject to section 13-54-104 (3), C.R.S.

**(VII) Objections to income assignment.** (A) The obligor may file with the court a written objection to the activation of an income assignment pursuant to sub-subparagraph (C) of subparagraph (I) of this paragraph (b) within fourteen days after the advance notice of activation is sent to the obligor pursuant to subparagraph (II) of this paragraph (b) unless the obligor alleges that the notice was not received, in which case an objection may be filed no later than fourteen days after actual notice. The obligor shall mail a copy of the written objection to the obligee or the obligee's representative.

(B) The objection shall be limited to the defense that there is a mistake of fact such as an error in the identity of the obligor or in the amount of the support.

(C) If an objection is filed by the obligor, a hearing shall be set and held by the court within forty-two days after the date the advance notice of activation was sent to the obligor pursuant to subparagraph (II) of this paragraph (b). The court shall deny the objection without hearing if a defense in sub-subparagraph (B) of this subparagraph (VII) is not alleged.

(D) At a hearing on an objection, the sole issue before the court is whether there was a mistake of fact as specified in sub-subparagraph (B) of this subparagraph (VII).

(E) At a hearing on an objection, reasonable attorney fees and costs may be awarded to the prevailing party.

(F) If an objection is based on the amount of arrears, the income assignment may be activated and enforced as to current support obligations, and the activation of the income assignment as to arrears shall be stayed pending the outcome of a hearing on such objection.

(4) **Notice to withhold income for support.** Fourteen days after the date the advance notice of activation is mailed to the obligor for income assignments on orders entered during the time periods described in paragraphs (a), (b), and (d) of subsection (2) of this section or immediately for income assignments on orders entered during the time periods described in paragraphs (c), (e), and (f) of subsection (2) of this section, an income assignment may be activated by the obligee, the obligee's representative, or the delegate child support enforcement unit by causing a notice to withhold income for support to be served upon the employer, trustee, or other payor of funds, by first-class mail or by electronic service, if such employer, trustee, or other payor of funds mutually agrees with the state child support enforcement agency to receive such income assignments electronically. Receipt of notice by the employer, trustee, or other payor of funds confers jurisdiction of the court over the employer, trustee, or other payor of funds. Income assignments activated for orders entered during the time periods described in paragraphs (c), (e), and (f) of subsection (2) of this section shall be paid through the family support registry pursuant to section 26-13-114, C.R.S. In circumstances in which the source of income to the obligor is unemployment compensation benefits and the custodian of the child is receiving support enforcement services pursuant to section 26-13-106, C.R.S., no notice to withhold income for support shall be required. In such cases, the state child support enforcement agency shall electronically intercept the unemployment compensation benefits through an automated interface with the department of labor and employment. In all other cases, the notice to withhold income for support shall contain the following information and, except in cases in which the obligee is receiving child support enforcement services pursuant to section 26-13-106, C.R.S., shall have a certified copy of the support order attached thereto:

(a) The name and social security number of the obligor;

(b) A statement that withholding must begin no later than the first pay period that begins at least fourteen working days after the date on the notice to withhold income for support;

(c) Instructions concerning withholding the deductions, including:

(I) The amount to be withheld for current support and current maintenance when included in the child support order, the amount to be withheld for past due support, the amount to be withheld for past due maintenance when included in the child support order, the amount to be withheld for child support debt, the amount to be withheld for medical support, the amount to be withheld for current maintenance, the amount to be withheld for past due maintenance per month, and the amount to be withheld for processing fees, if any. In the event that the pay periods of the employer are more frequent, the employer shall withhold per pay period an appropriate percentage of the monthly amount due so that the total withheld during the month will total the monthly amount due.

(II) A statement that the employer, trustee, or other payor of funds may deduct a fee to defray the cost of withholding and that such employer, trustee, or other payor of funds shall refer to the laws governing the work state of the employee for the allowable amount of such fee;

(III) That, if section 13-54-104 (3), C.R.S., applies, the employer, trustee, or other payor of funds may not withhold more than the limitations set by said section;



(d) Instructions about disbursing the withheld amounts, including the requirements that each disbursement:

(I) Shall be forwarded within seven working days after the date of each deduction and withholding would have been paid or credited to the employee;

(II) Shall be forwarded to the address indicated on the notice;

(III) Shall be identified by the case number, the name and social security number of each obligor, the date the deduction was made, the amount of the payment, and the family support registry account number for cases ordered to be paid through the family support registry; and

(IV) May be combined with other disbursements in a single payment to the family support registry, if required to be sent to the registry, if the individual amount of each disbursement is identified as required by subparagraph (III) of this paragraph (d);

(e) A statement specifying whether or not the obligor is required to provide health insurance for the children who are the subject of the order;

(f) and (g) (Deleted by amendment, L. 2000, p. 1704, § 2, effective July 1, 2000.)

(h) A statement that, if the employer, trustee, or other payor of funds fails to withhold income as the notice to withhold income for support directs, the employer, trustee, or other payor of funds shall be liable for both the accumulated amount that should have been withheld from the obligor's income and any other penalties set by state law;

(i) A statement that the employer, trustee, or other payor of funds shall be subject to a fine determined under state law for discharging an obligor from employment, refusing to employ, or taking disciplinary action against an obligor because of a notice to withhold income for support;

(j) A statement that the employer shall notify the family support registry, in writing, if payments are required to be made through the registry promptly after the obligor terminates employment and shall provide the family support registry, in writing, with the obligor's name, date of separation, case identifier which shall be the family support registry account number, last-known home address, and the name and address of the obligor's new employer, if known;

(j.5) A statement that withholding under the notice to withhold income for support has priority over any other legal process under state law against the same income, that federal tax levies in effect before receipt of this notice to withhold income for support have priority, and that the requesting agency should be contacted if there are federal tax levies in effect;

(k) A statement that as long as the obligor is employed by the employer, the income assignment shall not be terminated or modified, except upon written notice by the obligee, the obligee's representative, the delegate child support enforcement unit, or the court;

(k.5) A statement that the employer, trustee, or other payor of funds may be required to report and withhold amounts from lump sum payments such as bonuses, commissions, or severance pay;

(l) (Deleted by amendment, L. 2000, p. 1704, § 2, effective July 1, 2000.)

(l.5) A statement that Colorado employers, trustees, or other payors of funds must comply with this section;

(m) A statement that, if the designated field on the notice to withhold income for support is checked, the employer, trustee, or other payor of funds is required to provide a copy of the notice to withhold income for support to the obligor;

(n) A statement that a fraudulent submission of a notice to withhold income for support shall subject the person submitting the notice to an employer, trustee, or other payor of funds to a fine of not less than one thousand dollars and court costs and attorney fees.

(4.5) When a Colorado employer receives an income assignment, or its equivalent, issued by another state, the employer shall apply the income assignment law of the obligor's principal state of employment. The obligor's principal state of employment shall be presumed to be Colorado unless there is a specific employment contract to the contrary.

(5) When activated, an income assignment shall be a continuing income assignment and shall remain in effect and shall be binding upon any employer, trustee, or other payor of funds upon whom it is served until further notice from the obligee, the obligee's representative, the delegate child support enforcement unit, or the court.

(6) **Priority.** (a) A notice of income assignment for support shall have priority over any garnishment, attachment, or lien.

(b) If there is more than one income assignment for support for the same obligor, the total amount withheld, which is subject to the limits specified in section 13-54-104 (3), C.R.S., shall be distributed in accordance with the priorities set forth in this paragraph (b):

(I) (A) First priority shall be given to income assignments for orders for current monthly child support obligations and maintenance when included in the child support order.

(B) If the amount withheld is sufficient to pay the current monthly support and maintenance for all orders, the employer or other payor of funds shall distribute the amount to all orders and proceed to the second priority to distribute any remaining withholding. If the amount withheld is not sufficient to pay the current monthly support and maintenance in all orders, the employer shall add the current monthly support and maintenance in all orders for a total and then divide the amount of current monthly support and maintenance in each order by the total to determine the percent of the total for each order. The percent for each order derived from such calculation shall be multiplied by the total amount withheld to determine what proportionate share of the amount withheld shall be paid for each order.

(II) (A) Second priority shall be given to income assignments for all orders for medical support when there is a specific amount ordered for medical support.

(B) If the amount withheld is sufficient to pay the medical support for all orders, the employer shall distribute the amount to all orders and proceed to the third priority to distribute any remaining withholding. If the amount withheld is not sufficient to pay the medical support in all orders, the employer shall add the medical support in all orders for a total and then divide the amount of medical support in each order by the total to determine the percent of the total for each order. The percent for each order derived from such calculation shall be multiplied by the total amount withheld to determine what proportionate share of the amount withheld shall be paid for each order.

(III) (A) Third priority shall be given to income assignments for child support debt and support arrears, including medical support arrears.

(B) If the amount withheld is sufficient to pay the child support debt and support arrears for all orders, the employer shall distribute the amount to all orders and proceed to the fourth priority to distribute any remaining withholding. If the amount withheld is not sufficient to pay the child support debt and support arrears in all orders, the employer shall add the child support debt and support arrears in all orders for a total and then divide the amount of child support debt and support arrears in each order by the total to determine the percent of the total for each order. The percent for each order derived from such calculation shall be multiplied by the total amount withheld to determine what proportionate share of the amount withheld shall be paid for each order.

(IV) (A) Fourth priority shall be given to income assignments for orders for maintenance only.

(B) If the amount withheld is sufficient to pay the maintenance only for all orders, the employer shall distribute the amount to all orders. If the amount withheld is not sufficient to pay the maintenance only in all orders, the employer shall add the maintenance only in all orders for a total and then divide the amount of maintenance only in each order by the total to determine the percent of the total for each order. The percent for each order derived from such calculation shall be multiplied by the total amount withheld to determine what proportionate share of the amount withheld shall be paid for each order.

(7) No employer, trustee, or other payor of funds who complies with a notice of income assignment issued pursuant to this section and as provided in subsection (8) of this section shall be liable to the obligor for wrongful withholding.

(8) An employer, trustee, or other payor of funds subject to this section who:

(a) Fails to abide by the terms enumerated in the notice of income assignment may be held in contempt of court;

(b) Wrongfully fails to withhold income in accordance with the provisions of this section shall be liable for both the accumulated amount the employer, trustee, or other payor



of funds should have withheld from the obligor's income and any other penalties set by state law;

(c) Discharges, refuses to hire, or takes disciplinary action against an employee because of the entry or service of an income assignment pursuant to this section may be held in contempt of court or be subject to a fine.

(9) If an employer discharges an employee in violation of the provisions of this section, the employee may, within ninety-one days, bring a civil action for the recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall be lost wages not to exceed six weeks, costs, and reasonable attorney fees.

(10) (a) The obligee, the obligee's representative, the delegate child support enforcement unit, or the court shall promptly notify the employer, trustee, or other payor of funds, in writing, when an income assignment is modified or terminated.

(b) An income assignment shall be modified when:

(I) The support order is modified by the court;

(II) The arrears payment is modified by agreement between the parties pursuant to subparagraph (V) of paragraph (b) of subsection (3) of this section; or

(III) The arrears payment is modified when updated periodically pursuant to subparagraph (V) of paragraph (b) of subsection (3) of this section.

(c) An income assignment shall be terminated when all current maintenance when included in the child support order, past due support, past due maintenance when included in the child support order, child support debt, medical support, current monthly child support, current maintenance, past due maintenance, and processing fees, if any, owed under the support order are paid in full.

(11) Disbursements received from the employer, trustee, or other payor of funds by a delegate child support enforcement unit shall be promptly distributed.

(12) The clerk of the court shall provide, upon request, any information required by the parties about any support order or any order affecting an order for support, including judgments and registered orders.

(13) The department of human services is hereby designated as the income withholding agency as required by the federal "Social Security Act", as amended.

(14) This section applies to any action brought under this article or article 5, 6, or 10 of this title or under article 4 or 6 of title 19, C.R.S., or under article 13.5 of title 26, C.R.S.

(15) Nothing in this section shall affect the availability of any other method for collecting child support, maintenance, child support when combined with maintenance, retroactive support, medical support, child support arrears, or child support debt.

(16) Income assignments under this section shall be issued by a delegate child support enforcement unit under the provisions of the "Colorado Administrative Procedure Act for the Establishment and Enforcement of Child Support", created in article 13.5 of title 26, C.R.S.

(16.3) The employer, trustee, or other payor of funds shall include with the first disbursement an indication of whether dependent health insurance coverage is available to the obligor and whether the obligor has elected to enroll the dependents who are the subject of the order in such coverage and that such information shall be included in a disbursement at least annually thereafter or at the next disbursement in the event of any change in the status of health insurance availability or coverage.

(16.5) The employer shall not be required to collect, possess, or control the obligor's tips, and any such tips shall not be owed by an employer to an obligor.

(16.7) The employer, trustee, or other payor of funds may extract a processing fee of up to five dollars per month from the remainder of the obligor's income after the deduction and withholding.

(17) For purposes of this section, unless the context otherwise requires, "income" means wages as defined in section 14-14-102 (9).

(18) (Deleted by amendment, L. 2000, p. 1704, § 2, effective July 1, 2000.)

(19) A person submitting a fraudulent notice to withhold income for support to an employer, trustee, or other payor of funds shall be subject to a fine of not less than one thousand dollars and court costs and attorney fees.

**Source:** **L. 96:** Entire section added, p. 600, § 12, effective July 1. **L. 97:** (2)(f), IP(4), (4)(d)(I), (4)(i), and (8)(c) amended and (4.5) and (18) added, p. 1271, § 10, effective July 1. **L. 98:** (3)(b)(III) amended, p. 766, § 15, effective July 1. **L. 99:** (2)(f)(II) amended, p. 1085, § 3, effective July 1. **L. 2000:** (2)(a)(II)(E), IP(4), (4), (8)(b), (10)(c), and (18) amended and (4)(m), (4)(n), (16.3), (16.5), (16.7), and (19) added, pp. 1704, 1708, §§ 2, 3, effective July 1. **L. 2002:** IP(4) amended, p. 23, § 2, effective July 1. **L. 2007:** (2)(f)(I) amended, p. 108, § 4, effective March 16. **L. 2011:** IP(4) amended, (SB 11-123), ch. 46, p. 119, § 4, effective August 10. **L. 2012:** (3)(b)(II)(I), (3)(b)(II)(K), (3)(b)(VII)(A), (3)(b)(VII)(C), IP(4), and (9) amended, (SB 12-175), ch. 208, p. 835, § 38, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (3)(b)(II)(I), (3)(b)(II)(K), (3)(b)(VII)(A), and (3)(b)(VII)(C), the introductory portion to subsection (4), and subsection (9) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For the legislative declaration contained in the 1997 act amending subsection (2)(f), the introductory portion to subsection (4), and subsections (4)(d)(I), (4)(i), and (8)(c) and enacting subsections (4.5) and (18), see section 1 of chapter 236, Session Laws of Colorado 1997.

## ANNOTATION

**Law reviews.** For article, "Legislative Update", see 12 Colo. Law. 1257 (1983). For article, "Domestic Case Update", see 14 Colo. Law. 209 (1985).

**Annotator's note.** Since § 14-14-111.5 is similar to § 14-14-107 as it existed prior to the 1996 repeal of said section, relevant cases construing that provision have been included in the annotations to this section.

**Statutory language is clear** that an order for wage assignment is mandatory if the obligor cannot establish one of the two specified defenses. Purpose of new subsection (2) was to effect a mandatory and expedited procedure for wage assignment when default in a child support payment occurred; provision for a limited hearing was included to afford the obligor due process. In re Barnes, 692 P.2d 329 (Colo. App. 1984).

**Section clearly applies to maintenance, whether or not combined with child support.** In re Connell, 831 P.2d 913 (Colo. App. 1992).

**Defense against wage assignment that the full amount claimed is not due is contemplated by section** and therefore success on such defense authorizes an award of attorney fees under section. In re Watters, 782 P.2d 1220 (Colo. App. 1989); In re Sabala, 802 P.2d 1163 (Colo. App. 1990).

**Attorney fee award to obligor must be reconsidered by trial court where obligee also prevails in part.** In re Sabala, 802 P.2d 1163 (Colo. App. 1990).

**There was a hearing on an objection where the amount due was stipulated prior to the hearing** because the issues at the hearing are limited to the identity of the obligor and the amount of the obligation, and an award of fees to the prevailing party is intended to discourage exaggerated claims or attempts to delay payment of valid claims. In re Vivens, 885 P.2d 301 (Colo. App. 1994).

**Wage assignment is mandatory** if the obligor cannot establish one of the specified defenses. In re Barnes, 692 P.2d 329 (Colo. App. 1984); In re Sabala, 802 P.2d 1163 (Colo. App. 1990); In re Connell, 831 P.2d 913 (Colo. App. 1992).

**Obligor may be subjected to more than one wage assignment.** In re Sabala, 802 P.2d 1163 (Colo. App. 1990).

**Denver department of social services entitled to keep proceeds from wage assignment even though assignment by ex-wife would take precedence since ex-wife did not file wage assignment.** Department's actions did not deprive ex-wife of right or ability to receive current support since she could file her own assignment. People in Interest of D.C., 797 P.2d 840 (Colo. App. 1990).

**Accumulated deductions in a PERA member's contribution account are not subject to assignment for payment of future child support obligations.** In re Riggs, 786 P.2d 504 (Colo. App. 1989), cert. denied, 797 P.2d 744 (Colo. 1990).

**14-14-112. Deductions for health insurance.** (1) In all orders which direct the obligor to provide health insurance for any child, the court or delegate child support enforcement unit shall include a provision directing the obligor's employer to enroll such child and the obligor, if enrollment of the obligor is a requirement of the plan, in the health insurance plan and to deduct from the wages due the obligor an amount sufficient to provide



for premiums for health insurance when such insurance is offered by the employer, including any employer subject to the provisions of section 607 (1) of the federal "Employee Retirement Income Security Act of 1974", as amended. For all orders entered prior to August 1, 1992, which direct the obligor to provide health insurance for any child, the obligee or the obligee's representative shall send a copy of the notice of the deduction for health insurance, by first-class mail, to the obligor concurrent with mailing of the notice to the obligor's employer pursuant to subsection (2) of this section. The court or the delegate child support enforcement unit shall direct the obligor to notify the court, or unit if the delegate child support enforcement unit is a party to the court action, in writing, of any change of address or employment within ten days after the change.

(1.5) Effective July 1, 2002, the delegate child support enforcement unit shall follow the procedure set forth in section 26-13-121.5, C.R.S., for the enforcement of orders for health insurance.

(2) Notice of the deduction for health insurance shall be mailed by first-class mail by the obligee or the obligee's representative to the obligor's employer. The notice of the deduction for health insurance shall contain:

(a) The name, address, and social security number of the obligor;  
(b) The name, birthdate, and social security number of any of the children to be covered by the health insurance;

(c) A statement that the employer shall enroll an obligor's child in the health insurance plan in which the obligor is enrolled if the child can be covered under that plan or, if the obligor is not enrolled, in the least costly plan otherwise available to the child, regardless of whether the child was born out of wedlock, is claimed as a dependent on the obligor's federal or state income tax return, lives with the obligor, or lives within the insurer's service area, notwithstanding any other provision of law restricting enrollment to persons who reside in an insurer's service area;

(d) A statement that the deduction for health insurance is to take effect no later than the first pay period after fourteen days from the date on which the notice is mailed to the employer or from the date on which the obligor submits an oral or written request to the employer, whichever occurs sooner, and that the deduction for health insurance is treated as a significant life change under open enrollment requirements;

(e) A statement that compliance with the notice to deduct for health insurance shall not subject the employer to liability to the obligor for wrongful withholding;

(f) A statement that noncompliance with the notice to deduct for health insurance may subject the employer to the liability and sanctions specified in subsection (5) of this section;

(g) A statement that the employer shall promptly notify the court, obligee, or delegate child support enforcement unit in writing within fourteen days after the obligor terminates employment and shall provide, if known, the name of the obligor's new employer;

(h) A statement that, as long as the obligor is employed by the employer, the notice to deduct for health insurance shall not be terminated or modified, except as follows:

(I) Upon written notice by the court, obligee, or delegate child support enforcement unit;

(II) Upon written verification, provided by the obligor to the employer, the employer determines that the child has been enrolled in a comparable health insurance plan that takes effect no later than the effective date on which the child is no longer enrolled under the plan offered by the obligor's employer; or

(III) Upon the employer's elimination of family health coverage for all employees;

(i) A statement that the employer may not discharge or refuse to hire or take disciplinary action against an employee because of the entry or service of a notice to deduct for health insurance issued and executed pursuant to this section and that such a violation may result in a finding of contempt of court;

(j) A statement that if the obligor or employer enrolls the dependents who are the subject of the order in health insurance coverage available through the employer, the employer shall send a copy of such enrollment to the location identified on the notice;

(k) A statement that when a child is no longer enrolled under a family health plan for the reasons described in subparagraphs (I) to (III) of paragraph (h) of this subsection (2), the employer within fourteen days after the termination of coverage shall send to the

location described on the health insurance premium notice a written notice of cancellation of enrollment or a copy of the verification provided by the obligor to the employer that the child is enrolled in a comparable health plan;

(1) A statement that the obligor may file an objection to the notice of the deduction for health insurance with the court if the premium amount does not meet the definition of reasonable cost as provided in section 14-10-115 (10) (g). A premium amount that results in a child support order of fifty dollars or less or that is twenty percent or more of the obligor's gross income shall not be considered reasonable.

(2.5) If an obligor enrolls a child in a health insurance plan other than one provided through the obligor's employment, the obligee, the obligee's representative, or the delegate child support enforcement unit shall send, by first-class mail, a written notice to such health insurance provider with whom the obligor enrolls the child stating that:

(a) The obligor is under a court order to provide health insurance coverage for a child;

(b) The insurance provider shall notify the obligee, the obligee's representative, or the delegate child support enforcement unit of any cancellation of the coverage.

(3) No employer who complies with a notice to deduct for health insurance benefits pursuant to this section shall be liable to the obligor for wrongful withholding.

(4) No employer shall discharge or refuse to hire or take disciplinary action against an employee because of the entry or service of a notice to deduct for health insurance issued and executed pursuant to this section. Any person who violates this subsection (4) may be deemed by the court to be subject to contempt of court.

(5) An employer who wrongfully fails to deduct for health insurance in accordance with the provisions of this section may be held liable for an amount up to the accumulated amount of such premiums the employer or payor should have withheld from the obligor's wages.

(6) When an employer is served with a notice to deduct for health insurance pursuant to this section, and the obligor is no longer employed by the employer, the employer shall promptly notify the court in writing of the obligor's last-known address, social security number, and the name of the obligor's new employer, if known.

(7) If an employer discharges an employee in violation of the provisions of this section, the employee may, within ninety days, bring a civil action for the recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall be lost wages not to exceed six weeks, costs, and reasonable attorney fees.

(8) A notice to deduct for health insurance issued and served pursuant to this section shall be continuing and shall remain in effect and be binding on any current or successor employer upon whom it is served until further notice by the court, obligee, obligee's representative, or delegate child support enforcement unit.

(9) The court, obligee, obligee's representative, or delegate child support enforcement unit shall promptly notify the employer, in writing, when a notice to deduct for health insurance is modified or terminated. A notice to deduct for health insurance shall be terminated when the court order requiring health insurance is terminated.

(10) Deductions for health insurance shall also be ordered by a delegate child support enforcement unit under the provisions of the "Colorado Administrative Procedure Act for the Establishment and Enforcement of Child Support", created in article 13.5 of title 26, C.R.S.

**Source:** L. 92: Entire section added, p. 169, § 4, effective August 1. L. 93: (2)(c) amended and (2)(j) added, p. 1563, § 13, effective September 1. L. 94: (1) amended, p. 1540, § 11, effective July 1; (1), (2)(c), (2)(d), and (2)(h) amended and (2)(k) added, p. 1596, § 5, effective July 1. L. 96: (2.5) added, p. 586, § 1, effective July 1. L. 97: IP(2) amended and (2)(l) added, p. 1273, § 11, effective July 1. L. 98: IP(2) amended, p. 757, § 7, effective July 1. L. 2002: (1), IP(2), (2)(l), and (6) amended and (1.5) added, p. 24, § 3, effective July 1. L. 2007: (2)(l) amended, p. 108, § 5, effective March 16. L. 2012: (2)(g) amended, (SB 12-175), ch. 208, p. 836, § 39, effective July 1.



**Editor's note:** (1) Amendments to subsection (1) by Senate Bill 94-088 and Senate Bill 94-164 were harmonized.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2)(g) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**Cross references:** For the legislative declaration contained in the 1997 act amending the introductory portion to subsection (2) and enacting subsection (2)(l), see section 1 of chapter 236, Session Laws of Colorado 1997.

**14-14-113. Recordation of social security numbers in certain family matters.**

(1) (a) (I) Except as otherwise provided in subparagraph (II) of this paragraph (a), effective July 1, 1997, every application for, or application for the renewal of, a professional or occupational license or certificate, a commercial driver's license pursuant to section 42-2-403, C.R.S., or a marriage license pursuant to section 14-2-105 sought by an individual person shall require the applicant's social security number. Such social security number shall be recorded on the application regardless of the licensing agency's use of another number on the social security field on the license. Nothing in this paragraph (a) shall be construed to require that a person's social security number appear on the professional or occupational license, commercial driver's license, or marriage license.

(II) Notwithstanding the provisions of subparagraph (I) of this paragraph (a), if an applicant for a professional or occupational license, commercial driver's license, or marriage license submits a sworn statement, together with the application, stating that the applicant does not have a social security number, such applicant shall not be required to provide a social security number on his or her application as required in subparagraph (I) of this paragraph (a).

(b) The judicial department shall maintain records of the parties' and children's social security numbers in family matters filed under articles 10 and 14 of this title, articles 4 and 6 of title 19, C.R.S., and article 13.5 of title 26, C.R.S. Nothing in this paragraph (b) shall require that a person's social security number appear on the face of the court order.

(c) All death certificates issued pursuant to section 25-2-110, C.R.S., shall identify the decedent's social security number, if available.

(2) (a) Access to records via the social security number provided in subsection (1) of this section and the security of those records shall be in accordance with section 26-13-107, C.R.S. Access shall be limited to the department of human services only for the purposes of establishing, modifying, or enforcing child support.

(b) Access to records via the social security number provided in subsection (1) of this section may be made by departments within their area of regulatory authority.

(3) In addition to the provisions of subsection (2) of this section, the child support enforcement agency and the delegate child support enforcement units, when exercising authority pursuant to this section, shall be subject to the privacy provisions of section 26-13-102.7, C.R.S.

**Source:** L. 97: Entire section added, p. 1274, § 12, effective July 1. L. 99: (3) amended, p. 622, § 17, effective August 4. L. 2000: (1)(a) amended, p. 1715, § 12, effective July 1. L. 2008: (1)(b) amended, p. 1347, § 2, effective July 1.

**Cross references:** For the legislative declaration contained in the 1997 act enacting this section, see section 1 of chapter 236, Session Laws of Colorado 1997.

## **TITLE 15**

# **PROBATE, TRUSTS, AND FIDUCIARIES**



1871

REPORT OF THE  
COMMISSIONER OF THE  
LAND OFFICE

# **TITLE 15**

## **PROBATE, TRUSTS, AND FIDUCIARIES**

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### **FIDUCIARY**

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##### **Fiduciary**

**Cross references:** For bank and trust company fiduciaries and common trust funds, see articles 24 and 101 to 109 of title 11; for legal investments, see part 6 of article 75 of title 24 and article 60 of



title 11; for investments of teachers' retirement funds, see § 22-64-112; for investment of police officers' and firefighters' pension funds, see article 30.5 of title 31; for investments by veterans administration fiduciaries, see § 28-5-301; for investment by custodians under the "Colorado Uniform Transfers to Minors Act", see § 11-50-113; for abolition of the rule against perpetuities in cases of cemetery trust and employee pension trust, see §§ 38-30-110 to 38-30-112.

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## PART 1

### GENERAL PROVISIONS

**15-1-101. Short title.** This part 1 shall be known and may be cited as the "Uniform Fiduciaries Law".

**Source:** L. 23: p. 178, § 14. CSA: C. 67, § 14. CRS 53: § 57-1-14. C.R.S. 1963: § 57-1-13.

## ANNOTATION

**Law reviews.** For article, "Uniform State Laws of Interest to Colorado Probate Lawyers", see 14 Colo. Law. 1961 (1985). For article, "Some Problems Arising in the Representation of a Fiduciary", see 32 Colo. Law. 11 (June 2003).

**The purpose of the Uniform Fiduciaries Act** is that uniform and definite rules were found

necessary to take the place of diverse and conflicting rules that had grown up concerning constructive notice of breach of fiduciary obligations in order that commerce might proceed with as little hindrance as possible. Wysowatcky v. Denver-Willys, Inc., 131 Colo. 266, 281 P.2d 165 (1955); Commercial Sav. Bank v. Baum, 137 Colo. 538, 327 P.2d 743 (1958).

**Applied** in *Fry & Co. v. District Court*, 653 P.2d 1135 (Colo. 1982).

**15-1-102. Legislative declaration.** This part 1 shall be interpreted and construed so as to effectuate its general purpose to make uniform the law of those states which enact it.

**Source:** L. 23: p. 178, § 13. CSA: C. 67, § 13. CRS 53: § 57-1-13. C.R.S. 1963: § 57-1-12.

**15-1-103. Definitions.** As used in this part 1, unless the context otherwise requires:

(1) "Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

(2) "Fiduciary" includes a trustee under any trust, expressed, implied, resulting, or constructive, executor, administrator, personal representative, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust, or estate.

(3) "Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

(4) "Principal" includes any person to whom a fiduciary as such owes an obligation.

**Source:** L. 23: p. 173, § 1. CSA: C. 67, § 1. CRS 53: § 57-1-1. C.R.S. 1963: § 57-1-1. L. 2002: (2) amended, p. 650, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Conflict of Interest Transactions: Fiduciary Duties of Corporate Directors Who Are Also Controlling Shareholders", see 57 Den. L.J. 609 (1980).

**Officers and directors of a corporation are fiduciaries** as to its stockholders and owe all stockholders the obligation of good faith, candor, forthrightness, and fairness. *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970).

**The existence of a fiduciary relationship between a customer and a stockbroker** is a

question of fact and is created if the relationship is accompanied by the customer's trust and confidence in the broker. *Adams v. Paine, Webber, Jackson & Curtis, Inc.*, 686 P.2d 797 (Colo. App. 1983).

**Applied** in *Clibon Drilling Co. v. Wyoming Mineral Corp.*, 42 Colo. App. 41, 589 P.2d 78 (1978).

**15-1-104. Prior transactions.** The provisions of this part 1 shall not apply to transactions taking place prior to April 16, 1923.

**Source:** L. 23: p. 178, § 11. CSA: C. 67, § 11. CRS 53: § 57-1-11. C.R.S. 1963: § 57-1-10.

**15-1-105. Application of payments to fiduciary.** A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary.

**Source:** L. 23: p. 174, § 2. CSA: C. 67, § 2. CRS 53: § 57-1-2. C.R.S. 1963: § 57-1-2.

#### ANNOTATION

**Applied** in *Clibon Drilling Co. v. Wyoming Mineral Corp.*, 42 Colo. App. 41, 589 P.2d 78

(1978); *Kaneco Oil & Gas v. Univ. Nat. Bank*, 732 P.2d 247 (Colo. App. 1986).



**15-1-106. Transfer of negotiable instruments by fiduciary.** If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by the fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument.

**Source:** L. 23: p. 174, § 4. CSA: C. 67, § 4. CRS 53: § 57-1-4. C.R.S. 1963: § 57-1-3.

**15-1-107. Check drawn by fiduciary payable to third person, effect.** If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligations as fiduciary in drawing or delivering the instrument and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.

**Source:** L. 23: p. 175, § 5. CSA: C. 67, § 5. CRS 53: § 57-1-5. C.R.S. 1963: § 57-1-4.

#### ANNOTATION

The Uniform Fiduciaries Act relaxes some of the harsher rules which require of a bank and of individuals the highest degree of vigilance in the detection of a fiduciary's wrongdoing. *Wysowatcky v. Denver-Willys, Inc.*, 131 Colo. 266, 281 P.2d 165 (1955).

Where an instrument is good on its face, there is no apparent reason for inquiry; it remains good until shown to have been taken in "bad faith" and the burden of proving that is on

the plaintiff. *Wysowatcky v. Denver-Willys, Inc.*, 131 Colo. 266, 281 P.2d 165 (1955).

The loss for breach of a fiduciary obligation should fall on the party directly responsible for the faithless agent and not on one who was a mere conduit to transmit the fund. *Wysowatcky v. Denver-Willys, Inc.*, 131 Colo. 266, 281 P.2d 165 (1955); *Commercial Sav. Bank v. Baum*, 137 Colo. 538, 327 P.2d 743 (1958).

**15-1-108. Check drawn by and payable to fiduciary, effect.** If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument and is not

chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

**Source:** L. 23: p. 175, § 6. CSA: C. 67, § 6. CRS 53: § 57-1-6. C.R.S. 1963: § 57-1-5.

**15-1-109. Deposit in name of fiduciary.** If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

**Source:** L. 23: p. 176, § 7. CSA: C. 67, § 7. CRS 53: § 57-1-7. C.R.S. 1963: § 57-1-6.

#### ANNOTATION

The mere failure of a bank to make inquiry, even though there are suspicious circumstances, does not constitute bad faith unless the facts and circumstances are so cogent and obvious that to remain passive would amount to deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction. *Richards v. Platte Valley Bank*, 866 F.2d 1576 (10th Cir. 1989); *In re M & L Business Machine Co.*, 84 F.3d 1330 (10th Cir. 1996).

In order for bank to be liable to real estate purchaser for bank's paying money to escrow agent who then converted money to his own use, bank was required to either have had actual knowledge that escrow agent was committing a breach of his obligation as fiduciary when he took the money or have acted in bad faith in paying escrow agent. *Richards v. Platte Valley Bank*, 866 F.2d 1576 (10th Cir. 1989).

**Applied** in *Kaneco Oil & Gas v. Univ. Nat. Bank*, 732 P.2d 247 (Colo. App. 1986).

**15-1-110. Check drawn upon account of principal by fiduciary.** If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

**Source:** L. 23: p. 176, § 8. CSA: C. 67, § 8. CRS 53: § 57-1-8. C.R.S. 1963: § 57-1-7.

**15-1-111. Deposits in personal account of fiduciary.** If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks on that account, or of checks payable to his principal and indorsed by him, if he is empowered to indorse such checks or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary by that action; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being



liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.

**Source:** L. 23: p. 177, § 9. CSA: C. 67, § 9. CRS 53: § 57-1-9. C.R.S. 1963: § 57-1-8.

**Cross references:** For deposits by a fiduciary, see part 5 of this article.

### ANNOTATION

**Section inapplicable where funds not held as fiduciary.** This section does not apply where a person depositing the funds to his personal account did not hold such funds as a fiduciary and was not empowered to endorse the checks. *Arvada Hardwood Floor Co. v. James*, 638 P.2d 828 (Colo. App. 1981).

**In order for bank to be liable to real estate purchaser for bank's paying money to escrow**

**agent who then converted money to his own use,** bank was required to either have had actual knowledge that escrow agent was committing a breach of his obligation as fiduciary when he took the money or have acted in bad faith in paying escrow agent. *Richards v. Platte Valley Bank*, 866 F.2d 1576 (10th Cir. 1989).

**15-1-112. Deposits in name of two or more trustees.** When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee authorized by the other trustee to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee to draw checks upon the trust account and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith.

**Source:** L. 23: p. 177, § 10. CSA: C. 67, § 10. CRS 53: § 57-1-10. C.R.S. 1963: § 57-1-9.

**Cross references:** For deposits by a fiduciary, see part 5 of this article.

**15-1-112.5. Liability of a fiduciary for acts of predecessor fiduciary.** In the absence of actual knowledge or information which would cause a reasonable fiduciary to inquire further, a fiduciary shall be under no duty to examine the accounts and records of or inquire into the acts or omissions of a predecessor fiduciary and shall not be liable for failure to seek redress for any act or omission of any predecessor fiduciary.

**Source:** L. 77: Entire section added, p. 829, § 1, effective July 1.

**15-1-113. Cases not provided for in law.** In any case not provided for in this part 1, the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments, and banking, shall continue to apply.

**Source:** L. 23: p. 178, § 12. CSA: C. 67, § 12. CRS 53: § 57-1-12. C.R.S. 1963: § 57-1-11.

## PART 2

### DISTRIBUTION BY FIDUCIARIES OF EXPRESS TRUSTS

**15-1-201. When part 2 applicable.** This part 2 shall be applicable to all powers of appointment or disposition existing or created on or after April 1, 1953, the donees of which powers shall be living on such date.

**Source:** L. 53: p. 304, § 6. CRS 53: § 57-2-6. C.R.S. 1963: § 57-2-6.

**15-1-202. Trustee not liable, when.** If a trustee of an express trust which includes property subject to a power of appointment or other power of disposition distributes such property to those persons who would take such property in default of appointment and such distribution is made not sooner than six months after the death of the donee of such power and without knowledge of the existence of an instrument exercising such power, he shall not be responsible to the appointee under the instrument exercising such power.

**Source:** L. 53: p. 303, § 1. CRS 53: § 57-2-1. C.R.S. 1963: § 57-2-1.

#### ANNOTATION

**Law reviews.** For article, "Trusts and Estates", see 30 Dicta 435 (1953).

**15-1-203. No liability if distribution under instrument.** If a trustee of an express trust which includes property subject to a power of appointment or other power of disposition distributes such property pursuant to an instrument exercising such power and without knowledge of any infirmity in such instrument and thereafter such instrument shall be held wholly or partially invalid, such trustee shall not be responsible to those persons who would take in default of appointment.

**Source:** L. 53: p. 303, § 2. CRS 53: § 57-2-2. C.R.S. 1963: § 57-2-2.

**15-1-204. Rights of appointees.** Nothing in this part 2 shall be deemed to affect the right of the appointee of such property to trace such property into the hands of the distributee or to affect the cause of action of such appointee against such distributee.

**Source:** L. 53: p. 303, § 3. CRS 53: § 57-2-3. C.R.S. 1963: § 57-2-3.

**15-1-205. Rights of persons entitled.** Nothing in this part 2 shall be deemed to affect the right of the person entitled to such property in default of appointment to trace such property into the hands of the appointee or to affect the cause of action of such person against such distributee.

**Source:** L. 53: p. 303, § 4. CRS 53: § 57-2-4. C.R.S. 1963: § 57-2-4.

**15-1-206. Rights of bona fide purchasers.** Nothing in this part 2 shall be construed to impair the title or lien of a purchaser or mortgagee in good faith and for value from the person to whom such property was first conveyed pursuant to, or in default of, appointment, as the case may be.

**Source:** L. 53: p. 304, § 5. CRS 53: § 57-2-5. C.R.S. 1963: § 57-2-5.

#### PART 3

#### FIDUCIARY INVESTMENTS

**15-1-301. Fiduciary defined.** The word "fiduciary" as used in this part 3 means original or successor administrators, special administrators, administrators cum testamento annexo, executors, guardians, conservators, and trustees, whether of express or implied trusts.

**Source:** L. 51: p. 841, § 5. CSA: C. 176, § 126(9). CRS 53: § 57-3-5. C.R.S. 1963: § 57-3-5.



**15-1-302. Application.** The provisions of this part 3 shall apply to and govern all fiduciaries appointed or lawfully acting.

**Source:** L. 51: p. 841, § 3. CSA: C. 176, § 126(7). CRS 53: § 57-3-3. C.R.S. 1963: § 57-3-4.

**15-1-303. Construction of part 3.** Nothing in this part 3 shall be construed as modifying or repealing either section 28-5-214 or section 28-5-301, C.R.S., with respect to investment of surplus funds by appointed guardians and conservators of minor and incompetent beneficiaries of the veterans administration.

**Source:** L. 51: p. 841, § 6. CSA: C. 176, § 126(10). CRS 53: § 57-3-6. C.R.S. 1963: § 57-3-6.

**15-1-304. Standard for investments.** In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of others, fiduciaries shall be required to have in mind the responsibilities which are attached to such offices and the size, nature, and needs of the estates entrusted to their care and shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion, and intelligence exercise in the management of the property of another, not in regard to speculation but in regard to the permanent disposition of funds, considering the probable income as well as the probable safety of capital. Within the limitations of the foregoing standard, fiduciaries are authorized to acquire and retain every kind of property, real, personal, and mixed, and every kind of investment, specifically including, but not by way of limitation, bonds, debentures, and other corporate obligations, stocks, preferred or common, securities of any open-end or closed-end management type investment company or investment trust, and participations in common trust funds, which men of prudence, discretion, and intelligence would acquire or retain for the account of another.

**Source:** L. 51: p. 840, § 1. CSA: C. 176, § 126(5). CRS 53: § 57-3-1. C.R.S. 1963: § 57-3-1. L. 75: Entire section amended, p. 588, § 6, effective July 1.

**Cross references:** For investments by custodians under the "Colorado Uniform Transfers to Minors Act", see § 11-50-113; for legal investments, see part 6 of article 75 of title 24; for investments of police and fire pension funds, see § 31-31-302.

## ANNOTATION

**Law reviews.** For article, "The 'Prudent Man Rule' Now Applies to Investments by Fiduciaries", see 28 Dicta 213 (1951). For article, "Problems in the Administration of Estates of Mental Incompetents", see 29 Dicta 286 (1952). For article, "On the Prudent Man Rule", see 30 Dicta 107 (1953). For article, "The Prudent Man: Charge and Surcharge", see 35 Dicta 69 (1958). For note, "Advice for Advisors - Trust Investments", see 37 Dicta 306 (1960). For comment on Rippey v. Denver United States Nat'l Bank, appearing below, see 45 Den. L.J. 483 (1968). For article, "Standards of Prudent Investment for Minors Act Custodians", see 19 Colo. Law. 39 (1990). For article, "The 'New' Prudent Investor Rule", see 20 Colo. Law. 713 (1991). For article, "The Prudent Investor Rule as it Affects Fiduciary Investments", see 21 Colo. Law. 1883 (1992).

**Within the limits and scope of their fiduciary duty, directors and officers have the**

**power, the duty, and the discretion to exercise their best judgment** when making business decisions for corporate purposes, and such decisions are primarily matters for the judgment of such officers and directors, or the stockholders in exercise of their stockholder powers, and not the court. It is only under special circumstances that the court scrutinizes these decisions. *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970).

**The standard of care imposed by this section** applies to all fiduciaries except custodians. *Buder v. Sartore*, 774 P.2d 1383 (Colo. 1989).

**Ex-husband had fiduciary duty to ex-wife since he retained complete control over her share of stock.** Despite having the power to sell the stock within his sole discretion, the husband still was required to operate within the bounds of prudent judgment, reasonableness, and equity. *Marshall v. Grauberger*, 796 P.2d 34 (Colo. App. 1990).

As a matter of law, the husband owed the wife a fiduciary duty to deal with her interest with the utmost good faith. *Marshall v. Grauberger*, 796 P.2d 34 (Colo. App. 1990).

The "reasonable prudence" standard applies to protecting and caring for the property and does not permit one to prudently speculate. The trustee may not subject his trust property to hazards which a man dealing with his own property might consider warranted if to do so would create danger to the trust estate. *Rippey v. Denver United States Nat'l Bank*, 273 F. Supp. 718 (D. Colo. 1967).

A trustee owes a duty to his beneficiaries to exercise such care and skill as a man of ordinary prudence would exercise in safeguarding and preserving his own property. This rule obtained at common law and has been codified in Colorado. *Rippey v. Denver United States Nat'l Bank*, 273 F. Supp. 718 (D. Colo. 1967).

The trustee should do his best to secure competitive bidding and to surround the sale with such other factors as will tend to cause the property to sell to the greatest advantage. *Rippey v. Denver United States Nat'l Bank*, 273 F. Supp. 718 (D. Colo. 1967); *Murphy v. Cent. Bank & Trust Co.*, 699 P.2d 13 (Colo. App. 1985).

The trustee's duty of loyalty and of reasonable care dictate that he must seek to obtain the best price obtainable for the property which he is selling. The rule is that a trustee has a duty

to determine the fair value of trust property before selling it, and any sale of it for an inadequate consideration measured against its fair value may be subject to being set aside as a constructive fraud upon proper complaint being made. *Rippey v. Denver United States Nat'l Bank*, 273 F. Supp. 718 (D. Colo. 1967); *Murphy v. Cent. Bank & Trust Co.*, 699 P.2d 13 (Colo. App. 1985).

A trustee's duty of loyalty and of reasonable care dictates that he must seek to obtain the best price for trust property he is selling. If a trust has been damaged but there is uncertainty as to the extent of the damage, damages are to be closely approximated by drawing reasonable and probable inferences from the facts proven. *Marshall v. Grauberger*, 796 P.2d 34 (Colo. App. 1990).

Trustee owes a fiduciary duty to the beneficiaries of the trust and he may not allow personal motives to interfere with the discharge of those duties. *Wright v. Wright*, 182 Colo. 425, 514 P.2d 73 (1973); *Vento v. Colo. Nat'l Bank-Pueblo*, 907 P.2d 642 (Colo. App. 1995).

Court may not review with advantages of hindsight. When reviewing investments made by a trustee, a court may not use the advantages of hindsight. *Heller v. First Nat'l Bank*, 657 P.2d 992 (Colo. App. 1982).

Applied in *Canaday v. Kauffman*, 140 Colo. 165, 342 P.2d 1027 (1959); *Kaitz v. Dist. Court*, 650 P.2d 553 (Colo. 1982).

**15-1-304.1. Standard for investments on and after July 1, 1995 - "Colorado Uniform Prudent Investor Act".** (1) On and after July 1, 1995, when investing and managing assets, fiduciaries shall be governed by the standard for trustees set forth in the "Colorado Uniform Prudent Investor Act", article 1.1 of this title.

(2) This section shall not apply to those persons, corporations, entities, or state agencies which were made subject to the provisions of section 15-1-304 by specific reference in another statute in existence prior to July 1, 1995.

**Source: L. 95:** Entire section added, p. 312, § 2, effective July 1.

**15-1-305. Terms of instrument govern.** Nothing in this part 3 shall be construed as authorizing any departure from or variation of the express terms or limitations set forth in any will, agreement, court order, or other instrument creating or defining the fiduciary's duties and powers, but the terms "legal investment" or "authorized investment", or words of similar import as used in any such instrument, shall be taken to mean any investment which is permitted by the terms of section 15-1-304.

**Source: L. 51:** p. 840, § 2. **CSA: C. 176,** § 126(6). **CRS 53:** § 57-3-2. **C.R.S. 1963:** § 57-3-2.

## ANNOTATION

**Law reviews.** For article, "The Meaning of the Prudent Man Rule", see 24 *Rocky Mt. L. Rev.* 44 (1951). For comment on *Rippey v. Denver United States Nat'l Bank*, appearing below, see 45 *Den. L.J.* 483 (1968).

**Despite will's provisions, trustee does not have absolute discretion.** In the will the trustee is authorized to sell the trust property (1) in its sole judgment; (2) at private sale; (3) without advertisement or notice to anyone; (4) without



the aid or necessity of any court order; (5) without consulting the beneficiaries and without regard to their opinions, desires, or judgment; (6) and at such price and upon such terms as to credit or otherwise as the trustee shall determine. The trustee is not therefore authorized to exercise unlimited or absolute discretion in making a sale of trust property. *Rippey v. Denver United States Nat'l Bank*, 273 F. Supp. 718 (D. Colo. 1967).

**In any event trustee cannot act recklessly.** Even if the instrument had contained language granting absolute and uncontrolled discretion, it would not follow that the trustee could act recklessly or in willful abuse of discretion. *Rippey v. Denver United States Nat'l Bank*, 273 F. Supp. 718 (D. Colo. 1967).

**When the bank acts despite a high probability that the beneficiaries would suffer loss,** such conduct is in law reckless and is not protected by an exculpatory clause. *Rippey v. Den-*

*ver United States Nat'l Bank*, 273 F. Supp. 718 (D. Colo. 1967).

**Exculpatory clause does not apply to transaction conducted in unorthodox manner.** An exculpatory clause in the will which provides that the trustee shall be free from liability for "depreciation or loss" of trust property "through error of judgment" does not apply to a loss which resulted from a sale which was not conducted in accordance with orthodox trust principles. Such a provision is usually held to add nothing. It does not limit the trustee liability for even negligence. If the exculpatory provision in express terms relieves the trustee from liability merely for errors of judgment, its effect does not go beyond what a court of equity would do in the absence of an exculpatory provision for a trustee is never held to the liability of an insurer. *Rippey v. Denver United States Nat'l Bank*, 273 F. Supp. 718 (D. Colo. 1967).

**15-1-306. Court not restricted.** Nothing in this part 3 shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale, or management of estate or trust property.

**Source:** L. 51: p. 841, § 3. CSA: C. 176, § 126(7). CRS 53: § 57-3-3. C.R.S. 1963: § 57-3-3.

#### ANNOTATION

**A court may not order trustee to deviate from terms of trust** unless, because of a change of circumstances, compliance with its terms would defeat or substantially impair the accomplishment of its underlying purposes. *Matter of Will of Killin*, 703 P.2d 1323 (Colo. App. 1985).

Deviation from the expressed intent of a testator that trust property be retained during trust administration is not warranted solely because of potential increased income to the income beneficiaries. *Matter of Will of Killin*, 703 P.2d 1323 (Colo. App. 1985).

**15-1-307. Powers of investment in persons other than fiduciary.** Whenever an instrument under which a fiduciary is acting reserves to the settlor or vests in an advisory or investment committee, or in any other person or persons including one or more other fiduciaries, to the exclusion of the fiduciary or to the exclusion of one or more of several fiduciaries, authority to direct the making or retention of any investment, the excluded fiduciary or fiduciaries shall not be liable, either individually or as a fiduciary, for any loss resulting from the making or retention of any investment pursuant to such direction.

**Source:** L. 77: Entire section added, p. 829, § 2, effective July 1.

**15-1-308. Investments in United States government obligations.** In the absence of an express provision to the contrary, any fiduciary is authorized, whenever a governing instrument or order requires or permits investment in United States government obligations which are backed by the full faith and credit of the United States government, to invest in such obligations, either directly or in the form of the securities of or other interests in any open-end or closed-end management type investment company or investment trust registered under the federal "Investment Company Act of 1940", 15 U.S.C. section 80(a)-1 et seq., if the portfolio of such investment company or investment trust is limited to United States government obligations which are backed by the full faith and credit of the United

States government and to repurchase agreements fully collateralized by such obligations and if any such investment company or investment trust actually takes delivery of such collateral, either directly or through an authorized custodian.

**Source:** L. 88: Entire section added, p. 645, § 1, effective April 6.

## PART 4

### UNIFORM PRINCIPAL AND INCOME ACT

#### SUBPART 1

#### DEFINITIONS AND FIDUCIARY DUTIES

**Editor's note:** (1) The National Conference of Commissioners on Uniform State Laws organized the Uniform Principal and Income Act (1997) into six separate articles. In C.R.S., all six articles are combined into this part 4. References in the OFFICIAL COMMENTS to specific sections have been changed to reflect the appropriate C.R.S. citation. References in the OFFICIAL COMMENTS to the 1931 Uniform Act and the 1962 Uniform Act refer to the 1931 Uniform Principal and Income Act and to the 1962 Revised Uniform Principal and Income Act, respectively. References in the OFFICIAL COMMENTS to this act refer to the Uniform Principal and Income Act (1997) contained in this part 4.

(2) This part 4 was numbered as article 4 of chapter 57, C.R.S. 1963. The substantive provisions of this part 4 were repealed and reenacted in 2000, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 4 prior to 2000, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

**Cross references:** For information concerning the effective date of this subpart 1, see § 15-1-434.

**Law reviews:** For article, "Highlights of the 1955 Colorado Legislative Session — Oil and Gas", see 28 Rocky Mt. L. Rev. 53 (1955); for article, "Highlights of the 1955 Colorado Legislative Session — Trusts", see 28 Rocky Mt. L. Rev. 74 (1955); for note, "Are Capital Gains Distributions from Regulated Investment Companies Income or Principal to a Colorado Trustee?", see 31 Rocky Mt. L. Rev. 224 (1959); for article, "The Care and Feeding of Individual Trustees", see 39 U. Colo. L. Rev. 205 (1966); for article, "Some Accounting Problems of Colorado Trustees", see 39 U. Colo. L. Rev. 192 (1967); for article, "Fiduciary Accounting — Are the Ground Rules Clear?", see 11 Colo. Law. 1192 (1982); for article, "Marital Bequest Computations (Pecuniary Bequests)", see 13 Colo. Law. 43 (1984); for article, "Uniform State Laws of Interest to Colorado Probate Lawyers", see 14 Colo. Law. 1961 (1985); for article, "Introduction to Colorado's New Principal and Income Act", see 30 Colo. Law. 55 (March 2001); for article, "Trust Income: New Possibilities and Approaches", see 33 Colo. Law. 77 (December 2004); for article, "Complexities of Pass-Through Entities Held in Trust", see 39 Colo. Law. 59 (June 2010).

## PART 4

### UNIFORM PRINCIPAL AND INCOME ACT (1997)

#### PREFATORY NOTE

This revision of the 1931 Uniform Principal and Income Act and the 1962 Revised Uniform Principal and Income Act has two purposes.

One purpose is to revise the 1931 and the 1962 Uniform Acts. Revision is needed to support the now widespread use of the revocable living trust as a will substitute, to change the rules in those Acts that experience has shown

need to be changed, and to establish new rules to cover situations not provided for in the old Acts, including rules that apply to financial instruments invented since 1962.

The other purpose is to provide a means for implementing the transition to an investment regime based on principles embodied in the Uniform Prudent Investor Act, especially the



principle of investing for total return rather than a certain level of "income" as traditionally perceived in terms of interest, dividends, and rents.

### **Revision of the 1931 and 1962 Uniform Acts**

The prior Acts and this revision of those Acts deal with four questions affecting the rights of beneficiaries:

(1) How is income earned during the probate of an estate to be distributed to trusts and to persons who receive outright bequests of specific property, pecuniary gifts, and the residue?

(2) When an income interest in a trust begins (i.e., when a person who creates the trust dies or when she transfers property to a trust during life), what property is principal that will eventually go to the remainder beneficiaries and what is income?

(3) When an income interest ends, who gets the income that has been received but not distributed, or that is due but not yet collected, or that has accrued but is not yet due?

(4) After an income interest begins and before it ends, how should its receipts and disbursements be allocated to or between principal and income?

Changes in the traditional sections are of three types: new rules that deal with situations not covered by the prior Acts, clarification of provisions in the 1962 Uniform Act, and changes to rules in the prior Acts.

**New rules.** Issues addressed by some of the more significant new rules include:

(1) The application of the probate administration rules to revocable living trusts after the settlor's death and to other terminating trusts. Sections 15-1-406 through 15-1-410.

(2) The payment of interest or some other amount on the delayed payment of an outright pecuniary gift that is made pursuant to a trust agreement instead of a will when the agreement or state law does not provide for such a payment. Section 15-1-406 (1)(c).

(3) The allocation of net income from partnership interests acquired by the trustee other than from a decedent (the old Acts deal only with partnership interests acquired from a decedent). Section 15-1-411.

(4) An "unincorporated entity" concept has been introduced to deal with businesses operated by a trustee, including farming and livestock operations, and investment activities in rental real estate, natural resources, timber, and derivatives. Section 15-1-413.

(5) The allocation of receipts from discount obligations such as zero-coupon bonds. Section 15-1-416 (2).

(6) The allocation of net income from harvesting and selling timber between principal and income. Section 15-1-422.

(7) The allocation between principal and income of receipts from derivatives, options, and

asset-backed securities. Sections 15-1-424 and 15-1-425.

(8) Disbursements made because of environmental laws. Section 15-1-427 (1)(g).

(9) Income tax obligations resulting from the ownership of S corporation stock and interests in partnerships. Section 15-1-430.

(10) The power to make adjustments between principal and income to correct inequities caused by tax elections or peculiarities in the way the fiduciary income tax rules apply. Section 15-1-431.

**Clarifications and changes in existing rules.** A number of matters provided for in the prior Acts have been changed or clarified in this revision, including the following:

(1) An income beneficiary's estate will be entitled to receive only net income actually received by a trust before the beneficiary's death and not items of accrued income. Section 15-1-410.

(2) Income from a partnership is based on actual distributions from the partnership, in the same manner as corporate distributions. Section 15-1-411.

(3) Distributions from corporations and partnerships that exceed 20% of the entity's gross assets will be principal whether or not intended by the entity to be a partial liquidation. Section 15-1-411 (4)(b).

(4) Deferred compensation is dealt with in greater detail in a separate section. Section 15-1-419.

(5) The 1962 Uniform Act rule for "property subject to depletion," (patents, copyrights, royalties, and the like), which provides that a trustee may allocate up to 5% of the asset's inventory value to income and the balance to principal, has been replaced by a rule that allocates 90% of the amounts received to principal and the balance to income. Section 15-1-420.

(6) The percentage used to allocate amounts received from oil and gas has been changed 90% of those receipts are allocated to principal and the balance to income. Section 15-1-421.

(7) The unproductive property rule has been eliminated for trusts other than marital deduction trusts. Section 15-1-423.

(8) Charging depreciation against income is no longer mandatory, and is left to the discretion of the trustee. Section 15-1-428.

### **Coordination with the Uniform Prudent Investor Act**

The law of trust investment has been modernized. See Uniform Prudent Investor Act (1994); Restatement (Third) of Trusts: Prudent Investor Rule (1992) (hereinafter Restatement of Trusts 3d: Prudent Investor Rule). Now it is time to update the principal and income allocation rules so the two bodies of doctrine can work well together. This revision deals conservatively with the tension between modern investment theory

and traditional income allocation. The starting point is to use the traditional system. If prudent investing of all the assets in a trust viewed as a portfolio and traditional allocation effectuate the intent of the settlor, then nothing need be done. The Act, however, helps the trustee who has made a prudent, modern portfolio-based investment decision that has the initial effect of skewing return from all the assets under management, viewed as a portfolio, as between income and principal beneficiaries. The Act gives that trustee a power to reallocate the portfolio return suitably. To leave a trustee constrained by the traditional system would inhibit the trustee's ability to fully implement modern portfolio theory.

As to modern investing see, e.g., the Preface to, terms of, and Comments to the Uniform Prudent Investor Act (1994); the discussion and reporter's note by Edward C. Halbach, Jr. in Restatement of Trusts 3d: Prudent Investor Rule; John H. Langbein, The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa L. Rev. 641 (1996); Bevis Longstreth, Modern Investment Management and the Pru-

dent Man Rule (1986); John H. Langbein & Richard A. Posner, The Revolution in Trust Investment Law, 62 A.B.A.J. 887 (1976); and Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U. L. Rev. 52 (1987). See also R.A. Brearly, An Introduction to Risk and Return from Common Stocks (2d ed. 1983); Jonathan R. Macey, An Introduction to Modern Financial Theory (2d ed. 1998). As to the need for principal and income reform see, e.g., Joel C. Dobris, Real Return, Modern Portfolio Theory and College, University and Foundation Decisions on Annual Spending From Endowments: A Visit to the World of Spending Rules, 28 Real Prop., Prob., & Tr. J. 49 (1993); Joel C. Dobris, The Probate World at the End of the Century: Is a New Principal and Income Act in Your Future?, 28 Real Prop., Prob., & Tr. J. 393 (1993); and Kenneth L. Hirsch, Inflation and the Law of Trusts, 18 Real Prop., Prob., & Tr. J. 601 (1983). See also, Jerold I. Horn, The Prudent Investor Rule — Impact on Drafting and Administration of Trusts, 20 ACTEC Notes 26 (Summer 1994).

**15-1-401. Short title.** Subparts 1 through 6 of this part 4 shall be known and may be cited as the “Uniform Principal and Income Act”.

**Source:** L. 2000: Entire part R&RE, p. 1128, § 1, effective July 1, 2001. L. 2009: Entire section amended, (HB 09-1241), ch. 169, p. 742, § 1, effective April 22.

**Editor's note:** This section is similar to former § 15-1-401 as it existed prior to 2001.

**15-1-402. Definitions.** As used in this part 4, unless the context otherwise requires:

(1) “Accounting period” means a calendar year unless another twelve-month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends.

(2) “Beneficiary” includes, in the case of a decedent's estate, an heir and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) “Fiduciary” means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) “Income” means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in subpart 4 of this part 4.

(5) “Income beneficiary” means a person to whom net income of a trust is or may be payable.

(6) “Income interest” means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) “Mandatory income interest” means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) “Net income” means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this part 4 to or from income during the period.

(9) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.



(10) “Principal” means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(10.5) “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s qualification is determined:

(a) Is a distributee or a permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interest of the distributees described in paragraph (a) of this subsection (10.5) terminated on that date; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on said date.

(11) “Remainder beneficiary” means a person entitled to receive principal when an income interest ends.

(12) “Terms of a trust” means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(12.5) “Total return trust” means a trust that is converted to a total return trust pursuant to section 15-1-404.5 or a trust the terms of which manifest the settlor’s intent that the trustee will administer the trust in accordance with section 15-1-404.5 (4) and (4.5).

(13) “Trustee” includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

**Source:** L. 2000: Entire part R&RE, p. 1128, § 1, effective July 1, 2001. L. 2003: (10.5) and (12.5) added, p. 2102, § 1, effective May 22.

**Editor’s note:** This section is similar to former § 15-1-403 as it existed prior to 2001.

### OFFICIAL COMMENT

**“Income beneficiary.”** The definitions of income beneficiary (Section 15-1-402 (5)) and income interest (Section 15-1-402 (6)) cover both mandatory and discretionary beneficiaries and interests. There are no definitions for “discretionary income beneficiary” or “discretionary income interest” because those terms are not used in the Act.

**Inventory value.** There is no definition for inventory value in this Act because the provisions in which that term was used in the 1962 Uniform Act have either been eliminated (in the case of the underproductive property provision) or changed in a way that eliminates the need for the term (in the case of bonds and other money obligations, property subject to depletion, and the method for determining entitlement to income distributed from a probate estate).

**“Net income.”** The reference to “transfers under this part 4 to or from income” means transfers made under Sections 15-4-404 (1), 15-1-422 (2), 15-1-427 (2), 15-1-428 (2), 15-1-429 (1), and 15-1-431.

**“Terms of a trust.”** This term was chosen in preference to “terms of the trust instrument” (the phrase used in the 1962 Uniform Act) to make it clear that the Act applies to oral trusts as well as those whose terms are expressed in written documents. The definition is based on the Restatement (Second) of Trusts § 4 (1959) and the Restatement (Third) of Trusts § 4 (Tent. Draft No. 1, 1996). Constructional preferences or rules would also apply, if necessary, to determine the terms of the trust.

### ANNOTATION

**Army retirement pension is not a “return derived from principal”** as is ordinary unearned income. In re Ellis, 36 Colo. App. 234,

538 P.2d 1347 (1975), aff’d, 191 Colo. 317, 552 P.2d 506 (1976) (decided prior to 2000 repeal and reenactment).

**15-1-403. Fiduciary duties - general principles.** (1) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of subparts 2 and 3 of this part 4, a fiduciary:

(a) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in subparts 1 through 6 of this part 4;

(b) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by subparts 1 through 6 of this part 4;

(c) Shall administer a trust or estate in accordance with subparts 1 through 6 of this part 4 if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(d) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and subparts 1 through 6 of this part 4 do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(2) In exercising the power to adjust under section 15-1-404 (1) or a discretionary power of administration regarding a matter within the scope of subparts 1 through 6 of this part 4, whether granted by the terms of a trust, a will, or subparts 1 through 6 of this part 4, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with subparts 1 through 6 of this part 4 is presumed to be fair and reasonable to all of the beneficiaries.

(3) The terms and conditions of a trust or a will shall govern all actions taken by a fiduciary with respect to any matter within the scope of subparts 1 through 6 of this part 4. The provisions of subparts 1 through 6 of this part 4 are default provisions and may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust or a will. The provisions of subparts 1 through 6 of this part 4 shall govern the administration of a trust or will by a fiduciary only if such trust or will contains no conflicting provision.

(4) Nothing in subparts 1 through 6 of this part 4 shall be construed to limit or restrict a maker of a trust or will from making provisions in such trust or will that are different from the provisions in subparts 1 through 6 of this part 4.

**Source:** L. 2000: Entire part R&RE, p. 1129, § 1, effective July 1, 2001. L. 2009: Entire section amended, (HB 09-1241), ch. 169, p. 742, § 2, effective April 22.

### OFFICIAL COMMENT

**Prior Act.** The rule in Section 2(a) of the 1962 Uniform Act is restated in Section 15-1-403 (1), without changing its substance, to emphasize that the Act contains only default rules and that provisions in the terms of the trust are paramount. However, Section 2(a) of the 1962 Uniform Act applies only to the allocation of receipts and disbursements to or between principal and income. In this Act, the first sentence of Section 15-1-403 (1) states that it also applies to matters within the scope of sections 15-1-406 to 15-1-410. Section 15-1-403 (1)(b) incorporates the rule in Section 2(b) of the 1962 Uniform Act that a discretionary allocation made by the trustee that is contrary to a rule in the Act should not give rise to an inference of imprudence or partiality by the trustee.

The Act deletes the language that appears at the end of 1962 Uniform Act Section 2(a)(3) — “and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their affairs” — because persons of ordinary prudence, discretion and judgment, acting in the management of their own affairs do not normally think in terms of the interests of successive beneficiaries. If

there is an analogy to an individual’s decision-making process, it is probably the individual’s decision to spend or to save, but this is not a useful guideline for trust administration. No case has been found in which a court has relied on the “prudent man” rule of the 1962 Uniform Act.

**Fiduciary discretion.** The general rule is that if a discretionary power is conferred upon a trustee, the exercise of that power is not subject to control by a court except to prevent an abuse of discretion. Restatement (Second) of Trusts § 187. The situations in which a court will control the exercise of a trustee’s discretion are discussed in the comments to § 187. See also *id.* § 233 Comment p.

**Questions for which there is no provision.** Section 15-1-403 (1)(d) allocates receipts and disbursements to principal when there is no provision for a different allocation in the terms of the trust, the will, or the Act. This may occur because money is received from a financial instrument not available at the present time (inflation-indexed bonds might have fallen into this category had they been announced after this Act was approved by the Commissioners on Uni-



form State Laws) or because a transaction is of a type or occurs in a manner not anticipated by the Drafting Committee for this Act or the drafter of the trust instrument.

Allocating to principal a disbursement for which there is no provision in the Act or the terms of the trust preserves the income beneficiary's level of income in the year it is allocated to principal, but thereafter will reduce the amount of income produced by the principal. Allocating to principal a receipt for which there is no provision will increase the income received by the income beneficiary in subsequent years, and will eventually, upon termination of the trust, also favor the remainder beneficiary. Allocating these items to principal implements the rule that requires a trustee to administer the trust impartially, based on what is fair and reasonable to both income and remainder beneficiaries. However, if the trustee decides that an adjustment between principal and income is needed to enable the trustee to comply with Section 15-1-403 (2), after considering the return from the portfolio as a whole, the trustee may make an appropriate adjustment under Section 15-1-404 (1).

**Duty of impartiality.** Whenever there are two or more beneficiaries, a trustee is under a duty to deal impartially with them. Restatement of Trusts 3d: Prudent Investor Rule § 183 (1992). This rule applies whether the beneficiaries' interests in the trust are concurrent or suc-

cessive. If the terms of the trust give the trustee discretion to favor one beneficiary over another, a court will not control the exercise of such discretion except to prevent the trustee from abusing it. Id. § 183, Comment *a*. "The precise meaning of the trustee's duty of impartiality and the balancing of competing interests and objectives inevitably are matters of judgment and interpretation. Thus, the duty and balancing are affected by the purposes, terms, distribution requirements, and other circumstances of the trust, not only at the outset but as they may change from time to time." Id. § 232, Comment *c*.

The terms of a trust may provide that the trustee, or an accountant engaged by the trustee, or a committee of persons who may be family members or business associates, shall have the power to determine what is income and what is principal. If the terms of a trust provide that this Act specifically or principal and income legislation in general does not apply to the trust but fail to provide a rule to deal with a matter provided for in this Act, the trustee has an implied grant of discretion to decide the question. Section 15-1-403 (2) provides that the rule of impartiality applies in the exercise of such a discretionary power to the extent that the terms of the trust do not provide that one or more of the beneficiaries are to be favored. The fact that a person is named an income beneficiary or a remainder beneficiary is not by itself an indication of partiality for that beneficiary.

**15-1-404. Trustee's power to adjust.** (1) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in section 15-1-403 (1), that the trustee is unable to comply with section 15-1-403 (2).

(2) In deciding whether and to what extent to exercise the power conferred by subsection (1) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (a) The nature, purpose, and expected duration of the trust;
- (b) The intent of the settlor;
- (c) The identity and circumstances of the beneficiaries;
- (d) The needs for liquidity, regularity of income, and preservation and appreciation of capital;
- (e) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
- (f) The net amount allocated to income under the other sections of subparts 1 through 6 of this part 4 and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (g) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
- (h) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

- (i) The anticipated tax consequences of an adjustment.
- (3) A trustee may not make an adjustment:
  - (a) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
  - (b) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;
  - (c) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;
  - (d) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;
  - (e) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;
  - (f) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;
  - (g) If the trustee is a beneficiary of the trust;
  - (h) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly; or
  - (i) If the trust is a unitrust.
- (4) If the provisions of paragraph (e), (f), (g), or (h) of subsection (3) of this section apply to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.
- (5) A trustee may release the entire power conferred by subsection (1) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in paragraph (a), (b), (c), (d), (e), (f), or (h) of subsection (3) of this section, or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (3) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.
- (6) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (1) of this section.
- (7) Nothing in this section or in subparts 1 through 6 of this part 4 is intended to create or imply a duty to make an adjustment, and a trustee is not liable for not considering whether to make an adjustment or for choosing not to make an adjustment. In a proceeding with respect to a trustee's exercise or nonexercise of the power to make an adjustment under this section, the sole remedy is to direct, deny, or revise an adjustment between principal and income.

**Source:** L. 2000: Entire part R&RE, p. 1130, § 1, effective July 1, 2001. L. 2003: (3)(g) and (3)(h) amended and (3)(i) added, p. 2102, § 2, effective May 22. L. 2006: (3)(i) amended, p. 388, § 16, effective July 1. L. 2009: (2)(f) and (7) amended, (HB 09-1241), ch. 169, p. 743, § 3, effective April 22.

#### OFFICIAL COMMENT

**Purpose and Scope of Provision.** The purpose of Section 15-1-404 is to enable a trustee to select investments using the standards of a pru-

dent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such



as interest, dividends, and rents. Section 15-1-404 (1) authorizes a trustee to make adjustments between principal and income if three conditions are met: (1) the trustee must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary's distribution rights in terms of the right to receive "income" in the sense of traditional trust accounting income; and (3) the trustee must determine, after applying the rules in Section 15-1-403 (1), that he is unable to comply with Section 15-1-403 (2). In deciding whether and to what extent to exercise the power to adjust, the trustee is required to consider the factors described in Section 15-1-404 (2), but the trustee may not make an adjustment in circumstances described in Section 15-4-404 (3).

Section 15-1-404 does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule. The paramount consideration in applying Section 15-1-404 (1) is the requirement in Section 15-1-403 (2) that "a fiduciary must administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." The power to adjust is subject to control by the court to prevent an abuse of discretion. Restatement (Second) of Trusts § 187 (1959). See also *id.* §§ 183, 232, 233, Comment *p* (1959).

Section 15-1-404 will be important for trusts that are irrevocable when a State adopts the prudent investor rule by statute or judicial approval of the rule in Restatement of Trusts 3d: Prudent Investor Rule. Wills and trust instruments executed after the rule is adopted can be drafted to describe a beneficiary's distribution rights in terms that do not depend upon the amount of trust accounting income, but to the extent that drafters of trust documents continue to describe an income beneficiary's distribution rights by referring to trust accounting income, Section 15-1-404 will be an important tool in trust administration.

**Three conditions to the exercise of the power to adjust.** The first of the three conditions that must be met before a trustee can exercise the power to adjust — that the trustee invest and manage trust assets as a prudent investor — is expressed in this Act by language derived from the Uniform Prudent Investor Act, but the condition will be met whether the prudent investor rule applies because the Uniform

Act or other prudent investor legislation has been enacted, the prudent investor rule has been approved by the courts, or the terms of the trust require it. Even if a State's legislature or courts have not formally adopted the rule, the Restatement establishes the prudent investor rule as an authoritative interpretation of the common law prudent man rule, referring to the prudent investor rule as a "modest reformulation of the Harvard College dictum and the basic rule of prior Restatements." Restatement of Trusts 3d: Prudent Investor Rule, Introduction, at 5. As a result, there is a basis for concluding that the first condition is satisfied in virtually all States except those in which a trustee is permitted to invest only in assets set forth in a statutory "legal list."

The second condition will be met when the terms of the trust require all of the "income" to be distributed at regular intervals; or when the terms of the trust require a trustee to distribute all of the income, but permit the trustee to decide how much to distribute to each member of a class of beneficiaries; or when the terms of a trust provide that the beneficiary shall receive the greater of the trust accounting income and a fixed dollar amount (an annuity), or of trust accounting income and a fractional share of the value of the trust assets (a unitrust amount). If the trust authorizes the trustee in its discretion to distribute the trust's income to the beneficiary or to accumulate some or all of the income, the condition will be met because the terms of the trust do not permit the trustee to distribute more than the trust accounting income.

To meet the third condition, the trustee must first meet the requirements of Section 15-1-403 (1), i.e., she must apply the terms of the trust, decide whether to exercise the discretionary powers given to the trustee under the terms of the trust, and must apply the provisions of the Act if the terms of the trust do not contain a different provision or give the trustee discretion. Second, the trustee must determine the extent to which the terms of the trust clearly manifest an intention by the settlor that the trustee may or must favor one or more of the beneficiaries. To the extent that the terms of the trust do not require partiality, the trustee must conclude that she is unable to comply with the duty to administer the trust impartially. To the extent that the terms of the trust do require or permit the trustee to favor the income beneficiary or the remainder beneficiary, the trustee must conclude that she is unable to achieve the degree of partiality required or permitted. If the trustee comes to either conclusion — that she is unable to administer the trust impartially or that she is unable to achieve the degree of partiality required or permitted — she may exercise the power to adjust under Section 15-1-404 (1).

**Impartiality and productivity of income.** The duty of impartiality between income and

remainder beneficiaries is linked to the trustee's duty to make the portfolio productive of trust accounting income whenever the distribution requirements are expressed in terms of distributing the trust's "income." The 1962 Uniform Act implies that the duty to produce income applies on an asset by asset basis because the right of an income beneficiary to receive "delayed income" from the sale proceeds of underproductive property under Section 12 of that Act arises if "any part of principal ... has not produced an average net income of a least 1% per year of its inventory value for more than a year ... ." Under the prudent investor rule, "[t]o whatever extent a requirement of income productivity exists, ... the requirement applies not investment by investment but to the portfolio as a whole." Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment i, at 34. The power to adjust under Section 15-1-404 (1) is also to be exercised by considering net income from the portfolio as a whole and not investment by investment. Section 15-1-423 (2) of this Act eliminates the underproductive property rule in all cases other than trusts for which a marital deduction is allowed; the rule applies to a marital deduction trust if the trust's assets "consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets ..." — in other words, the section applies by reference to the portfolio as a whole.

While the purpose of the power to adjust in Section 15-1-404 (1) is to eliminate the need for a trustee who operates under the prudent investor rule to be concerned about the income component of the portfolio's total return, the trustee must still determine the extent to which a distribution must be made to an income beneficiary and the adequacy of the portfolio's liquidity as a whole to make that distribution.

For a discussion of investment considerations involving specific investments and techniques under the prudent investor rule, see Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments *k-p*.

**Factors to consider in exercising the power to adjust.** Section 15-1-404 (2) requires a trustee to consider factors relevant to the trust and its beneficiaries in deciding whether and to what extent the power to adjust should be exercised. Section 2(c) of the Uniform Prudent Investor Act sets forth circumstances that a trustee is to consider in investing and managing trust assets. The circumstances in Section 2(c) of the Uniform Prudent Investor Act are the source of the factors in paragraphs (a) through (f) and (h) of Section 15-1-404 (2) (modified where necessary to adapt them to the purposes of this Act) so that, to the extent possible, comparable factors will apply to investment decisions and decisions involving the power to adjust. If a trustee who is operating under the prudent investor rule decides that the portfolio should be composed of

financial assets whose total return will result primarily from capital appreciation rather than dividends, interest, and rents, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary under Section 15-1-404. On the other hand, if a trustee decides that the risk and return objectives for the trust are best achieved by a portfolio whose total return includes interest and dividend income that is sufficient to provide the income beneficiary with the beneficial interest to which the beneficiary is entitled under the terms of the trust, the trustee can decide that it is unnecessary to exercise the power to adjust.

**Assets received from the settlor.** Section 3 of the Uniform Prudent Investor Act provides that "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." The special circumstances may include the wish to retain a family business, the benefit derived from deferring liquidation of the asset in order to defer payment of income taxes, or the anticipated capital appreciation from retaining an asset such as undeveloped real estate for a long period. To the extent the trustee retains assets received from the settlor because of special circumstances that overcome the duty to diversify, the trustee may take these circumstances into account in determining whether and to what extent the power to adjust should be exercised to change the results produced by other provisions of this Act that apply to the retained assets. See Section 15-1-404 (2)(e); Uniform Prudent Investor Act § 3, Comment, 7B U.L.A. 18, at 25-26 (Supp. 1997); Restatement of Trusts 3d: Prudent Investor Rule § 229 and Comments *a-e*.

**Limitations on the power to adjust.** The purpose of subsections (3)(a) through (d) is to preserve tax benefits that may have been an important purpose for creating the trust. Subsections (3)(e), (f), and (h) deny the power to adjust in the circumstances described in those subsections in order to prevent adverse tax consequences, and subsection (3)(g) denies the power to adjust to any beneficiary, whether or not possession of the power may have adverse tax consequences.

Under subsection (3)(a), a trustee cannot make an adjustment that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is allowed; but this subsection does not prevent the trustee from making an adjustment that increases the amount of income paid from a marital deduction trust to the spouse. Subsection (3)(a) applies to a trust that qualifies for the marital deduction because the spouse has a general power of appointment over the trust, but it applies to a qualified terminable interest prop-



erty (QTIP) trust only if and to the extent that the fiduciary makes the election required to obtain the tax deduction. Subsection (3)(a) does not apply to a so-called "estate" trust. This type of trust qualifies for the marital deduction because the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies; it is not necessary for the terms of an estate trust to require the income to be distributed annually. Reg. § 20.2056(c)-2(b)(1)(iii).

Subsection (3)(c) applies to annuity trusts and unitrusts with no charitable beneficiaries as well as to trusts with charitable income or remainder beneficiaries; its purpose is to make it clear that a beneficiary's right to receive a fixed annuity or a fixed fraction of the value of a trust's assets is not subject to adjustment under Section 15-1-404 (1). Subsection (3)(c) does not apply to any additional amount to which the beneficiary may be entitled that is expressed in terms of a right to receive income from the trust. For example, if a beneficiary is to receive a fixed annuity or the trust's income, whichever is greater, subsection (3)(c) does not prevent a trustee from making an adjustment under Section 15-1-404 (1) in determining the amount of the trust's income.

If subsection (3)(e), (f), (g), or (h), prevents a trustee from exercising the power to adjust, subsection (4) permits a cotrustee who is not subject to the provision to exercise the power unless the terms of the trust do not permit the cotrustee to do so.

**Release of the power to adjust.** Section 15-1-404 (5) permits a trustee to release all or part of the power to adjust in circumstances in which the possession or exercise of the power might deprive the trust of a tax benefit or impose a tax burden. For example, if possessing the power would diminish the actuarial value of the income interest in a trust for which the income beneficiary's estate may be eligible to claim a credit for property previously taxed if the beneficiary dies within ten years after the death of the person creating the trust, the trustee is permitted under subsection (5) to release just the power to adjust from income to principal.

**Trust terms that limit a power to adjust.** Section 15-1-404 (6) applies to trust provisions that limit a trustee's power to adjust. Since the power is intended to enable trustees to employ the prudent investor rule without being constrained by traditional principal and income rules, an instrument executed before the adoption of this Act whose terms describe the amount that may or must be distributed to a beneficiary by referring to the trust's income or that prohibit the invasion of principal or that prohibit equitable adjustments in general should not be construed as forbidding the use of the power to adjust under Section 15-1-404 (1) if the need for adjustment arises because the trustee is operating under the prudent investor rule. Instruments

containing such provisions that are executed after the adoption of this Act should specifically refer to the power to adjust if the settlor intends to forbid its use. See generally, Joel C. Dobris, *Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning*, 66 Iowa L. Rev. 273 (1981).

**Examples.** The following examples illustrate the application of Section 15-1-404:

**Example (1)** — T is the successor trustee of a trust that provides income to A for life, remainder to B. T has received from the prior trustee a portfolio of financial assets invested 20% in stocks and 80% in bonds. Following the prudent investor rule, T determines that a strategy of investing the portfolio 50% in stocks and 50% in bonds has risk and return objectives that are reasonably suited to the trust, but T also determines that adopting this approach will cause the trust to receive a smaller amount of dividend and interest income. After considering the factors in Section 15-1-404 (2), T may transfer cash from principal to income to the extent T considers it necessary to increase the amount distributed to the income beneficiary.

**Example (2)** — T is the trustee of a trust that requires the income to be paid to the settlor's son C for life, remainder to C's daughter D. In a period of very high inflation, T purchases bonds that pay double-digit interest and determines that a portion of the interest, which is allocated to income under Section 15-1-416 of this Act, is a return of capital. In consideration of the loss of value of principal due to inflation and other factors that T considers relevant, T may transfer part of the interest to principal.

**Example (3)** — T is the trustee of a trust that requires the income to be paid to the settlor's sister E for life, remainder to charity F. E is a retired schoolteacher who is single and has no children. E's income from her social security, pension, and savings exceeds the amount required to provide for her accustomed standard of living. The terms of the trust permit T to invade principal to provide for E's health and to support her in her accustomed manner of living, but do not otherwise indicate that T should favor E or F. Applying the prudent investor rule, T determines that the trust assets should be invested entirely in growth stocks that produce very little dividend income. Even though it is not necessary to invade principal to maintain E's accustomed standard of living, she is entitled to receive from the trust the degree of beneficial enjoyment normally accorded a person who is the sole income beneficiary of a trust, and T may transfer cash from principal to income to provide her with that degree of enjoyment.

**Example (4)** — T is the trustee of a trust that is governed by the law of State X. The trust became irrevocable before State X adopted the prudent investor rule. The terms of the trust require all of the income to be paid to G for life,

remainder to H, and also give T the power to invade principal for the benefit of G for "dire emergencies only." The terms of the trust limit the aggregate amount that T can distribute to G from principal during G's life to 6% of the trust's value at its inception. The trust's portfolio is invested initially 50% in stocks and 50% in bonds, but after State X adopts the prudent investor rule T determines that, to achieve suitable risk and return objectives for the trust, the assets should be invested 90% in stocks and 10% in bonds. This change increases the total return from the portfolio and decreases the dividend and interest income. Thereafter, even though G does not experience a dire emergency, T may exercise the power to adjust under Section 15-1-404 (1) to the extent that T determines that the adjustment is from only the capital appreciation resulting from the change in the portfolio's asset allocation. If T is unable to determine the extent to which capital appreciation resulted from the change in asset allocation or is unable to maintain adequate records to determine the extent to which principal distributions to G for dire emergencies do not exceed the 6% limitation, T may not exercise the power to adjust. See Joel C. Dobris, *Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning*, 66 Iowa L. Rev. 273 (1981).

**Example (5)** — T is the trustee of a trust for the settlor's child. The trust owns a diversified portfolio of marketable financial assets with a value of \$600,000, and is also the sole beneficiary of the settlor's IRA, which holds a diversified portfolio of marketable financial assets with a value of \$900,000. The trust receives a distribution from the IRA that is the minimum amount required to be distributed under the Internal Revenue Code, and T allocates 10% of the distribution to income under Section 15-1-419 (3) of this Act. The total return on the IRA's assets exceeds the amount distributed to the trust, and the value of the IRA at the end of the

year is more than its value at the beginning of the year. Relevant factors that T may consider in determining whether to exercise the power to adjust and the extent to which an adjustment should be made to comply with Section 15-1-403 (2) include the total return from all of the trust's assets, those owned directly as well as its interest in the IRA, the extent to which the trust will be subject to income tax on the portion of the IRA distribution that is allocated to principal, and the extent to which the income beneficiary will be subject to income tax on the amount that T distributes to the income beneficiary.

**Example (6)** — T is the trustee of a trust whose portfolio includes a large parcel of undeveloped real estate. T pays real property taxes on the undeveloped parcel from income each year pursuant to Section 15-1-426 (c). After considering the return from the trust's portfolio as a whole and other relevant factors described in Section 15-1-404 (2), T may exercise the power to adjust under Section 15-1-404 (1) to transfer cash from principal to income in order to distribute to the income beneficiary an amount that T considers necessary to comply with Section 15-1-403 (2).

**Example (7)** — T is the trustee of a trust whose portfolio includes an interest in a mutual fund that is sponsored by T. As the manager of the mutual fund, T charges the fund a management fee that reduces the amount available to distribute to the trust by \$2,000. If the fee had been paid directly by the trust, one-half of the fee would have been paid from income under Section 15-1-426 (1)(a) and the other one-half would have been paid from principal under Section 15-1-427 (1)(a). After considering the total return from the portfolio as a whole and other relevant factors described in Section 15-1-404 (2), T may exercise its power to adjust under Section 15-1-404 (1) by transferring \$1,000, or half of the trust's proportionate share of the fee, from principal to income.

**15-1-404.5. Conversion - unitrusts - administration.** (1) **Conversion by trustee.** Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust described in section 15-1-404 and convert a trust to a unitrust as described in this section if all of the following apply:

(a) The trust describes the amount that may or must be distributed to a beneficiary by referring to the trust's income and the trustee determines that conversion to a unitrust will enable the trustee to better carry out the purposes of the trust;

(b) The trustee sends a written notice of the trustee's decision to convert the trust to a unitrust specifying a prospective effective date for the conversion, which may not be sooner than sixty days after the notice is sent, and including a copy of this section to the qualified beneficiaries, determined as of the date the notice is sent and assuming nonexercise of all powers of appointment;

(c) There are one or more legally competent beneficiaries described in section 15-1-402 (10.5) (a), and one or more legally competent remainder beneficiaries described in either section 15-1-402 (10.5) (b) or 15-1-402 (10.5) (c), determined as of the date the notice is sent; and



(d) No beneficiary has objected in writing to the conversion to a unitrust and delivered such objection to the trustee within sixty days after the notice was sent.

(2) **Conversion, reconversion, and adjustment of the distribution percentage by agreement.** Conversion to a unitrust or reconversion to an income trust may be made by agreement between the trustee and all qualified beneficiaries of the trust. The trustee and all qualified beneficiaries may also agree to modify the distribution percentage; except that the trustee and the qualified beneficiaries may not agree to a distribution percentage less than three percent or greater than five percent. The agreement may include any other actions a court could properly order pursuant to subsection (7) of this section.

(3) **Conversion or reconversion by court.** (a) The trustee may, for any reason, elect to petition the court to order conversion to a unitrust, including without limitation the reason that conversion under subsection (1) of this section is unavailable because:

- (I) A beneficiary timely objects to the conversion to a unitrust;
- (II) There are no legally competent beneficiaries described in section 15-1-402 (10.5) (a); or
- (III) There are no legally competent beneficiaries described in section 15-1-402 (10.5) (b) or (10.5) (c).

(b) A beneficiary may request the trustee to convert to a unitrust or adjust the distribution percentage pursuant to this subsection (3). If the trustee declines or fails to act within six months after receiving a written request from a beneficiary to do so, the beneficiary may petition the court to order the conversion or adjustment.

(c) The trustee may petition the court prospectively to convert from a unitrust to an income trust or to adjust the distribution percentage if the trustee determines that the reconversion or adjustment will enable the trustee to better carry out the purposes of the trust. A beneficiary may request the trustee to petition the court prospectively to reconvert from a unitrust to an income trust or adjust the distribution percentage. If the trustee declines or fails to act within six months after receiving a written request from a beneficiary to do so, the beneficiary may petition the court to order the reconversion or adjustment.

(d) (I) In a judicial proceeding instituted under this subsection (3), the trustee may present opinions and reasons concerning:

(A) The trustee's support for, or opposition to, a conversion to a unitrust, a reconversion from a unitrust to an income trust, or an adjustment of the distribution percentage of a unitrust, including whether the trustee believes conversion, reconversion, or adjustment of the distribution percentage would enable the trustee to better carry out the purposes of the trust; and

(B) Any other matter relevant to the proposed conversion, reconversion, or adjustment of the distribution percentage.

(II) A trustee's actions undertaken in accordance with this subsection (3) shall not be deemed improper or inconsistent with the trustee's duty of impartiality unless the court finds from all the evidence that the trustee acted in bad faith.

(e) The court shall order conversion to a unitrust, reconversion prospectively from a unitrust to an income trust, or adjustment of the distribution percentage of a unitrust if the court determines that the conversion, reconversion, or adjustment of the distribution percentage will enable the trustee to better carry out the purposes of the trust.

(f) If a conversion to a unitrust is made pursuant to a court order, the trustee may reconvert the unitrust to an income trust only:

- (I) Pursuant to a subsequent court order; or
- (II) By filing with the court an agreement made pursuant to subsection (2) of this section to reconvert to an income trust.

(g) Upon a reconversion, the power to adjust, as described in section 15-1-404 and as it existed before the conversion, shall be revived.

(h) An action may be taken under this subsection (3) no more frequently than every two years, unless the court for good cause orders otherwise.

(4) **Administration of a unitrust.** During the time that a trust is a unitrust, the trustee shall administer the trust in accordance with the provisions of this subsection (4) as follows, unless otherwise expressly provided by the terms of the trust:

(a) The trustee shall invest the trust assets seeking a total return without regard to whether the return is from income or appreciation of principal;

(b) The trustee shall make income distributions in accordance with the governing instrument subject to the provisions of this section;

(c) The distribution percentage for any trust converted to a unitrust by a trustee in accordance with subsection (1) of this section shall be four percent, unless a different percentage has been determined in an agreement made pursuant to subsection (2) of this section or ordered by the court pursuant to subsection (3) of this section;

(d) (I) The trustee shall pay to a beneficiary in the case of an underpayment within a reasonable time, and shall recover from a beneficiary in the case of an overpayment, either by repayment by the beneficiary or by withholding from future distributions to the beneficiary;

(A) An amount equal to the difference between the amount properly payable and the amount actually paid; and

(B) Interest compounded annually at a rate per annum equal to the distribution percentage in the year or years during which the underpayment or overpayment occurs.

(II) For purposes of this paragraph (d), accrual of interest may not commence until the beginning of the trust year following the year in which the underpayment or overpayment occurs.

(e) A change in the method of determining a reasonable current return by converting to a unitrust in accordance with this section and substituting the distribution amount for net trust accounting income is a proper change in the definition of trust income and shall be given effect notwithstanding any contrary provision of subparts 1 through 6 of this part 4. The distribution amount shall in all cases be deemed a reasonable current return that fairly apportions the total return of a unitrust.

(4.5) For purposes of subsection (4) of this section:

(a) "Income", as that term appears in the governing instrument, shall be deemed to mean the distribution amount.

(b) (I) The "distribution amount" shall be an annual amount equal to the distribution percentage multiplied by the average net fair market value of the trust's assets.

(II) For purposes of this paragraph (b), the average net fair market value of the trust's assets shall be the net fair market value of the trust's assets averaged over the lesser of:

(A) The three preceding years; or

(B) The period during which the trust has been in existence.

(5) **Determination of matters in administration of unitrust.** The trustee may determine any of the following matters in administering a unitrust as the trustee deems necessary or helpful for the proper functioning of the trust:

(a) The effective date of a conversion to a unitrust pursuant to subsection (1) of this section;

(b) The manner of prorating the distribution amount for a short year in which a beneficiary's interest commences or ceases, or if the trust is a unitrust for only part of the year, or the trustee may elect to treat the trust year as two separate years, the first of which ends at the close of the day on which the conversion or reconversion occurs and the second of which ends at the close of the trust year;

(c) Whether distributions are made in cash or in kind;

(d) The manner of adjusting valuations and calculations of the distribution amount to account for other payments from, or contributions to, the trust;

(e) Whether to value the trust's assets annually or more frequently;

(f) Which valuation dates to use and how many valuation dates to use;

(g) Valuation decisions concerning any asset for which there is no readily available market value, including:

(I) How frequently to value such an asset;

(II) Whether and how often to engage a professional appraiser to value such an asset; and

(III) Whether to exclude the value of such an asset from the net fair market value of the trust's assets for purposes of determining the distribution amount. For purposes of this section, any such asset so excluded shall be referred to as an "excluded asset", and the



trustee shall distribute any net income received from the excluded asset as provided for in the governing instrument, subject to the following principles:

(A) The trustee shall treat each asset for which there is no readily available market value as an excluded asset unless the trustee determines that there are compelling reasons not to do so and the trustee considers all relevant factors including the best interests of the beneficiaries;

(B) If tangible personal property or real property is possessed or occupied by a beneficiary, the trustee may not limit or restrict any right of the beneficiary to use the property in accordance with the governing instrument regardless of whether the trustee treats the property as an excluded asset; and

(C) By way of example and not by way of limitation, assets for which there is a readily available market value include cash and cash equivalents; stocks, bonds, and other securities and instruments for which there is an established market on a stock exchange, in an over-the-counter market, or otherwise; and any other property that can reasonably be expected to be sold within one week of the decision to sell without extraordinary efforts by the seller. By way of example and not by way of limitation, assets for which there is no readily available market value include stocks, bonds, and other securities and instruments for which there is no established market on a stock exchange, in an over-the-counter market, or otherwise; real property; tangible personal property; and artwork and other collectibles.

(h) Any other administrative matter that the trustee determines is necessary or helpful for the proper functioning of the unitrust.

(6) **Allocations.** (a) Expenses, taxes, and other charges that would otherwise be deducted from income if the trust was not a unitrust may not be deducted from the distribution amount.

(b) Unless otherwise provided by the governing instrument, the distribution amount each year shall be deemed to be paid from the following sources for that year in the following order:

- (I) Net income determined as if the trust was not a unitrust;
- (II) Other ordinary income as determined for federal income tax purposes;
- (III) Net realized short-term capital gains as determined for federal income tax purposes;
- (IV) Net realized long-term capital gains as determined for federal income tax purposes;
- (V) Trust principal comprising assets for which there is a readily available market value; and
- (VI) Other trust principal.

(7) **Court orders.** (a) The court may order any of the following actions in a proceeding brought by a trustee or a beneficiary pursuant to paragraph (a), (b), or (c) of subsection (3) of this section:

- (I) Select a distribution percentage other than four percent, except that the court may not order a distribution percentage less than three percent or greater than five percent;
- (II) Average the valuation of the trust's net assets over a period other than three years;
- (III) Reconvert prospectively from a unitrust, or adjust the distribution percentage of a unitrust;
- (IV) Direct the distribution of net income, determined as if the trust were not a unitrust, in excess of the distribution amount as to any or all trust assets if the distribution is necessary to preserve a tax benefit; or
- (V) Change or direct any administrative procedure as the court determines is necessary or helpful for the proper functioning of the unitrust.

(b) Nothing in this subsection (7) shall be construed to limit the equitable jurisdiction of the court to grant other relief as the court deems proper.

(8) **Restrictions.** Conversion to a unitrust shall not affect any provision in the governing instrument that:

- (a) Directs or authorizes the trustee to distribute the principal;
- (b) Directs or authorizes the trustee to distribute a fixed annuity or a fixed fraction of the value of trust assets;
- (c) Authorizes a beneficiary to withdraw a portion or all of the principal; or

(d) Diminishes in any manner an amount permanently set aside for charitable purposes under the governing instrument unless both income and principal are set aside.

(9) **Tax limitations.** If a particular trustee is also a beneficiary of the trust and conversion or failure to convert would enhance or diminish the beneficial interest of that trustee, or if possession or exercise of the conversion power by a particular trustee alone would cause any individual to be treated as owner of a part of the trust for federal income tax purposes or cause a part of the trust to be included in the gross estate of any individual for federal estate tax purposes, then that particular trustee may not participate as a trustee in the exercise of the conversion power; except that:

(a) The trustee may petition the court under paragraph (a) of subsection (3) of this section to order conversion in accordance with this section; and

(b) A co-trustee or co-trustees to whom this subsection (9) does not apply, may convert the trust to a unitrust in accordance with subsection (1) or (2) of this section.

(10) **Releases.** A trustee may irrevocably release the power granted by this section if the trustee reasonably believes the release is in the best interests of the trust and its beneficiaries. The release may be personal to the releasing trustee or it may apply generally to some or all subsequent trustees. The release may be for any specified period, including a period measured by the life of an individual.

(11) **Remedies.** (a) A trustee who reasonably and in good faith takes any action or omits to take any action under this section is not liable to any person interested in the trust. An act or omission by a trustee under this section shall be presumed to be reasonable and undertaken in good faith unless the act or omission is determined by the court to have been an abuse of discretion.

(b) If a trustee reasonably and in good faith takes or omits to take any action under this section and a person interested in the trust opposes the act or omission, the person's exclusive remedy shall be to seek an order of the court directing the trustee to:

(I) Convert the trust to a unitrust;

(II) Reconvert from a unitrust;

(III) Change the distribution percentage; or

(IV) Order any administrative procedures the court determines are necessary or helpful for the proper functioning of the trust.

(c) A claim for relief under this subsection (11) that is not barred by adjudication, consent, or limitation, is nevertheless barred as to any beneficiary who has received a statement fully disclosing the matter unless a proceeding to assert the claim is commenced within six months after receipt of the statement. A beneficiary is deemed to have received a statement if it is received by the beneficiary or the beneficiary's representative in a manner described in section 15-10-403 or 15-1-405.

(12) **No duty.** A trustee has no duty to inform a beneficiary about the availability and provisions of this section. A trustee has no duty to review the trust to determine whether any action should be taken under this section unless the trustee is requested in writing by a qualified beneficiary to do so.

(13) **Application.** (a) This section shall apply to trusts in existence on May 22, 2003, and to trusts created on or after that date.

(b) This section shall be construed to apply to the administration of a trust that is administered in Colorado under Colorado law or that is governed by Colorado law with respect to the meaning and effect of its terms unless:

(I) The trust is a trust described in the federal "Internal Revenue Code of 1986", section 642 (c) (5), 664 (d), or 2702 (a) (3);

(II) The governing instrument expressly prohibits the use of this section by specific reference to one or more provisions of subparts 1 through 6 of this part 4;

(III) The terms of a trust in existence on May 22, 2003, incorporate provisions that operate as a unitrust. The trustee or a beneficiary of such a trust may proceed under section 15-1-405 to adopt provisions in this section that do not contradict provisions in the governing instrument.

(14) **Application to express trusts.** (a) This subsection (14) does not apply to a charitable remainder unitrust as defined by section 664 (d), federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 664, as amended.



(b) As used in this section:

(I) "Unitrust" means a trust, the terms of which require or permit distribution of a unitrust amount, without regard to whether the trust has been converted to a unitrust in accordance with this section or whether the trust is established by express terms of the governing instrument.

(II) "Unitrust amount" means an amount equal to a percentage of a unitrust's assets that may or are required to be distributed to one or more beneficiaries annually in accordance with the terms of the unitrust. The unitrust amount may be determined by reference to the net fair market value of the unitrust's assets as of a particular date each year or as an average determined on a multiple-year basis.

**Source:** L. 2003: Entire section added, p. 2103, § 3, effective May 22. L. 2006: (1), (2), (3), (4), IP(5), (5)(a), (5)(b), (5)(g)(III)(C), (5)(h), (6)(a), (6)(b)(I), (7)(a), (8), (9), (11)(b), and (13) amended and (14) added, p. 382, § 15, effective July 1. L. 2009: (4)(e) and (13)(b)(II) amended, (HB 09-1241), ch. 169, p. 743, § 4, effective April 22.

### ANNOTATION

**Law reviews.** For article, "Colorado Unitrust Conversion: A Tool for Trustees and Estate Planning Attorneys", see 40 Colo. Law. 57 (March 2011).

**15-1-405. Notice of action.** (1) A trustee may give a notice of proposed action regarding a matter governed by subparts 1 through 6 of this part 4 as provided in this section. For the purpose of this section, a proposed action includes a course of action and a decision not to take action.

(2) The trustee shall mail notice of the proposed action to all adult beneficiaries who are receiving, or are entitled to receive, income under the trust or to receive a distribution of principal if the trust were terminated at the time the notice is given. If there are no adult beneficiaries who may receive such notice, then notice shall be given to all beneficiaries who are receiving, or are entitled to receive, income under the trust or to receive a distribution of principal if the trust were terminated at the time notice is given, in accordance with the provisions of section 15-10-403. Notice may be given to any other beneficiary. A person shall be bound under this section with respect to such proposed action if the person receives actual notice, if another person having a substantially identical interest receives notice, or if the person would be bound under the provisions of section 15-10-403.

(3) Notice of proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

(4) The notice of proposed action shall state that it is given pursuant to this section and shall state all of the following:

(a) The name and mailing address of the trustee;

(b) The name and telephone number of a person who may be contacted for additional information;

(c) A description of the action proposed to be taken and an explanation of the reasons for the action;

(d) The time within which objections to the proposed action can be made, which shall be at least thirty days from the mailing of the notice of proposed action;

(e) The date on or after which the proposed action may be taken or is effective.

(5) A beneficiary may object to the proposed action by mailing a written objection to the trustee at the address stated in the notice of proposed action within the time period specified in the notice of proposed action.

(6) A trustee is not liable to a beneficiary for an action regarding a matter governed by this chapter if the trustee does not receive a written objection to the proposed action from the beneficiary within the applicable period and the other requirements of this section are satisfied. If no beneficiary entitled to notice objects under this section, the trustee is not liable to any current or future beneficiary with respect to the proposed action.

(7) If the trustee receives a written objection within the applicable time period, either the trustee or a beneficiary may petition the court to have the proposed action performed as proposed, performed with modifications, or denied. In the proceeding, a beneficiary objecting to the proposed action has the burden of proving that the trustee's proposed action should not be performed. A beneficiary who has not objected is not estopped from opposing the proposed action in the proceeding. If the trustee decides not to implement the proposed action, the trustee shall notify the beneficiaries of the decision not to take the action and the reasons for the decision, and the trustee's decision not to implement the proposed action does not itself give rise to liability to any current or future beneficiary. A beneficiary may petition the court to have the action performed, and has the burden of proving that it should be performed.

**Source:** L. 2000: Entire part R&RE, p. 1132, § 1, effective July 1, 2001. L. 2009: (1) amended, (HB 09-1241), ch. 169, p. 744, § 5, effective April 22.

## SUBPART 2

### DECEDENT'S ESTATE OR TERMINATING INCOME INTEREST

**Cross references:** For information concerning the effective date of this subpart 2, see § 15-1-434.

**15-1-406. Determination and distribution of net income.** (1) After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules shall apply:

(a) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in subparts 3 to 5 of this part 4 that apply to trustees and the rules in paragraph (e) of this subsection (1). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(b) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in subparts 3 to 5 of this part 4 that apply to trustees and by:

(I) Including in net income all income from property used to discharge liabilities;

(II) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax, marital, or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(III) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(c) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under paragraph (b) of this subsection (1) or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(d) A fiduciary shall distribute the net income remaining after distributions required by paragraph (c) of this subsection (1) in the manner described in section 15-1-407 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the



beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(e) A fiduciary may not reduce principal or income receipts from property described in paragraph (a) of this subsection (1) because of a payment described in section 15-1-426 or 15-1-427 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

**Source:** L. 2000: Entire part R&RE, p. 1134, § 1, effective July 1, 2001.

### OFFICIAL COMMENT

**Terminating income interests and successive income interests.** A trust that provides for a single income beneficiary and an outright distribution of the remainder ends when the income interest ends. A more complex trust may have a number of income interests, either concurrent or successive, and the trust will not necessarily end when one of the income interests ends. For that reason, the Act speaks in terms of income interests ending and beginning rather than trusts ending and beginning. When an income interest in a trust ends, the trustee's powers continue during the winding up period required to complete its administration. A terminating income interest is one that has ended but whose administration is not complete.

If two or more people are given the right to receive specified percentages or fractions of the income from a trust concurrently and one of the concurrent interests ends, e.g., when a beneficiary dies, the beneficiary's income interest ends but the trust does not. Similarly, when a trust with only one income beneficiary ends upon the beneficiary's death, the trust instrument may provide that part or all of the trust assets shall continue in trust for another income beneficiary. While it is common to think and speak of this (and even to characterize it in a trust instrument) as a "new" trust, it is a continuation of the original trust for a remainder beneficiary who has an income interest in the trust assets instead of the right to receive them outright. For purposes of this Act, this is a successive income interest in the same trust. The fact that a trust may or may not end when an income interest ends is not significant for purposes of this Act.

If the assets that are subject to a terminating income interest pass to another trust because the income beneficiary exercises a general power of appointment over the trust assets, the recipient trust would be a new trust; and if they pass to another trust because the beneficiary exercises a nongeneral power of appointment over the trust

assets, the recipient trust might be a new trust in some States (see 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 640, at 483 (4th ed. 1989)); but for purposes of this Act a new trust created in these circumstances is also a successive income interest.

**Gift of a pecuniary amount.** Section 15-1-406 (c) and (d) provide different rules for an outright gift of a pecuniary amount and a gift in trust of a pecuniary amount; this is the same approach used in Section 5(b)(2) of the 1962 Uniform Act.

**Interest on pecuniary amounts.** Section 15-1-406 (1)(c) provides that the beneficiary of an outright pecuniary amount is to receive the interest or other amount provided by applicable law if there is no provision in the will or the terms of the trust. Many States have no applicable law that provides for interest or some other amount to be paid on an outright pecuniary gift under an *inter vivos* trust; this section provides that in such a case the interest or other amount to be paid shall be the same as the interest or other amount required to be paid on testamentary pecuniary gifts. This provision is intended to accord gifts under *inter vivos* instruments the same treatment as testamentary gifts. The various state authorities that provide for the amount that a beneficiary of an outright pecuniary amount is entitled to receive are collected in Richard B. Covey, *Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions*, App. B (4th ed. 1997).

**Administration expenses and interest on death taxes.** Under Section 15-1-406 (1)(b)(II) a fiduciary may pay administration expenses and interest on death taxes from either income or principal. An advantage of permitting the fiduciary to choose the source of the payment is that, if the fiduciary's decision is consistent with the decision to deduct these expenses for income tax purposes or estate tax purposes, it eliminates the need to adjust between principal and income

that may arise when, for example, an expense that is paid from principal is deducted for income tax purposes or an expense that is paid from income is deducted for estate tax purposes.

The United States Supreme Court has considered the question of whether an estate tax marital deduction or charitable deduction should be reduced when administration expenses are paid from income produced by property passing in trust for a surviving spouse or for charity and deducted for income tax purposes. The Court rejected the IRS position that administration expenses properly paid from income under the terms of the trust or state law must reduce the amount of a marital or charitable transfer, and held that the value of the transferred property is not reduced for estate tax purposes unless the administration expenses are material in light of the income the trust corpus could have been expected to generate. *Commissioner v. Estate of Otis C. Hubert*, 117 S.Ct. 1124 (1997). The provision in Section 15-1-406 (1)(b)(II) permits a fiduciary to pay and deduct administration expenses from income only to the extent that it will not cause the reduction or loss of an estate tax marital or charitable contributions deduction, which means that the limit on the amount payable from income will be established eventually by Treasury Regulations.

**Interest on estate taxes.** The IRS agrees that interest on estate and inheritance taxes may be

deducted for income tax purposes without having to reduce the estate tax deduction for amounts passing to a charity or surviving spouse, whether the interest is paid from principal or income. Rev. Rul. 93-48, 93-2 C.B. 270. For estates of persons who died before 1998, a fiduciary may not want to deduct for income tax purposes interest on estate tax that is deferred under Section 6166 or 6163 because deducting that interest for estate tax purposes may produce more beneficial results, especially if the estate has little or no income or the income tax bracket is significantly lower than the estate tax bracket. For estates of persons who die after 1997, no estate tax or income tax deduction will be allowed for interest paid on estate tax that is deferred under Section 6166. However, interest on estate tax deferred under Section 6163 will continue to be deductible for both purposes, and interest on estate tax deficiencies will continue to be deductible for estate tax purposes if an election under Section 6166 is not in effect.

Under the 1962 Uniform Act, Section 13(c)(5) charges interest on estate and inheritance taxes to principal. The 1931 Uniform Act has no provision. Section 15-1-426 (1)(c) of this Act provides that, except to the extent provided in Section 15-1-406 (1)(b)(II) or (III), all interest must be paid from income.

#### ANNOTATION

**In enacting this act, the general assembly departed from the uniform act and rejected the approach that all trustee fees and expenses had to be paid out of income.** The court, therefore, has discretion to determine how much of the fees and expenses will be paid out

of income. In this case, there was no demonstration that the court's allocation was unreasonable or an abuse of discretion. *Matter of Trust by Cannady*, 926 P.2d 191 (Colo. App. 1996) (decided prior to 2000 repeal and reenactment).

**15-1-407. Distribution to residuary and remainder beneficiaries.** (1) Each beneficiary described in section 15-1-406 (1) (d) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(2) In determining a beneficiary's share of net income, the following rules shall apply:

(a) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(b) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(c) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(d) The distribution date for purposes of this section may be the date as of which the



fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(3) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(4) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

**Source:** L. 2000: Entire part R&RE, p. 1135, § 1, effective July 1, 2001.

### OFFICIAL COMMENT

**Relationship to prior Acts.** Section 15-1-407 retains the concept in Section 5(b)(2) of the 1962 Uniform Act that the residuary legatees of estates are to receive net income earned during the period of administration on the basis of their proportionate interests in the undistributed assets when distributions are made. It changes the basis for determining their proportionate interests by using asset values as of a date reasonably near the time of distribution instead of inventory values; it extends the application of these rules to distributions from terminating trusts; and it

extends these rules to gain or loss realized from the disposition of assets during administration, an omission in the 1962 Uniform Act that has been noted by several commentators. See, e.g., Richard B. Covey, *Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions* 91 (4th ed. 1998); Thomas H. Cantrill, *Fractional or Percentage Residuary Bequests: Allocation of Postmortem Income, Gain and Unrealized Appreciation*, 10 *Prob. Notes* 322, 327 (1985).

### SUBPART 3

#### APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST

**Cross references:** For information concerning the effective date of this subpart 3, see § 15-1-434.

**15-1-408. When right to income begins and ends.** (1) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(2) An asset becomes subject to a trust:

(a) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(b) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(c) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(3) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (4) of this section, even if there is an intervening period of administration to wind up the preceding income interest.

(4) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

**Source:** L. 2000: Entire part R&RE, p. 1136, § 1, effective July 1, 2001.

## OFFICIAL COMMENT

**Period during which there is no beneficiary.** The purpose of the second part of subsection (4) is to provide that, at the end of a period during which there is no beneficiary to whom a trustee may distribute income, the trustee must apply the same apportionment rules that apply when a mandatory income interest ends. This provision would apply, for example, if a settlor

creates a trust for grandchildren before any grandchildren are born. When the first grandchild is born, the period preceding the date of birth is treated as having ended, followed by a successive income interest, and the apportionment rules in Sections 15-1-409 and 15-1-410 apply accordingly if the terms of the trust do not contain different provisions.

**15-1-409. Apportionment of receipts and disbursements when decedent dies or income interest begins.** (1) A trustee shall allocate an income receipt or disbursement, other than one to which section 15-1-406 (1) (a) applies, to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(2) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(3) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of subparts 1 through 6 of this part 4. Distributions to shareholders or other owners from an entity to which section 15-1-411 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

**Source:** L. 2000: Entire part R&RE, p. 1137, § 1, effective July 1, 2001. L. 2009: (3) amended, (HB 09-1241), ch. 169, p. 744, § 6, effective April 22.

## OFFICIAL COMMENT

**Prior Acts.** Professor Bogert stated that “Section 4 of the [1962] Act makes a change with respect to the apportionment of the income of trust property not due until after the trust began but which accrued in part before the commencement of the trust. It treats such income as to be credited entirely to the income account in the case of a living trust, but to be apportioned between capital and income in the case of a testamentary trust. The [1931] Act apportions such income in the case of both types of trusts, except in the case of corporate dividends.” George G. Bogert, *The Revised Uniform Principal and Income Act*, 38 Notre Dame Law. 50, 52 (1962). The 1962 Uniform Act also provides that an asset passing to an inter vivos trust by a bequest in the settlor’s will is governed by the rule that applies to a testamentary trust, so that different rules apply to assets passing to an inter vivos trust depending upon whether they were transferred to the trust during the settlor’s life or by his will.

Having several different rules that apply to similar transactions is confusing. In order to

simplify administration, Section 15-1-409 applies the same rule to inter vivos trusts (revocable and irrevocable), testamentary trusts, and assets that become subject to an inter vivos trust by a testamentary bequest.

**Periodic payments.** Under Section 15-1-402, a periodic payment is principal if it is due but unpaid before a decedent dies or before an asset becomes subject to a trust, but the next payment is allocated entirely to income and is not apportioned. Thus, periodic receipts such as rents, dividends, interest, and annuities, and disbursements such as the interest portion of a mortgage payment, are not apportioned. This is the original common law rule. Edwin A. Howes, Jr., *The American Law Relating to Income and Principal* 70 (1905). In trusts in which a surviving spouse is dependent upon a regular flow of cash from the decedent’s securities portfolio, this rule will help to maintain payments to the spouse at the same level as before the settlor’s death. Under the 1962 Uniform Act, the pre-death portion of the first periodic payment due after death is apportioned to principal in the case of a testa-



mentary trust or securities bequeathed by will to an inter vivos trust.

**Nonperiodic payments.** Under the second sentence of Section 15-1-409 (2), interest on an obligation that does not provide a due date for the interest payment, such as interest on an income tax refund, would be apportioned to principal to the extent it accrues before a person dies or an income interest begins unless the obligation is specifically given to a devisee or remainder beneficiary, in which case all of the

accrued interest passes under Section 15-1-406 (1)(a) to the person who receives the obligation. The same rule applies to interest on an obligation that has a due date but does not provide for periodic payments. If there is no stated interest on the obligation, such as a zero coupon bond, and the proceeds from the obligation are received more than one year after it is purchased or acquired by the trustee, the entire amount received is principal under Section 15-1-416.

**15-1-410. Apportionment when income interest ends.** (1) For the purposes of this section, “undistributed income” means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(2) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary’s share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(3) When a trustee’s obligation to pay a fixed annuity or a fixed fraction of the value of the trust’s assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

**Source:** L. 2000: Entire part R&RE, p. 1137, § 1, effective July 1, 2001.

### OFFICIAL COMMENT

**Prior Acts.** Both the 1931 Uniform Act (Section 4) and the 1962 Uniform Act (Section 4(d)) provide that a deceased income beneficiary’s estate is entitled to the undistributed income. The Drafting Committee concluded that this is probably not what most settlors would want, and that, with respect to undistributed income, most settlors would favor the income beneficiary first, the remainder beneficiaries second, and the income beneficiary’s heirs last, if at all. However, it decided not to eliminate this provision to avoid causing disputes about whether the trustee should have distributed collected cash before the income beneficiary died.

**Accrued periodic payments.** Under the prior Uniform Acts, an income beneficiary or his estate is entitled to receive a portion of any payments, other than dividends, that are due or that have accrued when the income interest terminates. The last sentence of subsection (1) changes that rule by providing that such items are not included in undistributed income. The items affected include periodic payments of interest, rent, and dividends, as well as items of income that accrue over a longer period of time; the rule also applies to expenses that are due or accrued.

**Example — accrued periodic payments.** The rules in Section 15-1-409 and Section 15-1-410 work in the following manner: Assume that a periodic payment of rent that is due on July 20 has not been paid when an income interest ends on July 30; the successive income interest begins on July 31, and the rent payment that was due on July 20 is paid on August 3. Under Section 15-1-409 (1), the July 20 payment is added to the principal of the successive income interest when received. Under Section 15-1-409 (2), the entire periodic payment of rent that is due on August 20 is income when received by the successive income interest. Under Section 15-1-410, neither the income beneficiary of the terminated income interest nor the beneficiary’s estate is entitled to any part of either the July 20 or the August 20 payments because neither one was received before the income interest ended on July 30. The same principles apply to expenses of the trust.

**Beneficiary with an unqualified power to revoke.** The requirement in subsection (2) to pay undistributed income to a mandatory income beneficiary or her estate does not apply to the extent the beneficiary has an unqualified power to revoke more than five percent of the

trust immediately before the income interest ends. Without this exception, subsection (2) would apply to a revocable living trust whose settlor is the mandatory income beneficiary during her lifetime, even if her will provides that all of the assets in the probate estate are to be distributed to the trust.

If a trust permits the beneficiary to withdraw all or a part of the trust principal after attaining a specified age and the beneficiary attains that age but fails to withdraw all of the principal that she is permitted to withdraw, a trustee is not required to pay her or her estate the undistributed income attributable to the portion of the

principal that she left in the trust. The assumption underlying this rule is that the beneficiary has either provided for the disposition of the trust assets (including the undistributed income) by exercising a power of appointment that she has been given or has not withdrawn the assets because she is willing to have the principal and undistributed income be distributed under the terms of the trust. If the beneficiary has the power to withdraw 25% of the trust principal, the trustee must pay to her or her estate the undistributed income from the 75% that she cannot withdraw.

#### SUBPART 4

### ALLOCATION OF RECEIPTS DURING ADMINISTRATION OF TRUST

**Cross references:** For information concerning the effective date of this subpart 4, see § 15-1-434.

**15-1-411. Character of receipts.** (1) For the purposes of this section, “entity” means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate governed by section 15-1-412, a business or activity governed by section 15-1-413, or an asset-backed security governed by section 15-1-425.

(2) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(3) A trustee shall allocate the following receipts from an entity to principal:

(a) Property other than money;

(b) Money received in one distribution or a series of related distributions in exchange for part or all of a trust’s interest in the entity;

(c) Money received in total or partial liquidation of the entity; and

(d) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(4) Money is received in partial liquidation:

(a) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(b) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent of the entity’s gross assets, as shown by the entity’s year-end financial statements immediately preceding the initial receipt.

(5) Money is not received in partial liquidation, nor may it be taken into account under paragraph (b) of subsection (4) of this section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(6) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity’s board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation’s board of directors.

**Source:** L. 2000: Entire part R&RE, p. 1138, § 1, effective July 1, 2001.

#### OFFICIAL COMMENT

**Entities to which Section 15-1-411 applies.**  
The reference to partnerships in Section 15-1-

411 (1) is intended to include all forms of partnerships, including limited partnerships, limited



liability partnerships, and variants that have slightly different names and characteristics from State to State. The section does not apply, however, to receipts from an interest in property that a trust owns as a tenant in common with one or more co-owners, nor would it apply to an interest in a joint venture if, under applicable law, the trust's interest is regarded as that of a tenant in common.

**Capital gain dividends.** Under the Internal Revenue Code and the Income Tax Regulations, a "capital gain dividend" from a mutual fund or real estate investment trust is the excess of the fund's or trust's net long-term capital gain over its net short-term capital loss. As a result, a capital gain dividend does not include any net short-term capital gain, and cash received by a trust because of a net short-term capital gain is income under this Act.

**Reinvested dividends.** If a trustee elects (or continues an election made by its predecessor) to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares would be principal. Making or continuing such an election would be equivalent to deciding under Section 15-1-404 to transfer income to principal in order to comply with Section 15-1-403 (2). However, if the trustee makes or continues the election for a reason other than to comply with Section 15-1-403 (2), e.g., to make an investment without incurring brokerage commissions, the trustee should transfer cash from principal to income in an amount equal to the reinvested dividends.

**Distribution of property.** The 1962 Uniform Act describes a number of types of property that would be principal if distributed by a corporation. This becomes unwieldy in a section that applies to both corporations and all other entities. By stating that principal includes the distribution of any property other than money, Sec-

tion 15-1-411 embraces all of the items enumerated in Section 6 of the 1962 Uniform Act as well as any other form of nonmonetary distribution not specifically mentioned in that Act.

**Partial liquidations.** Under subsection (4)(a), any distribution designated by the entity as a partial liquidating distribution is principal regardless of the percentage of total assets that it represents. If a distribution exceeds 20% of the entity's gross assets, the entire distribution is a partial liquidation under subsection (4)(b) whether or not the entity describes it as a partial liquidation. In determining whether a distribution is greater than 20% of the gross assets, the portion of the distribution that does not exceed the amount of income tax that the trustee or a beneficiary must pay on the entity's taxable income is ignored.

**Other large distributions.** A cash distribution may be quite large (for example, more than 10% but not more than 20% of the entity's gross assets) and have characteristics that suggest it should be treated as principal rather than income. For example, an entity may have received cash from a source other than the conduct of its normal business operations because it sold an investment asset; or because it sold a business asset other than one held for sale to customers in the normal course of its business and did not replace it; or it borrowed a large sum of money and secured the repayment of the loan with a substantial asset; or a principal source of its cash was from assets such as mineral interests, 90% of which would have been allocated to principal if the trust had owned the assets directly. In such a case the trustee, after considering the total return from the portfolio as a whole and the income component of that return, may decide to exercise the power under Section 15-1-404 (1) to make an adjustment between income and principal, subject to the limitations in Section 15-1-404 (3).

**15-1-412. Distribution from trust or estate.** A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, section 15-1-411 or section 15-1-425 shall apply to a receipt from the trust.

**Source:** L. 2000: Entire part R&RE, p. 1139, § 1, effective July 1, 2001.

## OFFICIAL COMMENT

**Terms of the distributing trust or estate.** Under Section 15-1-403 (1), a trustee is to allocate receipts in accordance with the terms of the recipient trust or, if there is no provision, in accordance with this Act. However, in determining whether a distribution from another trust or

an estate is income or principal, the trustee should also determine what the terms of the distributing trust or estate say about the distribution — for example, whether they direct that the distribution, even though made from the income of the distributing trust or estate, is to be

added to principal of the recipient trust. Such a provision should override the terms of this Act, but if the terms of the recipient trust contain a provision requiring such a distribution to be allocated to income, the trustee may have to obtain a judicial resolution of the conflict between the terms of the two documents.

**Investment trusts.** An investment entity to which the second sentence of this section applies includes a mutual fund, a common trust

fund, a business trust or other entity organized as a trust for the purpose of receiving capital contributed by investors, investing that capital, and managing investment assets, including asset-backed security arrangements to which Section 15-1-425 applies. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997).

**15-1-413. Business and other activities conducted by trustee.** (1) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(2) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(3) Activities for which a trustee may maintain separate accounting records include:

- (a) Retail, manufacturing, service, and other traditional business activities;
- (b) Farming;
- (c) Raising and selling livestock and other animals;
- (d) Management of rental properties;
- (e) Extraction of minerals and other natural resources;
- (f) Timber operations; and
- (g) Activities governed by section 15-1-424.

**Source:** L. 2000: Entire part R&RE, p. 1139, § 1, effective July 1, 2001.

### OFFICIAL COMMENT

**Purpose and scope.** The provisions in Section 15-1-413 are intended to give greater flexibility to a trustee who operates a business or other activity in proprietorship form rather than in a wholly-owned corporation (or, where permitted by state law, a single-member limited liability company), and to facilitate the trustee's ability to decide the extent to which the net receipts from the activity should be allocated to income, just as the board of directors of a corporation owned entirely by the trust would decide the amount of the annual dividend to be paid to the trust. It permits a trustee to account for farming or livestock operations, rental properties, oil and gas properties, timber operations, and activities in derivatives and options as though they were held by a separate entity. It is not intended, however, to permit a trustee to account separately for a traditional securities portfolio to avoid the provisions of this Act that apply to such securities.

Section 15-1-413 permits the trustee to account separately for each business or activity for which the trustee determines separate accounting is appropriate. A trustee with a computerized accounting system may account for these activities in a "subtrust"; an individual trustee may continue to use the business and record-keeping methods employed by the decedent or transferor who may have conducted the business under an assumed name. The intent of this section is to give the trustee broad authority to select business record-keeping methods that best suit the activity in which the trustee is engaged.

If a fiduciary liquidates a sole proprietorship or other activity to which Section 15-1-413 applies, the proceeds would be added to principal, even though derived from the liquidation of accounts receivable, because the proceeds would no longer be needed in the conduct of the business. If the liquidation occurs during probate or during an income interest's winding up



period, none of the proceeds would be income for purposes of Section 15-1-406.

**Separate accounts.** A trustee may or may not maintain separate bank accounts for business activities that are accounted for under Section 15-1-413. A professional trustee may decide not to maintain separate bank accounts, but an individual trustee, especially one who has continued

a decedent's business practices, may continue the same banking arrangements that were used during the decedent's lifetime. In either case, the trustee is authorized to decide to what extent cash is to be retained as part of the business assets and to what extent it is to be transferred to the trust's general accounts, either as income or principal.

**15-1-414. Principal receipts.** (1) A trustee shall allocate to principal:

(a) To the extent not allocated to income under subparts 1 through 6 of this part 4, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(b) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this subpart 4;

(c) Amounts recovered from third parties to reimburse the trust because of disbursements described in section 15-1-427 (1) (g) or for other reasons to the extent not based on the loss of income;

(d) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(e) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(f) Other receipts as provided in sections 15-1-418 to 15-1-425.

**Source:** L. 2000: Entire part R&RE, p. 1139, § 1, effective July 1, 2001. L. 2009: (1)(a) amended, (HB 09-1241), ch. 169, p. 744, § 7, effective April 22.

### OFFICIAL COMMENT

**Eminent domain awards.** Even though the award in an eminent domain proceeding may include an amount for the loss of future rent on

a lease, if that amount is not separately stated the entire award is principal. The rule is the same in the 1931 and 1962 Uniform Acts.

**15-1-415. Rental property.** To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

**Source:** L. 2000: Entire part R&RE, p. 1140, § 1, effective July 1, 2001.

### OFFICIAL COMMENT

**Application of Section 15-1-415.** This section applies to the extent that the trustee does not account separately under Section 15-1-415 for the management of rental properties owned by the trust.

**Receipts that are capital in nature.** A portion of the payment under a lease may be a reimbursement of principal expenditures for improvements to the leased property that is characterized as rent for purposes of invoking con-

tractual or statutory remedies for nonpayment. If the trustee is accounting for rental income under Section 15-1-415, a transfer from income to reimburse principal may be appropriate under Section 15-1-429 to the extent that some of the "rent" is really a reimbursement for improvements. This set of facts could also be a relevant factor for a trustee to consider under Section 15-1-404 (2) in deciding whether and to what extent to make an adjustment between principal

and income under Section 15-1-404 (2) after considering the return from the portfolio as a whole.

**15-1-416. Obligation to pay money.** (1) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(2) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(3) This section shall not apply to an obligation to which the provisions of section 15-1-419, 15-1-420, 15-1-421, 15-1-422, 15-1-424, or 15-1-425 applies.

**Source: L. 2000:** Entire part R&RE, p. 1140, § 1, effective July 1, 2001.

### OFFICIAL COMMENT

**Variable or floating interest rates.** The reference in subsection (1) to variable or floating interest rate obligations is intended to clarify that, even though an obligation's interest rate may change from time to time based upon changes in an index or other market indicator, an obligation to pay money containing a variable or floating rate provision is subject to this section and is not to be treated as a derivative financial instrument under Section 15-1-424.

**Discount obligations.** Subsection (2) applies to all obligations acquired at a discount, including short-term obligations such as U.S. Treasury Bills, long-term obligations such as U.S. Savings Bonds, zero-coupon bonds, and discount bonds that pay interest during part, but not all, of the period before maturity. Under subsection (2), the entire increase in value of these obligations is principal when the trustee receives the proceeds from the disposition unless the obligation, when acquired, has a maturity of less than one year. In order to have one rule that applies to

all discount obligations, the Act eliminates the provision in the 1962 Uniform Act for the payment from principal of an amount equal to the increase in the value of U.S. Series E bonds. The provision for bonds that mature within one year after acquisition by the trustee is derived from the Illinois act. 760 ILCS 15/8 (1996).

Subsection (2) also applies to inflation-indexed bonds — any increase in principal due to inflation after issuance is principal upon redemption if the bond matures more than one year after the trustee acquires it; if it matures within one year, all of the increase, including any attributable to an inflation adjustment, is income.

**Effect of Section 15-1-404.** In deciding whether and to what extent to exercise the power to adjust between principal and income granted by Section 15-1-404 (1), a relevant factor for the trustee to consider is the effect on the portfolio as a whole of having a portion of the assets invested in bonds that do not pay interest currently.

**15-1-417. Insurance policies and similar contracts.** (1) Except as otherwise provided in subsection (2) of this section, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(2) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to section 15-1-413, loss of profits from a business.

(3) This section shall not apply to a contract governed by the provisions of section 15-1-419.

**Source: L. 2000:** Entire part R&RE, p. 1140, § 1, effective July 1, 2001.



**15-1-418. Insubstantial allocations not required.** (1) If a trustee determines that an allocation between principal and income required by the provisions of sections 15-1-419 to 15-1-422 or section 15-1-425 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in section 15-1-404 (3) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in section 15-1-404 (4) and may be released for the reasons and in the manner described in section 15-1-404 (5). An allocation is presumed to be insubstantial if:

(a) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent; or

(b) The value of the asset producing the receipt for which the allocation would be made is less than ten percent of the total value of the trust's assets at the beginning of the accounting period.

**Source:** L. 2000: Entire part R&RE, p. 1141, § 1, effective July 1, 2001.

### OFFICIAL COMMENT

This section is intended to relieve a trustee from making relatively small allocations while preserving the trustee's right to do so if an allocation is large in terms of absolute dollars.

For example, assume that a trust's assets, which include a working interest in an oil well, have a value of \$1,000,000; the net income from the assets other than the working interest is \$40,000; and the net receipts from the working interest are \$400. The trustee may allocate all of the net receipts from the working interest to principal instead of allocating 10%, or \$40, to income under Section 15-1-421. If the net receipts from the working interest are \$35,000, so that the amount allocated to income under Section 15-1-421 would be \$3,500, the trustee may decide that this amount is sufficiently significant to the income beneficiary that the allocation

provided for by Section 15-1-421 should be made, even though the trustee is still permitted under Section 15-1-418 to allocate all of the net receipts to principal because the \$3,500 would increase the net income of \$40,000, as determined before making an allocation under Section 15-1-421, by less than 10%. Section 15-1-418 will also relieve a trustee from having to allocate net receipts from the sale of trees in a small woodlot between principal and income.

While the allocation to principal of small amounts under this section should not be a cause for concern for tax purposes, allocations are not permitted under this section in circumstances described in Section 15-1-404 (3) to eliminate claims that the power in this section has adverse tax consequences.

**15-1-419. Deferred compensation, annuities, and similar payments.** (1) For purposes of this section:

(a) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For purposes of subsections (4) to (7) of this section, "payment" also includes any payment from any separate fund, regardless of the reason for the payment.

(b) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(2) To the extent that a payment is characterized as interest, a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(3) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection (3), a payment is not required to be made to the extent that it is made because the trustee exercises a right of withdrawal.

(4) Except as otherwise provided in subsection (5) of this section, subsections (6) and (7) of this section apply, and subsections (2) and (3) do not apply, in determining the allocation of a payment made from a separate fund to:

(a) A trust to which an election to qualify for a marital deduction under 26 U.S.C. sec. 2056 (b) (7), as amended, has been made; or

(b) A trust that qualifies for the marital deduction under 26 U.S.C. sec. 2056 (b) (5), as amended.

(5) Subsections (4), (6), and (7) of this section do not apply if and to the extent that the series of payments would, without application of said subsection (4), qualify for the marital deduction under 26 U.S.C. sec. 2056 (b) (7) (C), as amended.

(6) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this part 4. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(7) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four percent of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under 26 U.S.C. sec. 7520, as amended, for the month preceding the accounting period for which the computation is made.

(8) This section does not apply to a payment governed by the provisions of section 15-1-420.

**Source:** L. 2000: Entire part R&RE, p. 1141, § 1, effective July 1, 2001. L. 2009: Entire section amended, (SB 09-139), ch. 131, p. 565, § 1, effective April 16.

### OFFICIAL COMMENT

**Scope.** Section 15-1-419 applies to amounts received under contractual arrangements that provide for payments to a third party beneficiary as a result of services rendered or property transferred to the payer. While the right to receive such payments is a liquidating asset of the kind described in Section 15-1-420 (i.e., “an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration”), these payment rights are covered separately in Section 15-1-419 because of their special characteristics.

Section 15-1-419 applies to receipts from all forms of annuities and deferred compensation arrangements, whether the payment will be received by the trust in a lump sum or in installments over a period of years. It applies to bonuses that may be received over two or three years and payments that may last for much longer periods, including payments from an individual retirement account (IRA), deferred compensation plan (whether qualified or not qualified for special federal income tax treat-

ment), and insurance renewal commissions. It applies to a retirement plan to which the settlor has made contributions, just as it applies to an annuity policy that the settlor may have purchased individually, and it applies to variable annuities, deferred annuities, annuities issued by commercial insurance companies, and “private annuities” arising from the sale of property to another individual or entity in exchange for payments that are to be made for the life of one or more individuals. The section applies whether the payments begin when the payment right becomes subject to the trust or are deferred until a future date, and it applies whether payments are made in cash or in kind, such as employer stock (in-kind payments usually will be made in a single distribution that will be allocated to principal under the second sentence of subsection (3)).

**The 1962 Uniform Act.** Under Section 12 of the 1962 Uniform Act, receipts from “rights to receive payments on a contract for deferred compensation” are allocated to income each year in an amount “not in excess of 5% per



year" of the property's inventory value. While "not in excess of 5%" suggests that the annual allocation may range from zero to 5% of the inventory value, in practice the rule is usually treated as prescribing a 5% allocation. The inventory value is usually the present value of all the future payments, and since the inventory value is determined as of the date on which the payment right becomes subject to the trust, the inventory value, and thus the amount of the annual income allocation, depends significantly on the applicable interest rate on the decedent's date of death. That rate may be much higher or lower than the average long-term interest rate. The amount determined under the 5% formula tends to become fixed and remain unchanged even though the amount received by the trust increases or decreases.

**Allocations Under Section 15-1-419 (2).** Section 15-1-419 (2) applies to plans whose terms characterize payments made under the plan as dividends, interest, or payments in lieu of dividends or interest. For example, some deferred compensation plans that hold debt obligations or stock of the plan's sponsor in an account for future delivery to the person rendering the services provide for the annual payment to that person of dividends received on the stock or interest received on the debt obligations. Other plans provide that the account of the person rendering the services shall be credited with "phantom" shares of stock and require an annual payment that is equivalent to the dividends that would be received on that number of shares if they were actually issued; or a plan may entitle the person rendering the services to receive a fixed dollar amount in the future and provide for the annual payment of interest on the deferred amount during the period prior to its payment. Under Section 15-1-419 (2), payments of dividends, interest or payments in lieu of dividends or interest under plans of this type are allocated to income; all other payments received under these plans are allocated to principal.

Section 15-1-419 (2) does not apply to an IRA or an arrangement with payment provisions similar to an IRA. IRAs and similar arrangements are subject to the provisions in Section 15-1-419 (3).

**Allocations Under Section 15-1-419 (3).** The focus of Section 15-1-419, for purposes of allocating payments received by a trust to or between principal and income, is on the payment right rather than on assets that may be held in a fund from which the payments are made. Thus, if an IRA holds a portfolio of marketable stocks and bonds, the amount received by the IRA as dividends and interest is not taken into account in determining the principal and income allocation except to the extent that the Internal Revenue Service may require them to be taken into account when the payment is received by a trust that qualifies for the estate tax marital deduction

(a situation that is provided for in Section 15-1-419 (4)). An IRA is subject to federal income tax rules that require payments to begin by a particular date and be made over a specific number of years or a period measured by the lives of one or more persons. The payment right of a trust that is named as a beneficiary of an IRA is not a right to receive particular items that are paid to the IRA, but is instead the right to receive an amount determined by dividing the value of the IRA by the remaining number of years in the payment period. This payment right is similar to the right to receive a unitrust amount, which is normally expressed as an amount equal to a percentage of the value of the unitrust assets without regard to dividends or interest that may be received by the unitrust.

An amount received from an IRA or a plan with a payment provision similar to that of an IRA is allocated under Section 15-1-419 (3), which differentiates between payments that are required to be made and all other payments. To the extent that a payment is required to be made (either under federal income tax rules or, in the case of a plan that is not subject to those rules, under the terms of the plan), 10% of the amount received is allocated to income and the balance is allocated to principal. All other payments are allocated to principal because they represent a change in the form of a principal asset; Section 15-1-419 follows the rule in Section 15-1-414 (1) (b), which provides that money or property received from a change in the form of a principal asset be allocated to principal.

Section 15-1-419 (3) produces an allocation to income that is similar to the allocation under the 1962 Uniform Act formula if the annual payments are the same throughout the payment period, and it is simpler to administer. The amount allocated to income under Section 15-1-419 is not dependent upon the interest rate that is used for valuation purposes when the decedent dies, and if the payments received by the trust increase or decrease from year to year because the fund from which the payment is made increases or decreases in value, the amount allocated to income will also increase or decrease.

**Marital deduction requirements.** When an IRA is payable to a QTIP marital deduction trust, the IRS treats the IRA as separate terminable interest property and requires that a QTIP election be made for it. In order to qualify for QTIP treatment, an IRS ruling states that all of the IRA's income must be distributed annually to the QTIP marital deduction trust and then must be allocated to trust income for distribution to the spouse. Rev. Rul. 89-89, 1989-2 C.B. 231. If an allocation to income under this Act of 10% of the required distribution from the IRA does not meet the requirement that all of the IRA's income be distributed from the trust to the spouse, the provision in subsection (4) requires

the trustee to make a larger allocation to income to the extent necessary to qualify for the marital deduction. The requirement of Rev. Rul. 89-89 should also be satisfied if the IRA beneficiary designation permits the spouse to require the trustee to withdraw the necessary amount from the IRA and distribute it to her, even though the spouse never actually requires the trustee to do so. If such a provision is in the beneficiary designation, a distribution under subsection (4) should not be necessary.

**15-1-420. Liquidating asset.** (1) For purposes of this section, “liquidating asset” means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to section 15-1-419, resources subject to section 15-1-421, timber subject to section 15-1-422, an activity subject to section 15-1-424, an asset subject to section 15-1-425, or any asset for which the trustee establishes a reserve for depreciation under section 15-1-428.

(2) A trustee shall allocate to income ten percent of the receipts from a liquidating asset and the balance to principal.

**Source: L. 2000:** Entire part R&RE, p. 1142, § 1, effective July 1, 2001.

### OFFICIAL COMMENT

**Prior Acts.** Section 11 of the 1962 Uniform Act allocates receipts from “property subject to depletion” to income in an amount “not in excess of 5%” of the asset’s inventory value. The 1931 Uniform Act has a similar 5% rule that applies when the trustee is under a duty to change the form of the investment. The 5% rule imposes on a trust the obligation to pay a fixed annuity to the income beneficiary until the asset is exhausted. Under both the 1931 and 1962 Uniform Acts the balance of each year’s receipts is added to principal. A fixed payment can produce unfair results. The remainder beneficiary receives all of the receipts from unexpected growth in the asset, e.g., if royalties on a patent or copyright increase significantly. Conversely,

if the receipts diminish more rapidly than expected, most of the amount received by the trust will be allocated to income and little to principal. Moreover, if the annual payments remain the same for the life of the asset, the amount allocated to principal will usually be less than the original inventory value. For these reasons, Section 15-1-420 abandons the annuity approach under the 5% rule.

**Lottery payments.** The reference in subsection (1) to rights to receive payments under an arrangement that does not provide for the payment of interest includes state lottery prizes and similar fixed amounts payable over time that are not deferred compensation arrangements covered by Section 15-1-419.

**15-1-421. Minerals, water, and other natural resources.** (1) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(a) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

(b) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

(c) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, ninety percent must be allocated to principal and the balance to income.

(d) If an amount is received from a working interest or any other interest not provided for in paragraph (a), (b), or (c) of this subsection (1), ninety percent of the net amount received must be allocated to principal and the balance to income.



(2) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent of the amount must be allocated to principal and the balance to income.

(3) Subparts 1 through 6 of this part 4 apply whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(4) If a trust owns an interest in minerals, water, or other natural resources on July 1, 2001, the trustee may allocate receipts from the interest as provided in subparts 1 through 6 of this part 4 or in the manner used by the trustee before July 1, 2001. If the trust acquires an interest in minerals, water, or other natural resources after July 1, 2001, the trustee shall allocate receipts from the interest as provided in subparts 1 through 6 of this part 4.

**Source:** L. 2000: Entire part R&RE, p. 1142, § 1, effective July 1, 2001. L. 2009: (3) and (4) amended, (HB 09-1241), ch. 169, p. 744, § 8, effective April 22.

**Editor's note:** This section is similar to former § 15-1-414 as it existed prior to 2001.

### OFFICIAL COMMENT

**Prior Acts.** The 1962 Uniform Act allocates to principal as a depletion allowance, 27-1/2% of the gross receipts, but not more than 50% of the net receipts after paying expenses. The Internal Revenue Code no longer provides for a 27-1/2% depletion allowance, although the major oil-producing States have retained the 27-1/2% provision in their principal and income acts (Texas amended its Act in 1993, but did not change the depletion provision). Section 9 of the 1931 Uniform Act allocates all of the net proceeds received as consideration for the "permanent severance of natural resources from the lands" to principal.

Section 15-1-421 allocates 90% of the net receipts to principal and 10% to income. A depletion provision that is tied to past or present Code provisions is undesirable because it causes a large portion of the oil and gas receipts to be paid out as income. As wells are depleted, the amount received by the income beneficiary falls drastically. Allocating a larger portion of the receipts to principal enables the trustee to acquire other income producing assets that will continue to produce income when the mineral reserves are exhausted.

**Application of Sections 15-1-413 and 15-1-418.** This section applies to the extent that the trustee does not account separately for receipts from minerals and other natural resources under Section 15-1-413 or allocate all of the receipts to principal under Section 15-1-418.

**Open mine doctrine.** The purpose of Section 15-1-421 (3) is to abolish the "open mine doctrine" as it may apply to the rights of an income beneficiary and a remainder beneficiary in receipts from the production of minerals from land owned or leased by a trust. Instead, such receipts are to be allocated to or between principal and income in accordance with the provisions of this

Act. For a discussion of the open mine doctrine, see generally 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 239.3 (4th ed. 1988), and *Nutter v. Stockton*, 626 P.2d 861 (Okla. 1981).

**Effective date provision.** Section 9(b) of the 1962 Uniform Act provides that the natural resources provision does not apply to property interests held by the trust on the effective date of the Act, which reflects concerns about the constitutionality of applying a retroactive administrative provision to interests in real estate, based on the opinion in the Oklahoma case of *Franklin v. Margay Oil Corporation*, 153 P.2d 486, 501 (Okla. 1944). Section 15-1-421 (4) permits a trustee to use either the method provided for in this Act or the method used before the Act takes effect. Lawyers in jurisdictions other than Oklahoma may conclude that retroactivity is not a problem as to property situated in their States, and this provision permits trustees to decide, based on advice from counsel in States whose law may be different from that of Oklahoma, whether they may apply this provision retroactively if they conclude that to do so is in the best interests of the beneficiaries.

If the property is in a State other than the State where the trust is administered, the trustee must be aware that the law of the property's situs may control this question. The outcome turns on a variety of questions: whether the terms of the trust specify that the law of a State other than the situs of the property shall govern the administration of the trust, and whether the courts will follow the terms of the trust; whether the trust's asset is the land itself or a leasehold interest in the land (as it frequently is with oil and gas property); whether a leasehold interest or its proceeds should be classified as real property or personal property, and if as personal property, whether applicable state law treats it as

a movable or an immovable for conflict of laws purposes. See 5A Austin W. Scott & William F.

Fratcher, *The Law of Trusts* §§ 648, at 531, 533-534; § 657, at 600 (4th ed. 1989).

**15-1-421.5. Disposition of natural resources.** (1) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on, or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

(a) If received as rent on a lease or extension payments on a lease, the receipts are income;

(b) If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts that the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

(c) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in paragraph (a) or (b) of this subsection (1) shall be apportioned on a yearly basis in accordance with this paragraph (c) regardless of whether any natural resource was being taken from the land at the time the trust was established. Fifteen percent of the gross receipts, but not to exceed fifty percent of the net receipts remaining after payment of all expenses, direct and indirect, computed without allowance for depletion, shall be added to principal as an allowance for depletion. The balance of the gross receipts after payment therefrom of all expenses, direct and indirect, is income.

(2) If a trustee, on April 22, 2009, held an item of depletable property of a type specified in this section, he or she shall allocate receipts from the property in the manner used before April 22, 2009, but as to all depletable property acquired after April 22, 2009, by an existing or new trust, the method of allocation provided herein shall be used.

(3) This section does not apply to timber, water, soil, sod, dirt, turf, or mosses.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 745, § 9, effective April 22.

**15-1-422. Timber.** (1) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(a) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(b) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(c) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in paragraphs (a) and (b) of this subsection (1); or

(d) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to paragraph (a), (b), or (c) of this subsection (1).

(2) In determining net receipts to be allocated pursuant to subsection (1) of this section, a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(3) Subparts 1 through 6 of this part 4 apply whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(4) If a trust owns an interest in timberland on July 1, 2001, the trustee may allocate net receipts from the sale of timber and related products as provided in subparts 1 through 6 of this part 4 or in the manner used by the trustee before July 1, 2001. If the trust acquires an interest in timberland after July 1, 2001, the trustee shall allocate net receipts from the sale of timber and related products as provided in subparts 1 through 6 of this part 4.



**Source:** L. 2000: Entire part R&RE, p. 1143, § 1, effective July 1, 2001. L. 2009: (3) and (4) amended, (HB 09-1241), ch. 169, p. 746, § 10, effective April 22.

### OFFICIAL COMMENT

**Scope of section.** The rules in Section 15-1-422 are intended to apply to net receipts from the sale of trees and by-products from harvesting and processing trees without regard to the kind of trees that are cut or whether the trees are cut before or after a particular number of years of growth. The rules apply to the sale of trees that are expected to produce lumber for building purposes, trees sold as pulpwood, and Christmas and other ornamental trees. Subsection (1) applies to net receipts from property owned by the trustee and property leased by the trustee. The Act is not intended to prevent a tenant in possession of the property from using wood that he cuts on the property for personal, noncommercial purposes, such as a Christmas tree, firewood, mending old fences or building new fences, or making repairs to structures on the property.

Under subsection (1), the amount of net receipts allocated to income depends upon whether the amount of timber removed is more

or less than the rate of growth. The method of determining the amount of timber removed and the rate of growth is up to the trustee, based on methods customarily used for the kind of timber involved.

**Application of Sections 15-1-413 and 15-1-418.** This section applies to the extent that the trustee does not account separately for net receipts from the sale of timber and related products under Section 15-1-413 or allocate all of the receipts to principal under Section 15-1-418. The option to account for net receipts separately under Section 15-1-413 takes into consideration the possibility that timber harvesting operations may have been conducted before the timber property became subject to the trust, and that it may make sense to continue using accounting methods previously established for the property. It also permits a trustee to use customary accounting practices for timber operations even if no harvesting occurred on the property before it became subject to the trust.

**15-1-423. Property not productive of income.** (1) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under section 15-1-404 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by section 15-1-404 (1). The trustee may decide which action or combination of actions to take.

(2) In cases not governed by the provisions of subsection (1) of this section, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

**Source:** L. 2000: Entire part R&RE, p. 1144, § 1, effective July 1, 2001.

**Editor's note:** This section is similar to former § 15-1-413 as it existed prior to 2001.

### OFFICIAL COMMENT

**Prior Acts' Conflict with Uniform Prudent Investor Act.** Section 2(b) of the Uniform Prudent Investor Act provides that "[a] trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole ... ." The underproductive property provisions in Section 12 of the 1962 Uniform Act and Section 11 of the 1931 Uniform Act give the income beneficiary a right to receive a portion of the proceeds from the sale of underproductive property as "delayed income." In each Uniform Act the provision applies on an

asset by asset basis and not by taking into consideration the trust portfolio as a whole, which conflicts with the basic precept in Section 2(b) of the Prudent Investor Act. Moreover, in determining the amount of delayed income, the prior Uniform Acts do not permit a trustee to take into account the extent to which the trustee may have distributed principal to the income beneficiary, under principal invasion provisions in the terms of the trust, to compensate for insufficient income from the unproductive asset. Under Section 15-1-404 (2)(g) of this Act, a trustee must consider prior distributions of principal to the

income beneficiary in deciding whether and to what extent to exercise the power to adjust conferred by Section 15-1-404 (1).

**Duty to make property productive of income.** In order to implement the Uniform Prudent Investor Act, this Act abolishes the right to receive delayed income from the sale proceeds of an asset that produces little or no income, but it does not alter existing state law regarding the income beneficiary's right to compel the trustee to make property productive of income. As the law continues to develop in this area, the duty to make property productive of current income in a particular situation should be determined by taking into consideration the performance of the portfolio as a whole and the extent to which a trustee makes principal distributions to the income beneficiary under the terms of the trust and adjustments between principal and income under Section 15-1-404 of this Act.

Trusts for which the value of the right to receive income is important for tax reasons may be affected by Reg. § 1.7520-3(b)(2)(v) *Example (1)*, § 20.7520-3(b)(2)(v) *Examples (1) and (2)*, and § 25.7520-3(b)(2)(v) *Examples (1) and (2)*, which provide that if the income beneficiary does not have the right to compel the trustee to make the property productive, the income interest is considered unproductive and may not be valued actuarially under those sections.

**Marital deduction trusts.** Subsection (1) draws on language in Reg. § 20.2056(b)-5(f)(4) and (5) to enable a trust for a spouse to qualify for a marital deduction if applicable state law is unclear about the spouse's right to compel the trustee to make property productive of income.

**15-1-424. Derivatives and options.** (1) For purposes of this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments that gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(2) To the extent that a trustee does not account under section 15-1-413 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(3) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

**Source:** L. 2000: Entire part R&RE, p. 1144, § 1, effective July 1, 2001.

## OFFICIAL COMMENT

**Scope and application.** It is difficult to predict how frequently and to what extent trustees

The trustee should also consider the application of Section 15-1-404 of this Act and the provisions of Restatement of Trusts 3d: Prudent Investor Rule § 240, at 186, app. § 240, at 252 (1992). Example (6) in the Comment to Section 15-1-404 describes a situation involving the payment from income of carrying charges on unproductive real estate in which Section 15-1-404 may apply.

Once the two conditions have occurred — insufficient beneficial enjoyment from the property and the spouse's demand that the trustee take action under this section — the trustee must act; but instead of the formulaic approach of the 1962 Uniform Act, which is triggered only if the trustee sells the property, this Uniform Act permits the trustee to decide whether to make the property productive of income, convert it, transfer funds from principal to income, or to take some combination of those actions. The trustee may rely on the power conferred by Section 15-1-404 (1) to adjust from principal to income if the trustee decides that it is not feasible or appropriate to make the property productive of income or to convert the property. Given the purpose of Section 15-1-423, the power under Section 15-1-404 (1) would be exercised to transfer principal to income and not to transfer income to principal.

Section 15-1-423 does not apply to a so-called "estate" trust, which will qualify for the marital deduction, even though the income may be accumulated for a term of years or for the life of the surviving spouse, if the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies. Reg. § 20.2056(c)-2(b)(1)(iii).

will invest directly in derivative financial instruments rather than participating indirectly



through investment entities that may utilize these instruments in varying degrees. If the trust participates in derivatives indirectly through an entity, an amount received from the entity will be allocated under Section 15-1-411 and not Section 15-1-424. If a trustee invests directly in derivatives to a significant extent, the expectation is that receipts and disbursements related to derivatives will be accounted for under Section 15-1-413; if a trustee chooses not to account under Section 15-1-413, Section 15-1-424 (2) provides the default rule. Certain types of option transactions in which trustees may engage are dealt with in subsection (3) to distinguish those transactions from ones involving options that are embedded in derivative financial instruments.

**Definition of "derivative."** "Derivative" is a difficult term to define because new derivatives are invented daily as dealers tailor their terms to achieve specific financial objectives for particular clients. Since derivatives are typically contract-based, a derivative can probably be devised for almost any set of objectives if another party can be found who is willing to assume the obligations required to meet those objectives.

The most comprehensive definition of derivative is in the Exposure Draft of a Proposed Statement of Financial Accounting Standards titled "Accounting for Derivative and Similar Financial Instruments and for Hedging Activities," which was released by the Financial Accounting Standards Board (FASB) on June 20, 1996 (No. 162-B). The definition in Section 15-1-424 (1) is derived in part from the FASB definition. The purpose of the definition in subsection (1) is to implement the substantive rule in subsection (2) that provides for all receipts and disbursements to be allocated to principal to the extent the trustee elects not to account for transactions in derivatives under Section 15-1-413. As a result, it is much shorter than the FASB definition, which serves much more ambitious objectives.

A derivative is frequently described as including futures, forwards, swaps and options, terms that also require definition, and the definition in this Act avoids these terms. FASB used the same approach, explaining in paragraph 65 of the Exposure Draft:

The definition of *derivative financial instrument* in this Statement includes those financial instruments generally considered to be derivatives, such as forwards, futures, swaps, options, and similar instruments. The Board considered defining a derivative financial instrument by merely referencing those commonly understood instruments, similar to paragraph 5 of Statement 119, which says that "... a derivative financial instrument is a futures, forward, swap, or option contract, or other financial instrument with similar characteristics." However, the continued development of financial markets and innovative financial instruments could ultimately render a definition based on examples inadequate and obsolete. The Board, therefore, decided to base the definition of a derivative financial instrument on a description of the common characteristics of those instruments in order to accommodate the accounting for newly developed derivatives. (Footnote omitted.)

**Marking to market.** A gain or loss that occurs because the trustee marks securities to market or to another value during an accounting period is not a transaction in a derivative financial instrument that is income or principal under the Act — only cash receipts and disbursements, and the receipt of property in exchange for a principal asset, affect a trust's principal and income accounts.

**Receipt of property other than cash.** If a trustee receives property other than cash upon the settlement of a derivatives transaction, that property would be principal under Section 15-1-414 (1) (b).

**Options.** Options to which subsection (3) applies include an option to purchase real estate owned by the trustee and a put option purchased by a trustee to guard against a drop in value of a large block of marketable stock that must be liquidated to pay estate taxes. Subsection (3) would also apply to a continuing and regular practice of selling call options on securities owned by the trust if the terms of the option require delivery of the securities. It does not apply if the consideration received or given for the option is something other than cash or property, such as cross-options granted in a buy-sell agreement between owners of an entity.

**15-1-425. Asset-backed securities.** (1) For purposes of this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset governed by the provisions of section 15-1-411 or 15-1-419.

(2) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment that the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(3) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate ten percent of the payment to income and the balance to principal.

**Source:** L. 2000: Entire part R&RE, p. 1144, § 1, effective July 1, 2001.

#### OFFICIAL COMMENT

**Scope of section.** Typical asset-backed securities include arrangements in which debt obligations such as real estate mortgages, credit card receivables and auto loans are acquired by an investment trust and interests in the trust are sold to investors. The source for payments to an investor is the money received from principal and interest payments on the underlying debt. An asset-backed security includes an "interest only" or a "principal only" security that permits the investor to receive only the interest payments received from the bonds, mortgages or other assets that are the collateral for the asset-backed security, or only the principal payments made on those collateral assets. An asset-backed security also includes a security that permits the investor to participate in either the capital ap-

preciation of an underlying security or in the interest or dividend return from such a security, such as the "Primes" and "Scores" issued by Americus Trust. An asset-backed security does not include an interest in a corporation, partnership, or an investment trust described in the Comment to Section 15-1-412, whose assets consist significantly or entirely of investment assets. Receipts from an instrument that do not come within the scope of this section or any other section of the Act would be allocated entirely to principal under the rule in Section 15-1-403 (1)(d), and the trustee may then consider whether and to what extent to exercise the power to adjust in Section 15-1-404, taking into account the return from the portfolio as whole and other relevant factors.

#### SUBPART 5

#### ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST

**Cross references:** For information concerning the effective date of this subpart 5, see § 15-1-434.

**15-1-426. Disbursements from income.** (1) A trustee shall make the following disbursements from income to the extent that they are not disbursements governed by the provisions of section 15-1-406 (1) (b) (II) or (1) (b) (III):

(a) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(b) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(c) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(d) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

**Source:** L. 2000: Entire part R&RE, p. 1145, § 1, effective July 1, 2001.

**Editor's note:** This section is similar to former § 15-1-415 as it existed prior to 2001.

#### OFFICIAL COMMENT

**Trustee fees.** The regular compensation of a trustee or the trustee's agent includes compen-

sation based on a percentage of either principal or income or both.



**Insurance premiums.** The reference in paragraph (1)(d) to “recurring” premiums is intended to distinguish premiums paid annually for fire insurance from premiums on title insurance, each of which covers the loss of a principal asset. Title insurance premiums would be a principal disbursement under Section 15-1-427 (1)(e).

**Regularly recurring taxes.** The reference to “regularly recurring taxes assessed against principal” includes all taxes regularly imposed on real property and tangible and intangible personal property.

**15-1-427. Disbursements from principal.** (1) A trustee shall make the following disbursements from principal:

(a) The remaining one-half of the disbursements described in section 15-1-426 (1) (a) and section 15-1-426 (1) (b);

(b) All of the trustee’s compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(c) Payments on the principal of a trust debt;

(d) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(e) Premiums paid on a policy of insurance not described in section 15-1-426 (1) (d) of which the trust is the owner and beneficiary;

(f) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(g) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(2) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

**Source:** L. 2000: Entire part R&RE, p. 1145, § 1, effective July 1, 2001.

**Editor’s note:** This section is similar to former § 15-1-415 as it existed prior to 2001.

### OFFICIAL COMMENT

**Environmental expenses.** All environmental expenses are payable from principal, subject to the power of the trustee to transfer funds to principal from income under Section 15-1-429. However, the Drafting Committee decided that it was not necessary to broaden this provision to cover other expenditures made under compulsion of governmental authority. See generally the annotation at 43 A.L.R.4th 1012 (Duty as Between Life Tenant and Remainderman with Respect to Cost of Improvements or Repairs Made Under Compulsion of Governmental Authority).

Environmental expenses paid by a trust are to be paid from principal under Section 15-1-502 (1)(g) on the assumption that they will usually be extraordinary in nature. Environmental expenses might be paid from income if the trustee is carrying on a business that uses or sells toxic

substances, in which case environmental cleanup costs would be a normal cost of doing business and would be accounted for under Section 15-1-413. In accounting under that Section, environmental costs will be a factor in determining how much of the net receipts from the business is trust income. Paying all other environmental expenses from principal is consistent with this Act’s approach regarding receipts — when a receipt is not clearly a current return on a principal asset, it should be added to principal because over time both the income and remainder beneficiaries benefit from this treatment. Here, allocating payments required by environmental laws to principal imposes the detriment of those payments over time on both the income and remainder beneficiaries.

Under Sections 15-1-429 (1) and 15-1-429 (2)(e), a trustee who makes or expects to make

a principal disbursement for an environmental expense described in Section 15-1-427 (1)(g) is authorized to transfer an appropriate amount from income to principal to reimburse principal for disbursements made or to provide a reserve for future principal disbursements.

The first part of Section 15-1-427 (1)(g) is based upon the definition of an "environmental remediation trust" in Treas. Reg. § 301.7701-4(e)(as amended in 1996). This is not because the Act applies to an environmental remediation trust, but because the definition is a useful and thoroughly vetted description of the kinds of expenses that a trustee owning contaminated property might incur. Expenses incurred to comply with environmental laws include the cost of environmental consultants, administrative proceedings and burdens of every kind imposed as

the result of an administrative or judicial proceeding, even though the burden is not formally characterized as a penalty.

**Title proceedings.** Disbursements that are made to protect a trust's property, referred to in Section 15-1-427 (1) (d), include an "action to assure title" that is mentioned in Section 13(c)(2) of the 1962 Uniform Act.

**Insurance premiums.** Insurance premiums referred to in Section 15-1-427 (1)(e) include title insurance premiums. They also include premiums on life insurance policies owned by the trust, which represent the trust's periodic investment in the insurance policy. There is no provision in the 1962 Uniform Act for life insurance premiums.

**Taxes.** Generation-skipping transfer taxes are payable from principal under subsection (1)(f).

**15-1-428. Transfers from income to principal for depreciation.** (1) For purposes of this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(2) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(a) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(b) During the administration of a decedent's estate; or

(c) Under this section if the trustee is accounting under section 15-1-413 for the business or activity in which the asset is used.

(3) An amount transferred to principal need not be held as a separate fund.

**Source: L. 2000:** Entire part R&RE, p. 1145, § 1, effective July 1, 2001.

## OFFICIAL COMMENT

**Prior Acts.** The 1931 Uniform Act has no provision for depreciation. Section 13(a)(2) of the 1962 Uniform Act provides that a charge shall be made against income for "... a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles ... ." That provision has been resisted by many trustees, who do not provide for any depreciation for a variety of reasons. One reason relied upon is that a charge for depreciation is not needed to protect the remainder beneficiaries if the value of the land is increasing; another is that generally accepted accounting principles may not require depreciation to be taken if the property is not part of a business. The Drafting Committee concluded that the decision to provide for depreciation

should be discretionary with the trustee. The power to transfer funds from income to principal that is granted by this section is a discretionary power of administration referred to in Section 15-1-403 (2), and in exercising the power a trustee must comply with Section 15-1-403 (2).

One purpose served by transferring cash from income to principal for depreciation is to provide funds to pay the principal of an indebtedness secured by the depreciable property. Section 15-1-429 (2)(d) permits the trustee to transfer additional cash from income to principal for this purpose to the extent that the amount transferred from income to principal for depreciation is less than the amount of the principal payments.

**15-1-429. Transfers from income to reimburse principal.** (1) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.



(2) Principal disbursements governed by the provisions of subsection (1) of this section include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(a) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(b) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(c) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(d) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(e) Disbursements described in section 15-1-427 (1) (g).

(3) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (1) of this section.

**Source:** L. 2000: Entire part R&RE, p. 1147, § 1, effective July 1, 2001.

### OFFICIAL COMMENT

**Prior Acts.** The sources of Section 15-1-429 are Section 13(b) of the 1962 Uniform Act, which permits a trustee to "regularize distributions," if charges against income are unusually large, by using "reserves or other reasonable means" to withhold sums from income distributions; Section 13(c)(3) of the 1962 Uniform Act, which authorizes a trustee to establish an allowance for depreciation out of income if principal is used for extraordinary repairs, capital improvements and special assessments; and Sec-

tion 12(3) of the 1931 Uniform Act, which permits the trustee to spread income expenses of unusual amount "throughout a series of years." Section 15-1-429 contains a more detailed enumeration of the circumstances in which this authority may be used, and includes in subsection (2)(d) the express authority to use income to make principal payments on a mortgage if the depreciation charge against income is less than the principal payments on the mortgage.

**15-1-430. Income taxes.** (1) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(2) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(3) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid:

(a) From income to the extent that receipts from the entity are allocated only to income;

(b) From principal to the extent that receipts from the entity are allocated only to principal;

(c) Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(d) From principal to the extent that the tax exceeds the total receipts from the entity.

(4) After applying subsections (1) to (3) of this section, the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

**Source:** L. 2000: Entire part R&RE, p. 1147, § 1, effective July 1, 2001. L. 2009: Entire section amended, (SB 09-139), ch. 131, p. 567, § 2, effective April 16.

### OFFICIAL COMMENT

**Electing Small Business Trusts.** An Electing Small Business Trust (ESBT) is a creature created by Congress in the Small Business Job

Protection Act of 1996 (P.L. 104-188). For years beginning after 1996, an ESBT may qualify as an S corporation stockholder even if the trustee

does not distribute all of the trust's income annually to its beneficiaries. The portion of an ESBT that consists of the S corporation stock is treated as a separate trust for tax purposes (but not for trust accounting purposes), and the S corporation income is taxed directly to that portion of the trust even if some or all of that income is distributed to the beneficiaries.

A trust normally receives a deduction for distributions it makes to its beneficiaries. Subsection (4) takes into account the possibility that

an ESBT may not receive a deduction for trust accounting income that is distributed to the beneficiaries. Only limited guidance has been issued by the Internal Revenue Service, and it is too early to anticipate all of the technical questions that may arise, but the powers granted to a trustee in Sections 15-1-431 and 15-1-404 to make adjustments are probably sufficient to enable a trustee to correct inequities that may arise because of technical problems.

**15-1-431. Adjustments between principal and income because of taxes.** (1) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries that arise from:

(a) Elections and decisions, other than those described in subsection (2) of this section, that the fiduciary makes from time to time regarding tax matters;

(b) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(c) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(2) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

**Source:** L. 2000: Entire part R&RE, p. 1148, § 1, effective July 1, 2001.

#### OFFICIAL COMMENT

**Discretionary adjustments.** Section 15-1-431 (1) permits the fiduciary to make adjustments between income and principal because of tax law provisions. It would permit discretionary adjustments in situations like these: (1) A fiduciary elects to deduct administration expenses that are paid from principal on an income tax return instead of on the estate tax return; (2) a distribution of a principal asset to a trust or other beneficiary causes the taxable income of an estate or trust to be carried out to the distributee and relieves the persons who receive the income of any obligation to pay income tax on the income; or (3) a trustee realizes a capital gain on the sale of a principal asset and pays a large state income tax on the gain, but under applicable federal income tax rules the trustee may not deduct the state income tax payment from the capital gain in calculating the trust's

federal capital gain tax, and the income beneficiary receives the benefit of the deduction for state income tax paid on the capital gain. See generally Joel C. Dobris, *Limits on the Doctrine of Equitable Adjustment in Sophisticated Post-mortem Tax Planning*, 66 Iowa L. Rev. 273 (1981).

Section 15-1-431 (1)(c) applies to a qualified Subchapter S trust (QSST) whose income beneficiary is required to include a pro rata share of the S corporation's taxable income in his return. If the QSST does not receive a cash distribution from the corporation that is large enough to cover the income beneficiary's tax liability, the trustee may distribute additional cash from principal to the income beneficiary. In this case the retention of cash by the corporation benefits the trust principal. This situation could occur if the corporation's taxable income includes capital



gain from the sale of a business asset and the sale proceeds are reinvested in the business instead of being distributed to shareholders.

**Mandatory adjustment.** Subsection (2) provides for a mandatory adjustment from income to principal to the extent needed to preserve an estate tax marital deduction or charitable contributions deduction. It is derived from New York's EPTL § 11-1.2(A), which requires principal to be reimbursed by those who benefit when a fiduciary elects to deduct administration expenses on an income tax return instead of the estate tax return. Unlike the New York provision, subsection (2) limits a mandatory reimbursement to cases in which a marital deduction or a charitable contributions deduction is reduced by the payment of additional estate taxes because of the fiduciary's income tax election. It is intended to preserve the result reached in *Estate of Britenstool v. Commissioner*, 46 T.C. 711 (1966), in which the Tax Court held that a reimbursement required by the predecessor of EPTL § 11-1.2(A) resulted in the estate receiving the same charitable contributions deduction it would have received if the administration expenses had been deducted for estate tax purposes instead of for income tax purposes. Because a fiduciary will elect to deduct administration expenses for income tax purposes only when the income tax reduction exceeds the estate tax reduction, the effect of this adjustment is that the principal is placed in the same position it would have occupied if the fiduciary had deducted the expenses for estate tax purposes, but the income beneficiaries receive an additional benefit. For example, if the income tax

benefit from the deduction is \$30,000 and the estate tax benefit would have been \$20,000, principal will be reimbursed \$20,000 and the net benefit to the income beneficiaries will be \$10,000.

**Irrevocable grantor trusts.** Under Sections 671-679 of the Internal Revenue Code (the "grantor trust" provisions), a person who creates an irrevocable trust for the benefit of another person may be subject to tax on the trust's income or capital gains, or both, even though the settlor is not entitled to receive any income or principal from the trust. Because this is now a well-known tax result, many trusts have been created to produce this result, but there are also trusts that are unintentionally subject to this rule. The Act does not require or authorize a trustee to distribute funds from the trust to the settlor in these cases because it is difficult to establish a rule that applies only to trusts where this tax result is unintended and does not apply to trusts where the tax result is intended. Settlers who intend this tax result rarely state it as an objective in the terms of the trust, but instead rely on the operation of the tax law to produce the desired result. As a result it may not be possible to determine from the terms of the trust if the result was intentional or unintentional. If the drafter of such a trust wants the trustee to have the authority to distribute principal or income to the settlor to reimburse the settlor for taxes paid on the trust's income or capital gains, such a provision should be placed in the terms of the trust. In some situations the Internal Revenue Service may require that such a provision be placed in the terms of the trust as a condition to issuing a private letter ruling.

## SUBPART 6

### MISCELLANEOUS PROVISIONS

**Cross references:** For information concerning the effective date of this subpart 6, see § 15-1-434.

**15-1-432. Uniformity of application - construction.** In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source:** L. 2000: Entire part R&RE, p. 1148, § 1, effective July 1, 2001.

**15-1-433. Severability.** If any provision of subparts 1 through 6 of this part 4 or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of subparts 1 through 6 of this part 4 that can be given effect without the invalid provision or application, and to this end the provisions of subparts 1 through 6 of this part 4 are severable.

**Source:** L. 2000: Entire part R&RE, p. 1148, § 1, effective July 1, 2001. L. 2009: Entire section amended, (HB 09-1241), ch. 169, p. 746, § 11, effective April 22.

**15-1-434. Effective date - application to existing trusts and estates - election.**  
(1) Subparts 1 through 6 of this part 4 shall take effect July 1, 2001.

(2) Subparts 1 through 6 of this part 4 shall apply to every trust or decedent's estate existing on and after July 1, 2001, except as otherwise expressly provided in the will or terms of the trust or in subparts 1 through 6 of this part 4. For each trust established under a will or trust agreement existing and irrevocable on July 1, 2001, the trustee may elect to apply the "Uniform Principal and Income Act" of this state in effect on June 30, 2001. The trustee shall make such election by July 1, 2002.

(3) Notwithstanding the provisions of subsection (2) of this section, subparts 1 through 6 of this part 4 shall not apply to any trust or decedent's estate existing on July 1, 2001, in which no trustee has the authority to act under section 15-1-404 unless the trustees elect to apply subparts 1 through 6 of this part 4. The trustees may make this election at any time.

(4) Once an election is made pursuant to this section, the election shall be irrevocable. The trustee shall give notice of such an election to the beneficiaries of the trust in accordance with section 15-1-405. If such notice complies with section 15-1-405, the provisions of said section shall apply to such election.

**Source: L. 2000:** Entire part R&RE, p. 1149, § 1, effective July 1, 2001. **L. 2009:** (1), (2), and (3) amended, (HB 09-1241), ch. 169, p. 746, § 12, effective April 22.

**15-1-435. Application of certain provisions - notice of election.** (1) Section 15-1-421.5 shall apply to all trusts and estates executed on or after July 1, 2009, unless the qualified beneficiaries elect not to apply said section.

(2) The provisions of section 15-1-421.5 shall not apply to the determination of income from the disposition of natural resources in a trust or estate created before July 1, 2009, unless the qualified beneficiaries elect to apply section 15-1-421.5 as provided in this section.

(3) If the qualified beneficiaries elect under subsection (1) or (2) of this section, notice of the election to apply or not to apply section 15-1-421.5 shall be given by the trustee in accordance with section 15-1-405, and the provisions of such section shall apply to the election.

(4) An election to apply section 15-1-421.5 is irrevocable.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 746, § 13, effective April 22.

**15-1-436. Transitional matters.** (1) Section 15-1-419, as amended by Senate Bill 09-139, enacted in 2009, applies to a trust described in section 15-1-419 (4) on and after the following dates:

- (a) If the trust is not funded as of April 16, 2009, the date of the decedent's death;
- (b) If the trust is initially funded in the calendar year beginning January 1, 2009, the date of the decedent's death; or
- (c) If the trust is not described in either paragraph (a) or (b) of this subsection (1), January 1, 2009.

**Source: L. 2009:** Entire section added, (SB 09-139), ch. 131, p. 567, § 3, effective April 16.

## SUBPART 7

### UNIFORM PRINCIPAL AND INCOME ACT OF 1955

**15-1-451. Short title.** This subpart 7 shall be known and may be cited as the "Uniform Principal and Income Act of 1955".

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 747, § 14, effective April 22.



**15-1-452. Source and prior enactment - uniform application.** (1) This subpart 7 is derived from the "Uniform Principal and Income Act" promulgated in 1931 by the national conference of commissioners on uniform state laws and enacted in this state effective September 1, 1955. The reenactment of such act in this subpart 7 includes the amendments to such act enacted in this state through June 30, 2001, and additional amendments to accommodate its reenactment.

(2) This subpart 7 shall be construed and interpreted as to effectuate the general purpose of the act as promulgated by such commissioners to make uniform the law of those jurisdictions which enacted such act taking into account the case law of such jurisdictions with respect to such act.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 747, § 14, effective April 22.

**15-1-453. Definitions - construction of terms.** (1) As used in this subpart 7, unless the context otherwise requires:

(a) "Executor" means the executor named in a will and any successor executor and includes an administrator with the will annexed.

(b) "Income" means the return derived from principal.

(c) "Net probate income" means the income derived from property passing to the executor by will or by the execution of a power of appointment or from any substitute for such property acquired by purchase, exchange, or otherwise, including income derived from property which is used to discharge liabilities of the testator or of the executor in his or her representative capacity, and legacies payable in money, less any income taxes paid by the executor which are attributable to such income and less that share of administration expenses properly chargeable to income.

(d) "Principal" means any realty or personalty which has been so set aside or limited by the owner thereof or a person thereto legally empowered that it and any substitutions for it are eventually to be conveyed, delivered, or paid to a person, while the return therefrom or use thereof or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person.

(e) "Remainderman" means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established or determined by operation of law.

(f) "Tenant" means the person to whom income is presently or currently payable or for whom it is accumulated or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution.

(g) "Trustee" includes the original trustee of any trust to which the principal may be subject and also any succeeding or added trustee.

(2) This section shall be effective with respect to wills the testators of which die on or after April 18, 1961, to revocable inter vivos trusts the settlors of which die after said date, and to irrevocable inter vivos trusts which are created after said date.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 747, § 14, effective April 22.

**15-1-454. Applicability.** (1) Except as specifically provided by the person establishing the principal, this subpart 7 shall apply:

(a) To life estates, estates for a term, remainders, reversions, and other legal estates created before July 1, 2001, or after July 1, 2010;

(b) Except as provided in paragraph (b) of subsection (2) of this section, to trusts in existence before July 1, 2001, that have elected:

(I) Not to have subparts 1 through 6 of this part 4 apply to such trust, in accordance with section 15-1-434 (2); or

(II) To have the prior laws apply in accordance with section 15-1-434 (3); and

(c) To trusts in existence before July 1, 2001, that are subject to section 15-1-434 (3) and that have not elected to have subparts 1 through 6 of this part 4 apply to the trust, in accordance with section 15-1-434 (3).

(2) (a) This subpart 7 shall apply retroactively to a life estate or estate for term in principal, which estate was created during the period beginning on July 1, 2001, and before July 1, 2010, and also to the remainder or reversion that commences in possession upon the termination of such life estate or estate for a term unless a tenant or a remainderman of such principal, or any part of such principal, elects to apply and complies with the provisions of subsection (3) of this section.

(b) This subpart 7 shall apply retroactively to trusts described in paragraphs (b) and (c) of subsection (1) of this section beginning on July 1, 2001, unless the qualified beneficiaries of the trust elect to apply and comply with the provisions of section 15-1-405.

(3) (a) A tenant or a remainderman of principal, or any part of such principal, may make and deliver and, if required, record a notice of election as provided in this subsection (3) on or before July 1, 2009.

(b) The notice of election shall be a written statement of the election by such tenant or remainderman, against the retroactive application of this subpart 7 to such estates in such principal. The notice of election shall include a reference to this subsection (3); the dates of the instruments creating the present and future legal estates in such principal; the names of the persons creating such estates; a description of the principal, including the location of such principal; a description of such estates and the names or descriptions of the persons who are tenants and remaindermen of such principal; identification of which such persons are tenants and which are remaindermen; and the name and address of the person making the election. The notice of election shall be signed and acknowledged by the person making the election.

(c) (I) In the case of an election made by a tenant, notice shall be delivered to the other tenants and to the remaindermen of the principal. In the case of an election made by a remainderman, notice shall be delivered to the other remaindermen and to the tenants of the principal.

(II) If the estate of the remainderman is unvested, notice may be made by or delivered to the persons then living or in existence who would, if then living or in existence, succeed to the principal upon the termination of the life estate or estate for a term in the principal.

(III) In the case of a child under the age of eighteen years, such notice may be made by or delivered to a conservator, guardian, or parent of such child. In the case of a person who is not competent to manage his or her affairs, such notice may be made by or delivered to the conservator, guardian, or person acting under a general power of attorney with respect to the business or financial affairs of such individual.

(IV) The notice of election shall be considered delivered to the person to whom delivery is required to be made when the notice of election or a copy thereof is delivered in person or when mailed by registered or certified mail, return receipt requested, to such person.

(V) The recording of notice as provided in paragraph (d) of this subsection (3) shall fulfill the requirement of delivery of such notice in the case of any unborn, unascertained, or unknown person and in the case of a child who is under the age of eighteen years or an individual who is not competent to manage his or her affairs and for whom there is no person authorized by subparagraph (III) of this paragraph (c) to receive such notice.

(d) (I) In the case that the principal is realty, a copy of the notice of election with an additional statement made as required by this subparagraph (I) shall be recorded with the recorder of the county where such realty is located. The additional statement shall state to whom, when, and by what means the notice was mailed or otherwise delivered and be signed by the person making the election.

(II) In the case that the principal is not realty, a copy of the notice with such additional statement may be recorded with the recorder of the county where the principal is located or, if the principal is intangible personalty, where the address of the tenant in possession of such principal is located. If such location is not within this state, then such copy and statement shall be recorded with the recorder of the city and county of Denver.



(III) Such copy of the notice and additional statement when recorded as provided in this paragraph (d) are prima facie evidence of the facts therein stated.

(e) No fiduciary for any trust, estate, individual, or other person with an interest, right, or power affected by the retroactive application of such amendments shall be required to make such election, nor shall such fiduciary be held responsible for not making such election.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 748, § 14, effective April 22.

**15-1-455. Application of this subpart 7 - powers of settlor.** (1) This subpart 7 shall govern the ascertainment of income and principal and the apportionment of receipts and expenses between tenants and remaindermen in all cases where a principal has been established with or, unless otherwise stated in this subpart 7, without the interposition of a trust; except that, in the establishment of the principal, provision may be made touching all matters covered by this subpart 7, and the person establishing the principal may himself or herself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this subpart 7.

(2) If neither this subpart 7 nor the direction of the person establishing the principal states an applicable rule, income and principal shall be determined in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as those entitled to principal and in view of the manner in which persons of ordinary prudence, discretion, and judgment would determine such matters. If the person establishing the principal grants the trustee or other person discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference of imprudence or partiality arises from the fact that the trustee or other person has made an allocation contrary to the provisions of this subpart 7.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 750, § 14, effective April 22.

**15-1-456. Income and principal - disposition.** (1) All receipts of money or other property paid or delivered as rent of realty or hire of personalty or dividends on corporate shares payable other than in shares of the corporation itself, or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income unless otherwise expressly provided in this subpart 7.

(2) All receipts of money or other property paid or delivered as the consideration for the sale or other transfer, not a leasing or letting, of property forming a part of the principal, or as a repayment of loans, or in liquidation of the assets of a corporation, or as the proceeds of property taken on eminent domain proceedings where separate awards to tenant and remainderman are not made, or as proceeds of insurance upon property forming a part of the principal except where such insurance has been issued for the benefit of either tenant or remainderman alone, or otherwise as a refund or replacement or change in form of principal, shall be deemed principal, unless otherwise expressly provided in this subpart 7. Any profit or loss resulting upon any change in form of principal shall inure to or fall upon principal.

(3) All income after payment of expenses properly chargeable to it shall be paid and delivered to the tenant or retained by him or her if already in his or her possession or held for accumulation where legally so directed by the terms of the transaction by which the principal was established; except that the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established or by law.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 751, § 14, effective April 22.

**15-1-457. Apportionment of income.** (1) Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans, and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, the tenant or his or her personal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his or her right is of the total period during which such income would normally accrue.

(2) The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto.

(3) The provisions of this section shall apply regardless of whether an ultimate remainderman is specifically named. Likewise, when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he or she shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he or she has been so entitled is of the total period during which such income would normally accrue. The balance shall be a part of the principal.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 751, § 14, effective April 22.

**15-1-458. Corporate dividends and share rights.** (1) All dividends on shares of a corporation forming a part of the principal, which shares are payable in the identical class of the shares of the corporation as the stock on which the dividend is paid, shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in such identical class of the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in other shares or in other securities or in obligations of corporations other than the declaring corporation, shall be deemed income. Except with respect to investment trusts, regulated investment companies, and trusts qualifying and electing to be taxed under federal law as real estate investment trusts, where the trustees have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee. Distributions made from ordinary income by an investment trust, by a regulated investment company, or by a trust qualifying and electing to be taxed under federal laws as a real estate investment trust shall be deemed income. All other distributions made by the company or trust, including distributions from capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, shall be deemed principal.

(2) All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in such corporation and the proceeds of any sale of such rights shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights, shall be deemed income.

(3) Where the assets of a corporation are wholly or partially liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursement of the corporate assets to the stockholders shall be deemed principal.

(4) If a corporation succeeds another by merger, consolidation, or reorganization or otherwise acquires its assets and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section, but two corporations shall not be



considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other.

(5) In applying this section, the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or, in default thereof, the date of declaration of the dividend.

(6) All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

(7) Any distribution of shares or other securities or obligations of a corporation, other than the distributing corporation, or the proceeds of sale or other disposition thereof, made as a result of a court decree or final administrative order by a governmental agency ordering the distributing corporation to divest itself of the shares, securities, or other obligations, shall be deemed principal unless the distributing corporation designates that the distribution is wholly or partly in lieu of an ordinary cash dividend, in which case the distribution, to the extent that it is in lieu of the ordinary cash dividend, shall be deemed income. The provisions of this subsection (7) shall take effect on or after March 13, 1963, and shall apply to all estates of tenants or remaindermen then legally effective, whenever created, as well as to all estates of tenants or remaindermen which become legally effective thereafter.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 752, § 14, effective April 22.

**15-1-459. Premium and discount bonds.** Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value, which in the case of a testamentary trust, unless a contrary intention appears from the will, shall be the value at the date of death, or in default thereof at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value, and, upon their respective maturities or upon their sale, any loss or gain realized thereon shall fall upon or inure to the principal. If, however, any of such bonds or obligations bears no stated interest but is redeemable at maturity or at a future time at an amount in excess of the amount in consideration of which it was issued, such accretion, as and when realized or realizable, shall be income.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 753, § 14, effective April 22.

**15-1-460. Principal used in business.** (1) Whenever a trustee or a tenant is authorized by the terms of the transaction by which the principal was established, or by law, to use any part of the principal in the continuance of a business that the original owner of the property comprising the principal had carried on, the net profits of such business attributable to such principal shall be deemed income.

(2) If such business consists of buying and selling property, the net profits for any period shall be ascertained by deducting, from the gross returns during and the inventory value of the property at the end of such period, the expenses during the inventory value of the property at the beginning of such period.

(3) If such business does not consist of buying and selling property, the net income shall be computed in accordance with the customary practice of such business, but not in such a way as to decrease the principal.

(4) Any increase in the value of the principal used in such business shall be deemed principal, and all losses in any one calendar year, after the income from such business for that year has been exhausted, shall fall upon the principal.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 753, § 14, effective April 22.

**15-1-461. Principal comprising animals.** If any part of the principal consists of animals employed in business, the provisions of section 15-1-460 shall apply; and, in other cases where the animals are held as a part of the principal partly or wholly because of the offspring or increase which they are expected to produce, all offspring or increase shall be deemed principal to the extent necessary to maintain the original number of such animals, and the remainder shall be deemed income; and in all other cases such offspring or increase shall be deemed income.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 754, § 14, effective April 22.

**15-1-462. Principal subject to depletion.** If any part of the principal consists of property other than natural resources, subject to depletion, such as leaseholds, patents, copyrights, and royalty rights, and the trustee or tenant in possession is not under a duty to change the form of the investment of the principal, the full amount of rents, royalties, or return from the property shall be income to the tenant; except that, where the trustee or tenant is under a duty, arising either by law or by the terms of the transaction by which the principal was established, to change the form of the investment, either at once or as soon as it may be done without loss, then the return from such property not in excess of four percent per annum of its fair inventory value, which in the case of a testamentary trust, unless a contrary intention appears from the will, shall be the value at date of death, or, in default of same, its market value at the time the principal was established, or at its cost where purchased later, shall be deemed income and the remainder principal.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 754, § 14, effective April 22.

**15-1-463. Unproductive estate.** (1) If any part of a principal in the possession of a trustee consists of realty or personalty that for more than a year and until disposed of as stated in this section has not produced an average net income of at least one percent per annum of its fair inventory value, which in the case of a testamentary trust, unless a contrary intention appears from the will, shall be the value at date of death, or, in default thereof, its market value at the time the principal was established or of its cost where purchased later, and the trustee is under a duty to change the form of the investment as soon as it may be done without sacrifice of value and such change is delayed, but is made before the principal is finally distributed, then the tenant, or, in case of his or her death, his or her personal representative, shall be entitled to share in the net proceeds received from the property as delayed income to the extent stated in this section.

(2) Such income shall be the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of four percent per annum for the period during which the change was delayed, would have produced the net proceeds at the time of change, but in no event shall such income be more than the amount by which the net proceeds exceed the fair inventory value of the property, which in the case of a testamentary trust, unless a contrary intention appears from the will, shall be the value at the date of death, or, in default thereof, its market value at the time the principal was established or its cost where purchased later. The net proceeds shall consist of the gross proceeds received from the property less any expenses incurred in disposing of it and less all carrying charges which have been paid out of principal during the period while it has been unproductive.

(3) The time the change is delayed starts when the duty to make it first arose, which shall be presumed, in the absence of evidence to the contrary, to be:

(a) One year after the trustee first received the property if the property was unproductive at that time; or

(b) One year after the property became unproductive.

(4) If the tenant has received any income from the property or has had any beneficial use thereof during the period while the change has been delayed, his or her share of the



delayed income shall be reduced by the amount of such income received or the value of the use had.

(5) In the case of successive tenants, the delayed income shall be divided among them or their representatives according to the length of the period for which each was entitled to income.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 754, § 14, effective April 22.

**15-1-464. Disposition of natural resources.** (1) If any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas, or other natural resources, and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal was established to sell, lease, or otherwise develop such natural resources, and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such property, such net proceeds, if received as rent on a lease, shall be deemed income but, if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed, to the extent provided in this section, principal to be invested to produce income, and the remainder of such net proceeds shall be deemed income. Of the net proceeds received during any period as consideration for permanent severance of a natural resource, the amount to be considered as principal for that period shall be the greater of the following:

(a) The amount that bears the same ratio to the fair inventory value of such natural resource, which in the case of a testamentary trust, unless a contrary intention appears in the will, shall be the value at date of death, or, in default thereof, its market value at the time the principal was established, or its cost if purchased later, as the number of units of the natural resource severed during the period bears to the total number of severable units of the natural resource estimated as having existed at the time the principal was established;

(b) The amount that bears the same ratio to the estimated value of the natural resource at the time of commencement of severance as the number of units of the natural resources severed during the period bears to the total number of severable units of the natural resource estimated as having existed at the time of commencement of such severance;

(c) An amount equal to that percentage of the net proceeds received as consideration for such permanent severance that is allowable as a deduction from gross income for depletion purpose under the federal income tax law then in effect at the time of severance or, if the federal income tax law then in effect makes no provision for the deduction of any stated percentage for depletion, or for any reason is not applicable to such natural resource, then fifteen percent of such net proceeds. Such disposition of net proceeds shall apply whether permanent severance commenced before or after the time the principal was established and without regard to the time when the instrument under which severance is being made was executed.

(2) Nothing in this section shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his or her own benefit.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 755, § 14, effective April 22.

**15-1-464.5. Disposition of natural resources - special applicability.** (1) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on, or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

(a) If received as rent on a lease or extension payments on a lease, the receipts are income;

(b) If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts that the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

(c) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in paragraph (a) or (b) of this subsection (1) shall be apportioned on a yearly basis in accordance with this paragraph (c) regardless of whether any natural resource was being taken from the land at the time the trust was established. Fifteen percent of the gross receipts, but not to exceed fifty percent of the net receipts remaining after payment of all expenses, direct and indirect, computed without allowance for depletion, shall be added to principal as an allowance for depletion. The balance of the gross receipts after payment therefrom of all expenses, direct and indirect, is income.

(2) If a trustee, on April 22, 2009, held an item of depletable property of a type specified in this section, he or she shall allocate receipts from the property in the manner used before April 22, 2009, but as to all depletable property acquired after April 22, 2009, by an existing or new trust, the method of allocation provided herein shall be used.

(3) This section does not apply to timber, water, soil, sod, dirt, turf, or mosses.

(4) (a) Except as provided in paragraph (b) of this subsection (4), this section applies to a trust or estate that is subject to this subpart 7 and shall control over the other provisions of this subpart 7 to the extent that any inconsistency exists between such provisions and this section.

(b) (I) In the case of a trust or a probate estate, the trustee or the personal representative may elect to have this section not apply to the trust or the probate estate by giving notice of such election to the beneficiaries of the trust or the probate estate as provided in subsection (5) of this section.

(II) In the case of an estate other than a trust, a life tenant or the remainderman may elect to have this section not apply to the estate by giving notice of such election in the same time and manner as provided in section 15-1-454 (3) for an election out of the application of this subpart 7 to the estate.

(5) (a) If a trustee or a personal representative makes an election under this section, he or she shall satisfy the requirements set forth in section 15-1-405 for providing notice of the election.

(b) If a life tenant or a remainderman makes an election under this section, he or she shall satisfy the requirements set forth in section 15-1-454 (3) for providing notice of the election and recording the election.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 756, § 14, effective April 22.

**15-1-465. Expenses - trust estates.** (1) All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and remainderman, interest on mortgages on the principal, ordinary repairs, a reasonable portion, but not less than one-half, of the trustees' compensation for current management of principal and application of income to the use of tenant, compensation of assistants, and court costs and attorneys' and other fees on regular accountings shall be paid out of income, but such expenses where incurred in disposing of, or as carrying charges on, an unproductive estate, as defined in section 15-1-463, shall be paid out of principal, subject to the provisions of section 15-1-463 (2).

(2) All other expenses, including trustees' commissions at trust inception and termination and not more than one-half of trustees' compensation for current management of principal and application of income to the use of the tenant, cost of investing or reinvesting principal, attorneys' fees and other costs incurred in maintaining or defending any action to construe the trust or protect it or the property or assure the title thereof, unless due to the fault or cause of the tenant, and costs of, or assessments for, improvements to property



forming part of the principal, shall be paid out of principal. Any tax levied by any authority, federal, state, or foreign, upon profit or gain defined as principal under the terms of section 15-1-466 (2) shall be paid out of principal, notwithstanding that said tax may be denominated a tax upon income by the taxing authority.

(3) Expenses paid out of income according to subsection (1) of this section that represent regularly recurring charges shall be considered to have accrued from day to day and shall be apportioned on that basis whenever the right of the tenant begins or ends at some date other than the payment date of the expenses. If the expenses to be paid out of income are of an unusual amount, the trustee may distribute them throughout an entire year or part thereof or throughout a series of years. After such distribution, if the right of the tenant ends during the period, the expenses shall be apportioned between tenant and remainderman on the basis of such distribution.

(4) If the costs of, or special taxes or assessments for, an improvement representing an addition of value to property held by the trustee as part of principal are paid out of principal, as provided in subsection (2) of this section, the trustee shall reserve out of income and add to the principal each year a sum equal to the cost of the improvement divided by the number of years of the reasonably expected duration of the improvement.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 758, § 14, effective April 22.

**15-1-466. Expenses - nontrust estates.** (1) The provisions of section 15-1-465, so far as applicable and excepting those provisions concerning costs of, or special taxes or assessments for, improvements to property, shall govern the apportionment of expenses between tenants and remaindermen where no trust has been created; except that such apportionment shall be subject to any legal agreement of the parties or any specific direction of the taxing or other statutes. If either tenant or remainderman has incurred an expense for the benefit of his or her own estate and without the consent or agreement of the other, he or she shall pay such expense in full.

(2) Subject to the exceptions described in subsection (1) of this section, the cost of, or special taxes or assessments for, an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant, if such improvement cannot reasonably be expected to outlast the estate of the tenant. In all other cases, a portion thereof only shall be paid by the tenant, while the remainder shall be paid by the remainderman. Such portion shall be ascertained by taking that percentage of the total that is found by dividing the present value of the tenant's estate by the present value of an estate of the same form as that of the tenant; except that, it is limited for a period corresponding to the reasonably expected duration of the improvement. The computation of present values of the estates shall be made on the expectancy basis set forth in the American experience tables of mortality, and no other evidence of duration or expectancy shall be considered.

**Source: L. 2009:** Entire section added, (HB 09-1241), ch. 169, p. 758, § 14, effective April 22.

**15-1-467. Disposition of net probate income.** (1) Subject to the provisions of section 15-1-455, an executor shall, at the time of distribution, pay over to the trustee of any trust, or to any other legatee to whom specific property other than money is bequeathed or devised, the net probate income of such property and shall pay over all other net probate income to:

- (a) The trustee of any trust created out of residue or to which any portion of residue is added;
- (b) Any legatee for life or years of any portion of the residue;
- (c) Any legatee of a present, legal, possessory interest in any portion of the residue; and
- (d) Any trustee of a sum of money under a trust created or added to by the will but not payable out of the residue, in pro rata shares, in accordance with the respective values of the property bequeathed or devised outright or in trust. The values shall be those finally

determined for federal estate tax purposes, or, if no such determination is made, the values shall be those at date of death as determined by the executor. Nothing in this subsection (1) shall prevent a court from ordering distribution of any net probate income directly to the beneficiary of a trust.

(2) If an executor makes a partial distribution of property to any legatee or trustee, the recipient of such partial distribution shall share in the net probate income collected to the date of distribution, but his or her share in the net probate income later collected by the executor shall be reduced accordingly.

(3) The amount of any net probate income distributed by the executor to each trustee or other distributee shall be stated in any order of distribution.

(4) A trustee who receives net probate income from an executor shall treat it as income of the trust for which he or she is acting.

(5) If net probate income, with respect to which income taxes have been paid by the executor, is distributed, and any of the distributees is a charitable or other tax-exempt organization, and a charitable deduction was allowable on the income tax return of the executor for the taxable year of the executor in which the income was received or accrued, such income taxes paid by the executor shall be allocated among the distributees so that the diminution in such taxes resulting from the charitable deduction allowable to the executor will inure to the benefit of such charitable or exempt organization.

(6) If net probate income with respect to which income taxes have been paid by the executor is distributed and includes tax-exempt or partially tax-exempt income or income with respect to which a credit or special deduction is allowable and the will requires such tax-exempt or partially tax-exempt income or income with respect to which a credit or special deduction is allowable to be distributed other than proportionately to the distributees of net probate income, such income taxes shall be allocated among the distributees so that the benefit of such tax exemption, partial tax exemption, credit, or special deduction will inure to the benefit of the distributee of such tax-exempt or partially tax-exempt income or of the income with respect to which a credit or special deduction is allowable.

(7) If a trust, whether inter vivos or testamentary, contains provisions whereby, on the happening or the failure to happen of an event, a gift is made of money in trust, or of specific property other than money, in trust or outright, or of any portion of the residue of such trust in further trust, or for life or years, the income of such trust for the period following the happening or failure to happen of such event shall be disposed of by the trustee thereof in the manner, so far as applicable, that would prevail if the trustee of such trust were an executor acting under the provisions of this section.

(8) This section shall be effective with respect to wills the testators of which die on or after April 18, 1961, to revocable inter vivos trusts the settlors of which die after said date, and to irrevocable inter vivos trusts which are created after said date.

**Source:** L. 2009: Entire section added, (HB 09-1241), ch. 169, p. 759, § 14, effective April 22.

## PART 5

### FIDUCIARY PROPERTY - DEPOSITORY NOMINEES

**Editor's note:** This part 5 was numbered as article 5 of chapter 57, C.R.S. 1963. The substantive provisions of this part 5 were repealed and reenacted in 1977, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 5 prior to 1977, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

**Cross references:** For deposits by a fiduciary, see §§ 15-1-111 and 15-1-112.

**15-1-501. Fiduciary property kept separate.** Every fiduciary shall keep fiduciary property separate and distinct from such fiduciary's own property and shall not invest or



deposit the same with any person, association, or corporation in such fiduciary's own name. Except as provided in this part 5, every fiduciary shall keep the property of each fiduciary account separate and distinct from the property of every other fiduciary account, and all transactions shall be conducted in such fiduciary's name as fiduciary.

**Source: L. 77:** Entire part R&RE, p. 826, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-1-501 as it existed prior to 1977.

#### ANNOTATION

**Law reviews.** For article, "The Care and Feeding of Individual Trustees", see 39 U. Colo. L. Rev. 205 (1966).

**15-1-502. Nominees.** Any fiduciary may register or hold the title to fiduciary property in the name of a nominee.

**Source: L. 77:** Entire part R&RE, p. 826, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-1-501 as it existed prior to 1977.

**15-1-503. Fiduciary property deposits.** Any fiduciary may deposit fiduciary property with a bank or trust company, including a federal reserve bank, or with a clearing corporation, as defined in section 4-8-102 (a) (5), C.R.S., as depository, and such fiduciary property so deposited may be registered in such depository's name as nominee for the fiduciary or may be registered in the name of a nominee of such depository.

**Source: L. 77:** Entire part R&RE, p. 826, § 1, effective July 1. **L. 96:** Entire section amended, p. 245, § 23, effective July 1.

**Editor's note:** This section is similar to former § 15-1-502 as it existed prior to 1977.

**15-1-504. Holding of securities by fiduciary or depository of fiduciary property.** Any bank or trust company or clearing corporation acting as a fiduciary or depository of fiduciary property may merge and hold securities held as fiduciary property, without certification as to ownership attached, with other securities held as fiduciary property, in one or more certificates representing securities of the same class of the same issuer. Ownership of such securities may be transferred by bookkeeping entry on the books of the fiduciary or of the depository without physical delivery of certificates representing such securities.

**Source: L. 77:** Entire part R&RE, p. 826, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-1-503 as it existed prior to 1977.

**15-1-505. Records.** The records of every fiduciary shall at all times show the ownership of any fiduciary property held by such fiduciary or in the name of its nominee or held in a depository.

**Source: L. 77:** Entire part R&RE, p. 827, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-1-505 as it existed prior to 1977.

**15-1-506. Liability of issuer.** No issuer of securities or agent thereof shall be liable for registering or causing to be registered on the books of such issuer any securities in the name

of any nominee or, when the transfer is made on the authorization of the nominee, for transferring or causing to be transferred on the books of the issuer any securities theretofore registered by the issuer in the name of any nominee.

**Source: L. 77:** Entire part R&RE, p. 827, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-1-506 as it existed prior to 1977.

**15-1-507. Custodian as fiduciary.** For purposes of this part 5, a bank or trust company acting as custodian shall be deemed to be a fiduciary, and property held in custody by a bank or trust company shall be deemed to be fiduciary property.

**Source: L. 77:** Entire part R&RE, p. 827, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-1-507 as it existed prior to 1977.

### ANNOTATION

**Bank acknowledgment of restriction in letters of conservatorship** made bank more than a mere custodian; bank became a fiduciary. Pledging collateral consisting of conservatorship funds breached fiduciary duty because bank

failed to refrain from involvement in transactions antagonistic to the interests of the protected person. In re Conservatorship of Roth, 804 P.2d 265 (Colo. App. 1990).

**15-1-508. Individual and corporate fiduciaries.** (1) For purposes of this part 5, a bank or trust company acting as a fiduciary, alone or jointly with any cofiduciary, may take any action authorized by this part 5 without regard to the language or provisions, or any limitations, in the will or trust instrument or other instrument establishing the fiduciary relationship.

(2) For purposes of this part 5, any fiduciary other than a bank or trust company may take any action authorized by this part 5, unless limited by the language or provisions in the will or trust instrument or other instrument establishing the fiduciary relationship expressing a clear intention that an action otherwise authorized by this part 5 shall be denied to such fiduciary.

(3) Nothing in subsection (2) of this section shall be construed to limit the authority of a bank or trust company serving as a cofiduciary with one or more other fiduciaries or serving as a depository to take any action authorized by this part 5 which it could take if serving as sole fiduciary.

**Source: L. 77:** Entire part R&RE, p. 827, § 1, effective July 1.

**15-1-509. Fiduciary duty.** In the exercise of any of the powers granted in this part 5, a fiduciary has a duty to act reasonably and equitably with due regard for his obligations and responsibilities toward the interests of beneficiaries and creditors and the estate or trust involved and the purposes thereof and with due regard for the manner in which men of prudence, discretion, and intelligence would act in the management of the property of another.

**Source: L. 77:** Entire part R&RE, p. 827, § 1, effective July 1.

**15-1-510. Application.** This part 5 shall apply to every fiduciary, regardless of the date of the agreement, instrument, or court order by which the fiduciary is appointed.

**Source: L. 77:** Entire part R&RE, p. 827, § 1, effective July 1.



## PART 6

## UNIFORM FIDUCIARY SECURITY TRANSFERS ACT

**15-1-601 to 15-1-611. (Repealed)**

**Source:** L. 96: Entire part repealed, p. 246, § 25, effective July 1.

**Editor's note:** This part 6 was numbered as article 6 of chapter 57, C.R.S. 1963. For amendments to this part 6 prior to its repeal in 1996, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**Cross references:** For provisions concerning investment securities, see article 8 of title 4.

## PART 7

## FIDUCIARY INTERESTS IN ENTITIES

**15-1-701. Power to become partner.** Subject to the terms of the partnership agreement, if permitted by the trust instrument or will under which the fiduciary serves or by order of a court having jurisdiction of the estate or trust, a fiduciary may enter into a partnership agreement and accept the assignment of or otherwise acquire, hold, and dispose of an interest in a partnership and in so doing may become either a general or a limited partner.

**Source:** L. 63: p. 496, § 1. C.R.S. 1963: § 57-7-1. L. 2002: Entire section amended, p. 650, § 2, effective July 1.

**15-1-702. Family business interests - maintenance of entity - formation of successor entity.** (1) As used in this section, unless the context otherwise requires:

(a) "Family" means an individual, such individual's spouse, parents, the descendants of either of such parents or of such spouse, or the spouses of such descendants or any combination of such persons.

(b) "Family business" means a business enterprise with respect to which the aggregate interests of the family are substantial in relation to the total outstanding interests in the business enterprise.

(c) "Interest" and "interests" include beneficial interests as beneficiaries of any estate or trust and indirect interests through any other form of entity.

(d) "Successor entity" includes the entity holding the family business where such entity survives a consolidation, merger, acquisition, or other combination.

(2) Any fiduciary acting under a will or trust instrument that evidences an intent to retain an interest in a family business may maintain the interest in any form of entity or successor entity. Such a successor entity may be formed by consolidation, merger, acquisition, or other combination and shall be considered the same enterprise for purposes of maintaining the interest in the family business where the interests of the beneficiaries in the successor entity are substantial.

(3) Except as otherwise provided in the instrument under which the fiduciary is acting:

(a) A fiduciary may proceed as provided in this subsection (3) with the formation of such a successor entity where the fiduciary believes in good faith that the formation is on a favorable basis considering only the overall interests of the beneficiaries including the maintenance of a substantial interest on the part of the beneficiaries in the enterprise and the value of such interest in the long term.

(b) A fiduciary may vote and otherwise deal with respect to interests in the family business as the fiduciary believes in the good faith exercise of the fiduciary's business judgment, under the business judgment rule, to be necessary or appropriate to complete such formation on such a favorable basis.

(c) A fiduciary may, in the good faith exercise of such judgment, accept a reduced participation in equity, voting, and other rights and preferences including a reduction in voting rights that results in less than voting control of the successor entity.

(d) A fiduciary may proceed without notice to the beneficiaries where disclosure is forbidden by law or where the fiduciary believes in the good faith exercise of such judgment, that nondisclosure is necessary to complete such formation on such a favorable basis.

(4) This section shall apply to any interests held by an estate or trust in a family business on or after May 26, 2000, and to the formation of any entity or successor entity completed after May 26, 2000.

**Source: L. 2000:** Entire section added, p. 1171, § 1, effective May 26.

## PART 8

### POWERS

**15-1-801. Short title.** This part 8 shall be known and may be cited as the “Colorado Fiduciaries’ Powers Act”.

**Source: L. 67:** p. 766, § 1. **C.R.S. 1963:** § 57-8-1.

**15-1-802. Definitions.** As used in this part 8, unless the context otherwise requires:

(1) “Court” means the district or probate court having jurisdiction over the administration of the estate or trust.

(2) “Estate” means the estate of a decedent or a person under disability.

(3) (a) “Fiduciary” means the one or more persons designated in a will, trust instrument, or otherwise, whether corporate or natural persons and including successors and substitutes, who are acting in any of the following capacities:

(I) Personal representatives, including executors, administrators, administrators with the will annexed (cum testamento annexo), administrators in succession acting under a will (de bonis non), ancillary administrators acting under a will, and ancillary executors;

(II) Special administrators;

(III) Conservators; and

(IV) Trustees.

(b) “Fiduciary” does not include a guardian, special fiduciary, or public administrator, except when the public administrator has been appointed a fiduciary as defined in this subsection (3).

(4) “Trust” means any express trust created by a will, trust instrument, or other instrument, whereby there is imposed upon a trustee the duty to administer a trust asset, for the benefit of a named or otherwise described income or principal beneficiary, or both. A trust shall not include trusts for the benefit of creditors, resulting or constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiary, investment trusts, voting trusts, security instruments such as deeds of trust and mortgages, trusts created by the judgment or decree of a court, liquidation or reorganization trusts, or trusts for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions, or profits, instruments wherein one or more persons are mere nominees for another, or trusts created in deposits in any banking institution or savings and loan institution.

(5) “Will” means a will of a decedent and includes a testament or codicil.

**Source: L. 67:** p. 766, § 1. **C.R.S. 1963:** § 57-8-2. **L. 73:** p. 1647, § 7. **L. 75:** (3) R&RE, p. 588, § 7, effective July 1.



## ANNOTATION

**Ex-husband had fiduciary duty to ex-wife since he retained complete control over her share of stock.** Despite having the power to sell the stock within his sole discretion, the husband still was required to operate within the bounds of prudent judgment, reasonableness, and equity. *Marshall v. Grauberger*, 796 P.2d 34 (Colo. App. 1990).

**As a matter of law, the husband owed the wife a fiduciary duty to deal with her interest with the utmost good faith.** *Marshall v. Grauberger*, 796 P.2d 34 (Colo. App. 1990).

**A trustee's duty of loyalty and of reasonable care dictates that he must seek to obtain the best price for trust property he is selling.** If a trust has been damaged but there is uncertainty as to the extent of the damage, damages are to be closely approximated by drawing reasonable and probable inferences from the facts proven. *Marshall v. Grauberger*, 796 P.2d 34 (Colo. App. 1990).

**15-1-803. Powers conferred on fiduciaries.** Fiduciaries have all powers conferred upon them by the provisions of this part 8, unless limited by the language or provisions in the will or trust instrument expressing a clear intention that powers conferred under this part 8 shall be denied to the fiduciary. They have, in addition to the powers conferred in this part 8, such other or further powers as are set forth in the will or trust instrument or as are provided by other statutes or by court rule or order. If any power specifically conferred on a fiduciary by the will or trust instrument conflicts with any power conferred by this part 8, the fiduciary shall be deemed to have only the power specifically conferred by the will or trust instrument and not the conflicting power conferred by this part 8. Provisions in articles 10 to 20 of this title concerning the exercise of powers in the administration of an estate by an executor having powers under a will shall apply to executors having powers conferred under this part 8.

**Source:** L. 67: p. 767, § 1. C.R.S. 1963: § 57-8-3. L. 73: p. 1648, § 8.

## ANNOTATION

**Applied** in *Fry & Co. v. District Court*, 653 P.2d 1135 (Colo. 1982).

**15-1-804. Powers available.** (1) During the period of administration of the estate or trust and until final distribution, a fiduciary has the power to perform, without court authorization, every act reasonably necessary to administer the estate or trust, including but not limited to the powers specified in subsection (2) of this section. In the exercise of any of his powers, whether derived from this part 8 or from any other source, a fiduciary has a duty to act reasonably and equitably with due regard for his obligations and responsibilities toward the interests of beneficiaries and creditors, the estate or trust involved, and the purposes thereof and with due regard for the manner in which men of prudence, discretion, and intelligence would act in the management of the property of another.

(2) Subject to subsection (1) of this section, a fiduciary has the power:

(a) To receive, take possession of, recover, and preserve the assets of the estate or trust, both real and personal, coming to his attention or knowledge and the rents, issues, and profits arising therefrom;

(b) To retain the initial assets of the estate or trust without liability for loss, depreciation, or diminution in value resulting from such retention until, in the judgment of the fiduciary, disposition of such assets should be made;

(c) To accept additions to the estate or trust, not only from the estate of the decedent or the settlor of the trust, but also from other sources;

(d) To acquire an undivided interest in an estate or trust asset in which the fiduciary, in a fiduciary or individual capacity, also holds an undivided interest;

(e) To invest and reinvest assets of the estate or trust, as provided by law;

(f) To effect and keep in force fire, rent, title, liability, casualty, or other insurance to

protect the assets of the estate or trust and the fiduciary against hazards usually insured against;

(g) With respect to real property or any interest in real property owned by the estate or trust, except where such real property, or interest in real property, is specifically devised:

(I) To grant options to sell and to sell and convey the same at public or private sale, for cash or on credit, upon fair, reasonable, and equitable terms;

(II) To lease the same, even for a term extending beyond the duration of the administration of the estate or trust, and, in any such case, to include or exclude the right to explore for and remove mineral or other natural resources, and in connection with mineral leases to enter into pooling and unitization agreements;

(III) To encumber the same;

(IV) To make repairs or alterations in buildings, or other structures; to improve or demolish any improvements; to raze existing party walls or buildings and erect new party walls or buildings together with owners of adjoining or adjacent property or to enter into agreements with respect thereto; to subdivide, develop, and dedicate to public use; to make or obtain the vacation of public plats; to adjust boundaries; to adjust differences in valuation on exchange or partition by giving or receiving money or money's worth; and to dedicate and grant easements to public use without consideration;

(h) With respect to personal property or any interest in personal property, owned by the estate or trust, except where such personal property is specifically bequeathed:

(I) To grant options to sell and to sell the same at public or private sale, for cash or on credit, upon fair, reasonable, and equitable terms;

(II) To lease personal property, even for a term extending beyond the duration of the administration of the estate or trust;

(III) To encumber the same;

(IV) To make repairs to the personal property of the estate or trust;

(i) With respect to any indebtedness owed to the estate or trust, secured or unsecured:

(I) To continue the same upon and after maturity, with or without renewal or extension, upon such terms as the fiduciary deems advisable;

(II) To foreclose any security for such indebtedness, to purchase any property securing such indebtedness, and to acquire any property by conveyance from the debtor in lieu of foreclosure;

(j) To perform, in the case of an estate, any and all valid and legally enforceable executory contracts to which at the time of his death the decedent was a party and which at the time of such death had not been fully performed by such decedent and to discharge all obligations of the estate arising under or by reason of such contracts if such obligations are legally enforceable against the estate;

(k) To enter into contracts which are reasonably incident to the administration of the estate or trust;

(l) To continue or to participate in the operation of any business activity or enterprise, including a sole proprietorship or partnership, existing at the inception of the estate or trust (in the case of an estate having due regard for those having claims against the estate) and to incorporate or otherwise change its form;

(m) To deposit funds of the estate or trust in one or more banks, including the banking department of a corporate fiduciary;

(n) To deposit fiduciary property with others, to the extent permitted by part 5 of this article, so long as the cost thereof does not constitute an additional charge against the estate or trust but is payable out of compensation otherwise properly payable to the fiduciary;

(o) To hold title to fiduciary property in the name of a nominee, without disclosure of the estate or trust, to the extent permitted by part 5 of this article;

(p) To borrow money from any source, including the commercial department of a corporate fiduciary, with any such indebtedness being repayable solely from assets of the estate or trust and to pledge or encumber estate or trust assets as security for such loans;

(q) To advance money for the protection of the estate, or the trust, or the assets thereof and for all expenses, losses, and liabilities incurred in or by the collection, care, administration, or protection of the estate, or trust, or the assets thereof. For all such advances, the



fiduciary shall have a lien on the estate or trust assets and may reimburse himself with interest at a reasonable rate out of the estate or trust.

(r) To pay, contest, or otherwise settle claims by or against the estate or trust, including taxes, assessments, and expenses, by compromise, arbitration, or otherwise;

(s) To determine all matters of estate and trust accounting as the fiduciary deems to be proper and equitable;

(t) In the case of a trust, to advance trust income to or for the use of a beneficiary, for which advance the fiduciary shall have a lien on the future benefits of such beneficiary from the trust;

(u) To make distributions in kind, in money, or partially in each, at fair market values on the effective date of distribution, as determined by the fiduciary, and without requiring pro rata distribution of specific assets;

(v) In the case of a trust, to abandon, charge off, or otherwise dispose of any property held by or on behalf of the trust which is of no value or of insufficient value to justify collection, care, administration, or protection;

(w) To execute and deliver all legal instruments which are necessary or appropriate for the administration of the estate or trust;

(x) (I) To employ attorneys or other advisors to advise or assist the fiduciary in the performance of his or her duties or, instead of acting personally, to employ one or more agents to do any ministerial act required to be done by the fiduciary in the performance of his or her duties;

(II) In accordance with section 15-1.1-109 of the "Colorado Uniform Prudent Investor Act", to delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances;

(y) In the case of the survivors of the holders of a power given to or imposed upon two or more fiduciaries, to exercise or perform such power, unless the exercise of such power would be contrary to any express provision of the will, trust instrument, or other instrument;

(z) As successor or substitute fiduciary, to succeed to all of the powers and duties of an original, successor, or prior substitute fiduciary, unless contrary to any express provision of the will, trust instrument, or other instrument;

(aa) To vote in person or by proxy shares of stock or other securities which are assets of the estate or trust;

(bb) To pay calls, assessments, and any other sums chargeable to or accruing against or on account of shares of stock or other securities which are assets of the estate or trust whenever such payments may be legally enforceable against the fiduciary or any property of the estate or trust or whenever the fiduciary deems payment expedient and for the best interests of the estate or trust;

(cc) To sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers, or liquidations; to enter into voting trust agreements or other similar arrangements; and to consent to corporate sales, leases, and encumbrances. In the exercise of such powers, the fiduciary shall be authorized, whenever he deems such course expedient, to deposit stocks or other securities which are assets of the estate or trust with any protective or other similar committee or with voting trustees under such terms and conditions respecting the deposit thereof as the fiduciary may approve.

(dd) In the case of a trustee, to hold the assets of two or more trusts or parts of such trusts created by the same instrument or by two or more instruments if the trust provisions are substantially similar, as an undivided whole, without separation as between the assets of such trusts or parts of such trusts; but such separate trusts or parts of such trusts shall have undivided interests in such assets; and no such holding shall defer the vesting of any estate in possession or otherwise;

(ee) In the case of an estate, to join with the surviving spouse, his conservator, his guardian, the executor of his will, or the administrator of his estate, in the execution and filing of a joint income tax return for any period prior to the death of a decedent for which he has not filed a return, a federal gift tax return on gifts made by the decedent's surviving spouse, or a Colorado gift tax return on gifts made before January 1, 1980, by the decedent's surviving spouse, and to consent to said gifts being made one-half by the decedent, for any

period prior to a decedent's death, and to pay such taxes thereon as are chargeable to the decedent;

(ff) With respect to stock of a corporation held in an estate or trust where the powers of investment conferred upon the fiduciary by the governing instrument or by this part 8 include the power to retain assets initially contributed, or subsequently added from the estate of the decedent or by the settlor of the trust or from any other source, to retain such stock, to exchange or convert such stock for the stock or other securities of an affiliate of the corporation issuing such stock, and to retain such new stock and other securities. For the purposes of this paragraph (ff), "corporation" includes the corporate fiduciary as well as any other corporation, and "affiliate" of a corporation means any corporation controlling, controlled by, or under common control with such corporation, or any corporation formed as a result of or for the purpose of effectuating any merger, consolidation, or reorganization of such corporation. The powers conferred by this paragraph (ff) are hereby conferred upon the fiduciaries of all estates and trusts, unless otherwise limited by language or provisions in the will or trust agreement expressing a clear intention to the contrary.

(gg) In the case of a bank acting as a corporate fiduciary, to invest fiduciary funds awaiting investment or distribution in short-term investments, including, but not limited to, a collective investment fund. A bank acting as a corporate fiduciary may also deposit fiduciary funds awaiting investment or distribution in the commercial department of such bank or in an affiliate bank. For the purposes of this paragraph (gg), the term "bank" includes a state bank or bank and trust company which is chartered by this state or as a national bank.

(hh) To grant a conservation easement in gross, as defined in section 38-30.5-102, C.R.S., whether for consideration or gratuitously; except that, if such grant is for less than fair market value, the consent of interested persons, as defined in section 15-10-201 (27), shall be obtained in writing or an order of the court shall be obtained after notice to interested persons, unless a will or trust instrument directs, permits, or requires a donation of a conservation easement in gross, in which case no such consent or order shall be required;

(ii) Subject to the terms of the documents controlling the entity concerned, to retain or acquire interests in any entity in which the fiduciary does not have general liability, regardless of form, including but not limited to any partnership, corporation, limited liability company, and joint venture, and to become a shareholder, partner, member, or joint venturer.

**Source:** L. 67: p. 767, § 1. C.R.S. 1963: § 57-8-4. L. 70: p. 196, § 1. L. 73: p. 1648, § 9. L. 77: (2)(n) and (2)(o) amended, p. 827, § 2, effective July 1. L. 79: (2)(u) amended, p. 656, § 20, effective July 1. L. 81: (2)(ee) amended, p. 1885, § 6, effective May 27; (2)(g)(I) and (2)(g)(II) amended, p. 631, § 8, effective July 1. L. 92: (2)(gg) added, p. 1991, § 1, effective April 16. L. 95: (2)(x) amended, p. 312, § 3, effective July 1. L. 99: (2)(hh) added, p. 70, § 1, effective August 4. L. 2002: (2)(ii) added, p. 650, § 3, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986).

**A revocable living trust is valid** even though the settlor reserves an extensive power of control over administration of the corpus. *Oken v. Hammer*, 791 P.2d 9 (Colo. App. 1990).

**Whether a deed of trust is intended to exercise the trustee's powers**, rather than encumber a lesser interest in the property, is a question of the intent of the parties. Evidence is properly admissible to ascertain the intent of the

parties. *Oken v. Hammer*, 791 P.2d 9 (Colo. App. 1990).

**Indorsement on the note from the transferor to the holder was not required** since, although trust instruments did not specifically include the power to indorse notes, the obligation to liquidate those assets included the implied power to perform the necessary acts required to carry out that undertaking. *First Nat. Bank v. Lohman*, 827 P.2d 583 (Colo. App. 1992).



**Applied** in *Cavanaugh v. State Dept. of Rev. Inheritance & Gift Tax Div.*, 42 Colo. App. 453, 599 P.2d 965 (1979).

**15-1-805. Powers of fiduciary conferred by court.** The court having jurisdiction of the estate or trust may authorize the fiduciary to exercise any power not otherwise held by the fiduciary which, in the judgment of the court, is necessary for the proper collection, care, administration, and protection of the estate or the trust.

**Source:** L. 67: p. 770, § 1. C.R.S. 1963: § 57-8-5.

**15-1-806. Third persons protected in dealing with fiduciary.** With respect to a third person dealing with a fiduciary or assisting a fiduciary in the conduct of a transaction, proper exercise of his powers by the fiduciary is to be presumed, and such third person shall not be bound to inquire whether the fiduciary has power to act or is properly exercising such powers, nor shall such third person be bound to see to the proper application of estate or trust assets paid or delivered to the fiduciary.

**Source:** L. 67: p. 770, § 1. C.R.S. 1963: § 57-8-6.

**15-1-807. Applicability.** This part 8 shall apply to all trusts existing on January 1, 1968, which are later amended to make applicable this part 8, and to all estates and trusts which may come into existence after January 1, 1968.

**Source:** L. 67: p. 771, § 1. C.R.S. 1963: § 57-8-7.

## PART 9

### DISCLAIMER OF SUCCESSION - NONTESTAMENTARY INSTRUMENTS

#### 15-1-901 to 15-1-907. (Repealed)

**Editor's note:** (1) This part 9 was numbered as article 9 of chapter 57, C.R.S. 1963. For amendments to this part 9 prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 15-1-907 provided for the repeal of this part 9, effective July 1, 1995. (See L. 94, p. 1041.)

## PART 10

### CHARITABLE, EDUCATIONAL, RELIGIOUS, AND BENEVOLENT TRUSTS

**Cross references:** For testamentary additions to trusts, see § 15-11-511.

**15-1-1001. Legislative declaration.** It is the purpose of this part 10 to preserve the intent of testators and grantors of testamentary and inter vivos trusts created prior to and after June 2, 1971, for charitable, educational, religious, and benevolent purposes, by minimizing the imposition of federal income and excise taxes, and federal estate and gift taxes, imposed upon the assets of such trusts, and thereby preserving the maximum amount of the trust assets for the charitable, educational, religious, and benevolent purposes for which they were intended. The attorney general of this state shall perform such acts as, in his opinion, will result in the effectuation of this declaration of purpose.

**Source:** L. 71: p. 589, § 1. C.R.S. 1963: § 57-10-1. L. 73: p. 638, § 1.

## ANNOTATION

**An express trust was created by implication in fact**, rather than theory of implied trust in case where loyal minority members of local church sought to recover possession of church's

property from seceding majority members. *Bishop and Diocese of Colo. v. Mote*, 716 P.2d 85 (Colo. 1986), cert. denied, 479 U.S. 826, 107 S. Ct. 102, 93 L. Ed. 2d 52 (1986).

**15-1-1002. Prohibition of certain acts - amendment of governing instrument.**

(1) In the administration of any trust which is a private foundation as defined in section 509 of the federal "Internal Revenue Code of 1986", a charitable trust as defined in section 4947 (a) (1) of the federal "Internal Revenue Code of 1986", or a split-interest trust as defined in section 4947 (a) (2) of the federal "Internal Revenue Code of 1986", notwithstanding any provisions to the contrary in the governing instrument or in any other law of this state, and except as otherwise provided by court decree entered on or after June 2, 1971, the following acts shall be prohibited:

(a) Engaging in any act of "self-dealing", as defined in section 4941 (d) of the federal "Internal Revenue Code of 1986", which would give rise to any liability for the tax imposed by section 4941 (a) of the federal "Internal Revenue Code of 1986";

(b) Retaining any "excess business holdings", as defined in section 4943 (c) of the federal "Internal Revenue Code of 1986", which would give rise to any liability for the tax imposed by section 4943 (a) of the federal "Internal Revenue Code of 1986";

(c) Making any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of section 4944 of the federal "Internal Revenue Code of 1986", so as to give rise to any liability for the tax imposed by section 4944 (a) of the federal "Internal Revenue Code of 1986"; and

(d) Making any "taxable expenditure", as defined in section 4945 (d) of the federal "Internal Revenue Code of 1986", which would give rise to any liability for the tax imposed by section 4945 (a) of the federal "Internal Revenue Code of 1986".

(2) The provisions of subsection (1) of this section shall not apply either to those split-interest trusts or to amounts thereof which are not subject to the prohibitions applicable to private foundations by reason of the provisions of section 4947 of the federal "Internal Revenue Code of 1986".

(3) Notwithstanding any provisions to the contrary in the governing instrument or in any other law of this state, the trustee of any charitable trust as defined in section 4947 (a) (1) or 4947 (a) (2) of the federal "Internal Revenue Code of 1986", with the consent of all the beneficiaries under the governing instrument, may, without application to any court and either before or after the funding of such trust, amend the governing instrument to conform to the provisions of sections 508 (e), 664, 2055 (e), and 2522 (c) of the federal "Internal Revenue Code of 1986", to the extent applicable, by executing a written amendment to the trust for that purpose. Consent shall not be required as to individual beneficiaries not living at the time of amendment or as to charitable beneficiaries not named or not in existence at the time of amendment. The possibility of beneficial interests arising after the amendment of the governing instruments shall not defeat the ability to amend. In the case of an individual beneficiary not competent to give consent, the consent of such beneficiary's guardian or conservator, if any, or the consent of a guardian ad litem appointed by a court of competent jurisdiction shall be treated as the consent of the beneficiary. A copy of the proposed amendment, executed by the trustee and consented to by all beneficiaries whose consent is required under this subsection (3), shall be delivered in person or by registered mail to the attorney general. The attorney general may, within sixty days after such receipt, indicate by registered mail to the trustee his specific objections to such proposed amendment, in which event the provisions of subsection (4) of this section shall apply if he does not withdraw his objections. In the case of any amendment to a trust created by will or to a trust created by inter vivos instrument, unless otherwise provided, the amendment shall be deemed to apply as of the date of death of the decedent or as of the date of gift.

(4) In the event that all such trustees and beneficiaries under the governing instrument do not consent to such amendment or in the event that there are no named beneficiaries, any court of competent jurisdiction shall have the power to amend the governing instrument in



accordance with subsection (3) of this section upon petition of the trustee or any beneficiary and upon a subsequent finding by the court that the testator's or the grantor's intention would not be defeated by such amendment. A copy of such petition shall be delivered in person or by registered mail to the attorney general.

(5) Unless otherwise expressly provided in the governing instrument, any devise, bequest, or transfer in a testamentary or revocable inter vivos trust for religious, educational, charitable, or benevolent uses to be determined by the trustee or any other person shall be made only to organizations and for purposes within the meaning of section 2055 (a) of the federal "Internal Revenue Code of 1986".

**Source:** L. 71: p. 589, § 1. C.R.S. 1963: § 57-10-2. L. 73: p. 638, § 2. L. 2000: (1), (2), (3), and (5) amended, p. 1844, § 25, effective August 2.

**15-1-1003. Requirement for distribution of certain amounts.** In the administration of any trust which is a private foundation, as defined in section 509 of the federal "Internal Revenue Code of 1986", or which is a charitable trust, as defined in section 4947 (a) (1) of the federal "Internal Revenue Code of 1986", there shall be distributed, for the purposes specified in the trust instrument, for each taxable year, amounts at least sufficient to avoid liability for the tax imposed by section 4942 (a) of the federal "Internal Revenue Code of 1986". No trustee of such a trust shall be required to reimburse the trust from his own property for the amount of any liability for such tax which is incurred by the trust if the trustee acted in a prudent manner and in good faith. No trustee of such a trust shall be required to reimburse the trust from his own property for any amount which he, acting prudently and in good faith, distributes from the trust, believing it to be required to be distributed in order to avoid the liability for such tax, but which later is determined not to have been required to be distributed for that purpose.

**Source:** L. 71: p. 590, § 1. C.R.S. 1963: § 57-10-3. L. 2000: Entire section amended, p. 1845, § 26, effective August 2.

**15-1-1004. Applicability of sections 15-1-1002 and 15-1-1003.** The provisions of sections 15-1-1002 and 15-1-1003 shall not apply to any trust to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the instrument governing such trust and that the terms of such instrument may not properly be changed to conform to such sections.

**Source:** L. 71: p. 590, § 1. C.R.S. 1963: § 57-10-4.

**15-1-1005. Rights and powers of courts and attorney general not impaired.** Nothing in this part 10 shall impair the rights and powers of the courts or the attorney general of this state with respect to any trust.

**Source:** L. 71: p. 590, § 1. C.R.S. 1963: § 57-10-5.

**15-1-1006. References to "Internal Revenue Code of 1954".** All references to sections of the "Internal Revenue Code of 1954" refer to the "Internal Revenue Code of 1954" as it exists on June 2, 1971; except that all references to the "Internal Revenue Code of 1954" in section 15-1-1002 (3) and (5) refer to the "Internal Revenue Code of 1954" as it exists on April 19, 1973.

**Source:** L. 71: p. 590, § 1. C.R.S. 1963: § 57-10-6. L. 73: p. 639, § 3.

**15-1-1007. Application of part 10.** This part 10 shall apply to all trusts established after December 31, 1969, with the exceptions contained in section 4947 (a) (2) of the federal "Internal Revenue Code of 1986". This part 10 shall also apply to all trusts

established before January 1, 1970, with the exceptions contained in section 508 (e) (2) and section 4947 (a) (2) of the federal "Internal Revenue Code of 1986". Section 15-1-1002 (3) to (5) shall apply in the case of all decedents dying after December 31, 1969, and in the case of all irrevocable inter vivos trusts created after July 31, 1969.

**Source:** L. 71: p. 591, § 1. C.R.S. 1963: § 57-10-7. L. 73: p. 639, § 4. L. 2000: Entire section amended, p. 1846, § 27, effective August 2.

## PART 11

### UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

**Editor's note:** This part 11 was numbered as article 26 of chapter 31, C.R.S. 1963, and was not amended prior to 2008. The substantive provisions of this part 11 were repealed and reenacted in 2008, resulting in the addition, relocation, and elimination of sections as well as subject matter. For the text of this part 11 prior to 2008, consult the 2007 Colorado Revised Statutes. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this part 11, see the comparative tables located in the back of the index.

### PREFATORY NOTE

**Reasons for Revision.** The Uniform Prudent Management of Institutional Funds Act (UPMIFA) replaces the Uniform Management of Institutional Funds Act (UMIFA). The National Conference of Commissioners on Uniform State Laws approved UMIFA in 1972, and 47 jurisdictions have enacted the act. UMIFA provided guidance and authority to charitable organizations within its scope concerning the management and investment of funds held by those organizations. UMIFA provided endowment spending rules that did not depend on trust accounting principles of income and principal, and UMIFA permitted the release of restrictions on the use or management of funds under certain circumstances. The changes UMIFA made to the law permitted charitable organizations to use modern investment techniques such as total-return investing and to determine endowment fund spending based on spending rates rather than on determinations of "income" and "principal."

UMIFA was drafted almost 35 years ago, and portions of it are now out of date. The prudence standards in UMIFA have provided useful guidance, but prudence norms evolve over time. The new Act provides modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending. The Uniform Prudent Investor Act (UPIA), an Act promulgated in 1994 and already enacted in 43 jurisdictions, served as a model for many of the revisions. UPIA updates rules on investment decision making for trusts, including charitable trusts, and imposes additional duties on trustees for the protection of beneficiaries. UPMIFA applies these rules and duties to charities organized as nonprofit corporations. UPMIFA does not apply to trusts managed by corporate and other fiduciaries that are not char-

ities, because UPIA provides management and investment standards for those trusts.

In applying principles based on UPIA to charities organized as nonprofit corporations, UPMIFA combines the approaches taken by UPIA and by the Revised Model Nonprofit Corporation Act (RMNCA). UPMIFA reflects the fact that standards for managing and investing institutional funds are and should be the same regardless of whether a charitable organization is organized as a trust, a nonprofit corporation, or some other entity. See Bevis Longstreth, *Modern Investment Management and the Prudent Man Rule 7 (1986)* (stating "[t]he modern paradigm of prudence applies to all fiduciaries who are subject to some version of the prudent man rule, whether under ERISA, the private foundation provisions of the Code, UMIFA, other state statutes, or the common law."); Harvey P. Dale, *Nonprofit Directors and Officers - Duties and Liabilities for Investment Decisions*, 1994 N.Y.U. Conf. Tax Plan. 501(c)(3) Org's. Ch. 4.

UPMIFA provides guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations, and UPMIFA imposes additional duties on those who manage and invest charitable funds. These duties provide additional protections for charities and also protect the interests of donors who want to see their contributions used wisely.

UPMIFA modernizes the rules governing expenditures from endowment funds, both to provide stricter guidelines on spending from endowment funds and to give institutions the ability to cope more easily with fluctuations in the value of the endowment.

Finally, UPMIFA updates the provisions governing the release and modification of restric-



tions on charitable funds to permit more efficient management of these funds. These provisions derive from the approach taken in the Uniform Trust Code (UTC) for modifying charitable trusts. Like the UTC provisions, UPMIFA's modification rules preserve the historic position of the attorneys general in most states as the overseers of charities.

As under UMIFA, the new Act applies to charities organized as charitable trusts, as non-profit corporations, or in some other manner, but the rules do not apply to funds managed by trustees that are not charities. Thus, the Act does not apply to trusts managed by corporate or individual trustees, but the Act does apply to trusts managed by charities.

**Prudent Management and Investment.** UMIFA applied the 1972 prudence standard to investment decision making. In contrast, UPMIFA will give charities updated and more useful guidance by incorporating language from UPIA, modified to fit the special needs of charities. The revised Act spells out more of the factors a charity should consider in making investment decisions, thereby imposing a modern, well accepted, prudence standard based on UPIA.

Among the expressly enumerated prudence factors in UPMIFA is "the preservation of the endowment fund," a standard not articulated in UMIFA.

In addition to identifying factors that a charity must consider in making management and investment decisions, UPMIFA requires a charity and those who manage and invest its funds to:

1. Give primary consideration to donor intent as expressed in a gift instrument,
2. Act in good faith, with the care an ordinarily prudent person would exercise,
3. Incur only reasonable costs in investing and managing charitable funds,
4. Make a reasonable effort to verify relevant facts,
5. Make decisions about each asset in the context of the portfolio of investments, as part of an overall investment strategy,
6. Diversify investments unless due to special circumstances, the purposes of the fund are better served without diversification,
7. Dispose of unsuitable assets, and
8. In general, develop an investment strategy appropriate for the fund and the charity.

UMIFA did not articulate these requirements.

Thus, UPMIFA strengthens the rules governing management and investment decision making by charities and provides more guidance for those who manage and invest the funds.

**Donor Intent with Respect to Endowments.** UPMIFA improves the protection of donor intent with respect to expenditures from endowments. When a donor expresses intent clearly in a written gift instrument, the Act requires that the charity follow the donor's instructions.

When a donor's intent is not so expressed, UPMIFA directs the charity to spend an amount that is prudent, consistent with the purposes of the fund, relevant economic factors, and the donor's intent that the fund continue in perpetuity. This approach allows the charity to give effect to donor intent, protect its endowment, assure generational equity, and use the endowment to support the purposes for which the endowment was created.

**Retroactivity.** Like UMIFA, UPIA, the Uniform Principal and Income Act of 1961, and the Uniform Principal and Income Act of 1997, UPMIFA applies retroactively to institutional funds created before and prospectively to institutional funds created after enactment of the statute. Regarding the considerations motivating this treatment of the issues, see the comment to Section 4.

**Endowment Spending.** UPMIFA improves the endowment spending rule by eliminating the concept of historic dollar value and providing better guidance regarding the operation of the prudence standard. Under UMIFA a charity can spend amounts above historic dollar value that the charity determines to be prudent. The Act directs the charity to focus on the purposes and needs of the charity rather than on the purposes and perpetual nature of the fund. Amounts below historic dollar value cannot be spent. The Drafting Committee concluded that this endowment spending rule created numerous problems and that restructuring the rule would benefit charities, their donors, and the public. The problems include:

1. Historic dollar value fixes valuation at a moment in time, and that moment is arbitrary. If a donor provides for a gift in the donor's will, the date of valuation for the gift will likely be the donor's date of death. (UMIFA left uncertain what the appropriate date for valuing a testamentary gift was.) The determination of historic dollar value can vary significantly depending upon when in the market cycle the donor dies. In addition, the fund may be below historic dollar value at the time the charity receives the gift if the value of the asset declines between the date of the donor's death and the date the asset is actually distributed to the charity from the estate.
2. After a fund has been in existence for a number of years, historic dollar value may become meaningless. Assuming reasonable long term investment success, the value of the typical fund will be well above historic dollar value, and historic dollar value will no longer represent the purchasing power of the original gift. Without better guidance on spending the increase in value of the fund, historic dollar value does not provide adequate protection for the fund. If a charity views the restriction on spending simply as a direction to preserve historic dollar value, the charity may spend more than it should.

3. The Act does not provide clear answers to questions a charity faces when the value of an endowment fund drops below historic dollar value. A fund that is so encumbered is commonly called an “underwater” fund. Conflicting advice regarding whether an organization could spend from an underwater fund has led to difficulties for those managing charities. If a charity concluded that it could continue to spend trust accounting income until a fund regained its historic dollar value, the charity might invest for income rather than on a total-return basis. Thus, the historic dollar value rule can cause inappropriate distortions in investment policy and can ultimately lead to a decline in a fund’s real value. If, instead, a charity with an underwater fund continues to invest for growth, the charity may be unable to spend anything from an underwater endowment fund for several years. The inability of a charity to spend anything from an endowment is likely to be contrary to donor intent, which is to provide current benefits to the charity.

The Drafting Committee concluded that providing clearly articulated guidance on the prudence rule for spending from an endowment fund, with emphasis on the permanent nature of the fund, would provide the best protection of the purchasing power of endowment funds.

**Presumption of Imprudence.** UPMIFA includes as an optional provision a presumption of imprudence if a charity spends more than seven percent of an endowment fund in any one year. The presumption is meant to protect against spending an endowment too quickly. Although the Drafting Committee believes that the prudence standard of UPMIFA provides appropriate and adequate protection for endowments, the Committee provided the option for states that want to include a mechanical guideline in the statute. A major drawback to any statutory percentage is that it is unresponsive to changes in the rate of inflation or deflation.

**Modification of Restrictions on Charitable Funds.** UPMIFA clarifies that the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts. Courts have applied trust law

rules to nonprofit corporations in the past, but the Drafting Committee believed that statutory authority for applying these principles to nonprofit corporations would be helpful. UMIFA permitted release of restrictions but left the application of cy pres uncertain. Under UPMIFA, as under trust law, the court will determine whether and how to apply cy pres or deviation and the attorney general will receive notice and have the opportunity to participate in the proceeding. The one addition to existing law is that UPMIFA gives a charity the authority to modify a restriction on a fund that is both old and small. For these funds, the expense of a trip to court will often be prohibitive. By permitting a charity to make an appropriate modification, money is saved for the charitable purposes of the charity. Even with respect to small, old funds, however, the charity must notify the attorney general of the charity’s intended action. Of course, if the attorney general has concerns, he or she can seek the agreement of the charity to change or abandon the modification, and if that fails, can commence a court action to enjoin it. Thus, in all types of modification the attorney general continues to be the protector both of the donor’s intent and of the public’s interest in charitable funds.

**Other Organizational Law.** For matters not governed by UPMIFA, a charitable organization will continue to be governed by rules applicable to charitable trusts, if it is organized as a trust, or rules applicable to nonprofit corporations, if it is organized as a nonprofit corporation.

**Relation to Trust Law.** Although UPMIFA applies a number of rules from trust law to institutions organized as nonprofit corporations, in two respects UPMIFA creates rules that do not exist under the common law applicable to trusts. The endowment spending rule of Section 4 and the provision for modifying a small, old fund in subsection (d) of Section 6 have no counterparts in the common law or the UTC. The Drafting Committee believes that these rules could be useful to charities organized as trusts, and the Committee recommends conforming amendments to the UTC and the Principal and Income Act to incorporate these changes into trust law.

**15-1-1101. Short title.** This part 11 shall be known and may be cited as the “Uniform Prudent Management of Institutional Funds Act”.

**Source:** L. 2008: Entire part R&RE, p. 559, § 1, effective September 1.

**Editor’s note:** This section is similar to former § 15-1-1101 as it existed prior to 2008.

## ANNOTATION

**Law reviews.** For article, “Uniform State Laws of Interest to Colorado Probate Lawyers”, see 14 Colo. Law. 1961 (1985). For article,

“Modern Tomb Raiders: Nonprofit Organizations’ Impermissible Use of Restricted Funds”, see 31 Colo. Law. 57 (September 2002).



**15-1-1102. Definitions.** As used in this part 11, unless the context otherwise requires:

(1) “Charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, or any other charitable or eleemosynary purpose.

(2) “Endowment fund” means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(3) “Gift instrument” means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) “Institution” means:

(A) A person, other than an individual, organized and operated exclusively for charitable purposes;

(B) A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or

(C) A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) “Institutional fund” means a fund held by an institution exclusively for charitable purposes. The term does not include funds held by the public employees’ retirement association created by article 51 of title 24, C.R.S., or:

(A) Program-related assets;

(B) A fund held for an institution by a trustee that is not an institution; or

(C) A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) “Program-related asset” means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**Source: L. 2008:** Entire part R&RE, p. 559, § 1, effective September 1. **L. 2009:** IP(5) amended, (SB 09-282), ch. 288, p. 1398, § 61, effective January 1, 2010.

**Editor’s note:** This section is similar to former § 15-1-1103 as it existed prior to 2008.

#### OFFICIAL COMMENT

Subsection (1). Charitable Purpose. The definition of charitable purpose follows that of UTC § 405 and Restatement (Third) of Trusts § 28 (2003). This long-familiar standard derives from the English Statute of Charitable Uses, enacted in 1601.

Some 17 states have created statutory definitions of charitable purpose for various purposes. See, e.g., 10 Pa. Cons. Stat. § 162.3 (2005) (defining charitable purpose within the Solicitation of Funds for Charitable Purposes Act to include “humane,” “patriotic,” “social welfare and advocacy,” and “civic” purposes). The definition in subsection (1) applies for purposes of this Act and does not affect other definitions of charitable purpose.

Subsection (2). Endowment Fund. An endowment fund is an institutional fund or a part of an

institutional fund that is not wholly expendable by the institution on a current basis. A restriction that makes a fund an endowment fund arises from the terms of a gift instrument. If an institution has more than one endowment fund, under Section 3 the institution can manage and invest some or all endowment funds together. Section 4 and Section 6 must be applied to individual funds and cannot be applied to a group of funds that may be managed collectively for investment purposes.

Board-designated funds are institutional funds but not endowment funds. The rules on expenditures and modification of restrictions in this Act do not apply to restrictions that an institution places on an otherwise unrestricted fund that the institution holds for its own benefit. The institution may be able to change these

restrictions itself, subject to internal rules and to the fiduciary duties that apply to those that manage the institution.

If an institution transfers assets to another institution, subject to the restriction that the other institution hold the assets as an endowment, then the second institution will hold the assets as an endowment fund.

Subsection (3). Gift Instrument. The term gift instrument refers to the records that establish the terms of a gift and may consist of more than one document. The definition clarifies that the only legally binding restrictions on a gift are the terms set forth in writing.

As used in this definition, "record" is an expansive concept and means a writing in any form, including electronic. The term includes a will, deed, grant, conveyance, agreement, or memorandum, and also includes writings that do not have a donative purpose. For example, under some circumstances the bylaws of the institution, minutes of the board of directors, or canceled checks could be a gift instrument or be one of several records constituting a gift instrument. Although the term can include any of these records, a record will only become a gift instrument if both the donor and the institution were or should have been aware of its terms when the donor made the gift. For example, if a donor sends a contribution to an institution for its general purposes, then the articles of incorporation may be used to clarify those purposes. If, in contrast, the donor sends a letter explaining that the institution should use the contribution for its "educational projects concerning teenage depression," then any funds received in response must be used for that purpose and not for broader purposes otherwise permissible under the articles of incorporation.

Solicitation materials may constitute a gift instrument. For example, a solicitation that suggests in writing that any gifts received pursuant to the solicitation will be held as an endowment may be integrated with other writings and may be considered part of the gift instrument. Whether the terms of the solicitation become part of the gift instrument will depend upon the circumstances, including whether a subsequent writing superseded the terms of the solicitation. Each gift received in response to a solicitation will be subject to any restrictions indicated in the gift instrument pertaining to that gift. For example, if an initial gift establishes an endowment fund, and the charity then solicits additional gifts "to be held as part of the Charity X Endowment Fund," those additional gifts will each be subject to the restriction that the gifts be held as part of that endowment fund.

The term gift instrument includes matching funds provided by an employer or some other person. Whether matching funds are treated as part of the endowment fund or otherwise will depend on the terms of the matching gift.

The term gift instrument also includes an appropriation by a legislature or other public or governmental body for the benefit of an institution.

Subsection (4). Institution. The Act applies generally to institutions organized and operated exclusively for charitable purposes. The term includes charitable organizations created as non-profit corporations, unincorporated associations, governmental subdivisions or agencies, or any form of entity, however organized, that is organized and operated exclusively for charitable purposes. The term includes a trust organized and operated exclusively for charitable purposes, but only if a charity acts as trustee. This approach leaves unchanged the coverage of UMIFA. The exclusion of "individual" from the definition of institution is not intended to exclude a corporation sole.

Although UPMIFA does not apply to all charitable trusts, many of UPMIFA's provisions derive from trust law. Prudent investor standards apply to trustees of charitable trusts in states that have adopted UPIA. Trustees of charitable trusts can use the doctrines of cy pres and deviation to modify trust provisions, and the UTC includes a number of modification provisions. The Uniform Principal and Income Act permits allocation between principal and income to facilitate total-return investing. Charitable trusts not included in UPMIFA, primarily those managed by corporate trustees and individuals, will lose the benefits of UPMIFA's endowment spending rule and the provision permitting a charity to apply cy pres, without court supervision, for modifications to a small, old fund. Enacting jurisdictions may choose to incorporate these rules into existing trust statutes to provide the benefits to charitable funds managed by corporate trustees.

The definition of institution includes governmental organizations that hold funds exclusively for the purposes listed in the definition. A governmental entity created by state law may fall outside the definition on account of the form of organization under which the state created it. Because state arrangements are so varied, creating a definition that encompasses all charitable entities created by states is not feasible. States should consider applying the core principles of UPMIFA to such governmental institutions. For example, the control over a state university may be held by a State Board of Regents. In that situation, the state may have created a governing structure by statute or in the state constitution so that the university is, in effect, privately chartered. The Drafting Committee does not intend to exclude these universities from the definition of institution, but additional state legislation may be necessary to address particular situations.

Subsection (5). Institutional Fund. The term institutional fund includes any fund held by an institution for charitable purposes, whether the



fund is expendable currently or subject to restrictions. The term does not include a fund held by a trustee that is not an institution.

Some institutions combine assets from multiple funds for investment purposes, and some institutions invest funds from different institutions in a common fund. Typically each fund is assigned units representing the share value of the individual fund. The assets are invested collectively, permitting more efficient investment and improved diversification of the overall portfolio. The collective fund makes annual distributions to the individual funds based on the units held by each fund. For purposes of Section 3 [and Section 5], the collective fund is considered one institutional fund. Section 4 and Section 6 apply to each fund individually and not to the collective fund.

Assets held by an institution primarily for program-related purposes rather than exclusively for investment are not subject to UPMIFA. For example, a university may purchase land adjacent to its campus for future development. The purchase might not meet prudent investor standards for commercial real estate, but the purchase may be appropriate because the university needs to build a new dormitory. The classroom buildings, administration buildings, and dormitories held by the university all have value as property, but the university does not hold those buildings as financial assets for investment purposes. The Act excludes from the prudent investor norms those assets that a charity uses to conduct its charitable activities, but does not exclude assets that have a tangential tie to the charitable purpose of the institution but are held primarily for investment purposes.

A fund held by an institution is not an institutional fund if any beneficiary of the fund is not an institution. For example, a charitable remainder trust held by a charity as trustee for the benefit of the donor during the donor's lifetime, with the remainder interest held by the charity, is not an institutional fund. However, this subsection treats as an institution a charitable remainder trust that continues to operate for charitable purposes after the termination of the noncharitable interests. The Act will have only a limited

effect on a charitable remainder trust that terminates after the noncharitable interest ends. During the period required to complete the distribution of the trust's property, the prudence norm will apply to the actions of the trustee, but the short timeframe will affect investment decision making.

Subsection (6). Person. The Act uses as the definition of person the definition approved by the National Conference of Commissioners on Uniform State Laws. The definition of institution uses the term person, but to be an institution a person must be organized and operated exclusively for charitable purposes. A person with a commercial purpose cannot be an institution. Thus, although the definition of person includes "business trust" and "any other . . . commercial entity," the Act does not apply to an entity organized for business purposes and not exclusively for charitable purposes. Further, the definition of person includes trusts, but only trusts managed by charities can be institutional funds. UPMIFA does not apply to trusts managed by corporate trustees or by individual trustees.

If a governing instrument provides that a fund will revert to the donor if, and only if, the institution ceases to exist or the purposes of the fund fail, then the fund will be considered an institutional fund until such contingency occurs.

Subsection (7). Program-Related Asset. Although UPMIFA does not apply to program-related assets, if program-related assets serve, in part, as investments for an institution, then the institution should identify categories for reporting those investments and should establish investment criteria for the investments that are reasonably related to achieving the institution's charitable purposes. For example, a program providing below-market loans to inner-city businesses may be "primarily to accomplish a charitable purpose of the institution" but also can be considered, in part, an investment. The institution should create reasonable credit standards and other guidelines for the program to increase the likelihood that the loans will be repaid.

Subsection (8). Record. This definition was added to clarify that the definition of instrument includes electronic records as defined in Section 2(8) of the Uniform Electronic Transactions Act (1999).

### **15-1-1103. Standard of conduct in managing and investing institutional fund.**

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this part 11, each person responsible for managing and investing an institutional fund shall manage and invest the institutional fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) May incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(2) Shall make a reasonable effort to verify facts relevant to the management and investment of the institutional fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) General economic conditions;

(B) The possible effect of inflation or deflation;

(C) The expected tax consequences, if any, of investment decisions or strategies;

(D) The role that each investment or course of action plays within the overall investment portfolio of the institutional fund;

(E) The expected total return from income and the appreciation of investments;

(F) Other resources of the institution;

(G) The needs of the institution and the institutional fund to make distributions and to preserve capital; and

(H) An asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the institutional fund and to the institution.

(3) Except as otherwise provided by law other than this part 11, an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the institutional fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this part 11.

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

**Source:** L. 2008: Entire part R&RE, p. 560, § 1, effective September 1.

**Editor's note:** This section is similar to former §§ 15-1-1106 and 15-1-1108 as they existed prior to 2008.

## OFFICIAL COMMENT

**Purpose and Scope of Revisions.** This section adopts the prudence standard for investment decision making. The section directs directors or others responsible for managing and investing the funds of an institution to act as a prudent investor would, using a portfolio approach in making investments and considering the risk and return objectives of the fund. The section lists the factors that commonly bear on decisions in fiduciary investing and incorporates the duty to diversify investments absent a conclusion that special circumstances make a decision not to diversify reasonable. Thus, the section follows modern portfolio theory for investment decision making. Section 3 applies to all funds held by an

institution, regardless of whether the institution obtained the funds by gift or otherwise and regardless of whether the funds are restricted.

The Drafting Committee discussed extensively the standard that should govern nonprofit managers. UMIFA states the standard as "ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision." Since the decision in *Stern v. Lucy Webb Hayes National Training School for Deaconesses*, 381 F. Supp. 1003 (1974), the trend has been to hold directors of nonprofit corporations to a standard nominally similar to the corporate standard but with the recognition that the facts and circumstances considered in-



clude the fact that the entity is a charity and not a business corporation.

The language of the prudence standard adopted in UPMIFA is derived from the RMNCA and from the prudent investor rule of UPIA. The standard is consistent with the business judgment standard under corporate law, as applied to charitable institutions. That is, a manager operating a charitable organization under the business judgment rule would look to the same factors as those identified by the prudent investor rule. The standard for prudent investment set forth in Section 3 first states the duty of care as articulated in the RMNCA, but provides more specific guidance for those managing and investing institutional funds by incorporating language from UPIA. The criteria derived from UPIA are consistent with good practice under current law applicable to nonprofit corporations.

Trust law norms already inform managers of nonprofit corporations. The Preamble to UPIA explains: "Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations." See also, Restatement (Third) of Trusts: Prudent Investor Rule § 379, Comment b, at 190 (1992) (stating that "absent a contrary statute or other provision, the prudent investor rule applies to investment of funds held for charitable corporations."). Trust precedents have routinely been found to be helpful but not binding authority in corporate cases.

The Drafting Committee decided that by adopting language from both the RMNCA and UPIA, UPMIFA could clarify that common standards of prudent investing apply to all charitable institutions. Although the principal trust authorities, UPIA § (2)(a), Restatement (Third) of Trusts § 337, UTC § 804, and Restatement (Second) of Trusts § 174 (prudent administration) use the phrase "care, skill and caution," the Drafting Committee decided to use the more familiar corporate formulation as found in RMNCA. The standard also appears in Sections 3, 4 and 5 of UPMIFA. The Drafting Committee does not intend any substantive change to the UPIA standard and believes that "reasonable care, skill, and caution" are implicit in the term "care" as used in the RMNCA. The Drafting Committee included the detailed provisions from UPIA, because the Committee believed that the greater precision of the prudence norms of the Restatement and UPIA, as compared with UMIFA, could helpfully inform managers of charitable institutions. For an explanation of the Prudent Investor Act, see John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641 (1996), and for a discussion of the effect UPIA has had on investment decision making, see Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform*

of Prudent Trust Investment Laws Change Trust Portfolio Allocation?, 50 J. L. & Econ. (forthcoming 2007).

Section 3 has incorporated the provisions of UPIA with only a few exceptions. UPIA applies to private trusts and is entirely default law. The settlor of a private trust has complete control over virtually all trust provisions. See UTC § 105. Because UPMIFA applies to charitable organizations, UPMIFA makes the duty of care, the duty to minimize costs, and the duty to investigate mandatory. The duty of loyalty is mandatory under applicable organization law, corporate or trust. Other than these duties, the provisions of Section 3 are default rules. A gift instrument or the governing instruments of an institution can modify these duties, but the charitable purpose doctrine limits the extent to which an institution or a donor can restrict these duties. In addition, subsection (a) of Section 3 reminds the decision maker that the intent of a donor expressed in a gift instrument will control decision making. Further, the decision maker must consider the charitable purposes of the institution and the purposes of the institutional fund for which decisions are being made. These factors are specific to charitable organizations; UPIA § 2(a) states the duty to consider similar factors in the private trust context.

UPMIFA does not include the duty of impartiality, stated in UPIA § 6, because nonprofit corporations do not confront the multiple beneficiaries problem to which the duty is addressed. Under UPIA, a trustee must treat the current beneficiaries and the remainder beneficiaries with due regard to their respective interests, subject to alternative direction from the trust document. A nonprofit corporation typically creates one charity. The institution may serve multiple beneficiaries, but those beneficiaries do not have enforceable rights in the institution in the same way that beneficiaries of a private trust do. Of course, if a charitable trust is created to benefit more than one charity, rather than being created to carry out a charitable purpose, then UPIA will apply the duty of impartiality to that trust.

In other respects, the Drafting Committee made changes to language from UPIA only where necessary to adapt the language for charitable institutions. No material differences are intended. Subsection (e)(1)(D) of Section 3 of UPMIFA does not include a clause that appears at the end of UPIA § 2(c)(4) ("which may include financial assets, interest in closely held enterprises, tangible and intangible personal property, and real property."). The Drafting Committee deemed this clause unnecessary for charitable institutions. The language of subsection (e)(1)(G) reflects a modification of the language of UPIA § (2)(c)(7). Other minor modifications to the UPIA provisions make the

language more appropriate for charitable institutions.

The duties imposed by this section apply to those who govern an institution, including directors and trustees, and to those to whom the directors or managers delegate responsibility for investment and management of institutional funds. The standard applies to officers and employees of an institution and to agents who invest and manage institutional funds. Volunteers who work with an institution will be subject to the duties imposed here, but state and federal statutes may provide reduced liability for persons who act without compensation. UPMIFA does not affect the application of those shield statutes.

**Subsection (a). Donor Intent and Charitable Purposes.** Subsection (a) states the overarching duty to comply with donor intent as expressed in the terms of the gift instrument. The emphasis in the Act on giving effect to donor intent does not mean that the donor can or should control the management of the institution. The other fundamental duty is the duty to consider the charitable purposes of the institution and of the institutional fund in making management and investment decisions. UPIA § 2(a) states a similar duty to consider the purposes of a trust in investing and managing assets of a trust.

**Subsection (b). Duty of Loyalty.** Subsection (b) reminds those managing and investing institutional funds that the duty of loyalty will apply to their actions, but Section 3 does not state the loyalty standard that applies. The Drafting Committee was concerned, at least nominally, that different standards of loyalty may apply to directors of nonprofit corporations and to trustees of charitable trusts. The RMNCA provides that under the duty of loyalty a director of a nonprofit corporation should act “in a manner the director reasonably believes to be in the best interests of the corporation.” RMNCA § 8.30. The trust law articulation of the loyalty standard uses “sole interests” rather than “best interests.” As the Restatement of Trusts explains, “[t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.” Restatement (Second) of Trusts § 170 (1). Although the standards for loyalty, like the standard of care, are merging, see Evelyn Brody, *Charitable Governance: What’s Trust Law Got to do With It?* Chi.-Kent L. Rev. (2005); John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest*, 114 Yale L.J. 929 (2005), the Drafting Committee concluded that formulating a duty of loyalty provision for UPMIFA was unnecessary. Thus the duty of loyalty under nonprofit corporation law will apply to charities organized as nonprofit corporations, and the duty of loyalty under trust law will apply to charitable trusts.

**Subsection (b). Duty of Care.** Subsection (b) also applies the duty of care to performance of

investment duties. The language derives from § 8.30 of the RMNCA. This subsection states the duty to act in good faith, “with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” Although the language in the RMNCA and in UPMIFA is similar to that of § 8.30 of the Model Business Corporation Act (3d ed. 2002), the standard as applied to persons making decisions for charities is informed by the fact that the institution is a charity and not a business corporation. Thus, in UPMIFA the references to “like position” and “similar circumstances” mean that the charitable nature of the institution affects the decision making of a prudent person acting under the standard set forth in subsection (b). The duty of care involves considering the factors set forth in subsection (e)(1).

**Subsection (c)(1). Duty to Minimize Costs.** Subsection (c)(1) tracks the language of UPIA § 7 and requires an institution to minimize costs. An institution may prudently incur costs by hiring an investment advisor, but the costs incurred should be appropriate under the circumstances. See UPIA § 7 cmt; Restatement (Third) of Trusts: Prudent Investor Rule § 227, cmt. M, at 58 (1992); Restatement (Second) of Trusts § 188 (1959). The duty is consistent with the duty to act prudently under § 8.30 of the RMNCA.

**Subsection (c)(2). Duty to Investigate.** This subsection incorporates the traditional fiduciary duty to investigate, using language from UPIA § 2(d). The subsection requires persons who make investment and management decisions to investigate the accuracy of the information used in making decisions.

**Subsection (d). Pooling Funds.** An institution holding more than one institutional fund may find that pooling its funds for investment and management purposes will be economically beneficial. The Act permits pooling for these purposes. The prohibition against commingling no longer prevents pooling funds for investment and management purposes. See UPIA § 3, cmt. (duty to diversify aided by pooling); UPIA § 7, cmt. (pooling to minimize costs); Restatement (Third) of Trusts: Duty to Segregate and Identify Trust Property § 84 (T.D. No. 4 2005). Funds will be considered individually for other purposes of the Act, including for the spending rule for endowment funds of Section 4 and the modification rules of Section 6.

**Subsection (e)(1). Prudent Decision Making.** Subsection (e)(1) takes much of its language from UPIA § 2(c). In making decisions about whether to acquire or retain an asset, the institution should consider the institution’s mission, its current programs, and the desire to cultivate additional donations from a donor, in addition to factors related more directly to the asset’s potential as an investment.



Subsection (e)(1)(C) reflects the fact that some organizations will invest in taxable investments that may generate unrelated business taxable income for income tax purposes.

Assets held primarily for program-related purposes are not subject to UPMIFA. The management of those assets will continue to be governed by other laws applicable to the institution. Other assets may not be held primarily for program-related purposes but may have both investment purposes and program-related purposes. Subsections (a) and (e)(1)(H) indicate that a prudent decision maker can take into consideration the relationship between an investment and the purposes of the institution and of the institutional fund in making an investment that may have a program-related purpose but not be primarily program-related. The degree to which an institution uses an asset to accomplish a charitable purpose will affect the weight given that factor in a decision to acquire or retain the asset.

Subsection (e)(2). Portfolio Approach. This subsection reflects the use of portfolio theory in modern investment practice. The language comes from UPIA § 2(b), which follows the articulation of the prudent investor standard in Restatement (Third) of Trusts: Prudent Investor Rule § 227(a) (1992).

Subsection (e)(3). Broad Investment Authority. Consistent with the portfolio theory of investment, this subsection permits a broad range of investments. The language derives from UPIA § 2(e).

Section 4 of UMIFA indicated that an institution could invest "without restriction to investments a fiduciary may make." The committee removed this language from subsection (e)(3) as unnecessary, because states no longer have legal lists restricting fiduciary investing to the specific types of investments identified in statutory lists.

Subsection (e)(3) also provides that other law may limit the authority under this subsection. In addition, all of subsection (e) is subject to contrary provisions in a gift instrument, and a gift instrument may restrict the ability to invest in particular assets. For example, the gift instrument for a particular institutional fund might preclude the institution from investing the assets of the fund in companies that produce tobacco products.

In her book, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 434 (Harv. Univ. Press 2004), Marion R. Fremont-Smith reports that some large charities pledge their endowment funds as security for loans. Subsection (e)(3) permits this sort of debt financing, subject to the guidelines of subsection (e)(1).

Subsection (e)(4). Duty to Diversify. This subsection assumes that prudence requires diversification but permits an institution to determine that nondiversification is appropriate under

exceptional circumstances. A decision not to diversify must be based on the needs of the charity and not solely for the benefit of a donor. A decision to retain property in the hope of obtaining additional contributions from the same donor may be considered made for the benefit of the charity, but the appropriateness of that decision will depend on the circumstances. This subsection derives its language from UPIA § 3. See UPIA § 3 cmt. (discussing the rationale for diversification); Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

Subsection (e)(5). Disposing of Unsuitable Assets. This subsection imposes a duty on an institution to review the suitability of retaining property contributed to the institution within a reasonable period of time after the institution receives the property. Subsection (e)(5) requires the institution to make a decision but does not require a particular outcome. The institution may consider a variety of factors in making its decision, and a decision to retain the property either for a period of time or indefinitely may be a prudent decision.

Section 4(2) of UMIFA specifically authorized an institution to retain property contributed by a donor. The comment explained that an institution might retain property in the hope of obtaining additional contributions from the donor. Under UPMIFA the potential for developing additional contributions by retaining property contributed to the institution would be among the "other circumstances" that the institution might consider in deciding whether to retain or dispose of the property. The institution must weigh the potential for obtaining additional contributions with all other factors that affect the suitability of retaining the property in the investment portfolio.

The language of subsection (e)(5) comes from UPIA § 4, which restates Restatement (Third) of Trusts: Prudent Investor Rule § 229 (1992), which adopted language from Restatement (Second) of Trusts § 231 (1959). See UPIA § 4 cmt.

Subsection (e)(6). Special Skills or Expertise. Subsection (e)(6) states the rule provided in UPIA § 2(f) requiring a trustee to use the trustee's own skills and expertise in carrying out the trustee's fiduciary duties. The comment to RMNCA § 8.30 describes the existence of a similar rule under the law of nonprofit corporations. Section 8.30(a)(2) provides that in discharging duties a director must act "with the care an ordinarily prudent person in a like position would exercise under similar circumstances. . . ." The comment explains that "[t]he concept of under similar circumstances' relates not only to the circumstances of the corporation but to the special background, qualifications, and management experience of the individual director and the role the director plays in the corporation." After describing directors chosen for their ability to raise money, the comment

notes that “[n]o special skill or expertise should be expected from such directors unless their background or knowledge evidences some special ability.”

The intent of subsection (e)(6) is that a person managing or investing institutional funds must use the person’s own judgment and experience, including any particular skills or expertise, in carrying out the management or investment duties. For example, if a charity names a person as a director in part because the person is a lawyer, the lawyer’s background may allow the lawyer to recognize legal issues in connection with funds held by the charity. The lawyer should identify the issues for the board, but the lawyer is not expected to provide legal advice. A lawyer

is not expected to be able to recognize every legal issue, particularly issues outside the lawyer’s area of expertise, simply because the board member is lawyer. See ALI Principles of the Law of Nonprofit Organizations, Preliminary Draft No. 3 (May 12, 2005) § 315 (Duty of Care), cmt. c.

UMIFA contained two provisions that authorized investments in pooled or common investment funds. UMIFA §§ 4(3), 4(4). The Drafting Committee concluded that Section 3(e)(3) of UPMIFA authorizes these investments. The decision not to include the two provisions in UPMIFA implies no disapproval of such investments.

**15-1-1104. Appropriation for expenditure of accumulation of endowment fund - rules of construction.** (a) Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

- (1) The duration and preservation of the endowment fund;
  - (2) The purposes of the institution and the endowment fund;
  - (3) General economic conditions;
  - (4) The possible effect of inflation or deflation;
  - (5) The expected total return from income and the appreciation of investments;
  - (6) Other resources of the institution; and
  - (7) The investment policy of the institution.
- (b) To limit the authority to appropriate for expenditure or accumulate under subsection (a) of this section, a gift instrument must specifically state the limitation.
- (c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only “income”, “interest”, “dividends”, or “rents, issues, or profits”, or “to preserve the principal intact”, or words of similar import:
- (1) Create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the endowment fund; and
  - (2) Do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a) of this section.

**Source:** L. 2008: Entire part R&RE, p. 562, § 1, effective September 1.

**Editor’s note:** This section is similar to former §§ 15-1-1104 and 15-1-1105 as they existed prior to 2008.

## OFFICIAL COMMENT

**Purpose and Scope of Revisions.** This section revises the provision in UMIFA that permitted the expenditure of appreciation of an endowment fund to the extent the fund had appreciated in value above the fund’s historic dollar value. UMIFA defined historic dollar value to mean all contributions to the fund, valued at the time of contribution. Instead of using historic dollar

value as a limitation, UPMIFA applies a more carefully articulated prudence standard to the process of making decisions about expenditures from an endowment fund. The expenditure rule of Section 4 applies only to the extent that a donor and an institution have not reached some other agreement about spending from an endowment. If a gift instrument sets forth specific



requirements for spending, then the charity must comply with those requirements. However, if the gift instrument uses more general language, for example directing the charity to "hold the fund as an endowment" or "retain principal and spend income," then Section 4 provides a rule of construction to guide the charity.

Prior to the promulgation of UMIFA, "income" for trust accounting purposes meant interest and dividends but not capital gains, whether or not realized. Many institutions assumed that trust accounting principles applied to charities organized as nonprofit corporations, and the rules limited the institutions' ability to invest their endowment funds effectively. UMIFA addressed this problem by construing "income" in gift instruments to include a prudent amount of capital gains, both realized and unrealized. Under UMIFA an institution could spend appreciation in addition to spending income determined under trust accounting rules. This rule of construction likely carried out the intent of the donor better than a rule limiting spending to trust accounting income, while permitting the charity to invest in a manner that could generate better returns for the fund.

UPMIFA also applies a rule of construction to terms like "income" or "endowment." The assumption in the Act is that a donor who uses one of these terms intends to create a fund that will generate sufficient gains to be able to make ongoing distributions from the fund while at the same time preserving the purchasing power of the fund. Because historic dollar value under UMIFA was a number fixed in time, the use of that approach may not have adequately captured the intent of a donor who wanted the endowment fund to continue to maintain its value in current dollars. UPMIFA takes a different approach, directing the institution to determine spending based on the total assets of the endowment fund rather than determining spending by adding a prudent amount of appreciation to trust accounting income.

UPMIFA requires the persons making spending decisions for an endowment fund to focus on the purposes of the endowment fund as opposed to the purposes of the institution more generally, as was the case under UMIFA. When the institution considers the purposes and duration of the fund, the institution will give priority to the donor's general intent that the fund be maintained permanently. Although the Act does not require that a specific amount be set aside as "principal," the Act assumes that the charity will act to preserve "principal" (i.e., to maintain the purchasing power of the amounts contributed to the fund) while spending "income" (i.e. making a distribution each year that represents a reasonable spending rate, given investment performance and general economic conditions). Thus, an institution should monitor principal in an accounting sense, identifying the original

value of the fund (the historic dollar value) and the increases in value necessary to maintain the purchasing power of the fund.

Subsection (a). Expenditure of Endowment Funds. Subsection (a) uses the RMNCA articulation of the standard of care for decision making under Section 4. The change in language does not reflect a substantive change. The comment to Section 3 more fully describes that standard of care.

Section 4 permits expenditures from an endowment fund to the extent the institution determines that the expenditures are prudent after considering the factors listed in subsection (a). These factors emphasize the importance of the intent of the donor, as expressed in a gift instrument. Section 4 looks to written documents as evidence of donor's intent and does not require an institution to rely on oral expressions of intent. By requiring written evidence of intent, the Act protects reliance by the donor and the institution on the written terms of a donative agreement. Informal conversations may be misremembered and may be subject to multiple interpretations. Of course, oral expressions of intent may guide an institution in further carrying out a donor's wishes and in understanding a donor's intent.

The factors in subsection (a) require attention to the purposes of the institution and the endowment fund, economic conditions, and present and reasonably anticipated resources of the institution. As under UMIFA, determinations under Section 4 do not depend on the characterization of assets as income or principal and are not limited to the amount of income and unrealized appreciation. The authority in Section 4 is permissive, however, and an institution organized as a trust may continue to make spending decisions under trust accounting principles so long as doing so is prudent.

Institutions have operated effectively under UMIFA and have operated more conservatively than the historic dollar value rule would have permitted. Institutions have little incentive to maximize allowable spending. Good practice has been to provide for modest expenditures while maintaining the purchasing power of a fund. Institutions have followed this practice even though UMIFA (1) does not require an institution to maintain a fund's purchasing power and (2) does allow an institution to spend any amounts in a fund above historic dollar value, subject to the prudence standard. The Drafting Committee concluded that eliminating historic dollar value and providing institutions with more discretion would not lead to depletion of endowment funds. Instead, UPMIFA should encourage institutions to establish a spending policy that will be responsive to short-term fluctuations in the value of the fund. Section 4 allows an institution to maintain appropriate levels of expenditures in times of economic

downturn or economic strength. In some years, accumulation rather than spending will be prudent, and in other years an institution may appropriately make expenditures even if a fund has not generated investment return that year.

Several levels of safeguard exist to prevent an institution from depleting an endowment fund or diverting assets from the purposes for which the fund was created. In comparison with UMIFA, UPMIFA provides greater direction to the institution with respect to making a prudent determination about spending from an endowment. UMIFA told the decision maker to consider "long and short term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions." UPMIFA clarifies that in making spending decisions the institution should attempt to ensure that the value of the fund endures while still providing that some amounts be spent for the purposes of the endowment fund. In UPMIFA prudent decision making emphasizes the endowment aspect of the fund, rather than the overall purposes or needs of the institution.

In addition to the guidance provided by Section 4, other safeguards exist. Donors can restrict gifts and can provide specific instructions to donee institutions regarding appropriate uses for assets contributed. Within institutions, fiduciary duties govern the persons making decisions on expenditures. Those persons must operate both with the best interests of the institution in mind and in keeping with the intent of donors. If an institution diverts an institutional fund from the charitable purposes of the institution, the state attorney general can enforce the charitable interests of the public. By relying on these safeguards while providing institutions with adequate discretion to make appropriate expenditures, the Act creates a standard that takes into consideration the diversity of the charitable sector. The committee expects that accumulated experience with such spending formulas will continue to inform institutional practice under the Act.

Distinguishing Legal and Accounting Standards. Deleting historic dollar value does not transform any portion of an endowment fund into unrestricted assets from a legal standpoint. An endowment fund is restricted because of the donor's intent that the fund be restricted by the prudent spending rule, that the fund not be spent in the current year, and that the fund continue to maintain its value for a long time. Regardless of the treatment of endowment fund from an accounting standpoint, legally an endowment fund should not be considered unrestricted. Subsection (a) states that endowment funds will be legally restricted until the institution appropriates funds for expenditure. The UMIFA statutes

in Utah and Maine contain similar language. 13 Me. Rev. Stat. Ann. tit. 13 § 4106 (West 2005); Utah Code Ann. 1953 § 13-29-3 (2005). See, also, advisory published by Mass. Attorney General, "The Attorney General's Position on FASB Statement of Financial Accounting Standards No. 117, paragraph 22 and Related G.L.C. 180A Issues" (January 2004) <http://www.ago.state.ma.us/filelibrary/fasb.pdf> (last visited May 22, 2006) (concerning the treatment of endowments as legally restricted assets).

The term "endowment fund" includes funds that may last in perpetuity but also funds that are created to last for a fixed term of years or until the institution achieves a specified objective. Section 4 requires the institution to consider the intended duration of the fund in making determinations about spending. For example, if a donor directs that a fund be spent over 20 years, Section 4 will guide the institution in making distribution decisions. The institution would amortize the fund over 20 years rather than try to maintain the fund in perpetuity. For an endowment fund of limited duration, spending at a rate higher than rates typically used for endowment spending will be both necessary and prudent.

Subsection (c). Rule of Construction. Donor's intent must be respected in the process of making decisions to expend endowment funds. Section 4 does not allow an institution to convert an endowment fund into a non-endowment fund nor does the section allow the institution to ignore a donor's intent that a fund be maintained as an endowment. Rather, subsection (c) provides rules of construction to assist institutions in interpreting donor's intent. Subsection (c) assumes that if a donor wants an institution to spend "only the income" from a fund, the donor intends that the fund both support current expenditures and be preserved permanently. The donor is unlikely to be concerned about designation of particular returns as "income" or "principal" under accounting principles. Rather the donor is more likely to assume that the institution will use modern total-return investing techniques to generate enough funds to distribute while maintaining the long-term viability of the fund. Subsection (c) is an intent effectuating provision that provides default rules to construe donor's intent.

As subsection (b) explains, a donor who wants to specify particular spending guidelines can do so. For example, a donor might require that a charity spend between three and five percent of an endowed gift each year, regardless of investment performance or other factors. Because the charity agrees to the restriction in accepting the gift, the restriction will govern spending decisions by the charity. Another donor might want to limit expenditures to trust accounting income and not want the institution to be able to expend appreciation. An instruction to "pay only the income" will not be specific



enough, but an instruction to "pay only interest and dividend income earned by the fund and not to make other distributions of the kind authorized by Section 4 of UPMIFA" should be sufficient. If a donor indicates that the rules on investing or expenditures under Section 4 do not apply to a particular fund, then as a practical matter the institution will probably invest the fund separately. Thus, a decision by a donor to require fund specific expenditure rules will likely also have consequences in the way the institution invests the fund.

**Retroactive Application of the Rule of Construction.** A constructional rule resolves an ambiguity, in this case, because donors use words like endowment or income without specific directions regarding the intended meaning. Changing a statutory constructional rule does not change the underlying intent, and instead changes the way an ambiguity is resolved, in an attempt to increase the likelihood of giving effect to the intent of most donors.

If a donor has stated in a gift instrument specific directions as to spending, then the institution must respect those wishes, but many donors do not give precise instructions about how to spend endowment funds. In Section 4 UPMIFA provides guidance for giving effect to a donor's intent when the donor has not been specific. Like Section 3 of UMIFA, Section 4 of UPMIFA is a rule of construction, so it does not violate either donor intent or the Constitution.

The issue of whether to apply a rule of construction retroactively was considered in connection with UMIFA. When the New Hampshire legislature considered UMIFA, the Senate asked the New Hampshire Supreme Court for an opinion regarding whether UMIFA, if adopted, would violate a provision of the state constitution prohibiting retrospective laws, and also whether the statute would encroach on the functions of the judicial branch. The opinion answered no to both questions. Opinion of the Justices, Request of the Senate No. 6667, 113 N.H. 287, 306 A.2d 55 (1973).

More recently the Colorado Supreme Court considered the retroactive application of another constructional statute, one that deems the designation of a spouse as the beneficiary of a life insurance policy to be revoked in a case in which the marriage was dissolved after the naming of the spouse as beneficiary. In *re Estate of DeWitt*, 54 P. 3d 849 (Colo. 2002). In holding that retroactive application of the statute did not violate the Contracts Clause, the court cited approvingly from a statement prepared by the Joint Editorial Board for Uniform Trusts and Estates Acts (JEB). JEB Statement Regarding the Constitutionality of Changes in Default Rules as Applied to PreExisting Documents, 17 Am. Coll. Tr. & Est. Couns. Notes 184 app. II (1991).

The JEB Statement explains that the purpose of the anti-retroactivity norm is to protect a transferor who relies on existing rules of law. By definition, however, rules of construction apply only in situations in which a transferor did not spell out his or her intent and hence did not rely on the then-current rule of construction. See also *In re Gardner's Trust*, 266 Minn. 127, 132, 123 N.W. 2d 69, 73 (1963) ("[I]t is doubtful whether the testatrix had any clear intention in mind at the time the will was executed. It is equally plausible that if she had thought about it at all she would have desired to have the dividends go where the law required them to go at the time they were received by the trustee.") (Uniform Principal and Income Act).

Non-retroactivity would produce serious practical problems: If the Act were not retroactive, a charity would need to keep two sets of books for each endowment fund created before the enactment of UPMIFA, if new funds were added after the enactment. The burden that such a rule would impose is out of proportion to the benefit sought.

**Subsection (d). Rebuttable Presumption of Imprudence.** The Drafting Committee debated at length whether to include a presumption of imprudence for spending above a fixed percentage of the value of the fund. The Drafting Committee decided to include a presumption in the Act in brackets, as an option for states to consider, and to include in these Comments a discussion of the advantages and disadvantages of including a presumption in the Act. (Colorado did not adopt the provisions contained in subsection (d).)

Some who commented on the Act viewed the presumption as linked to the retroactive application of the rule of construction of subsection (c). A donor who contributed to an endowment fund under UMIFA may have assumed that the historic dollar value of the gift would be subject to a no-spending rule under the statute. Because UPMIFA removes the concept of historic dollar value, the bracketed presumption of imprudence would assure the donor that spending from an endowment fund will be so limited.

Those in favor of the presumption of imprudence argued that the presumption would curb the temptation that a charity might have to spend endowment assets too rapidly. Although the presumption would be rebuttable, and spending above the identified percentage might, in some years and for some charities, be prudent, institutions would likely be reluctant to authorize spending above seven percent. In addition, the presumption would give the attorney general a benchmark of sorts.

A variety of considerations cut against including a presumption of imprudence in the statute. A fixed percentage in the statute might be perceived as a safe harbor that could lead institutions to spend more than is prudent. Although

the provision should not be read to imply that spending below seven percent will be considered prudent, some charities might interpret the statute in that way. Decision makers might be pressured to spend up to the percentage, and in doing so spend more than is prudent, without adequate review of the prudence factors as required under the Act.

Perhaps the biggest problem with including a presumption in the statute is the difficulty of picking a number that will be appropriate in view of the range of institutions and charitable purposes and the fact that economic conditions will change over time. Under recent economic conditions, a spending rate of seven percent is too high for most funds, but in a period of high inflation, seven percent might be too low. In making a prudent decision regarding how much to spend from an endowment fund, each institution must consider a variety of factors, including the particular purposes of the fund, the wishes of the donors, changing economic factors, and whether the fund will receive future donations.

Whether or not a statute includes the presumption, institutions must remember that prudence controls decision making. Each institution must make decisions on expenditures based on the circumstances of the particular charity.

**Application of Presumption.** For a state wishing to adopt a presumption of imprudence, subsection (d) provides language. Under subsection (d), a rebuttable presumption of imprudence will arise if expenditures in one year exceed seven percent of the assets of an endowment fund. The subsection applies a rolling average of three or more years in determining the value of the fund for purposes of calculating the seven-percent amount. An institution can rebut the presumption of imprudence if circumstances in a particular year make expenditures above that amount prudent. The concept and the language for the presumption of imprudence comes from Mass. Gen. L. ch. 180A, § 2 (2004). Massachusetts enacted this rule in 1975 as part of its UMIFA statute. New Mexico adopted the same presumption in 1978. N.M.S.A. § 46-9-2 (C) (2004). New Hampshire has a similar provision. N.H. Rev. Stat. § 292-B:6.

The period that a charity uses to calculate the presumption (three or more years) and the frequency of valuation (at least quarterly) will be binding in any determination of whether the presumption applies. For example, if a charity values an endowment fund on a quarterly basis and averages the quarterly values over three years to determine the fair market value of the fund for purposes calculating seven percent of the fund, the charity's choices of three years as a smoothing period and quarterly as a valuation period cannot be challenged. If the charity makes an appropriation that is less than seven percent of this value, then the presumption of

imprudence does not arise even if the appropriation would exceed seven percent of the value of the fund calculated based on monthly valuations averaged over five years.

If sufficient evidence establishes, by the preponderance of the evidence, the facts necessary to raise the presumption of imprudence, then the institution will have to carry the burden of production of (i.e., the burden of going forward with) other evidence that would tend to demonstrate that its decision was prudent. The existence of the presumption does not shift the burden of persuasion to the charity.

Expenditures from an endowment fund may include distributions for charitable purposes and amounts used for the management and administration of the fund, including annual charges for fundraising. The value of a fund, as calculated for purposes of determining the seven percent amount, will reflect increases due to contributions and investment gains and decreases due to distributions and investment losses. The seven percent figure includes charges for fundraising and administrative expenses other than investment management expenses. All costs or fees associated with an endowment fund are factors that prudent decision makers consider. High costs or fees of investment management could be considered imprudent regardless of whether spending exceeds seven percent of the fund's value.

The presumption of imprudence does not create an automatic safe harbor. Expenditures at six percent might well be imprudently high. See James P. Garland, *The Fecundity of Endowments and Long-Duration Trusts*, *The Journal of Portfolio Management* (2005). Evidence reviewed by the Drafting Committee suggests that at present few funds can sustain spending at a rate above five percent. See Roger G. Ibbotson & Rex A. Sinquefeld, *Stocks, Bonds, Bills, and Inflation: Historical Returns (1926-1987)* (Research Foundation of the Institute of Chartered Financial Analysts, 1989). Indeed, under current conditions five percent can be too high. See Joel C. Dobris, *Why Five? The Strange, Magnetic, and Mesmerizing Affect of the Five Percent Unitrust and Spending Rate on Settlers, Their Advisers, and Retirees*, 40 *Real Prop. Prob. & Tr. J.* 39 (2005). Further, spending at a lower rate, particularly in the early years of an endowment, may result in greater distributions over time. See DeMarche Associates, Inc., *Spending Policies and Investment Planning for Foundations: A Structure for Determining a Foundation's Asset Mix* (Council on Foundations: 3d ed. 1999). A presumption of imprudence can serve as a reminder that spending at too high a rate will jeopardize the long-term nature of an endowment fund. If an endowment fund is intended to continue permanently, the institution should take special care to limit annual spending



to a level that protects the purchasing power of the fund.

Subsection (d) provides that the terms of the gift instrument can provide additional spending authority. For example, if a gift instrument directs that an institution expend a fund over a ten-year period, exhausting the fund after ten years, spending at a rate higher than seven percent will be necessary.

Subsection (d) does not require an institution to spend a minimum amount each year. The prudence standard and the needs of the institution will supply sufficient guidance regarding whether to accumulate rather than to spend in a particular year.

Spending above seven percent in any one year will not necessarily be imprudent. For some endowment funds fluctuating spending rates may be appropriate. Although the Act does not apply the percentage for the presumption on a rolling basis (e.g., 21 percent over three years), some endowment funds may prudently spend little or nothing in some years and more than seven percent in other years. For example, a charity planning a construction project might decide to spend nothing from an endowment for three years and then in the fourth year might spend 20 percent of the value of the fund for construction costs. The decision to accumulate in years one through three and then to spend 20 percent in the fourth year might be prudent for the charity, depending on the other factors. The charity should maintain adequate records during the accumulation period and should document the decision-making process in the fourth year to be able to meet the burden of production associated with the presumption. Another charity might prudently spend 20 percent in year one and nothing for the following three years. That charity would also need to document the decision-making process through which the decision to spend occurred and maintain records explaining why the decision was prudent under the circumstances.

A charity might establish a "capital replacement fund" designed to provide funds to the institution for repair or replacement of major items of equipment. Disbursements from such a fund will likely fluctuate, with limited expenditures in some years and big expenditures in others. The fund would not exhibit a uniform spending rate. Indeed, an advantage of a capital replacement fund is the ability to absorb a significant capital expenditure in a single year without a negative impact on the operating budget of the institution. Disbursements might average five percent per year but would vary, with spending in some years more and in some years less. Even if this fund is an endowment fund subject to Section 4, spending above seven percent in a particular year could well be prudent. Subsection (d) does not preclude spending above seven percent.

A charity creating a capital replacement fund or a building fund might choose to adopt spending rules for the fund that would not be subject to UPMIFA. Specific donor intent can supersede the rules of UPMIFA. If the charity creates a gift instrument that establishes appropriate rules on spending for the fund, and if donors agree to those restrictions, then the UPMIFA rules on spending, including the bracketed presumption, will not apply.

Institutions with Limited Investment and Spending Experience. Several attorneys general and other charity officials raised concerns about whether small institutions would be able to adjust to a spending rule based solely on prudence, without the bright-line guidance of historic dollar value. Some charity regulators who spoke with the Drafting Committee noted that large institutions have sophisticated investment strategies, access to good investment advisors, and experience with spending rules that maintain purchasing power for endowment funds. For these institutions, the rules of UPMIFA should work well. For smaller institutions, however, the state regulators thought that additional guidance could be helpful. After discussing strategies to address this concern, the Drafting Committee decided to include in these comments an additional optional provision that a state could choose to include in its UPMIFA statute.

The optional provision focuses on institutions with endowment funds valued, in the aggregate, at less than \$2,000,000. The number is in brackets to indicate that it could be set higher or lower. The number was chosen to address the concern of the state regulators that some small charities might be more likely to spend imprudently than large charities. The Drafting Committee selected \$2,000,000 as the value that might include most unsophisticated institutions but would not be overinclusive.

The optional provision creates a notification requirement for an institution with a small endowment that plans to spend below historic dollar value. If an institution subject to the provision decides to appropriate an amount that would cause the value of its endowment funds to drop below the aggregate historic dollar value for all of its endowment funds, then the institution will have to notify the attorney general before proceeding with the expenditure. The provision does not require that the institution obtain the approval of the attorney general before making the distribution. Rather, the notification requirement gives the attorney general the opportunity to take a closer look at the institution and its spending decision, to educate the institution on prudent decision making for endowment funds, and to intervene if the attorney general determines that the spending would be imprudent for the institution. Although the Drafting Committee thinks that the prudence standard in UPMIFA provides adequate guid-

ance to all institutions within the scope of the Act, if a state chooses to adopt a notification provision for institutions with small endowments, the Drafting Committee recommends the following language:

(-) If an institution has endowment funds with an aggregate value of less than [\$2,000,000], the institution shall notify the [Attorney General] at least [60 days] prior to an appropriation for expenditure of an amount that would cause the value of the institution's endowment funds to fall below the aggregate historic dollar value of the institution's endowment funds, unless the

expenditure is permitted or required under law other than this [act] or in the gift instrument. For purposes of this subsection, "historic dollar value" means the aggregate value in dollars of (i) each endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time the donation is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The institution's determination of historic dollar value made in good faith is conclusive.

**15-1-1105. Delegation of management and investment functions.** (a) Subject to any specific limitation set forth in a gift instrument or in law other than this part 11, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

- (1) Selecting an agent;
  - (2) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and
  - (3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.
- (b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.
- (c) An institution that complies with subsection (a) of this section is not liable for the decisions or actions of an agent to which the function was delegated.
- (d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.
- (e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this part 11.

**Source:** L. 2008: Entire part R&RE, p. 563, § 1, effective September 1.

**Editor's note:** This section is similar to former § 15-1-1107 as it existed prior to 2008.

### OFFICIAL COMMENT

The prudent investor standard in Section 4 presupposes the power to delegate. For some types of investment, prudence requires diversification, and diversification may best be accomplished through the use of pooled investment vehicles that entail delegation. The Drafting Committee decided to put Section 5 in brackets because many states already provide sufficient authority to delegate authority through other statutes. If such authority exists, then an enacting state should enact UPMIFA without Section 5. Enacting delegation rules that duplicate existing rules could be confusing and might create conflicts. For charitable trusts, UPIA provides the same delegation rules as those in Section 5. For nonprofit corporations, nonprofit corporation statutes often provide comparable rules. A state enacting UPMIFA must be certain that its

laws authorize delegation, either through other statutes or by enacting Section 5.

Section 5 incorporates the delegation rule found in UPIA § 9, updating the delegation rules in UMIFA § 5. Section 5 permits the decision makers in an institution to delegate management and investment functions to external agents if the decision makers exercise reasonable skill, care, and caution in selecting the agent, defining the scope of the delegation and reviewing the performance of the agent. In some circumstances, the scope of the delegation may include redelegation. For example, an institution may select an investment manager to assist with investment decisions. The delegation may include the authority to redelegate to investment managers with expertise in particular investment areas. All decisions to delegate require the ex-



ercise of reasonable care, skill, and caution in selecting, instructing, and monitoring agents. Further, decision makers cannot delegate the authority to make decisions concerning expenditures and can only delegate management and investment functions. Subsection (c) protects decision makers who comply with the requirement for proper delegation from liability for actions or decisions of the agents. In making decisions concerning delegation, the institution must be mindful of Section 3(c)(1) of UPMIFA, the provision that directs the institution to incur only reasonable costs in managing and investing an institutional fund.

Section 5 does not address issues of internal delegation and potential liability for internal delegation, and subsection (c) does not affect laws that govern personal liability of directors or trustees for matters outside the scope of Section 5. Directors will look to nonprofit corporation laws for these rules, while trustees will look to trust law. See, e.g., RMNCA, § 8.30(b) (permitting directors to rely on information prepared by an officer or employee of the institution if the director reasonably believes the officer or employee to be reliable and competent in the matters presented).

The language of subsection (c) is similar to that of UPIA § 9(c) and RMNCA § 8.30(d). The decision not to include the terms “beneficiaries” or “members” in subsection (c) does not indicate a decision that this section does not create immunity from claims brought by beneficiaries or members. Instead, a decision maker who complies with section 5 will be protected from any liability resulting from actions or decisions made by an external agent.

Subsection (d) creates personal jurisdiction over the agent. This subsection is not a choice of law rule.

Subsection (e) notes that law other than this Act governs internal delegation. Section 5 of UMIFA included internal delegation as well as external delegation, due to a concern at that time that trust law concepts might govern internal delegation in nonprofit corporations. With the widespread adoption of nonprofit corporation statutes, that concern no longer exists. The decision not to address internal delegation in UPMIFA does not suggest that a governing board of a nonprofit corporation cannot delegate to committees, officers, or employees. Rather, a nonprofit corporation must look to other law, typically a nonprofit corporation statute, for the rules governing internal delegation.

**15-1-1106. Release or modification of restrictions on management, investment, or purpose.** (a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow an institutional fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the institutional fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the institutional fund. The institution shall notify the attorney general of the application, and the attorney general must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor’s probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the institutional fund or the restriction on the use of the institutional fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the attorney general of the application, and the attorney general must be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, sixty days after notification to the attorney general, may release or modify the restriction, in whole or part, if:

(1) The institutional fund, subject to the restriction, has a total value of less than one hundred thousand dollars; except that the dollar limit established in this paragraph (1) shall be adjusted for inflation in accordance with the annual percentage change in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Boulder-Greeley, all items, all urban consumers, or its successor index. On or before January 1, 2010, and each even-numbered year thereafter, the attorney general shall calculate the adjusted dollar amount for the next two-year cycle using inflation for the prior

two calendar years as of the date of the calculation. The adjusted exemption shall be rounded upward to the nearest one hundred dollar increment. The attorney general shall certify the amount of the adjustment for the next two-year cycle and shall publish the amount on the attorney general's web site.

(2) More than twenty years have elapsed since the institutional fund was established; and

(3) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

**Source: L. 2008:** Entire part R&RE, p. 563, § 1, effective September 1.

**Editor's note:** This section is similar to former § 15-1-1109 as it existed prior to 2008.

### OFFICIAL COMMENT

Section 6 expands the rules on releasing or modifying restrictions that are found in Section 7 of UMIFA. Subsection (a) restates the rule from UMIFA allowing the release of a restriction with donor consent. Subsections (b) and (c) make clear that an institution can always ask a court to apply equitable deviation or cy pres to modify or release a restriction, under appropriate circumstances. Subsection (d), a new provision, permits an institution to apply cy pres on its own for small funds that have existed for a substantial period of time, after giving notice to the state attorney general.

Although UMIFA stated that it did not "limit the application of the doctrine of cy pres", UMIFA § 7(d), what that statement meant under the Act was unclear. UMIFA itself appeared to permit only a release of a restriction and not a modification. That all-or-nothing approach did not adequately protect donor intent. See *Yale Univ. v. Blumenthal*, 621 A.2d 1304 (Conn. 1993). By expressly including deviation and cy pres, UPMIFA requires an institution to seek modifications that are "in accordance with the donor's probable intention" for deviation and "in a manner consistent with the charitable purposes expressed in the gift instrument" for cy pres.

**Individual Funds.** The rules on modification require that the institution, or a court applying a court-ordered doctrine, review each institutional fund separately. Although an institution may manage institutional funds collectively, for purposes of this Section each fund must be considered individually.

**Subsection (a). Donor Release.** Subsection (a) permits the release of a restriction if the donor consents. A release with donor consent cannot change the charitable beneficiary of the fund. Although the donor has the power to consent to a release of a restriction, this section does not create a power in the donor that will cause a federal tax problem for the donor. The gift to the institution is a completed gift for tax purposes, the property cannot be diverted from the charitable beneficiary, and the donor cannot redirect

the property to another use by the charity. The donor has no retained interest in the fund.

**Subsection (b). Equitable Deviation.** Subsection (b) applies the rule of equitable deviation, adapting the language of UTC § 412 to this section. See also Restatement (Third) of Trusts § 66 (2003). Under the deviation doctrine, a court may modify restrictions on the way an institution manages or administers a fund in a manner that furthers the purposes of the fund. Deviation implements the donor's intent. A donor commonly has a predominating purpose for a gift and, secondarily, an intent that the purpose be carried out in a particular manner. Deviation does not alter the purpose but rather modifies the means in order to carry out the purpose.

Sometimes deviation is needed on account of circumstances unanticipated when the donor created the restriction. In other situations the restriction may impair the management or investment of the fund. Modification of the restriction may permit the institution to carry out the donor's purposes in a more effective manner. A court applying deviation should attempt to follow the donor's probable intention in deciding how to modify the restriction. Consistent with the doctrine of equitable deviation in trust law, subsection (b) does not require an institution to notify donors of the proposed modification. Good practice dictates notifying any donors who are alive and can be located with a reasonable expenditure of time and money. Consistent with the doctrine of deviation under trust law, the institution must notify the attorney general who may choose to participate in the court proceeding. The attorney general protects donor intent as well as the public's interest in charitable assets. Attorney general is in brackets in the Act because in some states another official enforces the law of charities.

**Subsection (c). Cy Pres.** Subsection (c) applies the rule of cy pres from trust law, authorizing the court to modify the purpose of an institutional fund. The term "modify" encompasses the release of a restriction as well as an alteration of a restriction and also permits a



court to order that the fund be paid to another institution. A court can apply the doctrine of cy pres only if the restriction in question has become unlawful, impracticable, impossible to achieve, or wasteful. This standard, which comes from UTC § 413, updates the circumstances under which cy pres may be applied by adding “wasteful” to the usual common law articulation of the doctrine. Any change must be made in a manner consistent with the charitable purposes expressed in the gift instrument. See also Restatement (Third) of Trusts § 67 (2003). Consistent with the doctrine of cy pres, subsection (c) does not require an institution seeking cy pres to notify donors. Good practice will be to notify donors whenever possible. As with deviation, the institution must notify the attorney general who must have the opportunity to be heard in the proceeding.

Subsection (d). Modification of Small, Old Funds. Subsection (d) permits an institution to release or modify a restriction according to cy pres principles but without court approval if the amount of the institutional fund involved is small and if the institutional fund has been in existence for more than 20 years. The rationale is that under some circumstances a restriction may no longer make sense but the cost of a judicial cy pres proceeding will be too great to warrant a change in the restriction. The Drafting Committee discussed at length the parameters for allowing an institution to apply cy pres without court supervision. The Committee drafted subsection (d) to balance the needs of an institution to serve its charitable purposes efficiently with the policy of enforcing donor intent. The Committee concluded that an institutional fund with a value of \$25,000 or less is sufficiently small that the cost of a judicial proceeding will be out of proportion to its protective purpose. The Committee included a requirement that the institutional fund be in existence at least 20 years, as a further safeguard for fidelity to donor intent. The 20-year period begins to run from the date of inception of the fund and not from the date of each gift to the fund. The amount and the number of years have been placed in brackets to signal to an enacting jurisdiction that it may wish to designate a higher or lower figure. Because the amount should reflect

the cost of a judicial proceeding to obtain a modification, the number may be higher in some states and lower in others.

As under judicial cy pres, an institution acting under subsection (d) must change the restriction in a manner that is in keeping with the intent of the donor and the purpose of the fund. For example, if the value of a fund is too small to justify the cost of administration of the fund as a separate fund, the term “wasteful” would allow the institution to combine the fund with another fund with similar purposes. If a fund has been created for nursing scholarships and the institution closes its nursing school, the institution might appropriately decide to use the fund for other scholarships at the institution. In using the authority granted under subsection (d), the institution must determine which alternative use for the fund reasonably approximates the original intent of the donor. The institution cannot divert the fund to an entirely different use. For example, the fund for nursing scholarships could not be used to build a football stadium.

An institution seeking to modify a provision under subsection (d) must notify the attorney general of the planned modification. The institution must wait 60 days before proceeding; the attorney general may take action if the proposed modification appears inappropriate.

Notice to Donors. The Drafting Committee decided not to require notification of donors under subsections (b), (c), and (d). The trust law rules of equitable deviation and cy pres do not require donor notification and instead depend on the court and the attorney general to protect donor intent and the public’s interest in charitable assets.

With regard to subsection (d), the Drafting Committee concluded that an institution should not be required to give notice to donors. Subsection (d) can only be used for an old and small fund. Locating a donor who contributed to the fund more than 20 years earlier may be difficult and expensive. If multiple donors each gave a small amount to create a fund 20 years earlier, the task of locating all of those donors would be harder still. The Drafting Committee concluded that an institution’s concern for donor relations would serve as a sufficient incentive for notifying donors when donors can be located.

**15-1-1107. Reviewing compliance.** Compliance with this part 11 is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

**Source:** L. 2008: Entire part R&RE, p. 564, § 1, effective September 1.

**15-1-1108. Application to existing institutional funds.** This part 11 applies to institutional funds existing on or established after September 1, 2008. As applied to institutional funds existing on September 1, 2008, this part 11 governs only decisions made or actions taken on or after said date.

**Source: L. 2008:** Entire part R&RE, p. 565, § 1, effective September 1.

**15-1-1109. Relation to “Electronic Signatures in Global and National Commerce Act”.** This part 11 modifies, limits, and supersedes the “Electronic Signatures in Global and National Commerce Act”, 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or supersede section 101 (a) of that act, 15 U.S.C. sec. 7001 (a), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

**Source: L. 2008:** Entire part R&RE, p. 565, § 1, effective September 1.

**15-1-1110. Uniformity of application and construction.** In applying and construing this part 11, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source: L. 2008:** Entire part R&RE, p. 565, § 1, effective September 1.

**Editor’s note:** This section is similar to former § 15-1-1102 as it existed prior to 2008.

## PART 12

### LIFE ESTATE IN PROPERTY OF SURVIVING SPOUSE

**15-1-1201. Life estate in property - rights of surviving spouse.** (1) Unless the instrument provides otherwise, any devise of a life estate in property to a surviving spouse by a decedent spouse shall entitle the surviving spouse to:

(a) All income for life from the entire interest in or specific portion of the property, payable annually or at more frequent intervals;

(b) Exclusive beneficial enjoyment of the property during his life, including such income or use of the property as is consistent with the value of the property and its preservation; except that, during the surviving spouse’s lifetime, no person other than the surviving spouse may receive any distribution of the property or its income; and

(c) Make the property productive or convert it into productive property within a reasonable time after the devise; except that, the exercise of such power shall be subject to the degree of judgment and care which a prudent person would use if he were the owner of the property. The proceeds of any such conversion shall be reinvested by the surviving spouse in a form subject to the life estate and remainder rights created by the decedent.

(2) The provisions of this part 12 shall be interpreted consistently with the requirements of section 2056 (b) (7) of the federal “Internal Revenue Code of 1986”, as amended, if the personal representative of the estate of the decedent spouse elects to treat such life estate as qualified terminable interest property under said Internal Revenue Code section.

**Source: L. 88:** Entire part added, p. 647, § 1, effective May 17. **L. 2000:** (2) amended, p. 1846, § 28, effective August 2.

**15-1-1202. Applicability of part.** This part 12 shall apply to the estate of any person whose death occurred after December 31, 1981.

**Source: L. 88:** Entire part added, p. 648, § 1, effective May 17.



## PART 13

## UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT

**15-1-1301 to 15-1-1321. (Repealed)**

**Editor's note:** (1) This part 13 was added in 1992. For amendments to this part 13 prior to its repeal in 2010, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 15-1-1321 provided for the repeal of this part 13, effective January 1, 2010. (See L. 2009, p. 427.)

## PART 14

## RESTRICTIONS ON EXERCISE OF CERTAIN FIDUCIARY POWERS

**15-1-1401. Restrictions on exercise of certain fiduciary powers.** (1) (a) Due to the inherent conflict of interest that exists between a trustee who is a beneficiary of a trust and other beneficiaries of the trust, any of the following powers conferred upon a trustee shall not be exercised by such trustee:

(I) To make or cause to be made discretionary distributions of either principal or income to or for the direct or indirect benefit of such trustee; except that such a power may be exercised by such trustee to the extent that it may be exercised to provide for that trustee's health, education, maintenance, or support as described under sections 2041 and 2514 of the federal "Internal Revenue Code of 1986", as amended;

(II) To make discretionary distributions of either principal or income to satisfy any legal obligations of such trustee; or

(III) To make or cause to be made discretionary distributions of either principal or income to or for the direct or indirect benefit of any person who has the right to remove or replace such trustee; except that such a power may be exercised by such trustee to the extent that it may be exercised to provide for such person's health, education, maintenance, or support as described under sections 2041 and 2514 of the federal "Internal Revenue Code of 1986", as amended.

(b) Any of the powers prescribed in paragraph (a) of this subsection (1) that are conferred upon two or more trustees may be exercised by the trustees who are not so disqualified. If there is no trustee qualified to exercise such powers, any party in interest, as described in subsection (3) of this section, may apply to a court of competent jurisdiction to appoint an independent trustee, and such powers may be exercised by the independent trustee appointed by the court. Subparagraph (I) of paragraph (a) of this subsection (1) shall not prohibit a trustee from making payments, including reimbursement of and compensation of such trustee, for the protection of the trust, or the assets thereof, and for all expenses, losses, and liabilities incurred in or by the collection, care, administration, or protection of the trust or the assets thereof.

(2) This section applies to every trust unless the terms of the trust as it may be amended in accordance with its terms provide expressly to the contrary and either specifically refer to this section or otherwise clearly demonstrate the intent that this rule not apply or unless, if the trust is irrevocable, all parties in interest, as described in subsection (3) of this section, elect affirmatively, in the manner prescribed in subsection (4) of this section, not to be subject to the application of this section. Such election shall be made on or before July 1, 1999, or three years after the date on which the trust becomes irrevocable, whichever occurs later.

(3) For the purpose of subsection (1) or subsection (2) of this section:

(a) If the trust is revocable or amendable and the settlor is not incapacitated, the party in interest is the settlor.

(b) If the trust is revocable or amendable and the settlor is incapacitated, the party in interest is the settlor's legal representative under applicable law or the settlor's agent under a durable power of attorney that is sufficient to grant such authority.

- (c) If the trust is not revocable or amendable, the parties in interest are:
  - (I) Each trustee then serving;
  - (II) Each income beneficiary then in existence or, if any such beneficiary has not attained majority or is otherwise incapacitated, the beneficiary’s legal representative under applicable law or the beneficiary’s agent under a durable power of attorney that is sufficient to grant such authority; and
  - (III) Each remainder beneficiary then in existence or, if any such remainder beneficiary has not attained majority or is otherwise incapacitated, the beneficiary’s legal representative under applicable law or the beneficiary’s agent under a durable power of attorney that is sufficient to grant such authority.
- (4) The affirmative election required under subsection (2) of this section shall be made:
  - (a) If the settlor is not incapacitated and the trust is revocable or amendable, through a revocation of or an amendment to the trust;
  - (b) If the settlor is incapacitated and the trust is revocable or amendable, through a written declaration executed in the manner prescribed for the acknowledgment of deeds in this state and delivered to the trustee; or
  - (c) If the trust is not revocable or amendable, through a written declaration executed in the manner prescribed for the acknowledgment of deeds in this state and delivered to the trustee.
- (5) A person who has the right to remove or to replace a trustee does not possess nor may that person be deemed to possess, by virtue of having that right, the powers proscribed in subparagraphs (I), (II), and (III) of paragraph (a) of subsection (1) of this section of the trustee that is subject to removal or to replacement.
- (6) (a) Subparagraphs (I) and (II) of paragraph (a) of subsection (1) of this section shall not apply to a trustee with respect to trust property and the income from such property where such property would, upon the death of such trustee, be included in the gross estate of such trustee for federal estate tax purposes for any reason other than the powers proscribed by subparagraphs (I) and (II) of paragraph (a) of subsection (1) of this section.  
(b) Subparagraph (I) of paragraph (a) of subsection (1) of this section shall not apply to a trustee that may be appointed or removed by a person for whose benefit the proscribed powers may be exercised to distribute trust property or the income from such property where such property would, upon the death of such person, be included in the gross estate of such person for federal estate tax purposes for any reason other than such powers to appoint or remove such trustee.
- (7) The provisions of this section neither create a new cause of action nor impair any existing cause of action that, in either case, relates to any power proscribed by subsection (1) of this section that was exercised before July 1, 1996.

**Source:** L. 96: Entire part added, p. 654, § 4, effective July 1.

ARTICLE 1.1

Uniform Prudent Investor Act

**Editor’s note:** This article is a uniform act, and the numbering of subsections and paragraphs varies from the numbering system generally used in Colorado Revised Statutes.

**Law reviews:** For article, “Diversification Under the Uniform Prudent Investor Act”, see 32 Colo. Law. 87 (November 2003); for article, “What Every Trustee Should Know About Investing”, see 35 Colo. Law. 51 (February 2006).

15-1.1-101.	Prudent investor rule.	15-1.1-105.	Loyalty.
15-1.1-102.	Standard of care - portfolio strategy - risk and return objectives.	15-1.1-106.	Impartiality.
		15-1.1-107.	Investment costs.
15-1.1-103.	Diversification.	15-1.1-108.	Reviewing compliance.
15-1.1-104.	Duties at inception of trustee-ship.	15-1.1-109.	Delegation of investment and management functions.
		15-1.1-110.	Language invoking standard



	of article.	15-1.1-114.	Severability.
15-1.1-111.	Application to existing trusts.	15-1.1-115.	Colorado changes to uniform
15-1.1-112.	Uniformity of application and construction.		act - specific statutes control
15-1.1-113.	Short title.		- use of term "trustee".

## OFFICIAL COMMENT

### ARTICLE 1.1 - UNIFORM PRUDENT INVESTOR ACT PREFATORY NOTE

Over the quarter century from the late 1960's the investment practices of fiduciaries experienced significant change. The Uniform Prudent Investor Act (UPIA) undertakes to update trust investment law in recognition of the alterations that have occurred in investment practice. These changes have occurred under the influence of a large and broadly accepted body of empirical and theoretical knowledge about the behavior of capital markets, often described as "modern portfolio theory."

This Act draws upon the revised standards for prudent trust investment promulgated by the American Law Institute in its Restatement (Third) of Trusts: Prudent Investor Rule (1992) [hereafter Restatement of Trusts 3d: Prudent Investor Rule; also referred to as 1992 Restatement].

#### Objectives of the Act.

UPIA makes five fundamental alterations in the former criteria for prudent investing. All are to be found in the Restatement of Trusts 3d: Prudent Investor Rule.

(1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term "portfolio" embraces all the trust's assets. UPIA § 2(b).

(2) The tradeoff in all investing between risk and return is identified as the fiduciary's central consideration. UPIA § 2(b).

(3) All categorical restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing. UPIA § 2(e).

(4) The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing. UPIA § 3.

(5) The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards. UPIA § 9.

#### Literature.

These changes in trust investment law have been presaged in an extensive body of practical and scholarly writing. See especially the discussion and reporter's notes by Edward C. Halbach,

Jr., in Restatement of Trusts 3d: Prudent Investor Rule (1992); see also Edward C. Halbach, Jr., Trust Investment Law in the Third Restatement, 27 Real Property, Probate & Trust J. 407 (1992); Bevis Longstreth, Modern Investment Management and the Prudent Man Rule (1986); Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U.L. Rev. 52 (1987); John H. Langbein & Richard A. Posner, The Revolution in Trust Investment Law, 62 A.B.A.J. 887 (1976); Note, the Regulation of Risky Investments, 83 Harvard L. Rev. 603 (1970). A succinct account of the main findings of modern portfolio theory, written for lawyers, is Jonathan R. Macey, An Introduction to Modern Financial Theory (1991) (American College of Trust & Estate Counsel Foundation). A leading introductory text on modern portfolio theory is R.A. Brealey, An Introduction to Risk and Return from Common Stocks (2d ed. 1983). **Legislation.**

Most states have legislation governing trust-investment law. This Act promotes uniformity of state law on the basis of the new consensus reflected in the Restatement of Trusts 3d: Prudent Investor Rule. Some states have already acted. California, Delaware, Georgia, Minnesota, Tennessee, and Washington revised their prudent investor legislation to emphasize the total-portfolio standard of care in advance of the 1992 Restatement. These statutes are extracted and discussed in Restatement of Trusts 3d: Prudent Investor Rule § 227, reporter's note, at 60-66 (1992).

Drafters in Illinois in 1991 worked from the April 1990 "Proposed Final Draft" of the Restatement of Trusts 3d: Prudent Investor Rule and enacted legislation that is closely modeled on the new Restatement. 760 ILCS § 5/5 (prudent investing); and § 5/5.1 (delegation) (1992). As the Comments to this Uniform Prudent Investor Act reflect, the Act draws upon the Illinois statute in several sections. Virginia revised its prudent investor act in a similar vein in 1992. Virginia Code § 26-45.1 (prudent investing) (1992). Florida revised its statute in 1993. Florida Laws, ch. 93-257, amending Florida Statutes § 518.11 (prudent investing) and creating § 518.112 (delegation). New York legislation drawing on the new Restatement and on a preliminary version of this Uniform Prudent Inves-

tor Act was enacted in 1994. N.Y. Assembly Bill 11683-B, Ch. 609 (1994), adding Estates, Powers and Trusts Law § 11-2.3 (Prudent Investor Act).

#### **Remedies.**

This Act does not undertake to address issues of remedy law or the computation of damages in trust matters. Remedies are the subject of a reasonably distinct body of doctrine. See generally Restatement (Second) of Trusts §§ 197-226A (1959) [hereinafter cited as Restatement of Trusts 2d; also referred to as 1959 Restatement].

#### **Implications for charitable and pension trusts.**

This Act is centrally concerned with the investment responsibilities arising under the private gratuitous trust, which is the common vehicle for conditioned wealth transfer within the family. Nevertheless, the prudent investor rule also bears on charitable and pension trusts, among others. "In making investments of trust funds the trustee of a charitable trust is under a duty similar to that of the trustee of a private trust." Restatement of Trusts 2d § 389 (1959). The Employee Retirement Income Security Act (ERISA), the federal regulatory scheme for pension trusts enacted in 1974, absorbs trust-investment law through the prudence standard of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a). The Supreme Court has said: "ERISA's legislative history confirms that the Act's fiduciary responsibility provisions 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of

trusts.'" *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (footnote omitted). **Other fiduciary relationships.**

The Uniform Prudent Investor Act regulates the investment responsibilities of trustees. Other fiduciaries — such as executors, conservators, and guardians of the property — sometimes have responsibilities over assets that are governed by the standards of prudent investment. It will often be appropriate for states to adapt the law governing investment by trustees under this Act to these other fiduciary regimes, taking account of such changed circumstances as the relatively short duration of most executorships and the intensity of court supervision of conservators and guardians in some jurisdictions. The present Act does not undertake to adjust trust-investment law to the special circumstances of the state schemes for administering decedents' estates or conducting the affairs of protected persons.

Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations. As the 1992 Restatement observes, "the duties of the members of the governing board of a charitable corporation are generally similar to the duties of the trustee of a charitable trust." Restatement of Trusts 3d: Prudent Investor Rule § 379, Comment b, at 190 (1992). See also *id.* § 389, Comment b, at 190-91 (absent contrary statute or other provision, prudent investor rule applies to investment of funds held for charitable corporations).

**15-1.1-101. Prudent investor rule.** (a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this article.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

**Source:** L. 95: Entire article added, p. 309, § 1, effective July 1.

### **OFFICIAL COMMENT**

This section imposes the obligation of prudence in the conduct of investment functions and identifies further sections of the Act that specify the attributes of prudent conduct.

**Origins.** The prudence standard for trust investing traces back to *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830). Trustees should "observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." *Id.* at 461.

**Prior legislation.** The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the *Amory* case. See Mayo A. Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 *Ohio State L.J.* 491, at 501 (1951); for the text of the model act, which inspired many state statutes, see *id.* at 508-09. Another prominent codification of the *Amory* standard is Uniform Probate Code § 7-302 (1969), which provides that "the trustee shall observe the standards in dealing with the



trust assets that would be observed by a prudent man dealing with the property of another . . . .”

Congress has imposed a comparable prudence standard for the administration of pension and employee benefit trusts in the Employee Retirement Income Security Act (ERISA), enacted in 1974. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims . . . .”

**Prior Restatement.** The Restatement of Trusts 2d (1959) also tracked the language of the Amory case: “In making investments of trust funds the trustee is under a duty to the beneficiary . . . to make such investments and only such investments as a prudent man would make

of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived . . . .” Restatement of Trusts 2d § 227 (1959).

**Objective standard.** The concept of prudence in the judicial opinions and legislation is essentially relational or comparative. It resembles in this respect the “reasonable person” rule of tort law. A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective. Sections 2 through 9 of this Act identify the main factors that bear on prudent investment behavior.

**Variation.** Almost all of the rules of trust law are default rules, that is, rules that the settlor may alter or abrogate. Subsection (b) carries forward this traditional attribute of trust law. Traditional trust law also allows the beneficiaries of the trust to excuse its performance, when they are all capable and not misinformed. Restatement of Trusts 2d § 216 (1959).

## ANNOTATION

**The Colorado Uniform Prudent Investor Act provides a legal standard of care, not an independent cause of action.** The general assembly considered the issue of remedies and

chose not to include an independent right of action in the act. *Micale v. Bank One, N.A.*, 382 F. Supp. 2d 1207 (D. Colo. 2005).

### 15-1.1-102. Standard of care - portfolio strategy - risk and return objectives.

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

- (1) General economic conditions;
- (2) The possible effect of inflation or deflation;
- (3) The expected tax consequences of investment decisions or strategies;
- (4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
- (5) The expected total return from income and the appreciation of capital;
- (6) Other resources of the beneficiaries;
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) An asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this article.

(f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

Source: L. 95: Entire article added, p. 309, § 1, effective July 1.

## OFFICIAL COMMENT

Section 2 is the heart of the Act. Subsections (a), (b), and (c) are patterned loosely on the language of the Restatement of Trusts 3d: Prudent Investor Rule § 227 (1992), and on the 1991 Illinois statute, 760 § ILCS 5/5a (1992). Subsection (f) is derived from Uniform Probate Code § 7-302 (1969).

**Objective standard.** Subsection (a) of this Act carries forward the relational and objective standard made familiar in the Amory case, in earlier prudent investor legislation, and in the Restatements. Early formulations of the prudent person rule were sometimes troubled by the effort to distinguish between the standard of a prudent person investing for another and investing on his or her own account. The language of subsection (a), by relating the trustee's duty to "the purposes, terms, distribution requirements, and other circumstances of the trust," should put such questions to rest. The standard is the standard of the prudent investor similarly situated.

**Portfolio standard.** Subsection (b) emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other nontrust assets. In the trust setting the term "portfolio" embraces the entire trust estate.

**Risk and return.** Subsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. See generally the works cited in the Prefatory Note to this Act, under "Literature." Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

Subsection (b) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule § 227(a), which provides that the standard of prudent investing "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."

**Factors affecting investment.** Subsection (c) points to certain of the factors that commonly bear on risk/return preferences in fiduciary investing. This listing is nonexclusive. Tax considerations, such as preserving the stepped up

basis on death under Internal Revenue Code § 1014 for low-basis assets, have traditionally been exceptionally important in estate planning for affluent persons. Under the present recognition rules of the federal income tax, taxable investors, including trust beneficiaries, are in general best served by an investment strategy that minimizes the taxation incident to portfolio turnover. See generally Robert H. Jeffrey & Robert D. Arnott, *Is Your Alpha Big Enough to Cover Its Taxes?*, *Journal of Portfolio Management* 15 (Spring 1993).

Another familiar example of how tax considerations bear upon trust investing: In a regime of pass-through taxation, it may be prudent for the trust to buy lower yielding tax-exempt securities for high-bracket taxpayers, whereas it would ordinarily be imprudent for the trustees of a charitable trust, whose income is tax exempt, to accept the lowered yields associated with tax-exempt securities.

When tax considerations affect beneficiaries differently, the trustee's duty of impartiality requires attention to the competing interests of each of them.

Subsection (c)(8), allowing the trustee to take into account any preferences of the beneficiaries respecting heirlooms or other prized assets, derives from the Illinois act, 760 ILCS § 5/5(a)(4) (1992).

**Duty to monitor.** Subsections (a) through (d) apply both to investing and managing trust assets. "Managing" embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments.

**Duty to investigate.** Subsection (d) carries forward the traditional responsibility of the fiduciary investor to examine information likely to bear importantly on the value or the security of an investment — for example, audit reports or records of title. E.g., *Estate of Collins*, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on unimproved real estate, failed to have land appraised, and accepted an unaudited financial statement; held liable for losses).

**Abrogating categorical restrictions.** Subsection 2(e) clarifies that no particular kind of property or type of investment is inherently imprudent. Traditional trust law was encumbered with a variety of categorical exclusions, such as prohibitions on junior mortgages or new ventures. In some states legislation created so-called "legal lists" of approved trust investments. The universe of investment products changes incessantly. Investments that were at



one time thought too risky, such as equities, or more recently, futures, are now used in fiduciary portfolios. By contrast, the investment that was at one time thought ideal for trusts, the long-term bond, has been discovered to import a level of risk and volatility — in this case, inflation risk — that had not been anticipated. Accordingly, section 2(e) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule in abrogating categoric restrictions. The Restatement says: “Specific investments or techniques are not per se prudent or imprudent. The riskiness of a specific property, and thus the propriety of its inclusion in the trust estate, is not judged in the abstract but in terms of its anticipated effect on the particular trust’s portfolio.” Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment f, at 24 (1992). The premise of subsection 2(e) is that trust beneficiaries are better protected by the Act’s emphasis on close attention to risk/return objectives as prescribed in subsection 2(b) than in attempts to identify categories of investment that are per se prudent or imprudent.

The Act impliedly disavows the emphasis in older law on avoiding “speculative” or “risky” investments. Low levels of risk may be appropriate in some trust settings but inappropriate in others. It is the trustee’s task to invest at a risk level that is suitable to the purposes of the trust.

The abolition of categoric restrictions against types of investment in no way alters the trustee’s conventional duty of loyalty, which is reiterated for the purposes of this Act in Section 5. For example, were the trustee to invest in a second mortgage on a piece of real property owned by the trustee, the investment would be wrongful on account of the trustee’s breach of the duty to abstain from self-dealing, even though the investment would no longer automatically offend the former categoric restriction against fiduciary investments in junior mortgages.

**Professional fiduciaries.** The distinction taken in subsection (f) between amateur and professional trustees is familiar law. The prudent investor standard applies to a range of fiduciaries, from the most sophisticated professional investment management firms and corporate fiduciaries, to family members of minimal experience. Because the standard of prudence is re-

lational, it follows that the standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs. Restatement of Trusts 2d § 174 (1959) provides: “The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill.” Case law strongly supports the concept of the higher standard of care for the trustee representing itself to be expert or professional. See Annot., *Standard of Care Required of Trustee Representing Itself to Have Expert Knowledge or Skill*, 91 A.L.R. 3d 904 (1979) & 1992 Supp. at 48-49.

The Drafting Committee declined the suggestion that the Act should create an exception to the prudent investor rule (or to the diversification requirement of Section 3) in the case of smaller trusts. The Committee believes that subsections (b) and (c) of the Act emphasize factors that are sensitive to the traits of small trusts; and that subsection (f) adjusts helpfully for the distinction between professional and amateur trusteeship. Furthermore, it is always open to the settlor of a trust under Section 1(b) of the Act to reduce the trustee’s standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments h, m, at 28, 51; reporter’s note to Comment g, *id.* at 83.

**Matters of proof.** Although virtually all express trusts are created by written instrument, oral trusts are known, and accordingly, this Act presupposes no formal requirement that trust terms be in writing. When there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purpose of ascertaining the settlor’s intent. See Uniform Probate Code § 2-601 (1990), Comment; Restatement (Third) of Property: Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11, 1992).

**15-1.1-103. Diversification.** A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

**Source:** L. 95: Entire article added, p. 310, § 1, effective July 1.

#### OFFICIAL COMMENT

The language of this section derives from Restatement of Trusts 2d § 228 (1959). ERISA

insists upon a comparable rule for pension trusts. ERISA § 404(a)(1)(C), 29 U.S.C.

§ 1104(a)(1)(C). Case law overwhelmingly supports the duty to diversify. See Annot., *Duty of Trustee to Diversify Investments, and Liability for Failure to Do So*, 24 A.L.R. 3d 730 (1969) & 1992 Supp. at 78-79.

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement, carried forward in Section 3 of this Act, is that prudent investing ordinarily requires diversification.

Circumstances can however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an underdiversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.

**Rationale for diversification.** "Diversification reduces risk . . . [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another." Jonathan R. Macey, *An Introduction to Modern Financial Theory* 20 (American College of Trust and Estate Counsel Foundation, 1991). For example, during the Arab oil embargo of 1973, international oil stocks suffered declines, but the shares of domestic oil producers and coal companies benefitted. Holding a broad enough portfolio allowed the investor to set off, to some extent, the losses associated with the embargo.

Modern portfolio theory divides risk into the categories of "compensated" and "uncompensated" risk. The risk of owning shares in a mature and well-managed company in a settled industry is less than the risk of owning shares in a start-up high-technology venture. The investor requires a higher expected return to induce the investor to bear the greater risk of disappointment associated with the start-up firm. This is compensated risk — the firm pays the investor for bearing the risk. By contrast, nobody pays the investor for owning too few stocks. The investor who owned only international oils in 1973 was running a risk that could have been reduced by having configured the portfolio differently — to include investments in different industries. This is uncompensated risk — nobody pays the investor for owning shares in too few industries and too few companies. Risk that can be eliminated by adding different stocks (or bonds) is uncompensated risk. The object of

diversification is to minimize this uncompensated risk of having too few investments. "As long as stock prices do not move exactly together, the risk of a diversified portfolio will be less than the average risk of the separate holdings." R.A. Brealey, *An Introduction to Risk and Return from Common Stocks* 103 (2d ed. 1983).

There is no automatic rule for identifying how much diversification is enough. The 1992 Restatement says: "Significant diversification advantages can be achieved with a small number of well-selected securities representing different industries . . . . Broader diversification is usually to be preferred in trust investing," and pooled investment vehicles "make thorough diversification practical for most trustees." Restatement of Trusts 3d: Prudent Investor Rule § 227, General Note on Comments e-h, at 77 (1992). See also Macey, *supra*, at 23-24; Brealey, *supra*, at 111-13.

**Diversifying by pooling.** It is difficult for a small trust fund to diversify thoroughly by constructing its own portfolio of individually selected investments. Transaction costs such as the round-lot (100 share) trading economies make it relatively expensive for a small investor to assemble a broad enough portfolio to minimize uncompensated risk. For this reason, pooled investment vehicles have become the main mechanism for facilitating diversification for the investment needs of smaller trusts.

Most states have legislation authorizing common trust funds; see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to state statutes). As of 1992, 35 states and the District of Columbia had enacted the Uniform Common Trust Fund Act (UCTFA) (1938), overcoming the rule against commingling trust assets and expressly enabling banks and trust companies to establish common trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of adopting states). The Prefatory Note to the UCTFA explains: "The purposes of such a common or joint investment fund are to diversify the investment of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble." 7 Uniform Laws Ann. 402 (1985).

**Fiduciary investing in mutual funds.** Trusts can also achieve diversification by investing in mutual funds. See Restatement of Trusts 3d: Prudent Investor Rule, § 227, Comment m, at 99-100 (1992) (endorsing trust investment in mutual funds). ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes pension trusts to invest in mutual funds, identified as securities "issued by an investment company registered under the Investment Company Act of 1940 . . . ."



**15-1.1-104. Duties at inception of trusteeship.** Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this article.

**Source: L. 95:** Entire article added, p. 310, § 1, effective July 1.

#### OFFICIAL COMMENT

Section 4, requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising Restatement of Trusts 2d § 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d § 231 (1959). The same standards apply to successor trustees, see Restatement of Trusts 2d § 196 (1959).

The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust. The 1959 Restatement took the view that “[o]rdinarily any time within a year is reasonable, but under some circumstances a year may be too long a time and under

other circumstances a trustee is not liable although he fails to effect the conversion for more than a year.” Restatement of Trusts 2d § 230, comment b (1959). The 1992 Restatement retreated from this rule of thumb, saying, “No positive rule can be stated with respect to what constitutes a reasonable time for the sale or exchange of securities.” Restatement of Trusts 3d: Prudent Investor Rule § 229, comment b (1992).

The criteria and circumstances identified in Section 2 of this Act as bearing upon the prudence of decisions to invest and manage trust assets also pertain to the prudence of decisions to retain or dispose of inception assets under this section.

**15-1.1-105. Loyalty.** A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

**Source: L. 95:** Entire article added, p. 311, § 1, effective July 1.

#### OFFICIAL COMMENT

The duty of loyalty is perhaps the most characteristic rule of trust law, requiring the trustee to act exclusively for the beneficiaries, as opposed to acting for the trustee’s own interest or that of third parties. The language of Section 4 of this Act derives from Restatement of Trusts 3d: Prudent Investor Rule § 170 (1992), which makes minute changes in Restatement of Trusts 2d § 170 (1959).

The concept that the duty of prudence in trust administration, especially in investing and managing trust assets, entails adherence to the duty of loyalty is familiar. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), extracted in the Comment to Section 1 of this Act, effectively merges the requirements of prudence and loyalty. A fiduciary cannot be prudent in the conduct of investment functions if the fiduciary is sacrificing the interests of the beneficiaries.

The duty of loyalty is not limited to settings entailing self-dealing or conflict of interest in which the trustee would benefit personally from the trust. “The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property

to a third person for the purpose of benefitting the third person rather than the trust.” Restatement of Trusts 2d § 170, comment q, at 371 (1959).

No form of so-called “social investing” is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries — for example, by accepting below-market returns — in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause. See, e.g., John H. Langbein & Richard Posner, *Social Investing and the Law of Trusts*, 79 Michigan L. Rev. 72, 96-97 (1980) (collecting authority). For pension trust assets, see generally Ian D. Lanoff, *The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully under ERISA?*, 31 Labor L.J. 387 (1980). Commentators supporting social investing tend to concede the overriding force of the duty of loyalty. They argue instead that particular schemes of social investing may not result in below-market returns. See, e.g., Marcia O’Brien Hylton, “Socially Responsible” Investing: Doing Good Versus Doing Well in an Inefficient Market, 42 American U.L. Rev. 1 (1992). In 1994 the De-

partment of Labor issued an Interpretive Bulletin reviewing its prior analysis of social investing questions and reiterating that pension trust fiduciaries may invest only in conformity with the prudence and loyalty standards of ERISA §§ 403-404. Interpretive Bulletin 94-1, 59 Fed.

Regis. 32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94-1. The Bulletin reminds fiduciary investors that they are prohibited from "subordinat[ing] the interests of participants and beneficiaries in their retirement income to unrelated objectives."

**15-1.1-106. Impartiality.** If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

**Source: L. 95:** Entire article added, p. 311, § 1, effective July 1.

#### OFFICIAL COMMENT

The duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting, especially the conflicts between the interests of beneficiaries interested in income and those interested in principal.

The language of Section 6 derives from Restatement of Trusts 2d § 183 (1959); see also id., § 232. Multiple beneficiaries may be beneficiaries in succession (such as life and remain-

der interests) or beneficiaries with simultaneous interests (as when the income interest in a trust is being divided among several beneficiaries).

The trustee's duty of impartiality commonly affects the conduct of investment and management functions in the sphere of principal and income allocations. This Act prescribes no regime for allocating receipts and expenses. The details of such allocations are commonly handled under specialized legislation, such as the Revised Uniform Principal and Income Act (1962) (which is presently under study by the Uniform Law Commission with a view toward further revision).

**15-1.1-107. Investment costs.** In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

**Source: L. 95:** Entire article added, p. 311, § 1, effective July 1.

#### OFFICIAL COMMENT

Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs.

The language of Section 7 derives from Restatement of Trusts 2d § 188 (1959). The Restatement of Trusts 3d says: "Concerns over compensation and other charges are not an obstacle to a reasonable course of action using

mutual funds and other pooling arrangements, but they do require special attention by a trustee. . . . [I]t is important for trustees to make careful cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, comment m, at 58 (1992).

**15-1.1-108. Reviewing compliance.** Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

**Source: L. 95:** Entire article added, p. 311, § 1, effective July 1.

#### OFFICIAL COMMENT

This section derives from the 1991 Illinois act, 760 ILCS 5/5(a)(2) (1992), which draws

upon Restatement of Trusts 3d: Prudent Investor Rule § 227, comment b, at 11 (1992). Trustees



are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is

not the relevant standard. In the language of law and economics, the standard is *ex ante*, not *ex post*.

**15-1.1-109. Delegation of investment and management functions.** (a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with the requirements of subsection (a) of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

**Source:** L. 95: Entire article added, p. 311, § 1, effective July 1.

#### OFFICIAL COMMENT

This section of the Act reverses the much-criticized rule that forbade trustees to delegate investment and management functions. The language of this section is derived from Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992), discussed *infra*, and from the 1991 Illinois act, 760 ILCS § 5/5.1(b), (c) (1992).

**Former law.** The former nondelegation rule survived into the 1959 Restatement: "The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." The rule put a premium on the frequently arbitrary task of distinguishing discretionary functions that were thought to be nondelegable from supposedly ministerial functions that the trustee was allowed to delegate. Restatement of Trusts 2d § 171 (1959).

The Restatement of Trusts 2d admitted in a comment that "There is not a clear-cut line dividing the acts which a trustee can properly delegate from those which he cannot properly delegate." Instead, the comment directed attention to a list of factors that "may be of importance: (1) the amount of discretion involved; (2) the value and character of the property involved; (3) whether the property is principal or income; (4) the proximity or remoteness of the subject matter of the trust; (5) the character of the act as one involving professional skill or facilities possessed or not possessed by the trustee himself." Restatement of Trusts 2d § 171, comment d (1959). The 1959 Restatement further said: "A trustee cannot properly delegate to another power to select investments." Restatement of Trusts 2d § 171, comment h (1959).

For discussion and criticism of the former rule see William L. Cary & Craig B. Bright, *The Delegation of Investment Responsibility for Endowment Funds*, 74 Columbia L. Rev. 207 (1974); John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 American Bar Foundation Research J. 1, 18-24.

**The modern trend to favor delegation.** The trend of subsequent legislation, culminating in the Restatement of Trusts 3d: Prudent Investor Rule, has been strongly hostile to the nondelegation rule. See John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Missouri L. Rev. 105 (1994).

**The delegation rule of the Uniform Trustee Powers Act.** The Uniform Trustee Powers Act (1964) effectively abrogates the nondelegation rule. It authorizes trustees "to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary . . . ." Uniform Trustee Powers Act § 3(24), 7B Uniform Laws Ann. 743 (1985). The Act has been enacted in 16 states, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1993).

**UMIFA's delegation rule.** The Uniform Management of Institutional Funds Act (1972)

(UMIFA), authorizes the governing boards of eleemosynary institutions, who are trustee-like fiduciaries, to delegate investment matters either to a committee of the board or to outside investment advisors, investment counsel, managers, banks, or trust companies. UMIFA § 5, 7A Uniform Laws Ann. 705 (1985). UMIFA has been enacted in 38 states, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1993).

**ERISA's delegation rule.** The Employee Retirement Income Security Act of 1974, the federal statute that prescribes fiduciary standards for investing the assets of pension and employee benefit plans, allows a pension or employee benefit plan to provide that "authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers . . . ." ERISA § 403(a)(2), 29 U.S.C. § 1103(a)(2). Commentators have explained the rationale for ERISA's encouragement of delegation:

ERISA . . . invites the dissolution of unitary trusteeship. . . . ERISA's fractionation of traditional trusteeship reflects the complexity of the modern pension trust. Because millions, even billions of dollars can be involved, great care is required in investing and safekeeping plan assets. Administering such plans—computing and honoring benefit entitlements across decades of employment and retirement—is also a complex business. . . . Since, however, neither the sponsor nor any other single entity has a comparative advantage in performing all these functions, the tendency has been for pension plans to use a variety of specialized providers. A consulting actuary, a plan administration firm, or an insurance company may oversee the design of a plan and arrange for processing benefit claims. Investment industry professionals manage the portfolio (the largest plans spread their pension investments among dozens of money management firms).

John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 496 (1990).

**The delegation rule of the 1992 Restatement.** The Restatement of Trusts 3d: Prudent Investor Rule (1992) repeals the nondelegation rule of Restatement of Trusts 2d § 171 (1959), extracted *supra*, and replaces it with substitute text that reads:

§ 171. Duty with Respect to Delegation. A trustee has a duty personally to perform the responsibilities of trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion

and to act as a prudent person would act in similar circumstances.

Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992). The 1992 Restatement integrates this delegation standard into the prudent investor rule of section 227, providing that "the trustee must . . . deciding whether and how to delegate to others . . ." Restatement of Trusts 3d: Prudent Investor Rule § 227(c) (1992).

**Protecting the beneficiary against unreasonable delegation.** There is an intrinsic tension in trust law between granting trustees broad powers that facilitate flexible and efficient trust administration, on the one hand, and protecting trust beneficiaries from the misuse of such powers on the other hand. A broad set of trustees' powers, such as those found in most lawyer-drafted instruments and exemplified in the Uniform Trustees' Powers Act, permits the trustee to act vigorously and expeditiously to maximize the interests of the beneficiaries in a variety of transactions and administrative settings. Trust law relies upon the duties of loyalty and prudent administration, and upon procedural safeguards such as periodic accounting and the availability of judicial oversight, to prevent the misuse of these powers. Delegation, which is a species of trustee power, raises the same tension. If the trustee delegates effectively, the beneficiaries obtain the advantage of the agent's specialized investment skills or whatever other attributes induced the trustee to delegate. But if the trustee delegates to a knave or an incompetent, the delegation can work harm upon the beneficiaries.

Section 9 of the Uniform Prudent Investor Act is designed to strike the appropriate balance between the advantages and the hazards of delegation. Section 9 authorizes delegation under the limitations of subsections (a) and (b). Section 9(a) imposes duties of care, skill, and caution on the trustee in selecting the agent, in establishing the terms of the delegation, and in reviewing the agent's compliance.

The trustee's duties of care, skill, and caution in framing the terms of the delegation should protect the beneficiary against overbroad delegation. For example, a trustee could not prudently agree to an investment management agreement containing an exculpation clause that leaves the trust without recourse against reckless mismanagement. Leaving one's beneficiaries remediless against willful wrongdoing is inconsistent with the duty to use care and caution in formulating the terms of the delegation. This sense that it is imprudent to expose beneficiaries to broad exculpation clauses underlies both federal and state legislation restricting exculpation clauses, e.g., ERISA §§ 404(a)(1)(D), 410(a), 29 U.S.C. §§ 1104(a)(1)(D), 1110(a); New York Est. Powers Trusts Law § 11-1.7 (McKinney 1967).



Although subsection (c) of the Act exonerates the trustee from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection 9(a), subsection 9(b) makes the agent responsible to the trust. The beneficiaries of the trust can, therefore, rely upon the trustee to enforce the terms of the delegation.

**Costs.** The duty to minimize costs that is articulated in Section 7 of this Act applies to delegation as well as to other aspects of fiduciary investing. In deciding whether to delegate,

the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from "double dipping." If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.

**15-1.1-110. Language invoking standard of article.** The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this article: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

**Source: L. 95:** Entire article added, p. 311, § 1, effective July 1.

#### OFFICIAL COMMENT

This provision is taken from the Illinois act, 760 ILCS § 5/5(d) (1992), and is meant to facilitate incorporation of the Act by means of

the formulaic language commonly used in trust instruments.

**15-1.1-111. Application to existing trusts.** This article applies to trusts existing on and created after July 1, 1995; except that, as applied to trusts existing on July 1, 1995, this article governs only decisions or actions occurring after said date.

**Source: L. 95:** Entire article added, p. 312, § 1, effective July 1.

**15-1.1-112. Uniformity of application and construction.** This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among the states enacting it.

**Source: L. 95:** Entire article added, p. 312, § 1, effective July 1.

**15-1.1-113. Short title.** This article shall be known and may be cited as the "Colorado Uniform Prudent Investor Act".

**Source: L. 95:** Entire article added, p. 312, § 1, effective July 1.

**15-1.1-114. Severability.** If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

**Source: L. 95:** Entire article added, p. 312, § 1, effective July 1.

**15-1.1-115. Colorado changes to uniform act - specific statutes control - use of term "trustee".** (1) (a) The general assembly recognizes that persons, corporations,

entities, or state agencies who have responsibility for investing funds may be subject to a standard that is specifically set forth in other statutes. Under such circumstances, such persons, corporations, entities, or state agencies shall comply with the standard of investment set forth in the other statute, and this article shall not modify or repeal that standard.

(b) In addition, as provided for in section 15-1-304.1, this article shall not apply to those persons, corporations, entities, or state agencies which were made subject to the provisions of section 15-1-304 by specific reference in another statute in existence prior to July 1, 1995.

(2) As used in this article, "trustee" includes original or successor administrators, special administrators, administrators cum testamento annexo, executors, guardians, conservators, and trustees, whether of express or implied trusts.

**Source: L. 95:** Entire article added, p. 312, § 1, effective July 1.

**ARTICLE 1,5**

**Colorado Uniform Custodial Trust Act**

15-1.5-101.	Definitions.	15-1.5-112.	Liability to third persons.
15-1.5-102.	Custodial trust - general.	15-1.5-113.	Declination, resignation, incapacity, death, or removal of custodial trustee - designation of successor custodial trustee.
15-1.5-103.	Custodial trustee for future payment or transfer.	15-1.5-114.	Expenses, compensation, and bond of custodial trustee.
15-1.5-104.	Form and effect of receipt and acceptance by custodial trustee - jurisdiction.	15-1.5-115.	Reporting and accounting by custodial trustee - determination of liability of custodial trustee.
15-1.5-105.	Transfer to custodial trustee by fiduciary or obligor - facility of payment.	15-1.5-116.	Limitations of action against custodial trustee.
15-1.5-106.	Multiple beneficiaries - separate custodial trusts - survivorship.	15-1.5-117.	Distribution on termination.
15-1.5-107.	General duties of custodial trustee.	15-1.5-118.	Methods and forms for creating custodial trusts.
15-1.5-108.	General powers of custodial trustee.	15-1.5-119.	Applicable law.
15-1.5-109.	Use of custodial trust property.	15-1.5-120.	Uniformity of application and construction.
15-1.5-110.	Determination of incapacity - effect.	15-1.5-121.	Short title.
15-1.5-111.	Exemption of third persons from liability.	15-1.5-122.	Severability.

**OFFICIAL COMMENT**

**ARTICLE 1.5 - UNIFORM CUSTODIAL TRUST ACT  
PREFATORY NOTE**

This Uniform Act provides for the creation of a statutory custodial trust for adults to be governed by the provisions of the Act whenever property is delivered to another "as custodial trustee under the (Enacting state) Uniform Custodial Trust Act." The provisions of this Act are based on trust analogies to concepts developed and used in establishing custodianships for minors under the Uniform Transfers to Minors Act (UTMA). The Custodial Trust Act is designed to provide a statutory standby inter vivos trust for individuals who typically are not very affluent or sophisticated, and possibly represented by attor-

neys engaged in general rather than specialized estate practice. The most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity. The statute will also be available for accomplishing distribution of funds by judgment debtors and others to incapacitated persons for whom a conservator has not been appointed. Since this Act allows any person, competent to transfer property, to create custodial trusts for the benefit of themselves or others, with the beneficial interest in custodial trust property in



the beneficiary and not in the custodial trustee, its potential for use is extensive. Although the most frequent use probably will be by elderly persons, it is also available for a parent to establish a custodial trust for an adult child who may be incapacitated; for adult persons in the military, or those leaving the country temporarily, to place their property with another for management without relinquishing beneficial ownership of their property; or for young people who have received property under the Uniform Transfers to Minors Act to continue a custodial trust as adults in order to obtain the benefit and convenience of management services performed by the custodial trustee.

This Act follows the approach taken by the Uniform Transfers to Minors Act and allows any kind of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodial trustee for the benefit of a beneficiary. However, the most typical transaction envisioned would involve a person who would transfer intangible property, such as securities or bank accounts, to a custodial trustee but with retention by the transferor of direction over the property. Later, this direction could be relinquished, or it could be lost upon incapacity. The objective of the statute is to provide a simple trust that is uncomplicated in its creation, administration, and termination. The potential for tax problems is minimized by permitting the beneficiary in most instances to retain control while the beneficiary has capacity to manage the assets effectively. The statute contains an asset specific transfer provision that it is believed will be simple to use and will gain the acceptance of the securities and financial industry. A simple transfer document, examples of which are set forth in the Act, and a receipt from the custodian, also in the Act, would provide for identification of beneficiaries or distributees upon death of the beneficiary. Protection is extended to third parties dealing with the custodian. Although the Act is patterned on the Uniform Transfers to Minors Act and meshes into the Uniform Probate Code, it is appropriate for enactment as well in states which have not adopted either UTMA or the UPC.

An adult beneficiary, who is not incapacitated, may: (1) terminate the custodial trust on demand (section 15-1.5-102 (5)); (2) receive so much of the income or custodial property as he or she may request from time to time (section 15-1.5-109 (1)); and (3) give the custodial trustee binding instructions for investment or management (section 15-1.5-107 (2)). In the absence of direction by the beneficiary, who is not incapacitated, the custodial trustee manages

the property subject to the standard of care that would be observed by a prudent person dealing with the property of another and is not limited by other statutory restrictions on investments by fiduciaries. (section 15-1.5-107).

A principal feature of the Custodial Trust under this Act is designed to protect the beneficiary and his or her dependents against the perils of the beneficiary's possible future incapacity without the necessity of a conservatorship. Under section 15-1.5-110, the incapacity of the beneficiary does not terminate (1) the custodial trust, (2) the designation of a successor custodial trustee, (3) any power or authority of the custodial trustee, or (4) the immunities of third persons relying on actions of the custodial trustee. The custodial trustee continues to manage the property as a discretionary trust under the prudent person standard for the benefit of the incapacitated beneficiary.

Means of monitoring and enforcing the custodial trust include provisions requiring the custodial trustee to keep the beneficiary informed, requiring accounting by the custodial trustee (section 15-1.5-115), providing for removal of the custodial trustee (section 15-1.5-113), and the distribution of the assets on termination of the custodial trust (section 15-1.5-117). The custodial trustee is protected in section 15-1.5-116 by the statutes of limitation on proceedings against the custodial trustee.

Transactions with the custodial trustee should be executed readily and quickly by third parties because their rights and protections are determined by the Act and a third party acting in good faith has no need to determine the custodial trustee's authority to bind the beneficiary with respect to property and investment matters. (section 15-1.5-111). The Act generally limits the claims of third parties to recourse against the custodial property, with the beneficiary insulated against personal liability unless he or she is personally at fault and the custodial trustee is similarly insulated unless the custodial trustee is personally at fault or failed to disclose the custodial capacity when entering into a contract (section 15-1.5-112).

As a consequence of the mobility of our population, particularly the mature persons who are most likely to utilize this Act, uniformity of the laws governing custodial trusts is highly desirable, and the Act is designed to avoid conflict of laws problems. A custodial trust created under this Act remains subject to this Act despite a subsequent change in the residence of the transferor, the beneficiary, or the custodial trustee or the removal of the custodial trust property from the state of original location. (section 15-1.5-119).

#### **15-1.5-101. Definitions.** As used in this article:

- (1) "Adult" means an individual who is at least eighteen years of age.
- (2) "Beneficiary" means an individual for whom property has been transferred to or

held under a declaration of trust by a custodial trustee for the individual's use and benefit under this article.

(3) "Conservator" means a person appointed or qualified by a court to manage the estate of an individual or a person legally authorized to perform substantially the same functions.

(4) "Court" means the district courts of this state, except in the city and county of Denver, where it means the probate court.

(5) "Custodial trust property" means an interest in property transferred to or held under a declaration of trust by a custodial trustee under this article and the income from and proceeds of that interest.

(6) "Custodial trustee" means a person designated as trustee of a custodial trust under this article or a substitute or successor to the person designated.

(7) "Guardian" means a person appointed or qualified by a court as a guardian of an individual, including a limited guardian, but not a person who is only a guardian ad litem.

(8) "Incapacitated" means lacking the ability to manage property and business affairs effectively by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance, minority, or other disabling cause.

(9) "Legal representative" means a personal representative or conservator.

(10) "Member of the beneficiary's family" means a beneficiary's spouse, descendant, stepchild, parent, stepparent, grandparent, brother, sister, uncle, or aunt, whether related by whole or half blood or by adoption.

(11) "Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, or any other legal or commercial entity.

(12) "Personal representative" means an executor, administrator, or special administrator of a decedent's estate, a person legally authorized to perform substantially the same functions, or a successor to any of them.

(13) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(14) "Transferor" means a person who creates a custodial trust by transfer or declaration.

(15) "Trust company" means a financial institution, corporation, or other legal entity authorized to exercise general trust powers.

**Source: L. 99:** Entire article added, p. 1211, § 1, effective August 4.

#### OFFICIAL COMMENT

(1) "Adult" is a person 18 years of age for the purpose of custodial trusts. The result of this is that a person 18 years of age will be eligible to be a custodial trustee under this Act, although he or she may not be eligible under UTMA since minor custodianships under UTMA may run to age 21 and the minor could in some cases be older than the custodian. As the Comments under Section 1 of UTMA explain, the age of 21 was retained under that Act because the Internal Revenue Code continues to permit a "minority trust" under Section 2053(c), to continue in effect until age 21 and because it was believed that most transferors creating trusts or custodianships for minors would prefer to retain the property under management for the benefit of the young person as long as possible. The difference has little or no practical consequence and serves the purpose of each Act.

(3) "Conservator" is defined broadly to permit identification of a person functioning as a conservator.

(4) "Court" means the district courts of this state, except in the city and county of Denver, where it means the probate court. Here the likelihood is that most states would utilize the same court, e.g., the probate court, that deals with conservators and estates.

(5 and 6) The terms, "custodial trust property" and "custodial trustee," are used throughout to identify clearly the statutory trust property and trustee under this Act. The statutory trust concept is used throughout the Act.

(7) A definition of guardian has been included and is based on the Uniform Probate Code Section 5-103(6).

(8) A definition of incapacitated has been included, for the purpose of this Act, because



incapacity of the beneficiary converts the trust from a revocable trust to a discretionary trust. The definition is taken from the Uniform Probate Code Section 5-401(c) relating to the person who is unable to manage property. Compare Uniform Probate Code Section 5-103(7). Note that section 15-1.5-110(1)(b) permits a transferor to direct that the trust shall be administered as one for an incapacitated person. Section 15-1.5-110 deals specifically with the determination of incapacity.

(10) The beneficiary's family is broadly defined to identify persons who may have standing to seek judicial intervention or accounting (sections 15-1.5-113 and 15-1.5-115).

(11) The definition of a person is taken from the Uniform Probate Code Section 1-201(29).

(12) Personal representative is broadly defined and the definition reflects that in the Uniform Probate Code Section 1-201(30).

## ANNOTATION

**Law reviews.** For article, "Age Requirements in Colorado: A Guide for Estate Planners", see 34 Colo. Law. 87 (August 2005).

**15-1.5-102. Custodial trust - general.** (1) A person may create a custodial trust of property by a written transfer of the property to another person, evidenced by registration or by other instrument of transfer, executed in any lawful manner, naming as beneficiary an individual who may be the transferor, in which the transferee is designated, in substance, as custodial trustee under the "Colorado Uniform Custodial Trust Act".

(2) A person may create a custodial trust of property by a written declaration, evidenced by registration of the property or by other instrument of declaration executed in any lawful manner, describing the property and naming as beneficiary an individual other than the declarant, in which the declarant as titleholder is designated, in substance, as custodial trustee under the "Colorado Uniform Custodial Trust Act". A registration or other declaration of trust for the sole benefit of the declarant is not a custodial trust under the "Colorado Uniform Custodial Trust Act".

(3) Title to custodial trust property is in the custodial trustee and the beneficial interest is in the beneficiary.

(4) Except as provided in subsection (5) of this section, a transferor may not terminate a custodial trust.

(5) The beneficiary, if not incapacitated, or the conservator of an incapacitated beneficiary, may terminate a custodial trust by delivering to the custodial trustee a writing signed by the beneficiary or conservator declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(6) Any person may augment existing custodial trust property by the addition of other property pursuant to this article.

(7) The transferor may designate, or authorize the designation of, a successor custodial trustee in the trust instrument.

(8) This article does not displace or restrict other means of creating trusts. A trust whose terms do not conform to this article may be enforceable according to its terms under other law.

**Source:** L. 99: Entire article added, p. 1212, § 1, effective August 4.

## OFFICIAL COMMENT

Section 15-1.5-102 is the principal provision authorizing the creation of a custodial trust and utilizes the concept of incorporation by reference when the transferee or titleholder of property is designated as custodial trustee under the Act. Section 15-1.5-102 sets forth the general effect of such a transfer. Section 15-1.5-118 provides forms which satisfy the requirements

of this section and identifies customary methods of transferring assets to create a custodial trust.

Section 15-1.5-102(1) provides that a trust may be created by transfer to another for the benefit of the transferor or another. This is expected to be the most common way in which a custodial trust would be created. However, a custodial trust may also be created by declara-

tion of trust by the owner of property to hold it for the benefit of another as is provided in section 15-1.5-102(2). A declaration in trust by the owner of property for the sole benefit of the owner is not contemplated by this Act because such an attempt may be considered ineffective as a trust due to the total identity of the trustee and beneficiary. However, the doctrine of merger would not preclude an effective transfer under this Act for the benefit of the transferor and one or more other beneficiaries. See section 15-1.5-106.

A custodial trust could be created by the exercise of a valid power of attorney or power of appointment given by the owner of property as one of the transfers "consistent with law."

These alternatives permit the major uses of the custodial trust to be accomplished expeditiously. For example, an older person, wishing to be relieved of management of property may transfer property to another for benefit of the transferor or of the transferor's spouse or child. The declaration may be used to establish a trust of which the owner is trustee to continue management of the property for benefit of another, such as a spouse or child. The trust may include a provision for distribution of assets remaining at the beneficiary's death directly to a named distributee.

This Act does not preclude the creation of trusts under other existing law, statutory or non-statutory, but is designed to facilitate the creation of simple trusts incorporating the provisions of this Act. The written transfer or declaration "consistent with law" requires that the formalities of the transfer of particular property necessary under other law will be observed, e.g., if land is involved, the requirements of a proper deed and recording must be satisfied.

Section 15-1.5-102 (3) provides for the retention of the beneficial interest in the custodial trust property in the beneficiary and, of course, not in the custodial trustee. The extensive control and benefit in the beneficiary who is not incapacitated maintains the simplicity of the trust and avoids tax complexity. The custodial trustee is given the title to the property and

authority to act with regard to the property only as is authorized by the statute. The custodial trustee's powers are enumerated in section 15-1.5-108.

Section 15-1.5-102 (5) gives the adult beneficiary, who is not incapacitated, the power to terminate the custodial trust at any time during his or her lifetime. This power of termination exists in any beneficiary who is not incapacitated whether the beneficiary was or was not the transferor. A beneficiary may be determined to be incapacitated or the transferor may designate that the trust is to be administered as a trust for an incapacitated beneficiary under section 15-1.5-110, in which event the beneficiary does not have the power to terminate. However, the designation of incapacity by the transferor can be modified by the trustee or the court by reason of changed circumstances pursuant to section 15-1.5-110. The Act precludes termination by exercise of a durable power of attorney if the beneficiary is incompetent (section 15-1.5-107(6)). If the donor prefers not to permit the beneficiary the power to terminate or to designate the beneficiary as incapacitated under section 15-1.5-110, an individually drafted trust outside the scope of this Act would seem appropriate.

Upon termination of a custodial trust, the custodial trust property must be distributed as provided in section 15-1.5-117.

A transfer under this Act is irrevocable except to the extent the beneficiary may terminate it. Hence, a transfer to a trustee for benefit of a person other than the transferor is not revocable by the transferor. If a power of revocation were retained by the transferor, that would be a trust outside the scope of this Act and enforceable under general law pursuant to subsection 15-1.5-102 (8).

This Act does not provide for protection of the custodial trust assets from the claims of creditors of the beneficiary, whether those are general or governmental creditors. Other laws of the state remain unaffected. In this regard, unusual problems of handicapped persons and the coordination of resources and state or federal services call for special provision and planning outside the scope of this Act.

**15-1.5-103. Custodial trustee for future payment or transfer.** (1) A person having the right to designate the recipient of property payable or transferable upon a future event may create a custodial trust upon the occurrence of the future event by designating in writing the recipient, followed in substance by "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"".

(2) Persons may be designated as substitute or successor custodial trustees to whom the property must be paid or transferred in the order named if the first designated custodial trustee is unable or unwilling to serve.

(3) A designation under this section may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a power of appointment, or a writing designating a beneficiary of contractual rights. Otherwise, to be effective, the designation must be registered with or delivered to the fiduciary, payor, issuer, or obligor of the future right.



**Source: L. 99:** Entire article added, p. 1213, § 1, effective August 4.

### OFFICIAL COMMENT

This section permits a future custodial trustee to be designated to receive property for the beneficiary of a custodial trust to be effective upon the occurrence of a future event or transfer. To accommodate changes in circumstances during the passage of time, one or more successors or substitute custodial trustees can also be designated. The designation of the future custodial trustee and the beneficiary can be made in an instrument which is revocable or irrevocable depending upon the nature of the transaction or transfer. Any person designated as a future cus-

todial trustee may decline to serve before the transfer occurs or may resign under section 15-1.5-113 after the transfer.

The source of this section is Section 3 of UTMA. The enacting state's rule against perpetuities may limit or affect the creation of a custodial trust upon the occurrence of a future event, but because the use of a custodial trust usually contemplates dispositions for the benefit of living persons, perpetuity problems should rarely arise.

**15-1.5-104. Form and effect of receipt and acceptance by custodial trustee - jurisdiction.** (1) Obligations of a custodial trustee, including the obligation to follow upon directions of the beneficiary, arise under this article upon the custodial trustee's acceptance, express or implied, of the custodial trust property.

(2) The custodial trustee's acceptance may be evidenced by a writing stating in substance:

### CUSTODIAL TRUSTEE'S RECEIPT AND ACCEPTANCE

I, \_\_\_\_\_ (name of custodial trustee) acknowledge receipt of the custodial trust property described below or in the attached instrument and accept the custodial trust as custodial trustee for \_\_\_\_\_ (name of beneficiary) under the "Colorado Uniform Custodial Trust Act". I undertake to administer and distribute the custodial trust property pursuant to the "Colorado Uniform Custodial Trust Act". My obligations as custodial trustee are subject to the directions of the beneficiary unless the beneficiary is designated as, is, or becomes incapacitated. The custodial trust property consists of \_\_\_\_\_.  
Dated: \_\_\_\_\_

(Signature of Custodial Trustee)

(3) Upon accepting custodial trust property, a person designated as custodial trustee under this article is subject to personal jurisdiction of the court with respect to any matter relating to the custodial trust.

**Source: L. 99:** Entire article added, p. 1214, § 1, effective August 4.

### OFFICIAL COMMENT

Although a custodial trust is created by a transfer that satisfies section 15-1.5-102 of the Act, the responsibility and obligations upon the trustee do not arise until the trustee has accepted the transfer. This detailed section is included to call the attention of the parties to the effective receipt and acceptance by the custodial trustee. Once a custodial trustee accepts the transfer of the custodial trust property, the custodial trustee assumes the obligation of a custodial trustee under this Act. The acceptance can be expressed

or implied, but it is recommended that the written acceptance provided for in section 15-1.5-104 (2) be utilized. By the acceptance the custodial trustee submits to the personal jurisdiction of the courts of the enacting state for the purpose of the custodial trust, despite subsequent relocation of the parties or of the custodial trust property. The principal sources of these provisions are Sections 8 and 9 of UTMA and the analogous provisions under the Uniform Probate Code, Sections 3-602, 5-208, 5-307, 7-103.

**15-1.5-105. Transfer to custodial trustee by fiduciary or obligor - facility of payment.** (1) Unless otherwise directed by an instrument designating a custodial trustee

pursuant to section 15-1.5-103, a person, including a fiduciary other than a custodial trustee, who holds property of or owes a debt to an incapacitated individual not having a conservator may make a transfer to an adult member of the beneficiary's family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual. If the value of the property or the debt exceeds thirty thousand dollars, the transfer is not effective unless authorized by the court.

(2) A written acknowledgment of delivery, signed by a custodial trustee, is a sufficient receipt and discharge for property transferred to the custodial trustee pursuant to this section.

**Source: L. 99:** Entire article added, p. 1214, § 1, effective August 4.

#### OFFICIAL COMMENT

This section is in the nature of a facility-of-payment provision that permits persons owing money to an incapacitated individual to discharge a fixed obligation by a payment to a custodial trustee under this Act. The section does not authorize the custodial trustee to settle claims for disputed amounts but only to acknowledge an effective receipt of property paid

or delivered. It is based primarily on Sections 6 and 7 of UTMA and includes the protections of Section 8 of UTMA as well. It permits a custodial trust to be established as a substitute for a conservatorship to receive payments due an incapacitated individual. Also, see section 15-1.5-111, which protects transferors and other third parties dealing with the custodial trustee.

#### **15-1.5-106. Multiple beneficiaries - separate custodial trusts - survivorship.**

(1) Beneficial interests in a custodial trust created for multiple beneficiaries are deemed to be separate custodial trusts of equal undivided interests for each beneficiary. Except in a transfer or declaration for use and benefit of husband and wife, for whom survivorship is presumed, a right of survivorship does not exist unless the instrument creating the custodial trust specifically provides for survivorship.

(2) Custodial trust property held under this article by the same custodial trustee for the use and benefit of the same beneficiary may be administered as a single custodial trust.

(3) A custodial trustee of custodial trust property held for more than one beneficiary shall separately account to each beneficiary pursuant to sections 15-1.5-107 and 15-1.5-115 for the administration of the custodial trust.

**Source: L. 99:** Entire article added, p. 1214, § 1, effective August 4.

#### OFFICIAL COMMENT

This Act, unlike UTMA, does not preclude a custodial trust for more than one beneficiary. Adult persons creating custodial trusts are likely to set up custodial trusts in various forms, e.g., parents may wish to set up a custodial trust for their children or for themselves, then for a spouse, etc. However, the interests of each beneficiary are separate and the custodial trustee is obligated under subsection (3) to account separately

to each beneficiary for administration of the beneficiary's interest in the custodial trust.

Subsection (2) allows a custodial trustee who is administering multiple custodial trusts for the same beneficiary to administer the custodial trusts as a single custodial trust. For example, if multiple trusts are created for an incapacitated beneficiary, the custodial trustee can administer them as a single custodial trust.

**15-1.5-107. General duties of custodial trustee.** (1) If appropriate, a custodial trustee shall register or record the instrument vesting title to custodial trust property.

(2) If the beneficiary is not incapacitated, a custodial trustee shall follow the directions of the beneficiary in the management, control, investment, or retention of the custodial trust property. In the absence of effective contrary direction by the beneficiary while not incapacitated, or if the beneficiary is incapacitated, the custodial trustee shall observe the standard of care that would be observed by a prudent person dealing with property of another and shall comply with the provisions of the "Colorado Uniform Prudent Investor



Act". However, a custodial trustee, in the custodial trustee's discretion, may retain any custodial trust property received from the transferor.

(3) Subject to subsection (2) of this section, a custodial trustee shall take control of and collect, hold, manage, invest, and reinvest custodial trust property.

(4) A custodial trustee at all times shall keep custodial trust property of which the custodial trustee has control, separate from all other property in a manner sufficient to identify it clearly as custodial trust property of the beneficiary. Custodial trust property, the title to which is subject to recordation, is so identified if an appropriate instrument so identifying the property is recorded, and custodial trust property subject to registration is so identified if it is registered, or held in an account in the name of the custodial trustee, designated in substance: "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"".

(5) A custodial trustee shall keep records of all transactions with respect to custodial trust property, including information necessary for the preparation of tax returns, and shall make the records and information available at reasonable times to the beneficiary or legal representative of the beneficiary.

(6) The exercise of a durable power of attorney for an incapacitated beneficiary is not effective to terminate or direct the administration or distribution of a custodial trust.

**Source:** L. 99: Entire article added, p. 1215, § 1, effective August 4.

**Editor's note:** Colorado modified the model act by directing that the custodial trustee shall also comply with the provisions of the "Colorado Uniform Prudent Investor Act".

#### OFFICIAL COMMENT

Subsection (2) restates and confirms the control by the beneficiary who is not incapacitated. However, the trustee has a reasonable obligation to act when the beneficiary has not directed him. Under sections 15-1.5-109 and 15-1.5-110, when a beneficiary becomes incapacitated, the custodial trust becomes a discretionary trust and the trustee is subject to the control of the statute and not the beneficiary's direction. The custodial trustee is subject to the usual trustee's standard as taken from Section 7-302 of the Uniform

Probate Code. The statute also imposes a slightly higher standard on professional fiduciaries acting under the statute. Otherwise, much of this section is taken from Section 12 of UTMA. Whenever recordable assets, such as land, are in the custodial trust, the trustee would be expected to record title to the asset. The section is entitled "general duties" because there are additional specific duties identified in other sections such as Section 15-1.5-109.

**15-1.5-108. General powers of custodial trustee.** (1) A custodial trustee, acting in a fiduciary capacity, has all the rights and powers over custodial trust property which an unmarried adult owner has over individually owned property, but a custodial trustee may exercise those rights and powers in a fiduciary capacity only.

(2) This section does not relieve a custodial trustee from liability for a violation of section 15-1.5-107.

**Source:** L. 99: Entire article added, p. 1216, § 1, effective August 4.

#### OFFICIAL COMMENT

This section is taken from Section 13 of UTMA. It grants the trustee very broad powers over the property, subject, however, to the Prudent Person Rule and to the obligations set out in the Act. An alternative approach to subsection (1) that might be taken by an enacting state is to

refer to the existing statutes granting powers to a trustee, such as the Uniform Trustee's Powers Act. For example: [A custodial trustee has the powers of a trustee under the Uniform Trustee's Powers Act.]

**15-1.5-109. Use of custodial trust property.** (1) A custodial trustee shall pay to the beneficiary or expend for the beneficiary's use and benefit so much or all of the custodial trust property as the beneficiary while not incapacitated may direct from time to time.

(2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order and without regard to other support, income, or property of the beneficiary.

(3) A custodial trustee may establish checking, savings, or other similar accounts of reasonable amounts under which either the custodial trustee or the beneficiary may withdraw funds from, or draw checks against, the accounts. Funds withdrawn from, or checks written against, the account by the beneficiary are distributions of custodial trust property by the custodial trustee to the beneficiary.

**Source: L. 99:** Entire article added, p. 1216, § 1, effective August 4.

### OFFICIAL COMMENT

This section provides that the custodial trustee is obligated to follow the directions of the beneficiary who is not incapacitated in paying over or expending custodial trust property. If the beneficiary is incapacitated, this section imposes duties on the custodial trustee to apply funds for the beneficiary similar to those imposed on custodians for minors under Section 14 of UTMA. In addition, however, subsection (2) authorizes a custodial trustee to pay over or expend custodial trust property for the use and benefit of the incapacitated beneficiary's dependents who were supported by the beneficiary at the time the beneficiary became incapacitated or for whom there is a legal obligation to support.

The use-and-benefits standard for the expenditure of custodial property is intended to avoid any implication that the custodial trust property can be used only for the required support of the incapacitated beneficiary.

Subsection (3) allows a custodial trustee to maintain a bank account, of an amount reason-

able under the circumstances, with the beneficiary whereby both the beneficiary and the custodial trustee may write checks on the account. This may be used as one method of making money available for the beneficiary's personal needs. Many incapacitated persons, unable to manage business affairs, are still competent to pay personal expenses. This type of arrangement would be important to them. A custodial trustee should maintain, of course, a separate bank account for use in managing the custodial trust property and investments.

An alternative approach might be taken to this section that refers to the distributive powers of a conservator under the laws of the enacting state, in the event that state should prefer that incorporation by reference. For example: [The custodial trustee has the distributive powers of a conservator under the Uniform Probate Code.]

**15-1.5-110. Determination of incapacity - effect.** (1) The custodial trustee shall administer the custodial trust as for an incapacitated beneficiary if:

- (a) The custodial trust was created under section 15-1.5-105;
  - (b) The transferor has so directed in the instrument creating the custodial trust; or
  - (c) The custodial trustee has determined that the beneficiary is incapacitated.
- (2) A custodial trustee may determine that the beneficiary is incapacitated in reliance upon:

(a) Previous direction or authority given by the beneficiary while not incapacitated, including direction or authority pursuant to a durable power of attorney;

- (b) The certificate of the beneficiary's physician; or
- (c) Other persuasive evidence.

(3) If a custodial trustee for an incapacitated beneficiary reasonably concludes that the beneficiary's incapacity has ceased, or that circumstances concerning the beneficiary's ability to manage property and business affairs have changed since the creation of a custodial trust directing administration as for an incapacitated beneficiary, the custodial trustee may administer the trust as for a beneficiary who is not incapacitated.



(4) On petition of the beneficiary, the custodial trustee, or other person interested in the custodial trust property or the welfare of the beneficiary, the court shall determine whether the beneficiary is incapacitated.

(5) Absent determination of incapacity of the beneficiary under subsection (2) or (4) of this section, a custodial trustee who has reason to believe that the beneficiary is incapacitated shall administer the custodial trust in accordance with the provisions of this article applicable to an incapacitated beneficiary.

(6) Incapacity of a beneficiary does not terminate:

- (a) The custodial trust;
- (b) Any designation of a successor custodial trustee;
- (c) Rights or powers of the custodial trustee; or
- (d) Any immunities of third persons acting on instructions of the custodial trustee.

**Source: L. 99:** Entire article added, p. 1216, § 1, effective August 4.

### OFFICIAL COMMENT

This is one of the more important sections of the Act under which the custodial trustee may determine that the beneficiary is incapacitated so the trust will change from one subject to the control of the beneficiary to a discretionary trust for the beneficiary. Subsection (2) allows the custodial trustee to determine that the beneficiary is incapacitated provided the determination is based upon the certificate of the beneficiary's physician, the prior direction or authority of the beneficiary, or other reasonable evidence. That authority could be evidenced, for example, by a durable power of attorney executed by the beneficiary prior to becoming incapacitated even though that power of attorney is not otherwise effective to control management or termination of the custodial trust. Such a durable power of attorney could be given to a child, spouse, friend, or other trusted individual. In addition, specific authority is provided in subsection (4) for the beneficiary, the custodial trustee, or other interested person to seek a declaration from the court as to the capacity of the beneficiary for the purposes of this Act. This is important to the custodial trustee, as his duties

and responsibilities change on the event of the beneficiary's incapacity.

This section is not a proceeding for the appointment of a conservator, and it is not contemplated that such a declaration would lead to court appointment of a conservator or guardian unless other factors would warrant such appointment. The existence of a comprehensive and well-managed custodial trust would be one factor that would tend to avoid the necessity for the appointment of a conservator or guardian of the estate.

This section also does not provide a proceeding to attack the legal competence of a transferor in setting up a trust under section 15-1.5-102. Rather, section 15-1.5-110 relates to a management matter in a validly established custodial trust.

Subsection (6) provides that the incapacity of the beneficiary does not terminate the custodial trust. If the beneficiary becomes incapacitated, the authority of the custodial trustee continues and the custodial trustee must follow the statutory provisions of the Act relating to managing custodial trusts for incapacitated individuals.

**15-1.5-111. Exemption of third persons from liability.** (1) A third person in good faith and without a court order may act on instructions of, or otherwise deal with, a person purporting to make a transfer as, or purporting to act in the capacity of, a custodial trustee. In the absence of knowledge to the contrary, the third person is not responsible for determining:

- (a) The validity of the purported custodial trustee's designation;
- (b) The propriety of, or the authority under this article for, any action of the purported custodial trustee;
- (c) The validity or propriety of an instrument executed or instruction given pursuant to this article either by the person purporting to make a transfer or declaration or by the purported custodial trustee; or
- (d) The propriety of the application of property vested in the purported custodial trustee.

**Source: L. 99:** Entire article added, p. 1217, § 1, effective August 4.

**OFFICIAL COMMENT**

This section is based upon Section 16 of the UTMA and protects third persons who deal in good faith with the custodial trustee.

**15-1.5-112. Liability to third persons.** (1) A claim based on a contract entered into by a custodial trustee acting in a fiduciary capacity, an obligation arising from the ownership or control of custodial trust property, or a tort committed in the course of administering the custodial trust may be asserted by a third person against the custodial trust property by proceeding against the custodial trustee in a fiduciary capacity, whether or not the custodial trustee or the beneficiary is personally liable.

(2) A custodial trustee is not personally liable to a third person:

(a) On a contract properly entered into in a fiduciary capacity unless the custodial trustee fails to reveal that capacity or to identify the custodial trust in the contract; or

(b) For an obligation arising from control of custodial trust property or for a tort committed in the course of the administration of the custodial trust unless the custodial trustee is personally at fault.

(3) A beneficiary is not personally liable to a third person for an obligation arising from beneficial ownership of custodial trust property or for a tort committed in the course of administration of the custodial trust unless the beneficiary is personally in possession of the custodial trust property giving rise to the liability or is personally at fault.

(4) Subsections (2) and (3) of this section do not preclude actions or proceedings to establish liability of the custodial trustee or beneficiary to the extent the person sued is protected as the insured by liability insurance.

**Source: L. 99:** Entire article added, p. 1218, § 1 effective August 4.

**OFFICIAL COMMENT**

This section is patterned after Section 17 of the UTMA and that section in turn was based upon Sections 5-428 and 7-306 of the Uniform Probate Code limiting the liability of conservators and trustees. See also Restatement of Trusts, 2d Sections 265 and 277. The effect of this section is to limit the claims of third parties to recourse against custodial trust property as both the custodial trustee and the beneficiary are protected from personal liability absent personal fault on their part. This section does not alter the obligations between the custodial trustee and the beneficiary arising out of the administration of

the estate and the accounting for that administration.

There may be cases in which a custodial trustee or beneficiary may have a right to possession of custodial trust property and may insure against liability arising out of possession or control of the property as a named insured, e.g., under homeowner's or automobile liability insurance. In such a case, the beneficiary should be permitted as a party defendant under subsection (4) but only to the extent of the protection of the liability insurance.

**15-1.5-113. Declination, resignation, incapacity, death, or removal of custodial trustee - designation of successor custodial trustee.** (1) Before accepting the custodial trust property, a person designated as custodial trustee may decline to serve by notifying the person who made the designation, the transferor, or the transferor's legal representative. If an event giving rise to a transfer has not occurred, the substitute custodial trustee designated under section 15-1.5-103 becomes the custodial trustee, or, if a substitute custodial trustee has not been designated, the person who made the designation may designate a substitute custodial trustee pursuant to section 15-1.5-103. In other cases, the transferor or the transferor's legal representative may designate a substitute custodial trustee.

(2) A custodial trustee who has accepted the custodial trust property may resign by:

(a) Delivering written notice to a successor custodial trustee, if any, the beneficiary, and, if the beneficiary is incapacitated, to the beneficiary's conservator, if any; and

(b) Transferring or registering, or recording an appropriate instrument relating to, the



custodial trust property, in the name of, and delivering the records to, the successor custodial trustee identified under subsection (3) of this section.

(3) If a custodial trustee or successor custodial trustee is ineligible, resigns, dies, or becomes incapacitated, the successor designated under section 15-1.5-102 (7) or section 15-1.5-103 becomes custodial trustee. If there is no effective provision for a successor, the beneficiary, if not incapacitated, may designate a successor custodial trustee. If the beneficiary is incapacitated, or fails to act within ninety days after the ineligibility, resignation, death, or incapacity of the custodial trustee, the beneficiary's conservator becomes successor custodial trustee. If the beneficiary does not have a conservator or the conservator fails to act, the resigning custodial trustee may designate a successor custodial trustee.

(4) If a successor custodial trustee is not designated pursuant to subsection (3) of this section, the transferor, the legal representative of the transferor or of the custodial trustee, an adult member of the beneficiary's family, the guardian of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court to designate a successor custodial trustee.

(5) A custodial trustee who declines to serve or resigns, or the legal representative of a deceased or incapacitated custodial trustee, as soon as practicable, shall put the custodial trust property and records in the possession and control of the successor custodial trustee. The successor custodial trustee may enforce the obligation to deliver custodial trust property and records and becomes responsible for each item as received.

(6) A beneficiary, the beneficiary's conservator, an adult member of the beneficiary's family, a guardian of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court to remove the custodial trustee for cause and designate a successor custodial trustee, to require the custodial trustee to furnish a bond or other security for the faithful performance of fiduciary duties, or for other appropriate relief.

**Source: L. 99:** Entire article added, p. 1218, § 1, effective August 4.

#### OFFICIAL COMMENT

This section follows many of the provisions of Section 18 of UTMA with some substantive changes. It is designed to accommodate in a single section the circumstances in which a custodial trustee would be replaced by another custodial trustee. Under subsection (2), if the beneficiary is incapacitated, a custodial trustee who resigns must give written notice to both the beneficiary and the beneficiary's conservator if one exists. Under subsection (3), a beneficiary who is not incapacitated may designate, without limitation, a successor custodial trustee. If, however, the beneficiary fails to act or is incapacitated, the procedure to be followed is very similar to that found in UTMA except that the nonincapacitated beneficiary has 90 days to act

and if the beneficiary has no conservator or if the conservator declines to act, the custodial trustee may eventually designate a successor custodial trustee.

Under subsection (6), the beneficiary, whether or not incapacitated, can petition the court to remove the custodial trustee for cause and to designate a successor trustee, or the court may require the custodial trustee to give bond or other appropriate relief.

This section, unlike Section 18 of UTMA, does not give the custodial trustee the general power to designate a successor custodial trustee but rather limits that power to the situation in which the procedure for designating successor custodial trustees by others has been exhausted.

**15-1.5-114. Expenses, compensation, and bond of custodial trustee.** (1) Except as otherwise provided in the instrument creating the custodial trust, in an agreement with the beneficiary, or by court order, a custodial trustee:

(a) Is entitled to reimbursement from custodial trust property for reasonable expenses incurred in the performance of fiduciary services;

(b) Has a noncumulative election, to be made no later than six months after the end of each calendar year, to charge a reasonable compensation for fiduciary services performed during that year; and

(c) Need not furnish a bond or other security for the faithful performance of fiduciary duties.

**Source: L. 99:** Entire article added, p. 1219, § 1, effective August 4.

#### OFFICIAL COMMENT

This section follows the pattern of Section 15 of the UTMA except it does subject the arrangements for payment of expenses, compensation, and bond to provisions in the custodial trust instrument or agreement of the beneficiary or court order.

As in UTMA, the provisions with regard to compensation are designed to avoid imputed compensation to the custodian who waives com-

penensation and also to avoid the accumulation of claims for compensation until the termination of the custodial trust. Although the ability to control these matters by the trust instrument or agreement of the beneficiary seems to be implied, as was assumed in UTMA, it is here expressly stated because of the possibility of informal arrangements with persons as trustees.

**15-1.5-115. Reporting and accounting by custodial trustee - determination of liability of custodial trustee.** (1) (a) Upon the acceptance of custodial trust property, the custodial trustee shall provide a written statement describing the custodial trust property and shall thereafter provide a written statement of the administration of the custodial trust property:

(I) Once each year;

(II) Upon request at reasonable times by the beneficiary or the beneficiary's legal representative;

(III) Upon resignation or removal of the custodial trustee; and

(IV) Upon termination of the custodial trust.

(b) The statements must be provided to the beneficiary or to the beneficiary's legal representative, if any. Upon termination of the beneficiary's interest, the custodial trustee shall furnish a current statement to the person to whom the custodial trust property is to be delivered.

(2) A beneficiary, the beneficiary's legal representative, an adult member of the beneficiary's family, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative.

(3) A successor custodial trustee may petition the court for an accounting by a predecessor custodial trustee.

(4) In an action or proceeding under this article or in any other proceeding, the court may require or permit the custodial trustee or the custodial trustee's legal representative to account. The custodial trustee or the custodial trustee's legal representative may petition the court for approval of final accounts.

(5) If a custodial trustee is removed, the court shall require an accounting and order delivery of the custodial trust property and records to the successor custodial trustee and the execution of all instruments required for transfer of the custodial trust property.

(6) On petition of the custodial trustee or any person who could petition for an accounting, the court, after notice to interested persons, may issue instructions to the custodial trustee or review the propriety of the acts of a custodial trustee or the reasonableness of compensation determined by the custodial trustee for the services of the custodial trustee or others.

**Source: L. 99:** Entire article added, p. 1220, § 1, effective August 4.

#### OFFICIAL COMMENT

This section requires that the custodial trustee inform the beneficiary of the initiation of the trust and provide reasonably current reports of

the administration of the custodial trust to the beneficiary or the beneficiary's legal representative. Even though some custodial trustees may



act informally, it seems appropriate that both the trustee and the beneficiary be expected to exchange complete information concerning the administration of the trust at least once each year. In some cases, more frequent exchanges of information between the custodial trustee and beneficiary would be expected, e.g., when they use a bank account to which both have access. This is particularly true with regard to necessary information for tax reporting by the parties involved. This section assumes the usual minimum components of an account, i.e., assets and values at the beginning of the accounting period, receipts, and disbursements during the accounting period and assets and their values on hand or

available for distribution at the close of the accounting period.

Subsection (1) identifies the necessary reports and accountings for the parties, and subsection (2) identifies a broad group of persons who may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative. Much of the section is drawn from Section 19 of the UTMA modified to fit the custodial trust. Subsection (6) recognizes the inherent power of the court to instruct trustees and review their actions. This paragraph is patterned after Uniform Probate Code Section 7-205.

**15-1.5-116. Limitations of action against custodial trustee.** (1) Except as provided in subsection (3) of this section, unless previously barred by adjudication, consent, or limitation, a claim for relief against a custodial trustee for accounting or breach of duty is barred as to a beneficiary, a person to whom custodial trust property is to be paid or delivered, or the legal representative of an incapacitated or deceased beneficiary or payee:

(a) Who has received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within two years after receipt of the final account or statement; or

(b) Who has not received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within three years after the termination of the custodial trust.

(2) Except as provided in subsection (3) of this section, a claim for relief to recover from a custodial trustee for fraud, misrepresentation, or concealment related to the final settlement of the custodial trust or concealment of the existence of the custodial trust is barred unless an action or proceeding to assert the claim is commenced within five years after the termination of the custodial trust.

(3) A claim for relief is not barred by this section if the claimant:

(a) Is a minor, until the earlier of two years after the claimant becomes an adult or dies;

(b) Is an incapacitated adult, until the earliest of two years after the appointment of a conservator, the removal of the incapacity, or the death of the claimant; or

(c) Was an adult, now deceased, who was not incapacitated, until two years after the claimant's death.

**Source:** L. 99: Entire article added, p. 1221, § 1, effective August 4.

#### OFFICIAL COMMENT

In an effort to provide as comprehensive a statute as possible to inform the parties of substantially all of their obligations and rights, statutes of limitation are provided in this section. The limitations provided in this section are derived from the Uniform Probate Code, Sections 1-106 and 7-307, and from the Missouri Custodial Act.

The nature of the limitations imposed by the section are illustrated by the situation in which a custodial trustee is removed, resigns, or dies. If the former custodial trustee accounts as required under section 15-1.5-113 on removal or resignation, or the deceased custodial trustee's personal representative accounts, the two-year lim-

itation of subsection (1)(a) applies. Should the former custodial trustee or the personal representative fail to account, then, subsection (1)(b) would apply to limit the time in which a proceeding to assert the claim could be commenced. This time would begin to run on the date the trust terminated. Of course, if the claim is one for fraud or concealment, the longer time limitation of subsection (2) would apply. In any event, should the beneficiary become incapacitated or die before the applicable time limitation had expired, the tolling provision of subsection (3) could postpone the time bar until two years after removal of the disability or death.

- 15-1.5-117. Distribution on termination.** (1) Upon termination of a custodial trust, the custodial trustee shall transfer the unexpended custodial trust property:
- (a) To the beneficiary, if not incapacitated or deceased;
  - (b) To the conservator or other recipient designated by the court for an incapacitated beneficiary; or
  - (c) Upon the beneficiary's death, in the following order:
    - (I) As last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary;
    - (II) To the survivor of multiple beneficiaries if survivorship is provided for pursuant to section 15-1.5-106;
    - (III) As designated in the instrument creating the custodial trust; or
    - (IV) To the estate of the deceased beneficiary.
- (2) If, when the custodial trust would otherwise terminate, the distributee is incapacitated, the custodial trust continues for the use and benefit of the distributee as beneficiary until the incapacity is removed or the custodial trust is otherwise terminated.
- (3) Death of a beneficiary does not terminate the power of the custodial trustee to discharge obligations of the custodial trustee or beneficiary incurred before the termination of the custodial trust.

**Source: L. 99:** Entire article added, p. 1221, § effective August 4.

**OFFICIAL COMMENT**

This section controls distribution of the custodial trust property when the custodial trust is terminated under section 15-1.5-102(5). It is designed to provide for efficient and certain distribution without judicial proceedings. Subsection (1)(c) is an important provision for avoiding complications on distribution and provides that distribution may be controlled first, by the direction of the deceased beneficiary or second, by the custodial trust instrument (see sections 15-1.5-102, 15-1.5-106, and 15-1.5-118) and, only if no effective prior designation for the payment or distribution of the property on the death of the beneficiary has been made, shall it pass through the beneficiary's estate.

The direction to the custodial trustee by the beneficiary, who is not incapacitated, for distribution on termination of the custodial trust may

be in any written form clearly identifying the distributee. For example, the following direction would be adequate under the statute:

I, \_\_\_\_\_ (name of beneficiary) hereby direct \_\_\_\_\_ (name of trustee) as custodial trustee, to transfer and pay the unexpended balance of the custodial trust property of which I am beneficiary to \_\_\_\_\_ as distributee on the termination of the trust at my death. In the event of the prior death of \_\_\_\_\_ above named as distributee, I designate \_\_\_\_\_ as distributee of the custodial trust property.

Signed (signature) \_\_\_\_\_ Beneficiary  
Date \_\_\_\_\_  
Receipt Acknowledged (signature) \_\_\_\_\_  
Custodial Trustee  
Date \_\_\_\_\_

- 15-1.5-118. Methods and forms for creating custodial trusts.** (1) If a transaction, including a declaration with respect to or a transfer of specific property, otherwise satisfies applicable law, the criteria of section 15-1.5-102 are satisfied by:
- (a) The execution and either delivery to the custodial trustee or recording of an instrument in substantially the following form:

**TRANSFER UNDER THE  
"COLORADO UNIFORM CUSTODIAL TRUST ACT"**

I, \_\_\_\_\_ (name of transferor or name and representative capacity if a fiduciary), transfer to \_\_\_\_\_ (name of trustee other than transferor), as custodial trustee for \_\_\_\_\_ (name of beneficiary) as beneficiary and as distributee on termination of the trust in absence of direction by the beneficiary under the "Colorado Uniform Custodial Trust Act", the following: (insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature); or



(b) The execution and the recording or giving notice of its execution to the beneficiary of an instrument in substantially the following form:

DECLARATION OF TRUST UNDER THE  
"COLORADO UNIFORM CUSTODIAL TRUST ACT"

I, \_\_\_\_\_ (name of owner of property), declare that henceforth I hold as custodial trustee for \_\_\_\_\_ (name of beneficiary other than transferor) as beneficiary and as distributee on termination of the trust in absence of direction by the beneficiary under the "Colorado Uniform Custodial Trust Act", the following: (insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).  
Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature).

(2) Customary methods of transferring or evidencing ownership of property may be used to create a custodial trust, including any of the following:

(a) Registration of a security in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"";

(b) Delivery of a certificated security, or a document necessary for the transfer of an uncertificated security, together with any necessary endorsement, to an adult other than the transferor or to a trust company as custodial trustee, accompanied by an instrument in substantially the form prescribed in paragraph (a) of subsection (1) of this section;

(c) Payment of money or transfer of a security held in the name of a broker or a financial institution or its nominee to a broker or financial institution for credit to an account in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"";

(d) Registration of ownership of a life or endowment insurance policy or annuity contract with the issuer in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"";

(e) Delivery of a written assignment to an adult other than the transferor or to a trust company whose name in the assignment is designated in substance by the words: "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"";

(f) Irrevocable exercise of a power of appointment, pursuant to its terms, in favor of a trust company, an adult other than the donee of the power, or the donee who holds the power if the beneficiary is other than the donee, whose name in the appointment is designated in substance: "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"";

(g) Delivery of a written notification or assignment of a right to future payment under a contract to an obligor which transfers the right under the contract to a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, whose name in the notification or assignment is designated in substance: "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"";

(h) Execution, delivery, and recordation of a conveyance of an interest in real property in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"";

(i) Issuance of a certificate of title by an agency of a state or of the United States which evidences title to tangible personal property:

(l) Issued in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as

custodial trustee for (name of beneficiary) under the “Colorado Uniform Custodial Trust Act””; or

(II) Delivered to a trust company or an adult other than the transferor or endorsed by the transferor to that person, designated in substance: “as custodial trustee for (name of beneficiary) under the “Colorado Uniform Custodial Trust Act””; or

(j) Execution and delivery of an instrument of gift to a trust company or an adult other than the transferor, designated in substance: “as custodial trustee for (name of beneficiary) under the “Colorado Uniform Custodial Trust Act””.

**Source: L. 99:** Entire article added, p. 1222, § 1, effective August 4.

#### OFFICIAL COMMENT

This section largely follows Section 9 of UTMA. It provides instructional detail for forms and methods of transferring assets that satisfy the requirements of the statute. Although many of the customary methods of transferring assets are identified, these methods are not intended to be exclusive since any type of property that can be transferred by any legal means is intended to be within the scope of the statute, provided the requirements of section 15-1.5-102 are met. The

method of transfer or conveyance appropriate to the asset should be used, e.g., if land is involved, a deed or conveyance that satisfies the local requirements would be appropriate. In the effort to make the statute as self-contained and as fully explanatory as possible, these provisions for implementation are included in the statute rather than being appended or inserted in the Comments.

**15-1.5-119. Applicable law.** (1) This article applies to a transfer or declaration creating a custodial trust that refers to this article if, at the time of the transfer or declaration, the transferor, beneficiary, or custodial trustee is a resident of or has its principal place of business in this state or custodial trust property is located in this state. The custodial trust remains subject to this article despite a later change in residence or principal place of business of the transferor, beneficiary, or custodial trustee, or removal of the custodial trust property from this state.

(2) A transfer made pursuant to an act of another state substantially similar to this article is governed by the law of that state and may be enforced in this state.

**Source: L. 99:** Entire article added, p. 1224, § 1, effective August 4.

#### OFFICIAL COMMENT

This section is designed to avoid confusion in the event a party or assets are removed from the state.

**15-1.5-120. Uniformity of application and construction.** This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

**Source: L. 99:** Entire article added, p. 1225, § 1, effective August 4.

**15-1.5-121. Short title.** This article may be cited as the “Colorado Uniform Custodial Trust Act”.

**Source: L. 99:** Entire article added, p. 1225, § 1, effective August 4.

**15-1.5-122. Severability.** If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.



**Source: L. 99:** Entire article added, p. 1225, § 1, effective August 4.

## POWERS OF APPOINTMENT

### ARTICLE 2

#### Powers of Appointment

**Editor's note:** This article was numbered as articles 1 to 3 of chapter 107, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1967, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1967, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

PART 1		15-2-202.	Power may be released.
CREATION OF POWERS OF APPOINTMENT		15-2-203.	How power released.
		15-2-204.	Effect of release.
		15-2-205.	Release by one of two or more.
		15-2-206.	What "release" includes.
15-2-101.	Legislative declaration.	15-2-207.	Part 2 not exclusive.
15-2-102.	Power of appointment, donor, donee, objects, appointees, takers in default defined.	15-2-208.	Not a taxable transfer. (Repealed)
15-2-103.	Powers of appointment classified.	15-2-209.	Inheritance tax law not affected. (Repealed)
15-2-104.	Vested and contingent powers of appointment distinguished.	PART 3	
15-2-105.	Power may be created.	EXERCISE OF POWERS OF APPOINTMENT	
PART 2		15-2-301.	Extent of exercise.
RELEASE OF POWERS OF APPOINTMENT		15-2-302.	Partial exercise permissive.
		15-2-303.	Not exercised by residuary clause.
15-2-201.	Legislative declaration.		

### PART 1

#### CREATION OF POWERS OF APPOINTMENT

**15-2-101. Legislative declaration.** It is the policy of the state of Colorado to authorize the creation and reservation of powers of appointment as defined and classified under the provisions of this part 1.

**Source: L. 67:** R&RE, p. 1072, § 4. **C.R.S. 1963:** § 107-1-1.

**15-2-102. Power of appointment, donor, donee, objects, appointees, takers in default defined.** (1) A power of appointment is any power other than a power held in a fiduciary capacity created or reserved by any person, institution, or corporation having property subject to its disposal, enabling itself or another to designate, within such limits as it shall prescribe, the appointees of the property or of any right, interest, or estate therein or the shares in which it shall be received. A power of appointment shall include all powers which are in substance and effect powers of appointment regardless of the language used in creating them.

(2) Repealed.

(3) The donor of a power of appointment is the person, institution, or corporation who or which creates or reserves the power of appointment.

(4) The donee of a power of appointment is the person, institution, or corporation in whom or in which the power of appointment is created or reserved.

(5) The objects of a power of appointment are those persons, institutions, or corporations among whom the donee is given the power to appoint.

(6) The appointees of a power of appointment are those persons, institutions, or corporations to whom property or any right, interest, or estate therein is appointed by the donee.

(7) The takers in default of appointment are those persons, institutions, or corporations who will receive property not effectively appointed.

**Source:** L. 67: R&RE, p. 1072, § 4. C.R.S. 1963: § 107-1-2. L. 2009: (2) repealed, (HB 09-1198), ch. 106, p. 424, § 13, effective January 1, 2010.

#### ANNOTATION

**Vested powers of appointment do not include powers held by fiduciary.** Vested powers of appointment, as defined in this section, do not include those powers held by a fiduciary. In re Estate of Colman, 35 Colo. App. 390, 535 P.2d 227 (1975), aff'd, 191 Colo. 242, 552 P.2d 1 (1976).

**Valid exercise of power of appointment depends on manner exercised.** The question of

whether a power of appointment has been validly exercised depends not on the intent of the donee of the power, but on whether the power was exercised in the manner prescribed by the donor. Thompson v. Smith, 41 Colo. App. 366, 585 P.2d 319 (1978).

**15-2-103. Powers of appointment classified.** (1) A general power of appointment is a power of appointment which is exercisable in favor of the donee, his estate, his creditors, or the creditors of his estate.

(2) A special power of appointment is any power of appointment which is not a general power of appointment.

(3) A power of appointment by will is any power of appointment which, being created or reserved in an individual, may be exercised by the donee only by will or by other instrument which by its terms or by law takes effect only at death.

(4) A power of appointment by deed is any power of appointment which is not a power of appointment by will.

**Source:** L. 67: R&RE, p. 1073, § 4. C.R.S. 1963: § 107-1-3.

**15-2-104. Vested and contingent powers of appointment distinguished.** (1) A power of appointment is vested:

(a) When, at or after its creation, the donee has or obtains a present right to exercise such power by deed or by will, which present right may not be divested or defeated by the occurrence or nonoccurrence of any contingency, condition, or event; or

(b) When, at or after its creation, the donee has a present right to exercise such power, which exercise would become effective only after the termination of other rights, interests, or estates in the property subject to such power, and the donee's present right to exercise such power may not thereafter be divested or defeated by the occurrence or nonoccurrence of any contingency, condition, or event.

(2) All powers of appointment not vested are contingent.

**Source:** L. 67: R&RE, p. 1073, § 4. C.R.S. 1963: § 107-1-4.

#### ANNOTATION

**Applied** in In re Estate of Colman, 191 Colo. 242, 552 P.2d 1 (1976).



**15-2-105. Power may be created.** Any power of appointment may be created or reserved, whether or not the donee of such power is granted or possesses any other right, interest, or estate in the property subject to the power of appointment created or reserved in him.

**Source:** L. 67: R&RE, p. 1073, § 4. C.R.S. 1963: § 107-1-5.

## PART 2

### RELEASE OF POWERS OF APPOINTMENT

**15-2-201. Legislative declaration.** It is the policy of the state of Colorado to authorize and permit the release, disclaimer, or renunciation of powers of appointment as defined in this part 2.

**Source:** L. 67: R&RE, p. 1073, § 4. C.R.S. 1963: § 107-2-1.

**15-2-202. Power may be released.** A power of appointment, whether or not existing on July 1, 1967, may be released, wholly or partially, by the donee thereof, or his or her attorney-in-fact or agent acting under a power of attorney in accordance with part 7 of article 14 of this title. As used in this part 2, the term "release" includes a disclaimer or a renunciation of a power of appointment.

**Source:** L. 67: R&RE, p. 1074, § 4. C.R.S. 1963: § 107-2-2. L. 94: Entire section amended, p. 1036, § 4, effective July 1, 1995. L. 2009: Entire section amended, (HB 09-1198), ch. 106, p. 419, § 2, effective January 1, 2010.

**15-2-203. How power released.** A power releasable according to section 15-2-202 may be released, wholly or partially, by the donee of the power or his or her attorney-in-fact or agent acting under a power of attorney in accordance with part 7 of article 14 of this title, to any person who could be adversely affected by the exercise of the power or, in the case of a power created by will, by the filing of a written release in the district or probate court in which such will was proved or allowed; but, wherever property subject to the power is then held in trust, a written release must also be delivered to the trustee holding such property. The execution of a partial release of a power shall not prevent the execution and delivery of further partial releases from time to time nor prevent the later execution and delivery of an instrument wholly releasing such power.

**Source:** L. 67: R&RE, p. 1074, § 4. C.R.S. 1963: § 107-2-3. L. 94: Entire section amended, p. 1036, § 5, effective July 1, 1995. L. 2009: Entire section amended, (HB 09-1198), ch. 106, p. 419, § 3, effective January 1, 2010.

**15-2-204. Effect of release.** A release executed by the donee of a power releasable according to section 15-2-202 and delivered or filed in accordance with section 15-2-203 shall be effective to release the power to the extent provided in such release.

**Source:** L. 67: R&RE, p. 1074, § 4. C.R.S. 1963: § 107-2-4.

**15-2-205. Release by one of two or more.** If a power of appointment releasable according to section 15-2-202 is or may be exercisable by two or more persons in conjunction with one another or successively, a release of the power, in whole or in part, executed and delivered or filed, in accordance with section 15-2-203, by any one of the donees of the power, subject to the provisions of section 15-2-203, shall be effective to release, to the extent therein provided, all right of such person to exercise, or to participate

in the exercise of, the power but, unless the instrument creating the power otherwise provides, shall not prevent or limit the exercise or participation in the exercise thereof by the other donee or donees thereof.

**Source:** L. 67: R&RE, p. 1074, § 4. C.R.S. 1963: § 107-2-5.

**15-2-206. What “release” includes.** The word “release”, as used in sections 15-2-203 to 15-2-205, includes an instrument wherein the person who executes it in substance states that he wholly releases, or agrees in no respect to exercise or participate in the exercise of, a power of appointment and an instrument wherein the person who executes it in substance states that he releases all right to exercise, or participate in the exercise of, a power of appointment otherwise than within limits defined in such instrument or agrees not to exercise, or participate in the exercise of, a power of appointment otherwise than within limits therein defined.

**Source:** L. 67: R&RE, p. 1074, § 4. C.R.S. 1963: § 107-2-6.

**15-2-207. Part 2 not exclusive.** The rights and means provided for in this part 2 for the release of a power are not exclusive but are in addition to all other rights and means of a donee to release a power in whole or in part, and nothing in this statute contained shall prevent the release in any lawful manner of any releasable power of appointment.

**Source:** L. 67: R&RE, p. 1074, § 4. C.R.S. 1963: § 107-2-7.

**15-2-208. Not a taxable transfer. (Repealed)**

**Source:** L. 67: R&RE, p. 1074, § 4. C.R.S. 1963: § 107-2-8. L. 2003: Entire section repealed, p. 1989, § 27, effective May 22.

**15-2-209. Inheritance tax law not affected. (Repealed)**

**Source:** L. 67: R&RE, p. 1074, § 4. C.R.S. 1963: § 107-2-9. L. 2002: Entire section repealed, p. 1360, § 9, effective July 1.

### PART 3

#### EXERCISE OF POWERS OF APPOINTMENT

**15-2-301. Extent of exercise.** Unless the instrument creating a power of appointment expressly limits the right, interest, or estate which can be appointed by exercise of that power, a donee of a power, or his or her attorney-in-fact or agent acting under a power of attorney in accordance with part 7 of article 14 of this title, may exercise such power to pass to the appointee a fee or any lesser estate, interest, or a power of appointment or to pass the property subject to the power to a trustee for the benefit of one or more of the objects of the power of appointment.

**Source:** L. 67: R&RE, p. 1075, § 4. C.R.S. 1963: § 107-3-1. L. 94: Entire section amended, p. 1036, § 6, effective July 1, 1995. L. 2009: Entire section amended, (HB 09-1198), ch. 106, p. 419, § 4, effective January 1, 2010.

**15-2-302. Partial exercise permissive.** An exercise of a power of appointment shall be valid to the extent exercised, even though exercised in any respect to an extent less than that permitted by the terms of the instrument by which it was created.

**Source:** L. 67: R&RE, p. 1075, § 4. C.R.S. 1963: § 107-3-2.



**15-2-303. Not exercised by residuary clause.** The provisions of the residuary clause of the will of the donee of a power may or may not exercise a power in accordance with section 15-11-608.

**Source:** L. 67: R&RE, p. 1075, § 4. C.R.S. 1963: § 107-3-3. L. 94: Entire section amended, p. 1037, § 7, effective July 1, 1995.

ANNOTATION

**This section does not prevent the exercise of a power of appointment under the residuary clause** in a will where the intent to exercise the power clearly appears. *Johnson v. Shriver*, 121 Colo. 397, 216 P.2d 653 (1950) (decided under repealed CSA C. 128 A, § 8).

COLORADO PROBATE CODE

**Editor’s note:** (1) Articles 10 to 17 of this title were numbered as articles 1 to 8 of chapter 153, C.R.S. 1963. The substantive provisions of these articles were repealed and reenacted in 1973, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to these articles prior to 1973, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume. For a detailed comparison of these articles, see the comparative tables located in the back of the index.

(2) Articles 10 to 17 of this title, the Colorado Probate Code, are an adaptation of the Uniform Probate Code with some additions, deletions, and changes. The comments appearing with the Uniform Probate Code located on the National Conference of Commissioners on Uniform State Laws web site would be helpful in understanding certain sections of this code.

**Cross references:** For dead man’s statute, see § 13-90-102; for investment of estate funds, see part 3 of article 1 of this title; for investment of veterans’ estate funds, see § 28-5-301; for estate income tax, see § 39-22-104; for rule against perpetuities nullified as to designated trust, see §§ 38-30-110 to 38-30-114; for motor vehicle title by bequest or inheritance, see § 42-6-114; for uniform veterans’ guardianship law, see part 2 of article 5 of title 28; for powers of appointment as affecting wills and estates, see article 2 of this title; for witnesses, see part 1 of article 90 of title 13; for the Colorado estate tax, see article 23.5 of title 39.

ARTICLE 10

General Provisions, Definitions,  
Jurisdiction

**Law reviews:** For article, “The Revocable Living Trust Revisited”, see 18 Colo. Law. 225 (1989); for article, “Twenty-Six Reasons for Caution in Using Revocable Trusts”, see 21 Colo. Law. 1131 (1992).

PART 1		15-10-108.	Acts by holder of general power.
SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS		15-10-109.	Remarriage of absentee’s spouse.
		15-10-110.	Insurance and other contracts - surrender value - effect of contract provisions - suit on claim of death.
15-10-101.	Short title.	15-10-111.	Entry into safe deposit box of decedent - definitions.
15-10-102.	Purposes - rule of construction:	15-10-112.	Cost of living adjustment of certain dollar amounts.
15-10-103.	Supplementary general principles of law applicable.		
15-10-104.	Severability.		
15-10-105.	Construction against implied repeal.		
15-10-106.	Effect of fraud and evasion.		
15-10-106.5.	Petition to determine cause and date of death resulting from disaster - body unidentifiable or missing.		
15-10-107.	Evidence of death or status.		
			PART 2
			DEFINITIONS
		15-10-201.	General definitions.

## PART 3

## SCOPE, JURISDICTION, AND COURTS

- 15-10-301. Territorial application.
- 15-10-302. Subject matter jurisdiction.
- 15-10-303. Venue - multiple proceedings - transfer.
- 15-10-304. Practice in court.
- 15-10-305. Records and certified copies.
- 15-10-306. Jury trial.
- 15-10-307. Registrar - powers.
- 15-10-308. Appeals.
- 15-10-309. (Reserved)
- 15-10-310. Oath or affirmation on filed document.

## PART 4

NOTICE, PARTIES, AND  
REPRESENTATION IN ESTATE  
LITIGATION AND OTHER MATTERS

- 15-10-401. Notice - method and time of giving.
- 15-10-402. Notice - waiver.
- 15-10-403. Pleadings - when parties bound by others - notice.

## PART 1

## SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

**15-10-101. Short title.** Articles 10 to 17 of this title shall be known and may be cited as the "Colorado Probate Code" and is referred to in said articles as "this code" or "code".

**Source:** L. 73: R&RE, p. 1538, § 1. C.R.S. 1963: § 153-1-101.

## ANNOTATION

**Law reviews.** For article, "New Probate Code for Colorado", see 13 Rocky Mt. L. Rev. 85 (1941). For article, "Check Lists for Court Proceedings in Which Titles to Real Estate Are Involved", see 23 Rocky Mt. L. Rev. 371 (1951). For article, "Some Suggested Changes in the Colorado Statutes Concerning Wills and Estates", see 29 Rocky Mt. L. Rev. 595 (1957). For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969). For article, "Fam-

## PART 5

FIDUCIARY OVERSIGHT, REMOVAL,  
SANCTIONS, AND CONTEMPT

- 15-10-501. Court powers - definitions - application.
- 15-10-502. Initial investigation.
- 15-10-503. Power of a court to address the conduct of a fiduciary - emergencies - nonemergencies.
- 15-10-504. Surcharge - contempt - sanctions against fiduciaries.
- 15-10-505. Notice to fiduciary - current address on file.

## PART 6

## COMPENSATION AND COST RECOVERY

- 15-10-601. Definitions.
- 15-10-602. Recovery of reasonable compensation and costs.
- 15-10-603. Factors in determining the reasonableness of compensation and costs.
- 15-10-604. Fee disputes - process and procedure.
- 15-10-605. Compensation and costs - assessment - limitations.
- 15-10-606. Applicability.

ily Protection Under the Uniform Probate Code", see 50 Den. L.J. 137 (1973). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "The Life Beneficiary — Trustee", see 12 Colo. Law. 52 (1983). For article, "Uniform State Laws of Interest to Colorado Probate Lawyers", see 14 Colo. Law. 1961 (1985). For article, "Decedents' Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986).

**Applied** in Bohl v. Haney, 671 P.2d 991 (Colo. App. 1983).

**15-10-102. Purposes - rule of construction.** (1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

(a) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;



(b) To discover and make effective the intent of a decedent in distribution of his property;

(c) To promote a speedy and efficient system for settling the estate of the decedent and making distribution to his successors;

(d) To facilitate use and enforcement of certain trusts;

(d.1) To promote a speedy and efficient system for managing and protecting the estates of protected persons so that assets may be preserved for application to the needs of protected persons and their dependents;

(d.2) To provide a system of general and limited guardianships for minors and incapacitated persons and to coordinate guardianships and protective proceedings concerned with management and protection of the estates of incapacitated persons;

(e) To make uniform the law among the various jurisdictions.

**Source:** L. 73: R&RE, p. 1538, § 1. C.R.S. 1963: § 153-1-102. L. 88: (2)(d.1) and (2)(d.2) added, p. 649, § 1, effective July 1.

#### ANNOTATION

**Applied** in *In re Estate of Daigle*, 634 P.2d 71 (Colo. 1981); *Strong Bros. Enters. v. Estate of Strong*, 666 P.2d 1109 (Colo. App. 1983); *In re Estate of Shuler*, 981 P.2d 1109 (Colo. App. 1999).

**15-10-103. Supplementary general principles of law applicable.** Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions.

**Source:** L. 73: R&RE, p. 1539, § 1. C.R.S. 1963: § 153-1-103.

**15-10-104. Severability.** If any provision of this code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

**Source:** L. 73: R&RE, p. 1539, § 1. C.R.S. 1963: § 153-1-104.

**15-10-105. Construction against implied repeal.** This code is a general act intended as a unified coverage of its subject matter, and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

**Source:** L. 73: R&RE, p. 1539, § 1. C.R.S. 1963: § 153-1-105.

**15-10-106. Effect of fraud and evasion.** Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this code or if fraud is used to avoid or circumvent the provisions or purposes of this code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not. Any proceeding must be commenced within five years after the discovery of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

**Source:** L. 73: R&RE, p. 1539, § 1. C.R.S. 1963: § 153-1-106.

## ANNOTATION

Because this section provides an adequate legal remedy for plaintiff's claim that her son fraudulently induced her into not contesting her husband's will, the statute of limitations in § 15-12-108 is not subject to equitable tolling. In re Estate of Kubby, 929 P.2d 55 (Colo. App. 1996).

In the city and county of Denver, the jurisdiction for a claim of fraud lies only with the probate court and district court properly determined that it lacked jurisdiction in this matter. Pound v. Fletter, 39 P.3d 1241 (Colo. App. 2001).

**15-10-106.5. Petition to determine cause and date of death resulting from disaster - body unidentifiable or missing.** (1) If the occurrence of a disaster has been declared by proclamation of the governor under section 24-32-2104, C.R.S., and it appears that a person has died as a direct result, but the remains have not been located or are unidentifiable, the coroner, sheriff, or district attorney for the county in which any part of such disaster occurred, the spouse, next of kin, or public administrator for such county, or, thirty days after the disaster was declared, any other person, may apply to the coroner of such county asking that the coroner determine the cause, manner, and date of death of the alleged decedent.

(2) (a) Such application shall contain the facts and circumstances concerning the disaster, the reasons for the belief that the alleged decedent perished, a statement that the alleged decedent's remains have not been located or are unidentifiable, and the names and addresses of all persons known or believed to be heirs at law of the alleged decedent.

(b) The application shall contain an affidavit in which the applicant states the following information to the extent of the applicant's personal knowledge, information, and belief:

- (I) The full name of the alleged decedent;
- (II) The alleged decedent's residential address, including city, county, and zip code;
- (III) The alleged decedent's date and place of birth;
- (IV) The alleged decedent's sex, race, ethnicity, and social security number;
- (V) The full names of the alleged decedent's parents and the mother's maiden name;
- (VI) The applicant's name, address, telephone number, and relationship to the alleged decedent;
- (VII) The identification number of any missing person report filed concerning the alleged decedent;
- (VIII) The date and time of the applicant's last contact with the alleged decedent and a description of that contact;
- (IX) The basis for the belief that the alleged decedent was physically present at the time and place of an occurrence declared under section 24-32-2104, C.R.S.;
- (X) A description of the efforts undertaken by the applicant, and efforts the applicant knows others to have undertaken, to locate or identify the alleged decedent;
- (XI) Whether the alleged decedent served in the armed forces of the United States and, if so, the branch and dates of service;
- (XII) If the alleged decedent was employed, the name of the alleged decedent's employer and the employer's address and telephone number; and
- (XIII) The alleged decedent's marital status, the name of spouse, and wife's maiden name, if applicable.

(c) The applicant shall pay an application fee of twenty-five dollars when filing the application.

(d) The coroner shall assign an application number to the application.

(3) If the coroner finds sufficient evidence that a disaster occurred and that the alleged decedent named in the application may be presumed to have died, then the coroner shall issue a certificate of death under this section.

(4) A certified copy of an order issued pursuant to subsection (7) of this section shall be sufficient when presented to the coroner or other person acting in place of the coroner for the issuance of a certificate of death under this section.

(5) An application for the finding of death under this section shall not be filed later than five years following the initial proclamation of the disaster.



(6) This section shall apply only under the circumstances specified in subsection (1) of this section. In all other cases and if the coroner finds the evidence insufficient to support the issuance of a death certification, the provisions of section 15-10-107 with respect to determination of death and status apply.

(7) If the coroner denies or fails to act within thirty days on an application that complies with subsection (2) of this section, the applicant may file a petition, in the district court for the county in which any part of the disaster occurred or in the Denver probate court if any part of the disaster occurred in the city and county of Denver, for an expedited determination of death in accordance with this section. If the court determines the alleged decedent died, a certified copy of the court's order shall constitute sufficient evidence for the coroner under subsection (4) of this section.

**Source:** **L. 77:** Entire section added, p. 838, § 1, effective July 1. **L. 83:** (1) amended, p. 964, § 1, effective July 1, 1984. **L. 92:** (1) amended, p. 1042, § 6, effective March 12. **L. 2004:** Entire section amended, p. 624, § 1, effective August 4.

**15-10-107. Evidence of death or status.** (1) In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a court determination of death and status apply:

(a) Death occurs when an individual is determined dead under section 12-36-136, C.R.S.

(b) An authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie evidence of the fact, place, date, and time of death and the identity of the decedent.

(c) An authenticated copy of any record or report of a governmental agency, domestic or foreign, that an individual is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

(d) In the absence of prima facie evidence of death under paragraph (b) or (c) of this subsection (1), the fact of death shall be established by clear and convincing evidence, including circumstantial evidence.

(e) An individual whose death is not established under paragraphs (a) to (d) of this subsection (1) or under section 15-10-106.5 who is absent for a continuous period of five years, during which he or she has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His or her death is presumed to have occurred at the end of the period unless there is sufficient evidence, including, without limitation, a determination under section 15-10-106.5 that death occurred earlier.

(f) In the absence of evidence disputing the time of death stated on a document described in paragraph (b) or (c) of this subsection (1), a document described in paragraph (b) or (c) of this subsection (1) that states a time of death one hundred twenty hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by one hundred twenty hours.

(2) In the event that the fact of death of an absentee is entered in any action brought before a finding of death is entered in a formal testacy proceeding under this code, the finding relating to death of the absentee in such action shall not be determinative of any finding to be made in any proceeding under this code.

**Source:** **L. 73:** R&RE, p. 1539, § 1. **C.R.S. 1963:** § 153-1-107. **L. 94:** Entire section R&RE, p. 969, § 1, effective July 1, 1995. **L. 2004:** IP(1) and (1)(e) amended, p. 626, § 2, effective August 4.

#### ANNOTATION

**Law reviews.** For article, "Decedent's Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986).

**15-10-108. Acts by holder of general power.** For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all coholders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent that their interests (as objects, takers in default, or otherwise) are subject to the power.

**Source:** L. 73: R&RE, p. 1540, § 1. C.R.S. 1963: § 153-1-108.

**15-10-109. Remarriage of absentee's spouse.** (1) At any time after a finding of death of an absentee in a formal testacy proceeding under this code, the spouse of an absentee may remarry, and:

(a) Such subsequent marriage shall not constitute the offense of bigamy or any other criminal offense under the laws of this state, even though the absentee shall later be determined to be alive; and

(b) Upon such subsequent marriage, the marriage between the absentee and his said spouse shall be deemed to have been dissolved as of the date of the absentee's death as determined in accordance with section 15-10-107.

**Source:** L. 73: R&RE, p. 1540, § 1. C.R.S. 1963: § 153-1-109.

**15-10-110. Insurance and other contracts - surrender value - effect of contract provisions - suit on claim of death.** (1) A finding of death in a formal testacy proceeding under this code shall be fully effective as to rights under insurance, annuity, and endowment contracts dependent upon the life of an absentee, and the receipts of beneficiaries for payments made under any such contracts shall be a release to the contract issuer of all claims under such contracts.

(2) If, in any proceeding under this code, the absentee is not found to be deceased and any policy of insurance or any annuity or endowment contract owned by the absentee provides for a surrender value, the conservator, acting for the insured, with court approval and a finding of necessity, may demand the payment of surrender value to the estate of the absentee. The receipt of the conservator for such payment shall be a release to the contract issuer of all claims under the contract.

(3) Notwithstanding the provisions in any annuity or endowment contract or policy of life or accident insurance or in the charter or bylaws of any mutual or fraternal insurance association hereafter executed or adopted, the provisions of this section shall govern the effect to be given to evidence of absence or of death.

(4) When any annuity or endowment contract, any policy of life or accident insurance, or the charter or bylaws of any mutual or fraternal insurance association hereafter executed or adopted contains a provision requiring a beneficiary to bring suit upon a claim of death within a stated period after the death of the insured and the fact of the absence of the insured is relied upon by the beneficiary as evidence of the death, the action may be begun, notwithstanding such provision in the contract, policy, charter, or bylaws, at any time within the statutory period of limitation for actions on contracts in writing dating from the date of death of the absentee, as determined in a formal testacy proceeding under this code.

**Source:** L. 73: R&RE, p. 1540, § 1. C.R.S. 1963: § 153-1-110.

**15-10-111. Entry into safe deposit box of decedent - definitions.** (1) (a) Whenever a decedent at the time of his or her death was a sole or joint lessee of a safe deposit box, the custodian shall, prior to notice that a personal representative or special administrator has been appointed, allow access to the box by:

(I) A successor of the decedent, if such decedent was the sole lessee of the box, upon presentation of an affidavit made pursuant to section 15-12-1201 for the purpose of delivering the contents of the box in accordance with said section; or



(II) A person who is reasonably believed to be an heir at law or devisee of the decedent, a person nominated as a personal representative pursuant to the provisions of section 15-12-203 (1) (a), or the agent or attorney of such person for the purpose of determining whether the box contains an instrument that appears to be a will of the decedent, deed to a burial plot, or burial instructions.

(b) If a person described in subparagraph (I) or (II) of paragraph (a) of this subsection (1) desires access to a safe deposit box but does not possess a key to the box, the custodian shall drill the safe deposit box at the person's expense. In the case of a person described in subparagraph (I) of paragraph (a) of this subsection (1), the custodian shall deliver the contents of the box, other than a purported will, deed to a burial plot, and burial instructions, to the person in accordance with section 15-12-1201. In the case of a person described in subparagraph (II) of paragraph (a) of this subsection (1), the custodian shall retain, in a secure location at the person's expense, the contents of the box other than a purported will, deed to a burial plot, and burial instructions. A custodian shall deliver a purported will as described in paragraph (c) of subsection (2) of this section. A deed to a burial plot and burial instructions that are not part of a purported will may be removed by a person described in subparagraph (I) of paragraph (a) of this subsection (1) pursuant to paragraph (d) of subsection (2) of this section, and the custodian shall not prevent the removal. Expenses incurred by a custodian pursuant to this section shall be considered an estate administration expense.

(c) A representative of the custodian shall be present during the entry of a safe deposit box pursuant to this section.

(1.3) Nothing in this section affects the rights and responsibilities of a public administrator, as described in sections 15-12-620 and 15-12-621.

(1.5) As used in this section, unless the context otherwise requires:

(a) "Custodian" means a bank, savings and loan association, credit union, or other institution acting as a lessor of a safe deposit box, as defined in section 11-46-101, C.R.S., or section 11-101-401, C.R.S.

(b) "Representative of a custodian" means an authorized officer or employee of a custodian.

(2) (a) If an instrument purporting to be a will is found in a safe deposit box as the result of an entry pursuant to subsection (1) of this section, the purported will shall be removed by the representative of the custodian.

(b) At the request of the person or persons authorized to have access to the safe deposit box under the provisions of subsection (1) of this section, the representative of the custodian shall copy each purported will of the decedent, at the expense of the requesting person, and shall deliver the copy of each purported will to the person, or if directed by the person, to the person's agent or attorney. In copying any purported will, the representative of the custodian shall not remove any staples or other fastening devices or disassemble the purported will in any way.

(c) The custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the clerk of the district or probate court of the county in which the decedent was a resident. If the custodian is unable to determine the county of residence of the decedent, the custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the office of the clerk of the proper court of the county in which the safe deposit box is located.

(d) If the safe deposit box contains a deed to a burial plot or burial instructions that are not a part of a purported will, the person or persons authorized to have access to the safe deposit box under the provisions of subsection (1) of this section may remove these instruments.

(3) After the appointment of a personal representative or special administrator for the decedent, the personal representative or special administrator shall be permitted to enter the safe deposit box upon the same terms and conditions as the decedent was permitted to enter during his or her lifetime.

(4) If at the time of the decedent's death one or more other persons were legally permitted to enter the safe deposit box, their permission to enter shall continue, notwithstanding the death of the decedent.

(5) A custodian shall not be liable to a person for an action taken pursuant to this section or for a failure to act in accordance with the requirements of this section unless the action or failure to act is shown to have resulted from the custodian's bad faith, gross negligence, or intentional misconduct.

**Source:** **L. 73:** R&RE, p. 1540, § 1. **C.R.S. 1963:** § 153-1-111. **L. 75:** (1) amended, p. 588, § 8, effective July 1. **L. 77:** (1) amended, p. 840, § 1, effective July 1. **L. 80:** Entire section R&RE, p. 522, § 1, effective July 1. **L. 2007:** Entire section amended, p. 124, § 1, effective July 1. **L. 2009:** (1)(b) and (2)(b) amended, (HB 09-1241), ch. 169, p. 760, § 15, effective April 22.

**Editor's note:** The provisions of subsection (1) as amended by House Bill 07-1003, including subsection (1) (e) renumbered to subsection (1.3), and the paragraphs in subsection (2) as amended by House Bill 07-1003 have been renumbered on revision to conform to standard C.R.S. format.

**15-10-112. Cost of living adjustment of certain dollar amounts.** (1) As used in this section, unless the context otherwise requires:

(a) "CPI" means the consumer price index (annual average) for all urban consumers (CPI-U): United States city average — all items, reported by the bureau of labor statistics, United States department of labor or its successor agency or, if the index is discontinued, an equivalent index reported by a federal authority. If no such index is reported, the term means the substitute index chosen by the department of revenue; and

(b) "Reference base index" means the CPI for the calendar year 2010.

(2) The dollar amounts stated in sections 15-11-102, 15-11-201 (2), 15-11-403, 15-11-405, and 15-12-1201 apply to the estate of a decedent who died during or after 2010, but for the estate of a decedent who died after 2011, these dollar amounts must be increased or decreased if the CPI for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. The amount of any increase or decrease is computed by multiplying each dollar amount by the percentage by which the CPI for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. If the amount of the increase or decrease produced by the computation is not a multiple of one thousand dollars, then the amount of the increase or decrease is rounded down if it is an increase, or rounded up if it is a decrease, to the next multiple of one thousand dollars, but for the purpose of section 15-11-405, the periodic installment amount is the lump-sum amount divided by twelve. If the CPI for 2010 is changed by the bureau of labor statistics, the reference base index must be revised using the rebasing factor reported by the bureau of labor statistics, or other comparable data if a rebasing factor is not reported.

(3) Before February 1, 2012, and before February 1 of each succeeding year, the department of revenue shall publish a cumulative list, beginning with the dollar amounts effective for the estate of a decedent who died in 2012 of each dollar amount as increased or decreased under this section.

**Source:** **L. 2009:** Entire section added, (HB 09-1287), ch. 310, p. 1670, § 1, effective July 1, 2010. **L. 2010:** (1)(b), (2), and (3) amended, (SB 10-199), ch. 374, p. 1747, § 2, effective July 1.

**Editor's note:** (1) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act adding this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.



(2) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsections (1)(b), (2), and (3):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

### **Automatic Adjustments for Inflation.**

Added in 2008, Section 1-109 operates in conjunction with the inflation adjustments of the dollar amounts listed in subsection (b) also adopted in 2008. Section 1-109 was added to make it unnecessary in the future for the ULC or individual enacting states to continue to amend the UPC periodically to adjust the dollar amounts for inflation. This section provides for an automatic adjustment of each of the above dollar amounts annually.

In each January, the Bureau of Labor Statistics of the U.S. Department of Labor reports the CPI (annual average) for the preceding calendar

year. The information can be obtained by telephone (202/691-5200) or on the Bureau's website.

Subsection (c) tasks an appropriate state agency, such as the Department of Revenue, to issue an official cumulative list of the adjusted amounts beginning in January of the year after the effective date of the act. This subsection is bracketed because some enacting states might not have a state agency that could appropriately be assigned the task of issuing updated amounts. Such an enacting state might consider tasking the state supreme court to issue a court rule each year making the appropriate adjustment.

## PART 2

## DEFINITIONS

**15-10-201. General definitions.** Subject to additional definitions contained in the subsequent articles that are applicable to specific articles, parts, or sections, and unless the context otherwise requires, in this code:

(1) "Agent" means an attorney in fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under the "Colorado Patient Autonomy Act".

(2) "Application" means a written request to the registrar for an order of informal probate or appointment under part 3 of article 12 of this title.

(3) "Augmented estate" means the estate described in section 15-11-202.

(4) "Authenticated" means certified, when used in reference to copies of official documents, and only certification by the official having custody is required.

(5) "Beneficiary", as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary designation", includes a beneficiary of an insurance or annuity policy, of an account with payment on death (POD) designation, of a security registered in beneficiary form (TOD), or of a pension, profit sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument", includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, and a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

(6) "Beneficiary designation" means a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered

in the beneficiary form (TOD), or of a pension, profit sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

(7) "Child" includes an individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(8) "Claims", in respect to the estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or taxes due the state of Colorado, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(9) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(10) "Court" means the court or division thereof having jurisdiction in matters relating to the affairs of decedents and protected persons. This court is the district court, except in the city and county of Denver where it is the probate court.

(11) "Descendant" means all of the individual's lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code.

(12) "Devise", when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

(13) "Devisee" means a person designated in a will to receive a devise. For the purposes of article 12 of this title, in the case of a devise to an existing trust or trustee, or to a trustee in trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(14) "Disability" means cause for a protective order as described in section 15-14-401.

(15) "Distributee" means any person who has received property of a decedent from his or her personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his or her hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(16) "Divorce" includes a dissolution of marriage, and "annulment" includes a declaration of invalidity, as such terms are used in the "Uniform Dissolution of Marriage Act", article 10 of title 14, C.R.S.

(16.5) "Domiciliary foreign personal representative" means a personal representative appointed by another jurisdiction in which the decedent was domiciled at the time of the decedent's death.

(17) "Estate" means the property of the decedent, trust, or other person whose affairs are subject to this code as originally constituted and as it exists from time to time during administration.

(18) "Exempt property" means that property of a decedent's estate which is described in section 15-11-403.

(19) "Fiduciary" includes a personal representative, guardian, conservator, and trustee.

(20) "Foreign personal representative" means a personal representative appointed by another jurisdiction.

(21) "Formal proceedings" means proceedings conducted before a judge with notice to interested persons.

(22) "Governing instrument" means a deed, will, trust, insurance or annuity policy, multiple-party account, security registered in beneficiary form (TOD), pension, profit sharing, retirement or similar benefit plan, instrument creating or exercising a power of appointment or power of attorney, or a donative, appointive, or nominative instrument of any other type.



(23) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(24) "Heirs", except as controlled by section 15-11-711, means persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(25) "Incapacitated person" means an individual described in section 15-14-102 (5).

(26) "Informal proceedings" means those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will, appointment of a personal representative, or determination of a guardian under sections 15-14-202 and 15-14-301.

(27) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person, which may be affected by the proceeding. It also includes persons having priority for an appointment as a personal representative and other fiduciaries representing the interested person. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

(28) "Issue" of a person means descendant as defined in subsection (11) of this section.

(29) "Joint tenants with right of survivorship" and "community property with the right of survivorship" for the purposes of this code only includes co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

(30) "Lease" includes an oil, gas, or other mineral lease.

(31) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(32) "Minor" means a person who is under eighteen years of age.

(33) "Mortgage" means any conveyance, agreement, or arrangement in which the property is used as security.

(34) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his or her death.

(35) "Organization" means a corporation, business trust, estate, trust, partnership, joint venture, limited liability company, association, government or governmental subdivision or agency, or any other legal or commercial entity.

(36) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(37) "Payor" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(38) "Person" means an individual or an organization.

(39) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(40) "Petition" means a written request to the court for an order after notice.

(41) "Proceeding" includes action at law and suit in equity.

(42) "Property" means both real and personal property or any interest therein and anything that may be the subject of ownership.

(43) "Protected person" has the same meaning as set forth in section 15-14-102 (11).

(44) "Protective proceeding" has the same meaning as used in section 15-14-401.

(44.5) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(45) "Registrar" refers to the official of the court designated to perform the functions of registrar as provided in section 15-10-307.

(46) "Security" includes any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; collateral trust certificate; transferable share; voting trust certificate; or, in general, any interest or instrument commonly known as security; any certificate of interest or participation; any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the items enumerated in this subsection (46).

(47) "Settlement", in reference to a decedent's estate, means the full process of administration, distribution, and closing.

(47.5) "Sign" means, with present intent to authenticate or adopt a record other than a will:

(a) To execute or adopt a tangible symbol; or

(b) To attach to or logically associate with the record an electronic symbol, sound, or process.

(48) "Special administrator" means a personal representative as described by sections 15-12-614 to 15-12-618.

(49) "State" means any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, and any territory or insular possession subject to the jurisdiction of the United States.

(50) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(51) "Successors" means persons other than creditors, who are entitled to property of a decedent under his or her will or this code.

(52) "Supervised administration" means the proceedings described in part 5 of article 12 of this title.

(53) "Survive" means that an individual has neither predeceased an event, including the death of another individual, nor is deemed to have predeceased an event under section 15-11-104, 15-11-702, or 15-11-712. The term includes its derivatives, such as "survives", "survived", "survivor", and "surviving".

(54) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(55) "Testator" includes an individual of either sex.

(56) "Trust" includes an express trust, private or charitable, with additions thereto, wherever and however created and any amendments to such trusts. "Trust" also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts and excludes resulting trusts; conservatorships; personal representatives; accounts as defined in section 15-15-201 (1); custodial arrangements pursuant to the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.; business trusts providing for certificates to be issued to beneficiaries; common trust funds; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another.

(57) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(58) "Ward" means an individual described in section 15-14-102 (15).

(59) "Will" includes any codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession. "Will" does not include a designated beneficiary agreement that is executed pursuant to article 22 of this title.

**Source:** L. 73: R&RE, p. 1541, § 1. C.R.S. 1963: § 153-1-201. L. 74: (27) amended, p. 422, § 74, effective April 11. L. 75: (1) amended, p. 589, § 9, effective July 1. L. 84: (48) amended, p. 394, § 6, effective July 1. L. 90: (48) amended, p. 921, § 5, effective July 1. L. 94: Entire section R&RE, p. 970, § 2, effective July 1, 1995. L. 95: (11) amended,



p. 362, § 16, effective July 1. **L. 2000:** (25), (26), (43), (44), and (58) amended, p. 1833, § 8, effective January 1, 2001. **L. 2006:** (16.5) added, p. 391, § 24, effective July 1. **L. 2009:** (44.5) and (47.5) added, (HB 09-1287), ch. 310, p. 1671, § 2, effective July 1, 2010. **L. 2010:** (59) amended, (SB 10-199), ch. 374, p. 1748, § 3, effective July 1.

**Editor's note:** (1) This section was repealed and reenacted in 1994, resulting in the relocation of provisions. For a detailed comparison of this section for 1994, see the comparative tables located in the back of the index.

(2) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act adding subsections (44.5) and (47.5):

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

(3) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (59):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For age of competence, see § 13-22-101; for the "Colorado Uniform Transfers to Minors Act", see article 50 of title 11.

## ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

**Recorded option to purchase land at death of decedent is not "claim"** against the estate under this section, because it constitutes a demand or dispute regarding title to a specific asset of the estate. *Brown v. Brown*, 43 Colo. App. 535, 608 P.2d 840 (1980).

**Not equitable proceeding to redress breach of contract relating to will.** Since an equitable proceeding to redress a breach of contract relating to a will is not in the nature of a demand which would reduce the size of the estate, such an action involves a dispute as to the ownership of the decedent's property and is not a "claim" against the estate. Thus, the nonclaims statute, § 15-12-803, does not determine the time within which the action must be started. *Knies v. Gross*, 43 Colo. App. 127, 599 P.2d 976 (1979).

**Potential right of indemnity under insurance policy deemed "property".** A decedent's potential right of indemnity under a liability insurance policy is personal property encompassed within the comprehensive meaning of "property" as defined in subsection (36), justifying the appointment of an administrator and the probate of an estate. *Price v. Sommermeyer*, 195 Colo. 285, 577 P.2d 752 (1978).

**Definition of "claim" is applied** in *Matter of Estate of Musselman*, 784 P.2d 858 (Colo. App. 1989).

**Potential devisee is entitled to notice of hearing during which court will determine validity of will.** If, at time of hearing, the court had yet to determine the validity of the will, and thus the status of the petitioner as an "interested party", the potential devisee must be given notice in order to have the opportunity to meet her burden to prove decedent's intent and overcome any presumption of revocation. In re *Estate of Evarts*, 166 P.3d 161 (Colo. App. 2007).

## PART 3

## SCOPE, JURISDICTION, AND COURTS

**15-10-301. Territorial application.** (1) Except as otherwise provided in this code, this code applies to:

(a) The affairs and estates of decedents, missing persons, and persons to be protected, domiciled in this state;

(b) The property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state;

(c) Incapacitated persons and minors in this state;

(d) Survivorship and related accounts in this state;

(e) Trusts subject to administration in this state; and

(f) Declaration instruments created pursuant to article 19 of this title.

**Source:** L. 73: R&RE, p. 1545, § 1. C.R.S. 1963: § 153-1-301. L. 2003: (1)(f) added, p. 1355, § 2, effective August 6.

## ANNOTATION

**When representative appointed for nonresident decedents.** Personal representatives may be appointed for nonresident decedents only when there is property of the nonresident decedent located in the state. Price v. Sommermeyer, 195 Colo. 285, 577 P.2d 752 (1978).

**When potential indemnity under insurance policy supports letters of administration.** A

potential right of indemnity under a liability insurance policy is sufficient personal property to support letters of administration for a nonresident when the insurance carrier is authorized to transact business in this state. Price v. Sommermeyer, 195 Colo. 285, 577 P.2d 752 (1978).

**15-10-302. Subject matter jurisdiction.** (1) The court has jurisdiction over all subject matter vested by article VI of the state constitution and by articles 1 to 10 of title 13, C.R.S.

(2) The court has full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

**Source:** L. 73: R&RE, p. 1545, § 1. C.R.S. 1963: § 153-1-302.

## ANNOTATION

**Law reviews.** For article, "Probate Jurisdiction for Creditors' Claims", see 29 Colo. Law. 57 (May 2000).

**Specific enumeration of probate court's subject-matter jurisdiction is applicable to all district courts sitting in probate matters.** Lembach v. Lembach, 622 P.2d 606 (Colo. App. 1980).

**Federal district court lacked diversity jurisdiction over will contest since probate exception to diversity jurisdiction applied.** Exception applied because in Colorado a county court has exclusive original jurisdiction over probate matters. Johnson v. Porter, 931 F. Supp. 761 (D. Colo. 1996).

**Probate court has jurisdiction to adjudicate constructive trust issue that arises in con-**

nection with the administration of decedent's estate. Lembach v. Lembach, 622 P.2d 606 (Colo. App. 1980); Mitchem v. First Interstate Bank of Denver, 802 P.2d 1141 (Colo. App. 1990).

**Probate court's jurisdiction in guardianship cases gives probate court the authority to determine related parenting time issues in accordance with § 14-10-129.** People ex rel. A.R.D., 43 P.3d 632 (Colo. App. 2001).

**Court may revoke its orders and reopen proceedings irregularly made.** A probate court may revoke its orders and reopen proceedings with respect to the settlement of estates which have been irregularly made or procured by fraud or mistake. Lembach v. Lembach, 622 P.2d 606 (Colo. App. 1980).



**15-10-303. Venue - multiple proceedings - transfer.** (1) Where a proceeding under this code could be maintained in more than one place in this state, the court in which the proceeding is first commenced has the exclusive right to proceed.

(2) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one court of this state, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(3) If a court finds that in the interest of justice a proceeding or a file should be located in another court of this state, the court making the finding may transfer the proceeding or file to the other court.

**Source:** L. 73: R&RE, p. 1545, § 1. **C.R.S. 1963:** § 153-1-303.

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

**Applied** in *Jenkins v. District Court*, 620 P.2d 721 (Colo. 1980).

**15-10-304. Practice in court.** Unless specifically provided to the contrary in this code or unless inconsistent with its provisions, the Colorado rules of civil procedure including the rules concerning vacation of orders and appellate review govern formal proceedings under this code.

**Source:** L. 73: R&RE, p. 1546, § 1. **C.R.S. 1963:** § 153-1-304.

#### ANNOTATION

**Law reviews.** For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

**Motions to vacate formal testacy orders** are analogous to motions to vacate default judgments under C.R.C.P. 55(c) and 60(b). *Craig v. Rider*, 651 P.2d 397 (Colo. 1982).

**The provisions of C.R.C.P. 54(b) apply to probate proceedings and govern the interlocutory appeal of a probate court order.** In *re Estate of Scott*, 119 P.3d 511 (Colo. App. 2004), *aff'd*, 136 P.3d 892 (Colo. 2006).

**15-10-305. Records and certified copies.** (1) The clerk of each court shall keep for each decedent, ward, protected person, or trust under the court's jurisdiction a record of any document which may be filed with the court under this code, including petitions and applications, demands for notices or bonds, trust registrations, and of any orders or responses relating thereto by the registrar or court, and establish and maintain a system for indexing, filing, or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to probated wills must indicate whether the decedent was domiciled in this state and whether the probate was formal or informal. Certificates relating to letters must show the date of appointment.

(2) All instruments purporting to be the original wills, upon presentation for probate thereof, shall be recorded by the clerk of the court, in a well-bound book, to be provided by him for that purpose, or photographed, microphotographed, or reproduced on film as a permanent record, and shall remain and be preserved in the office of the clerk of the court. Upon admission of such will to probate, such record shall be sufficient, without again recording the same in the records of the clerk of the court.

**Source:** L. 73: R&RE, p. 1546, § 1. **C.R.S. 1963:** § 153-1-305.

**Cross references:** For the recording of wills and decrees affecting land, see § 38-30-153.

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**15-10-306. Jury trial.** (1) If duly demanded, a party is entitled to trial by jury in a formal testacy proceeding and any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

(2) If there is no right to trial by jury under subsection (1) of this section or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

**Source:** L. 73: R&RE, p. 1546, § 1. C.R.S. 1963: § 153-1-306.

#### ANNOTATION

**Law reviews.** For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

**Annotator's notes.** (1) Cases relevant to § 15-10-306 decided prior to its earliest source, § 153-1-306, C.R.S. 1963, have been included in the annotations to this section.

(2) For cases construing the right to jury trial in civil cases, see the annotations following C.R.C.P. 38.

**Under prior law there was no right to trial by jury in probate proceeding.** Stratton v. Rice, 66 Colo. 407, 181 P. 529 (1919); Miller v. O'Brien, 75 Colo. 117, 223 P. 1088 (1924).

**Contestants entitled to jury if prima facie case is made.** Where there is any substantial evidence tending to establish the facts necessary to make out a prima facie case, the contestants

of a will are entitled to have the case submitted to the jury for determination on the merits. In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

**Trial court invades province of jury if it weighs evidence.** Where trial court assumes to weigh the evidence adduced in support of a caveat and to determine what is and what is not credible evidence, it invades the province of the jury. In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

**Action to declare trust invalid not a "formal proceeding"** so as to entitle the trust beneficiaries to a jury trial under this section. Ayres v. King, 665 P.2d 594 (Colo. 1983).

**Applied in** In re Malone v. Colo. Nat'l Bank, 658 P.2d 284 (Colo. App. 1982).

**15-10-307. Registrar - powers.** The acts and orders which this code specifies as performable by the registrar may be performed either by a judge of the court or by a person, including the clerk, designated by the court by a written order filed and recorded in the office of the clerk of the court.

**Source:** L. 73: R&RE, p. 1546, § 1. C.R.S. 1963: § 153-1-307.

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**15-10-308. Appeals.** Appellate review, including the right to appellate review, interlocutory appeal, provisions as to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments, and power of the appellate court, is governed by the Colorado appellate rules.

**Source:** L. 73: R&RE, p. 1546, § 1. C.R.S. 1963: § 153-1-308.



## ANNOTATION

**No guide as to which probate court orders appealable.** The Colorado probate code furnishes no guidance as to the type of probate court orders which may be deemed final for purposes of appeal. In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978).

**The same rules of finality apply in probate cases as in other civil cases.** An order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

**C.R.C.P. 54(b) governs the interlocutory appeal of a probate court order.** In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

**Those probate court orders which are final and appealable must be determined on a case-by-case basis.** The test for finality is whether the order disposes of and is conclusive of the controverted claim for which the proceeding was brought. Estate of Binford v. Gibson, 839 P.2d 508 (Colo. App. 1992).

### 15-10-309. Reserved.

**15-10-310. Oath or affirmation on filed document.** (1) Except as otherwise specifically provided in this code or by rule, every document filed with the court under this code, including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein.

(2) The court shall have jurisdiction over any person, resident or nonresident, who files any document with the court under this code and over any person, resident or nonresident, who executes any such document and who knows or has reason to know that the document will be filed with the court under this code in any proceeding for relief from fraud relating to such a document that may be initiated against such person. Service of process shall be as provided in the Colorado rules of civil procedure.

**Source:** L. 73: R&RE, p. 1546, § 1. C.R.S. 1963: § 153-1-310. L. 77: Entire section amended, p. 831, § 6, effective July 10.

**Cross references:** For service of process, see Rule 4, C.R.C.P.

## PART 4

### NOTICE, PARTIES, AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

**15-10-401. Notice - method and time of giving.** (1) If notice of a hearing on any petition is required, and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing on any petition to be given to any interested person or to the interested person's attorney of record or the interested person's designee. Notice shall be given:

A party may not obtain a final appealable judgment by filing a new petition under a new case number, where determination of the new petition is inextricably linked to the main probate proceeding and there is no preclusive effect of the probate court's order that dismissed the new petition. In re Estate of Scott, 151 P.3d 642 (Colo. App. 2006).

**An order which completely determines the issues of the trustee's indebtedness to and compensation from the estate is a final judgment on those issues.** Retainer of jurisdiction by the probate court to later modify the trustee's rate of compensation does not change the order into an interlocutory order. Estate of Binford v. Gibson, 839 P.2d 508 (Colo. App. 1992).

**Probate court's order appointing special administrator is final and appealable.** In re Estate of Franchs, 722 P.2d 422 (Colo. App. 1986).

**Where probate court's order of partial summary judgment adjudicated fewer than all of the parties' claims, it was not a final judgment,** and party could not appeal the order without C.R.C.P. 54(b) certification. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

(a) By mailing a copy thereof at least fourteen days before the time set for the hearing by certified, registered, or ordinary first-class mail addressed to the person being notified at the post-office address given in any demand for notice, or at the person's office or place of residence, if known; or

(b) By delivering a copy thereof to the person being notified personally at least fourteen days before the time set for the hearing; or

(c) If the address or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing once a week for three consecutive weeks, a copy thereof in a newspaper having general circulation published in the county where the hearing is to be held, the last publication of which is to be at least fourteen days before the time set for the hearing. In case there is no newspaper of general circulation published in the county of appointment, said publication shall be made in such a newspaper in an adjoining county. A motion for court permission to publish the notice of any hearing shall not be required unless otherwise directed by the court.

(2) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(3) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding. If notice is given by publication, at the time the party who issued the notice by publication files proof of publication, that party shall also file an affidavit verified by the oath of such party or by someone on his or her behalf stating the facts that warranted the use of publication for service of the notice of the hearing and stating the efforts, if any, that have been made to obtain personal service or service by mail. The affidavit shall also state the address, or last known address, of each person served by publication or shall state that the person's address or identity is unknown and cannot be ascertained with reasonable diligence.

(4) "Publication once a week for three consecutive weeks" means publication once during each week of three consecutive calendar weeks with at least twelve days elapsing between the first and last publications.

**Source:** L. 73: R&RE, p. 1547, § 1. C.R.S. 1963: § 153-1-401. L. 75: (4) amended, p. 589, § 10, effective July 1. L. 77: (1)(a) amended, p. 831, § 7, effective July 1. L. 2002: Entire section amended, p. 651, § 4, effective July 1. L. 2012: (1) amended, (SB 12-175), ch. 208, p. 836, § 40, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Law reviews.** For article, "Some Footnotes to the 1945 Statutes", see 22 Dicta 130 (1945). For article, "In Defense of H.B. 109 — Re Serving Notice Before a Witness's Deposition May Be Taken", see 22 Dicta 152 (1945). For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "Inadequacy of Notice Provision for Obtaining Treasurers' Deeds", see 25 Dicta 144 (1948). For article, "One Year Review of Wills, Estates, and Trusts", see 37 Dicta 76 (1960). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Notice and Due Process in Probate Revisited", see 14 Colo. Law. 29 (1985). For article, "Published Notice Held Ineffective as to Known Creditors",

see 17 Colo. Law. 1320 (1988). For article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (February 2007).

**The service of process or notice in probate matters is governed by this section.** Michels v. Clemens, 140 Colo. 82, 342 P.2d 693 (1959) (decided under repealed § 151-1-11, C.R.S. 1963).

**Constitutionally required notice.** Notice by publication in estate proceedings is constitutionally insufficient and inconsistent with *Mullane v. Central Hanover Bank & Trust Co.* (339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)) and must be supplemented by personal service or mailing to interested persons whose names and



addresses are known, or by reasonable diligence can be ascertained. *Wimbush v. Wimbush*, 41 Colo. App. 289, 587 P.2d 796 (1978).

**Waiver of notice limited by fairness.** To construe waiver of further notice of the admission to probate hearing of a will to include waiver of notice of the subsequent dismissal and intestacy proceedings would be fundamentally unfair. *Wimbush v. Wimbush*, 41 Colo. App. 289, 587 P.2d 796 (1978).

**Potential devisee is entitled to notice of**

**hearing during which court will determine validity of will.** If, at time of hearing, the court had yet to determine the validity of the will, the potential devisee must be given notice in order to have the opportunity to meet her burden to prove decedent's intent and overcome any presumption of revocation. In re Estate of Evarts, 166 P.3d 161 (Colo. App. 2007).

**Applied** in *Craig v. Rider*, 651 P.2d 397 (Colo. 1982).

**15-10-402. Notice - waiver.** A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding.

**Source:** L. 73: R&RE, p. 1547, § 1. C.R.S. 1963: § 153-1-402.

### ANNOTATION

**Law reviews.** For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

**15-10-403. Pleadings - when parties bound by others - notice.** (1) In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the provisions of this section are applicable.

(2) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(3) Persons are bound by orders binding others in the following cases:

(a) Orders binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(b) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate.

(c) If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child, and where there is such representation orders binding the parent bind the minor child.

(d) An unborn, unascertained, minor, or incapacitated person who is not otherwise represented is bound by an order to the extent his or her interest is adequately represented by another party having a substantially identical interest in the proceeding.

(4) Notice is required as follows:

(a) Notice as prescribed by section 15-10-401 shall be given to each interested person or to one who can bind an interested person as described in subsection (3) of this section. Notice may be given both to a person and to another who may bind him.

(b) Notice is given to unborn, unascertained, minor, or incapacitated persons who are not represented under subsection (3) of this section by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn, unascertained, minor, or incapacitated persons.

(5) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, protected, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that a need for such representation appears. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

**Source:** L. 73: R&RE, p. 1547, § 1. C.R.S. 1963: § 153-1-403. L. 2000: (3)(d) and (4)(b) amended, p. 1172, § 2, effective May 26. L. 2009: (5) amended, (HB 09-1241), ch. 169, p. 761, § 16, effective April 22.

#### ANNOTATION

**Law reviews.** For article, “Trust Termination and Modification”, see 15 Colo. Law. 389 (1986). For article, “Will Contests — Some Procedural Aspects”, see 15 Colo. Law. 787 (1986).

#### PART 5

#### FIDUCIARY OVERSIGHT, REMOVAL, SANCTIONS, AND CONTEMPT

**15-10-501. Court powers - definitions - application.** (1) **Court powers.** A court, incident to a court proceeding, possesses and may employ all of the powers and authority expressed in the provisions of this part 5 to maintain the degree of supervision necessary to ensure the timely and proper administration of estates by fiduciaries over whom the court has obtained jurisdiction. Nothing in this part 5 shall be interpreted to limit a court’s powers under Colorado law. The powers of a court as described in this part 5 do not confer jurisdiction over the fiduciaries of nonsupervised trusts, private trusts, agencies created by powers of attorney, and custodial accounts created under the “Colorado Uniform Transfers to Minors Act”, article 50 of title 11, C.R.S., except as provided in paragraph (c) of subsection (2) of this section.

(2) **Definitions.** As used in this part 5, unless the context otherwise requires:

(a) “Court” means a district court of Colorado and the probate court of the city and county of Denver.

(b) “Estate” means the estate of a decedent; a guardianship; a protective proceeding; a trust, including an implied trust; an agency created by a power of attorney; or a custodial account created under the “Colorado Uniform Transfers to Minors Act”, article 50 of title 11, C.R.S.

(c) “Jurisdiction” means, and is restricted to, the personal jurisdiction obtained by a court over a fiduciary as a result of the filing of a proceeding concerning the estate. The filing of a trust registration statement, by itself, shall not constitute a proceeding for the purposes of this part 5.

(3) **Application.** The provisions of this part 5 shall apply to any fiduciary over whom a court has obtained jurisdiction, including but not limited to a personal representative, special administrator, guardian, conservator, special conservator, trustee, agent under a power of attorney, and custodian, including a custodian of assets or accounts created under the “Colorado Uniform Transfers to Minors Act”, article 50 of title 11, C.R.S.

**Source:** L. 2008: Entire part added, p. 477, § 1, effective July 1.

**15-10-502. Initial investigation.** (1) If, during the administration of an estate, a court desires to be informed about the current status of the administration, then the court, on its own motion or the request of an interested person, and without the need to state any reason for its actions, may:

(a) Send a letter to the fiduciary of the estate directing the fiduciary to file with the court one or more of the following documents on or before a date to be determined by the court:



- (I) A status report;
  - (II) An inventory of the current assets of the estate;
  - (III) An up-to-date interim accounting; or
  - (IV) A financial report concerning the estate;
- (b) Order the fiduciary to file or appear before the court to submit one or more of the documents described in paragraph (a) of this subsection (1) on or before a date to be determined by the court.

(2) When a court has directed a fiduciary to file or appear before the court to submit one or more of the documents described in paragraph (a) of this subsection (1), the fiduciary may request that the documents be placed under security pursuant to rule 20 of the Colorado rules of probate procedure.

**Source: L. 2008:** Entire part added, p. 478, § 1, effective July 1.

**15-10-503. Power of a court to address the conduct of a fiduciary - emergencies - nonemergencies.** (1) **Emergency situations - court action without the requirement of prior notice or hearing.** If it appears to a court that an emergency exists because a fiduciary's actions or omissions pose an imminent risk of substantial harm to a ward's or protected person's health, safety, or welfare or to the financial interests of an estate, the court may, on its own motion or upon the request of an interested person, without a hearing and without following any of the procedures authorized by section 15-10-502, order the immediate restraint, restriction, or suspension of the powers of the fiduciary; direct the fiduciary to appear before the court; or take such further action as the court deems appropriate to protect the ward or protected person or the assets of the estate. If a court restrains, restricts, or suspends the powers of a fiduciary, the court shall set a hearing and direct that notice be given pursuant to section 15-10-505. The clerk of the court shall immediately note the restraint, restriction, or suspension on the fiduciary's letters, if any. Any action for the removal, surcharge, or sanction of a fiduciary shall be governed by subsection (2) of this section.

(2) **Nonemergency situations - court action after notice and hearing.** Upon petition by a person who appears to have an interest in an estate, or upon the court's own motion, and after a hearing for which notice to the fiduciary has been provided pursuant to section 15-10-505, a court may order any one or more of the following:

(a) Supervised administration of a decedent's estate, as described in part 5 of article 12 of this title. The degree and extent of the supervision shall be endorsed upon the fiduciary's letters, if any.

(b) A temporary restraint on the fiduciary's performance of specified acts of administration, disbursement, or distribution; a temporary restraint on the fiduciary's exercise of any powers or discharge of any duties of the office of the fiduciary; or any other order to secure proper performance of the fiduciary's duty if it appears to the court that, in the absence of such an order, the fiduciary may take some action that would unreasonably jeopardize the interest of the petitioner or of some other interested person. The court may make persons with whom the fiduciary may transact business parties to any order issued pursuant to this paragraph (b). The restraint shall be endorsed upon the fiduciary's letters, if any.

(c) Additional restrictions on the powers of the fiduciary. The restrictions shall be endorsed upon the fiduciary's letters, if any.

(d) The suspension of the fiduciary if the court determines that the fiduciary has violated his, her, or its fiduciary duties. If a court orders the suspension of a fiduciary pursuant to this paragraph (d), the court shall direct that the suspension be endorsed upon the fiduciary's letters, if any.

(e) The removal of the fiduciary. A court may remove a fiduciary for cause at any time, and the following provisions shall apply:

(I) After a fiduciary receives notice of proceedings for his, her, or its removal, the fiduciary shall not act except to account, to correct maladministration, or to preserve the estate.

(II) If a court orders the removal of a fiduciary, the court shall direct by order the disposition of the assets remaining in the name of, or under the control of, the fiduciary being removed.

(III) Cause for removal of a fiduciary exists when removal would be in the best interests of the estate or if it is shown that the fiduciary or the person seeking the fiduciary's appointment intentionally misrepresented material facts in the proceedings leading to the fiduciary's appointment, or that the fiduciary has disregarded an order of the court, has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

(IV) If a court orders the removal of a fiduciary, the court shall direct that the fiduciary's letters, if any, be revoked and such revocation be endorsed upon the fiduciary's letters, if any.

(f) The appointment of a temporary or permanent successor fiduciary;

(g) A review of the fiduciary's conduct. If a court orders a review of the fiduciary's conduct, the court shall specify the scope and duration of the review in the court's order.

(h) A surcharge or sanction of the fiduciary pursuant to section 15-10-504; or

(i) Such further relief as the court deems appropriate to protect the ward or protected person or the assets of the estate.

**Source:** L. 2008: Entire part added, p. 478, § 1, effective July 1.

**15-10-504. Surcharge - contempt - sanctions against fiduciaries.** (1) **Notice.** Except as provided in subsection (3) of this section, notice to a fiduciary concerning any matters governed by the provisions of this section shall be provided pursuant to section 15-10-505.

(2) **Surcharge.** (a) If a court, after a hearing, determines that a breach of fiduciary duty has occurred or an exercise of power by a fiduciary has been improper, the court may surcharge the fiduciary for any damage or loss to the estate, beneficiaries, or interested persons. Such damages may include compensatory damages, interest, and attorney fees and costs.

(b) In awarding attorney fees and costs pursuant to this section, a court may consider the provisions of part 6 of this article.

(3) **Contempt proceedings against fiduciary.** Nothing in this part 5 shall be interpreted to limit or restrict a court's authority to proceed against a fiduciary for direct contempt as provided in rule 107 of the Colorado rules of civil procedure. In addition, if a fiduciary fails to comply with an order of a court issued pursuant to this part 5, the court may proceed against the fiduciary for indirect contempt as provided in rule 107 of the Colorado rules of civil procedure. A court may initiate indirect contempt proceedings on its own motion or upon the filing of a motion supported by affidavit as described in rule 107 of the Colorado rules of civil procedure.

(4) **Sanctions.** If a court determines that a breach of fiduciary duty has occurred or an exercise of power by a fiduciary has been improper, the court, after a hearing, may order such other sanctions as the court deems appropriate.

**Source:** L. 2008: Entire part added, p. 480, § 1, effective July 1. L. 2011: (2)(b) amended, (SB 11-083), ch. 101, p. 302, § 2, effective August 10.

**15-10-505. Notice to fiduciary - current address on file.** (1) In all actions undertaken pursuant to this part 5, the following provisions shall govern notice to fiduciaries:

(a) **In emergency situations.** If it appears to a court that an emergency exists because there is an imminent risk of substantial harm to a ward's or protected person's health, safety, or welfare or to the financial interests of an estate, the court may take appropriate action and issue an order with or without prior notice to a fiduciary as the court determines appropriate based upon the nature of the emergency. If a fiduciary of an estate is not present when an emergency order is entered concerning the administration of the estate, the court shall attempt to notify the fiduciary of the court's action and mail a copy of the court's order to



the fiduciary at the fiduciary's last address of record on file with the court. Notice of the court's order shall also be served, pursuant to section 15-10-401, upon all interested persons or as the court directs. Notice of all hearings set under section 15-10-503 (1) shall be given pursuant to section 15-10-401.

(b) **In nonemergency situations.** In nonemergency situations, notice to a fiduciary shall be governed by section 15-10-401.

(c) **Contempt.** For a hearing to determine possible contempt of a fiduciary, the court shall provide notice to the fiduciary as required by rule 107 of the Colorado rules of civil procedure.

(2) **Fiduciary's responsibility to keep current address in court file.** Every fiduciary appointed by a court is required to keep his, her, or its current address and telephone number on file with the court. The fiduciary shall promptly notify the court of any change in the fiduciary's address or telephone number.

**Source: L. 2008:** Entire part added, p. 481, § 1, effective July 1.

## PART 6

### COMPENSATION AND COST RECOVERY

**15-10-601. Definitions.** As used in this part 6, unless the context otherwise requires:

(1) "Estate" means the property of the decedent, trust, or other person whose affairs are subject to this code as the estate is originally constituted and as the estate exists from time to time during administration. "Estate" includes custodial property as described in the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.; custodial trust property as described in the "Colorado Uniform Custodial Trust Act", article 1.5 of this title; and the property of a principal that is subject to a power of attorney.

(2) "Fiduciary" means:

(a) A personal representative, guardian, conservator, or trustee;

(b) A custodian as described in the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.;

(c) A custodial trustee as described in the "Colorado Uniform Custodial Trust Act", article 1.5 of this title;

(d) An agent as defined in sections 15-10-201 (1), 15-14-602 (3), and 15-14-702 (1); and

(e) A public administrator as described in section 15-12-619.

(3) (a) "Governing instrument" means a will or a trust or a donative, appointive, or nominative instrument of any other type, including but not limited to:

(I) An instrument that creates a custodial transfer as described in the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.;

(II) A custodial trust as described in the "Colorado Uniform Custodial Trust Act", article 1.5 of this title;

(III) A medical durable power of attorney as described in section 15-14-506;

(IV) An agency instrument as defined in section 15-14-602 (2);

(V) A power of attorney as defined in section 15-14-702 (7);

(VI) A court order appointing a guardian as described in parts 2 and 3 of article 14 of this title; and

(VII) A court order appointing a conservator as described in part 4 of article 14 of this title.

(b) "Governing instrument" does not include a deed; an insurance or annuity policy; a multiple-party account; a security registered in beneficiary form; a pension; a profit-sharing, retirement, or similar benefit plan; or an individual retirement account.

**Source: L. 2011:** Entire part added, (SB 11-083), ch. 101, p. 295, § 1, effective August 10.

**15-10-602. Recovery of reasonable compensation and costs.** (1) A fiduciary and his or her lawyer are entitled to reasonable compensation for services rendered on behalf of an estate.

(2) A lawyer hired by a respondent, ward, or protected person is entitled to reasonable compensation and costs incurred for the legal representation the lawyer provides for the respondent, ward, or protected person.

(3) A third party who performs services at the request of a court is entitled to reasonable compensation.

(4) A person's entitlement to compensation or costs shall not limit or remove a court's inherent authority, discretion, and responsibility to determine the reasonableness of compensation and costs when appropriate.

(5) Except as limited or otherwise restricted by a court order, compensation and costs that may be recovered pursuant to this section may be paid directly or reimbursed without a court order. A court shall order a person who receives excessive compensation or payment for inappropriate costs to make appropriate refunds.

(6) Except as provided in sections 15-10-605 (4), 15-14-318 (4), and 15-14-431 (5), if any fiduciary or person with priority for appointment as personal representative, conservator, guardian, agent, custodian, or trustee defends or prosecutes a proceeding in good faith, whether successful or not, the fiduciary or person is entitled to receive from the estate reimbursement for necessary costs and disbursements, including but not limited to reasonable attorney fees.

(7) (a) Except as otherwise provided in part 5 of this article or in this part 6, a nonfiduciary or his or her lawyer is not entitled to receive compensation from an estate.

(b) If a lawyer or another person not appointed by the court provides services that result in an order beneficial to the estate, respondent, ward, or protected person, the lawyer or other person not appointed by the court may receive costs and reasonable compensation from the estate as provided below:

(I) The lawyer or other person shall file a request for compensation for services or costs alleged to have resulted in the order within fourteen days after the entry of the order or within a greater or lesser time as the court may direct. Any objection thereto shall be filed within fourteen days after the filing of the request for compensation or costs.

(II) After a request for compensation or costs or an objection to such a request, if any has been filed, the court shall determine, without a hearing, the benefit, if any, that the estate received from the services provided.

(III) If the court determines that a compensable benefit resulted from the services, then the person requesting compensation or costs shall submit to the court only those fees or costs purportedly incurred in providing the beneficial services. If no objection to those fees and costs is filed, the court shall determine the amount of compensation or costs to be awarded for the benefit, without a hearing.

(IV) An interested person disputing the reasonableness of the amount of compensation or costs requested for the beneficial services may file an objection. If an objection is filed, the proceedings to resolve the dispute shall be governed by section 15-10-604.

(c) In determining a reasonable amount of compensation or costs, the court may take into account, in addition to the factors set forth in section 15-10-603 (3):

(I) The value of a benefit to the estate, respondent, ward, or protected person;

(II) The number of parties involved in addressing the issue;

(III) The efforts made by the lawyer or person not appointed by the court to reduce and minimize issues; and

(IV) Any actions by the lawyer or person not appointed by the court that unnecessarily expanded issues or delayed or hindered the efficient administration of the estate.

(d) For the purposes of this subsection (7), services rendered by a lawyer or a person not appointed by a court that confer a benefit to an estate, respondent, ward, or protected person are those significant, demonstrable, and generally noncumulative services that assist the court in resolving material issues in the administration of an estate. By way of example and not limitation, such benefits may result in significantly increasing or preventing a significant decrease in the size of the estate, preventing or exposing maladministration or a material breach of fiduciary duty, or clarifying and upholding a decedent's, settlor's,



principal's, respondent's, ward's, or protected person's intent with respect to a material issue in dispute.

(8) A fiduciary who is a member of a law firm may use the services of the law firm and charge for the reasonable value of the services of the members and staff of the firm that assist the fiduciary in performing his or her duties.

(9) Every application or petition for appointment of a fiduciary filed under this code, including without limitation those required under sections 15-12-301, 15-12-402, 15-12-614, 15-12-621, 15-12-622, 15-14-202, 15-14-204, 15-14-304, and 15-14-403, shall include a statement by the applicant or petitioner disclosing the basis upon which any compensation is to be charged to the estate by the fiduciary and his or her or its counsel or shall state that the basis has not yet been determined. The disclosure statement shall specifically describe, as is applicable, the hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated. This disclosure obligation shall be continuing in nature so as to require supplemental disclosures if material changes to the basis for charging fees take place.

**Source:** **L. 2011:** Entire part added, (SB 11-083), ch. 101, p. 296, § 1, effective August 10. **L. 2012:** (7)(b)(I) amended, (SB 12-175), ch. 208, p. 837, § 41, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (7)(b)(I) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

### **15-10-603. Factors in determining the reasonableness of compensation and costs.**

(1) A court may review and determine:

(a) The reasonableness of the compensation of any fiduciary, lawyer, or other person who:

(I) Is employed on behalf of an estate, fiduciary, respondent, ward, or protected person;

(II) Is appointed by the court; or

(III) Provides beneficial services to an estate, respondent, ward, or protected person; and

(b) The appropriateness of any cost sought to be paid by or recovered from an estate.

(2) In considering the reasonableness of the compensation, there shall be no presumption that any method of charging a fee for services rendered to an estate, fiduciary, principal, respondent, ward, or protected person is per se unreasonable. Regardless of the method used for charging a fee, in determining appropriate compensation, the court shall apply the standard of reasonableness in light of all relevant facts and circumstances.

(3) The court shall consider all of the factors described in this subsection (3) in determining the reasonableness of any compensation or cost. The court may determine the weight to be given to each factor and to any other factor the court considers relevant in reaching its decision:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the service properly;

(b) The likelihood, if apparent to the fiduciary, that the acceptance of the particular employment will preclude the person employed from other employment;

(c) (I) The compensation customarily charged in the community for similar services with due consideration and allowance for the complexity or uniqueness of any administrative or litigated issues, the need for and local availability of specialized knowledge or expertise, and the need for and advisability of retaining outside fiduciaries or lawyers to avoid potential conflicts of interest;

(II) As used in this subsection (3), unless the context otherwise requires, "community" means the general geographical area in which the estate is being administered or in which the respondent, ward, or protected person resides.

(d) The nature and size of the estate, the liquidity or illiquidity of the estate, and the results and benefits obtained during the administration of the estate;

(e) Whether and to what extent any litigation has taken place and the results of such litigation;

(f) The life expectancy and needs of the respondent, ward, protected person, devisee, beneficiary, or principal;

(g) The time limitations imposed on or by the fiduciary or by the circumstances of the administration of the estate;

(h) The adequacy of any detailed billing statements upon which the compensation is based;

(i) Whether the fiduciary has charged variable rates that reflect comparable payment standards in the community for like services;

(j) The expertise, reputation, and ability of the person performing the services and, in the case of a fiduciary, whether and to what extent the fiduciary has had any prior experience in administering estates similar to those for which compensation is sought;

(k) The terms of a governing instrument;

(l) The various courses of action available to a fiduciary or an individual seeking compensation for a particular service or alleged benefit and whether the course of action taken was reasonable and appropriate under the circumstances existing at the time the service was performed; and

(m) The various courses of action available to a fiduciary or an individual seeking compensation for a particular service or alleged benefit and the cost-effectiveness of the action taken under the circumstances existing at the time the service was performed.

(4) If a governing instrument provides that a fiduciary is entitled to receive compensation in accordance with a published fee schedule in effect at the time the services are performed, fees charged in accordance with the published fee schedule shall be presumed to be reasonable. The absence of such a provision in a governing instrument shall not preclude the fiduciary from receiving compensation in accordance with a published fee schedule in effect at the time the services are performed.

(5) Nothing in this section shall be interpreted to prohibit members or employees of a professional fiduciary's organization or law firm, including partners, associates, paralegals, law clerks, trust officers, caregivers, and social workers, from collaborating on the same service so long as the collaboration is reasonable and the total compensation charged for the service in the aggregate is reasonable under the circumstances.

**Source: L. 2011:** Entire part added, (SB 11-083), ch. 101, p. 298, § 1, effective August 10.

**15-10-604. Fee disputes - process and procedure.** (1) A dispute over the reasonableness of a request for compensation or costs authorized by this part 6 shall be resolved in accordance with the factors set forth in section 15-10-603 (3) and the process and procedure set forth in this section.

(2) For purposes of this section, a fee dispute shall be deemed to have arisen when an objection to compensation or costs has been filed in a proceeding.

(3) After the objection to compensation or costs has been filed, the person requesting compensation or costs shall have thirty-five days, or a greater or lesser time as the court may direct, to make available to the objector for inspection and copying all documentation that the person deems necessary to establish the reasonableness of the compensation and costs in consideration of the factors set forth in section 15-10-603 (3) and to certify to the court that such documentation was made available to the objector on a certain date. The objector shall then have fourteen days, or a greater or lesser time as the court may direct, to file specific written objections to such compensation and costs based on the factors set forth in section 15-10-603 (3). The fourteen days shall commence on the date that the person makes the documentation available to the objector or upon the filing of the person's certification, whichever is later. The court may permit further discovery on the compensation and cost issues raised by the pleadings only upon good cause shown.

(4) Subject to the court's inherent authority to order alternative dispute resolution methods, the court shall determine, after notice and hearing, the amount of compensation



and costs it considers to be reasonable and shall issue its findings of fact and conclusions of law referencing the factors set forth in section 15-10-603 (3) and any other factors it deems relevant to its decision.

**Source:** L. 2011: Entire part added, (SB 11-083), ch. 101, p. 300, § 1, effective August 10. L. 2012: (3) amended, (SB 12-175), ch. 208, p. 837, § 42, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**15-10-605. Compensation and costs - assessment - limitations.** (1) If the court determines that any proceedings pursuant to this code or any pleadings filed in such proceedings were brought, defended, or filed in bad faith, the court may assess the fees and the costs, including reasonable attorney fees, incurred by the fiduciary and other affected parties in responding to the proceedings or pleadings, against an estate, party, person, or entity that brought or defended the proceedings or filed the pleadings in bad faith. Nothing in this section is intended to limit any other remedy, sanction, or surcharge provided by law.

(2) If any person entitled to compensation under this part 6 is required to defend the reasonableness of compensation or costs in a proceeding, the court may review the fees and costs incurred by the person in defending the compensation or costs, and the fees incurred in challenging the compensation and costs, and may assess the reasonable fees and costs incurred in the proceeding as the court deems equitable. The court may allocate fees or costs assessed pursuant to this subsection (2) in favor of or against the estate or any party, person, or entity involved in the proceeding as justice and equity may require.

(3) A person who is unsuccessful in defending the reasonableness of compensation or costs at a hearing shall not be entitled to recover the fees or costs of that defense as the court deems equitable.

(4) A fiduciary who is unsuccessful in defending the fiduciary's conduct in a proceeding pursuant to this code alleging breach of fiduciary duty shall not recover the fees or costs of that defense as the court deems equitable.

**Source:** L. 2011: Entire part added, (SB 11-083), ch. 101, p. 301, § 1, effective August 10.

**15-10-606. Applicability.** (1) This part 6 applies to:

- (a) An estate existing before, on, or after August 10, 2011; and
- (b) Proceedings to determine the reasonableness of compensation and costs commenced on or after August 10, 2011.

(2) This part 6 does not apply to proceedings to determine the reasonableness of compensation and costs commenced before August 10, 2011, unless the court determines that the application of this part 6 would not prejudice the rights of any party to the proceeding and the court directs otherwise.

**Source:** L. 2011: Entire part added, (SB 11-083), ch. 101, p. 302, § 1, effective August 10.

## ARTICLE 11

### Intestate Succession and Wills

**Editor's note:** Articles 10 to 17 of this title were repealed and reenacted in 1973, and parts 1 to 9 of this article were subsequently repealed and reenacted in 1994, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to parts 1 to 9 of this article prior to 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note immediately preceding article 10 of this title. Former

C.R.S. section numbers prior to 1994 are shown in editor's notes following those sections that were relocated. For a detailed comparison of parts 1 to 9 of this article for 1994, see the comparative tables located in the back of the index.

**Law reviews:** For article, "Highlights of the Uniform Probate Code, Article II", see 23 Colo. Law. 2279 (1994).

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## PREFATORY NOTE

The Uniform Probate Code was originally promulgated in 1969.

**1990 Revisions.** In 1990, Article II underwent significant revision. The 1990 revisions were the culmination of a systematic study of the Code conducted by the Joint Editorial Board for the Uniform Probate Code (now named the Joint Editorial Board for Uniform Trust and Estate Acts) and a special Drafting Committee to Revise Article II. The 1990 revisions concentrated on Article II, which is the article that covers the substantive law of intestate succession; spouse's elective share; omitted spouse and children; probate exemptions and allowances; execution and revocation of wills; will contracts; rules of construction; disclaimers; and the effect of homicide and divorce on succession rights; and the rule against perpetuities and honorary trusts.

*Themes of the 1990 Revisions.* In the twenty or so years between the original promulgation of the Code and 1990, several developments occurred that prompted the systematic round of review. Three themes were sounded: (1) the

decline of formalism in favor of intent-serving policies; (2) the recognition that will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages and (4) the acceptance of a partnership or marital-sharing theory of marriage.

The 1990 revisions responded to these themes. The multiple-marriage society and the partnership/marital-sharing theory were reflected in the revised elective-share provisions of Part 2. As the General Comment to Part 2 explained, the revised elective share granted the surviving spouse a right of election that implemented the partnership/marital-sharing theory of marriage.

The children-of-previous-marriages and stepchildren phenomena were reflected most prominently in the revised rules on the spouse's share in intestacy.



The proliferation of will substitutes and other inter-vivos transfers was recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison. One aspect of this tendency was reflected in the restructuring of the rules of construction. Rules of construction are rules that supply presumptive meaning to dispositive and similar provisions of governing instruments. See Restatement (Third) of Property: Wills and Other Donative Transfers § 11.3 (2003). Part 6 of the pre-1990 Code contained several rules of construction that applied only to wills. Some of those rules of construction appropriately applied only to wills; provisions relating to lapse, testamentary exercise of a power of appointment, and ademption of a devise by satisfaction exemplify such rules of construction. Other rules of construction, however, properly apply to all governing instruments, not just wills; the provision relating to inclusion of adopted persons in class gift language exemplifies this type of rule of construction. The 1990 revisions divided pre-1990 Part 6 into two parts — Part 6, containing rules of construction for wills only; and Part 7, containing rules of construction for wills and other governing instruments. A few new rules of construction were also added.

In addition to separating the rules of construction into two parts, and adding new rules of construction, the revocation-upon-divorce provision (section 2-804) was substantially revised so that divorce not only revokes testamentary devises, but also nonprobate beneficiary designations, in favor of the former spouse. Another

feature of the 1990 revisions was a new section (section 2-503) that brought the execution formalities for wills more into line with those for nonprobate transfers.

**2008 Revisions.** In 2008, another round of revisions was adopted. The principal features of the 2008 revisions are summarized as follows:

*Inflation Adjustments.* Between 1990 and 2008, the Consumer Price Index rose by somewhat more than 50 percent. The 2008 revisions raised the dollar amounts by 50 percent in Article II Sections 2-102, 2-102A, 2-201, 2-402, 2-403, and 2-405, and added a new cost of living adjustment section — Section 1-109.

*Intestacy.* Part 1 on intestacy was divided into two subparts: Subpart 1 on general rules of intestacy and subpart 2 on parent-child relationships. For details, see the General Comment to Part 1.

*Execution of Wills.* Section 2-502 was amended to allow notarized wills as an alternative to wills that are attested by two witnesses. That amendment necessitated minor revisions to Section 2-504 on self-proved wills and to Section 3-406 on the effect of notarized wills in contested cases.

*Class Gifts.* Section 2-705 on class gifts was revised in a variety of ways, as explained in the revised Comment to that section.

*Reformation and Modification.* New Sections 2-805 and 2-806 brought the reformation and modification sections now contained in the Uniform Trust Code into the Uniform Probate Code.

**Historical Note.** This Prefatory Note was revised in 2008.

## PART 1

### INTESTATE SUCCESSION

#### GENERAL COMMENT

The pre-1990 Code's basic pattern of intestate succession, contained in Part 1, was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. The 1990 and 2008 revisions were intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy and family relationships.

**1990 Revisions.** The principal features of the 1990 revisions were:

1. So-called negative wills were authorized, under which the decedent who dies intestate, in whole or in part, can by will disinherit a particular heir.

2. A surviving spouse was granted the whole of the intestate estate, if the decedent left no surviving descendants and no parents or if the decedent's surviving descendants are also

descendants of the surviving spouse and the surviving spouse has no descendants who are not descendants of the decedent. The surviving spouse receives the first \$200,000 plus three-fourths of the balance if the decedent left no surviving descendants but a surviving parent. The surviving spouse receives the first \$150,000 plus one-half of the balance of the intestate estate, if the decedent's surviving descendants are also descendants of the surviving spouse but the surviving spouse has one or more other descendants. The surviving spouse receives the first \$100,000 plus one-half of the balance of the intestate estate, if the decedent has one or more surviving descendants who are not descendants of the surviving spouse. (To adjust for inflation, these dollar figures and other dollar figures in Article II were increased by fifty percent in 2008.)

3. A system of representation called per capita at each generation was adopted as a means of more faithfully carrying out the underlying premise of the pre-1990 UPC system of representation. Under the per-capita-at-each-generation system, all grandchildren (whose parent has predeceased the intestate) receive equal shares.

4. Although only a modest revision of the section dealing with the status of adopted children and children born of unmarried parents was then made, the question was under continuing review and it was anticipated that further revisions would be forthcoming in the future.

5. The section on advancements was revised so that it applies to partially intestate estates as well as to wholly intestate estates.

**2008 Revisions.** As noted in Item 4 above, it was recognized in 1990 that further revisions on matters of status were needed. The 2008 revisions fulfilled that need. Specifically, the 2008 revisions contained the following principal features:

*Part 1 Divided into Two Subparts.* Part 1 was divided into two subparts: Subpart 1 on general rules of intestacy and Subpart 2 on parent-child relationships.

*Subpart 1: General Rules of Intestacy.* Subpart 1 contains Sections 2-101 (unchanged), 2-102 (dollar figures adjusted for inflation), 2-103 (restyled and amended to grant intestacy rights to certain stepchildren as a last resort before the intestate estate escheats to the state), 2-104 (amended to clarify the requirement of survival by 120 hours as it applies to heirs who are born before the intestate's death and those who are in gestation at the intestate's death), 2-105 (unchanged), 2-106 (unchanged), 2-107 (unchanged), 2-108 (deleted and matter dealing with heirs in gestation at the intestate's death relocated to 2-104), 2-109 (unchanged), 2-110 (unchanged), 2-111 (unchanged), 2-112 (unchanged), 2-113 (unchanged), and 2-114 (deleted and replaced with a new section addressing situations in which a parent is barred from inheriting).

*Subpart 2: Parent-Child Relationships.* New Subpart 2 contains several new or substantially revised sections. New Section 2-115 contains

definitions of terms that are used in subpart 2. New Section 2-116 is an umbrella section declaring that, except as otherwise provided in Section 2-119(b) through (e), if a parent-child relationship exists or is established under this subpart 2, the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession. Section 2-117 continues the rule that, except as otherwise provided in Sections 2-120 and 2-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of their marital status. Regarding adopted children, Section 2-118 continues the rule that adoption establishes a parent-child relationship between the adoptive parents and the adoptee for purposes of intestacy. Section 2-119 addresses the extent to which an adoption severs the parent-child relationship with the adoptee's genetic parents. New Sections 2-120 and 2-121 turn to various parent-child relationships resulting from assisted reproductive technologies in forming families. As one researcher reported: "Roughly 10 to 15 percent of all adults experience some form of infertility." Debora L. Spar, *The Baby Business* 31 (2006). Infertility, coupled with the desire of unmarried individuals to have children, have led to increased questions concerning children of assisted reproduction. Sections 2-120 and 2-121 address inheritance rights in cases of children of assisted reproduction, whether the birth mother is the one who parents the child or is a gestational carrier who bears the child for an intended parent or intended parents. As two authors have noted: "Parents, whether they are in a married or unmarried union with another, whether they are a single parent, whether they procreate by sexual intercourse or by assisted reproductive technology, are entitled to the respect the law gives to family choice." Charles P. Kindregan, Jr. & Maureen McBrien, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science* 6-7 (2006). The final section, new Section 2-122, provides that nothing contained in Subpart 2 should be construed as affecting application of the judicial doctrine of equitable adoption.

**Historical Note.** This General Comment was revised in 2008.

## SUBPART 1

### GENERAL RULES

**Cross references:** For clarification of the term "surviving spouse", see § 15-11-802.

**15-11-101. Intestate estate.** (1) Any part of a decedent's estate not effectively disposed of by will or otherwise passes by intestate succession to the decedent's heirs as prescribed in this code, except as modified by the decedent's will.

(2) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to



which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his or her intestate share.

**Source:** L. 94: Entire part R&RE, p. 976, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-101 as it existed prior to 1995.

### ANNOTATION

**Law reviews.** For article on administration of estates, see 10 Rocky Mt. L. Rev. 288 (1938). For note, "Non-Testamentary Transfers Effective at Death", see 24 Rocky Mt. L. Rev. 365 (1952). For article, "Administration of Intestate Estates", see 29 Rocky Mt. L. Rev. 571 (1957). For article, "An Ecclesiastical Role for the Lawyer in a Secular Society", see 44 Den. L.J. 275 (1967). For article, "Probate and Non-probate Distribution Issues in the Case of A Murder/Suicide", see 17 Colo. Law. 1061 (1988).

**Annotator's note.** Since § 15-11-101 is similar to repealed laws antecedent to CSA, C. 176, § 1, relevant cases construing those provisions have been included in the annotations to this section.

**Escheats and forfeitures are not favored by law,** and a doubt as to whether property is subject to escheat is to be resolved against the state. *Danks v. Herrmann*, 94 Colo. 546, 31 P.2d 912 (1934).

**Section inoperative where will disposes of the estate.** When the existence of a will disposing of the estate is once conceded, no heir can establish any rights by inheritance on simple proof of descent. Under such circumstances the statutes of intestate succession do not become operative. *Hall v. Cowles' Estate*, 15 Colo. 343, 25 P. 705 (1890).

**Where a will clearly limits participation in the estate to the devisees and unambiguously excludes other family members from participation, the omitted heirs cannot participate by intestacy in the distribution of the trust even if no devisee survives the termination of the trust.** In re Estate of Walter, 97 P.3d 188 (Colo. App. 2003).

**15-11-102. Share of spouse.** The various possible circumstances describing the decedent, his or her surviving spouse, and their surviving descendants, if any, are set forth in this section to be utilized in determining the intestate share of the decedent's surviving spouse. If more than one circumstance is applicable, the circumstance that produces the largest share for the surviving spouse shall be applied. The intestate share of a decedent's surviving spouse is:

- (1) The entire intestate estate if:
  - (a) No descendant or parent of the decedent survives the decedent; or
  - (b) All of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
- (2) The first three hundred thousand dollars, plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

**The right to inherit is statutory and the statute which governs is embraced in §§ 15-11-101 to 15-11-113 inclusive.** *Wilson v. Wilson*, 95 Colo. 159, 33 P.2d 969 (1934).

**The policy of our law is to have property descend to the heirs in the manner provided in this article.** *Danks v. Herrmann*, 94 Colo. 546, 31 P.2d 912 (1934).

**Remainder not devised or bequeathed shall be distributed as estate of an intestate.** Provisions of a will reviewed, and held to dispose of a life estate in the property only, being silent with respect to the remainder, which was not devised or bequeathed, is to be distributed in the same manner as the estate of an intestate. *Blatt v. Blatt*, 79 Colo. 57, 243 P. 1099 (1926).

**A testator is presumed to know the laws of the state in which he lives concerning the descent and distribution of intestate property.** *Blatt v. Blatt*, 79 Colo. 57, 243 P. 1099 (1926).

**The law of an intestate's actual domicile at the time of his death governs the intestate succession of his property,** when it is all situate in that state. *Blatt v. Blatt*, 79 Colo. 57, 243 P. 1099 (1926).

**Heirs cannot complain of steps taken by intestate to deprive them of inheritance.** During the lifetime of the intestate, his property was subject to his control and disposition. If it was his pleasure to take such steps as would increase the inheritance of this minor grandchild, he could do so, either by adoption or testamentary provision, and his heirs, whom he could have deprived of any inheritance at all, cannot complain. *Hughes v. Jones*, 89 Colo. 455, 3 P.2d 1074 (1931); In re *Wilson's Estate*, 95 Colo. 159, 33 P.2d 969 (1934).

(3) The first two hundred twenty-five thousand dollars, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) The first one hundred fifty thousand dollars, plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

(5) (Deleted by amendment, L. 2009, (HB 09-1287), ch. 310, p. 1671, § 3, effective July 1, 2010.)

(6) The dollar amounts stated in this section shall be increased or decreased based on the cost of living adjustment as calculated and specified in section 15-10-112.

**Source:** L. 94: Entire part R&RE, p. 976, § 3, effective July 1, 1995. L. 95: Entire section amended, p. 352, § 1, effective July 1. L. 2009: Entire section amended, (HB 09-1287), ch. 310, p. 1671, § 3, effective July 1, 2010.

**Editor's note:** (1) This section is similar to former § 15-11-102 as it existed prior to 1995.

(2) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For the descent and distribution of property of aliens, see § 15-11-111.

## COMMENT

**Purpose and Scope of 1990 Revisions.** This section was revised in 1990 to give the surviving spouse a larger share than the pre-1990 UPC. If the decedent leaves no surviving descendants and no surviving parent or if the decedent does leave surviving descendants but neither the decedent nor the surviving spouse has other descendants, the surviving spouse is entitled to all of the decedent's intestate estate.

If the decedent leaves no surviving descendants but does leave a surviving parent, the decedent's surviving spouse receives the first \$300,000 plus three-fourths of the balance of the intestate estate.

If the decedent leaves surviving descendants and if the surviving spouse (but not the decedent) has other descendants, and thus the decedent's descendants are unlikely to be the exclusive beneficiaries of the surviving spouse's estate, the surviving spouse receives the first \$225,000 plus one-half of the balance of the intestate estate. The purpose is to assure the decedent's own descendants of a share in the decedent's intestate estate when the estate exceeds \$225,000.

If the decedent has other descendants, the surviving spouse receives \$150,000 plus one-

half of the balance. In this type of case, the decedent's descendants who are not descendants of the surviving spouse are not natural objects of the bounty of the surviving spouse.

Note that in all the cases where the surviving spouse receives a lump sum plus a fraction of the balance, the lump sums must be understood to be in addition to the probate exemptions and allowances to which the surviving spouse is entitled under Part 4. These can add up to a minimum of \$64,500.

Under the pre-1990 Code, the decedent's surviving spouse received the entire intestate estate only if there were neither surviving descendants nor parents. If there were surviving descendants, the descendants to one-half of the balance of the estate in excess of \$50,000 (for example, \$25,000 in a \$100,000 estate). If there were no surviving descendants, but there was a surviving parent or parents, the parent or parents took that one-half of the balance in excess of \$50,000.

**2008 Cost-of-Living Adjustments.** As revised in 1990, the dollar amount in paragraph (2) was \$200,000, in paragraph (3) was \$150,000, and in paragraph (4) was \$100,000. To adjust for inflation, these amounts were increased in 2008 to \$300,000, \$225,000, and



\$150,000 respectively. The dollar amounts in these paragraphs are subject to annual cost-of-living adjustments under Section 1-109.

**References.** The theory of this section is discussed in Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code", 76 Iowa L. Rev. 223, 229-35 (1991).

Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their entire estates to their surviving spouses, even when the couple has children. See C. Shammass, M. Salmon & M. Bahlin, *Inheritance in America from Colonial Times to the Present* 184-85 (1987); M. Sussman, J. Cates & D. Smith, *The Family and Inheritance* (1970); Browder, "Recent Patterns of Testate Succession in the United States and England", 67 Mich. L. Rev. 1303, 1307-08 (1969); Dunham,

"The Method, Process and Frequency of Wealth Transmission at Death", 30 U. Chi. L. Rev. 241, 252 (1963); Gibson, "Inheritance of Community Property in Texas — A Need for Reform", 47 Texas L. Rev. 359, 364-66 (1969); Price, "The Transmission of Wealth at Death in a Community Property Jurisdiction", 50 Wash. L. Rev. 277, 283, 311-17 (1975). See also Fellows, Simon & Rau, "Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States", 1978 Am. B. F. Research J. 319, 355-68; Note, "A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes", 63 Iowa L. Rev. 1041, 1091-92 (1978).

**Cross Reference.** See Section 2-802 for the definition of spouse, which controls for purposes of intestate succession.

**Historical Note.** This Comment was revised in 2008.

## ANNOTATION

**Law reviews.** For article, "The Validity in Colorado of Marriages by Proxy", see 20 Dicta 283 (1943). For article, "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For article, "Marital Property Interests", see 27 Rocky Mt. L. Rev. 180 (1955). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (February 2000).

**Annotator's note.** Since § 15-11-102 is similar to repealed laws antecedent to CSA, C. 176, § 1, relevant cases construing those provisions have been included in the annotations to this section.

**Widow is an heir.** Under this section the widow takes by descent. The widow, therefore, is an heir. *Anderson v. Groesbeck*, 26 Colo. 3, 55 P. 1086 (1899); *Binkley v. Switzer*, 75 Colo. 1, 223 P. 757 (1923); *Page v. Elwell*, 81 Colo. 73, 253 P. 1059 (1927).

**Widow of testator's son who dies intestate takes whole estate.** *Daniels & Fisher Realty Co. v. Kenyon*, 261 F. 407 (D. Colo. 1919).

**Widow does not waive her right to take as an heir by tendering will for probate.** A widow by tendering the will of her deceased husband for probate does not vouch for its validity, nor waive her right to take under the statute, nor her right to claim all the property of the estate undisposed of by the will, as the sole

heir. *Blatt v. Blatt*, 79 Colo. 57, 243 P. 1099 (1926).

**Widow cannot be deprived of her rights without her written consent.** Under this and § 15-11-501, a husband cannot devise or bequeath away from his wife more than one-half of his property without her written consent executed after his death, and where he agrees to will to another a portion of his estate, the latter takes subject to this statutory provision. Such an agreement cannot deprive the widow of her lawful rights. *Ward v. Ward*, 94 Colo. 275, 30 P.2d 853 (1934).

**If there are no children or descendants of any child, the wife becomes the sole heir at law.** *Anderson v. Groesbeck*, 26 Colo. 3, 55 P. 1086 (1899).

**Widow entitled to relief from fraud of husband.** When the transaction by which the husband disposed of his property, real and personal, was colorable merely, and resorted to by him for the purpose of defeating his wife's right as heir, but with intent to reserve the benefit of the property to himself for life, it is a fraud upon the rights of his wife, from which she may be relieved after his death. *Smith v. Smith*, 22 Colo. 480, 46 P. 128 (1896).

**Applied in** *In re Arrington*, 618 P.2d 744 (Colo. App. 1980); *In re Estate of Daigle*, 634 P.2d 71 (Colo. 1981).

**15-11-102.5. Share of designated beneficiary.** (1) If the decedent is survived by a person with the right to inherit real or personal property from the decedent in a designated beneficiary agreement executed pursuant to article 22 of this title, the intestate share of the decedent's designated beneficiary is:

(a) The entire estate if no descendent of the decedent survives the decedent; or

(b) One half of the intestate estate if one or more descendants of the decedent survive the decedent.

**Source: L. 2010:** Entire section added, (SB 10-199), ch. 374, p. 1748, § 4, effective July 1.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act adding this section:

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

### **15-11-103. Share of heirs other than surviving spouse and designated beneficiary.**

Any part of the intestate estate not passing to the decedent's surviving spouse under section 15-11-102, or to the decedent's surviving designated beneficiary under section 15-11-102.5, or the entire intestate estate if there is no surviving spouse and no surviving designated beneficiary with the right to inherit real or personal property from the decedent through intestate succession, passes in the following order to the individuals who survive the decedent:

(1) (Deleted by amendment, L. 2010, (SB 10-199), ch. 374, p. 1748, § 5, effective July 1, 2010.)

(2) To the decedent's descendants per capita at each generation;

(3) If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;

(4) If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation;

(5) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:

(a) Half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation; and

(b) Half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation;

(6) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner as described in subsection (5) of this section;

(7) (Deleted by amendment, L. 2010, (SB 10-199), ch. 374, p. 1748, § 5, effective July 1, 2010.)

(8) (Deleted by amendment, L. 2009, (HB 09-1287), ch. 310, p. 1672, § 4, effective July 1, 2010.)

**Source: L. 94:** Entire part R&RE, p. 977, § 3, effective July 1, 1995. **L. 95:** Entire section amended, p. 353, § 2, effective July 1. **L. 2009:** Entire section amended, (HB



09-1260), ch. 107, p. 443, § 7, effective July 1; entire section amended, (HB 09-1287), ch. 310, p. 1672, § 4, effective July 1, 2010. **L. 2010:** IP, (1), and (7) amended, (SB 10-199), ch. 374, p. 1748, § 5, effective July 1.

**Editor's note:** (1) This section is similar to former § 15-11-103 as it existed prior to 1995.

(2) Amendments to this section by House Bill 09-1260 and House Bill 09-1287 were harmonized, effective July 1, 2010; except that the second sentence of subsection (7) and the provisions of subsection (8), as amended by House Bill 09-1260, are superseded by House Bill 09-1287, effective July 1, 2010.

(3) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

(4) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending the introductory portion to the entire section and subsections (1) and (7):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

This section provides for inheritance by descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

**1990 Revisions.** The 1990 revisions were stylistic and clarifying, not substantive. The pre-1990 version of this section contained the phrase "if they are all of the same degree of kinship to the decedent they take equally (etc.)." That language was removed. It was unnecessary and confusing because the system of representation in Section 2-106 gives equal shares if the decedent's descendants are all of the same degree of kinship to the decedent.

The word "descendants" replaced the word "issue" in this section and throughout the 1990

revisions of Article II. The term issue is a term of art having a biological connotation. Now that inheritance rights, in certain cases, are extended to adopted children, the term descendants is a more appropriate term.

**2008 Revisions.** In addition to making a few stylistic changes, which were not intended to change meaning, the 2008 revisions divided this section into two subsections. New subsection (b) grants inheritance rights to descendants of the intestate's deceased spouse(s) who are not also descendants of the intestate. The term deceased spouse refers to an individual to whom the intestate was married at the individual's death.

**Historical Note.** This Comment was revised in 2008.

## ANNOTATION

**Annotator's note.** Since § 15-11-103 is similar to repealed § 152-2-1, CRS 53, CSA, C. 176, § 1, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Natural inheritable interests follow the blood,** and the law of adoption does not change the law of descent. In *re Warr's Estate*, 111 Colo. 85, 137 P.2d 408 (1943).

**In the absence of nearer kin, the estate vests in such grandparents and uncles and**

**aunts collectively,** and not in the grandparents as a class, if there are any; and, if there be none, then in the uncles and aunts as a separate class. *Thatcher v. Thatcher*, 17 Colo. 404, 29 P. 800 (1892).

**Applied** in *State v. Rogers*, 140 Colo. 205, 344 P.2d 1073 (1959); *Witherspoon v. Sanford*, 44 Colo. App. 538, 616 P.2d 186 (1980); In *re Estate of Daigle*, 634 P.2d 71 (Colo. 1981).

**15-11-104. Requirement of survival by one hundred twenty hours - individual gestation.** (1) For purposes of intestate succession and exempt property, and except as otherwise provided in paragraph (b) of this subsection (1), the following rules apply:

(a) An individual born before a decedent's death who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent. If it is not established by clear and convincing evidence that an individual born before the decedent's death survived the decedent by one hundred twenty hours, it is deemed that the individual failed to survive for the required period.

(b) An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives one hundred twenty hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived one hundred twenty hours after birth, it is deemed that the individual failed to survive for the required period.

(2) This section is not to be applied if its application would result in a taking of intestate estate by the state under section 15-11-105.

**Source:** L. 94: Entire part R&RE, p. 978, § 3, effective July 1, 1995. L. 2009: Entire section amended, (HB 09-1287), ch. 310, p. 1673, § 5, effective July 1, 2010.

**Editor's note:** (1) This section is similar to former § 15-11-104 as it existed prior to 1995.

(2) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For requirement that a devisee survive a testator by one hundred twenty hours, see § 15-11-702.

## COMMENT

This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. See Halbach & Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 Alb. L. Rev. 1091, 1094-1099 (1992). The 120-hour period will not delay the administration of a decedent's estate because Sections 3-302 and

3-307 prevent informal issuance of letters for a period of five days from death. Subsection (b) prevents the survivorship requirement from defeating inheritance by the last eligible relative of the intestate who survives for any period.

In the case of a surviving spouse who survives the 120-hour period, the 120-hour requirement of survivorship does not disqualify the



spouse's intestate share for the federal estate-tax marital deduction. See Int.Rev.Code § 2056(b)(3).

**2008 Revisions.** In 2008, this section was reorganized, revised, and combined with former Section 2-108. What was contained in former Section 2-104 now appears as subsections (a)(1) and (b). What was contained in former Section 2-108 now appears as subsection (a)(2). Subsections (a)(1) and (a)(2) now distinguish between an individual who was born before the decedent's death and an individual who was in gestation at the decedent's death. With respect to an

individual who was born before the decedent's death, it must be established by clear and convincing evidence that the individual survived the decedent by 120 hours. For a comparable provision applicable to wills and other governing instruments, see Section 2-702. With respect to an individual who was in gestation at the decedent's death, it must be established by clear and convincing evidence that the individual lived for 120 hours after birth.

**Historical Note.** This Comment was revised in 2008.

## ANNOTATION

**Law reviews.** For article, "Probate and Non-probate Distribution Issues in the Case of a Murder/Suicide", see 17 Colo. Law. 1061 (1988).

**Applied in** *In re Estate of Whittman*, 220 P.3d 961 (Colo. App. 2009), *aff'd*, 233 P.3d 697 (Colo. 2010).

**15-11-105. No taker.** If there is no taker under the provisions of this article, the intestate estate passes to the state of Colorado, subject to the provisions of section 15-12-914.

**Source:** L. 94: Entire part R&RE, p. 978, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-105 as it existed prior to 1995.

## ANNOTATION

**Where the language in a will limits participation in the estate to named devisees and all the devisees predecease the termination of a trust, the corpus of the trust escheats to the**

**state, regardless of whether omitted heirs exist.** *In re Estate of Walter*, 97 P.3d 188 (Colo. App. 2003).

**15-11-106. Per capita at each generation.** (1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Deceased descendant", "deceased parent", or "deceased grandparent" means a descendant, parent, or grandparent who either predeceased the decedent or is deemed to have predeceased the decedent under section 15-11-104.

(b) "Surviving descendant" means a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under section 15-11-104.

(2) **Decedent's descendants.** If, under section 15-11-103 (2), a decedent's intestate estate or a part thereof passes "per capita at each generation" to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who are allocated a share and their surviving descendants had predeceased the decedent.

(3) **Descendants of parents or grandparents.** If, under section 15-11-103 (4) or (6), a decedent's intestate estate or a part thereof passes "per capita at each generation" to the descendants of the decedent's deceased parents or either of them, or to the descendants of the decedent's deceased grandparents or any of them, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to

the deceased parents or either of them, or the deceased grandparents or any of them, that contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

**Source:** L. 94: Entire part R&RE, p. 978, § 3, effective July 1, 1995. L. 95: (2) and (3) amended, p. 354, § 3, effective July 1. L. 2009: (2) and (3) amended, (HB 09-1260), ch. 107, p. 444, § 8, effective July 1.

**Editor's note:** This section is similar to former § 15-11-106 as it existed prior to 1995.

**15-11-107. Kindred of half blood.** Relatives of half blood inherit the same share they would inherit if they were of whole blood.

**Source:** L. 94: Entire part R&RE, p. 979, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-107 as it existed prior to 1995.

#### ANNOTATION

**Law reviews.** For article, "Children of the Half Blood", see 18 Dicta 158 (1941).

#### **15-11-108. After-born heirs - repeal. (Repealed)**

**Source:** L. 94: Entire part R&RE, p. 979, § 3, effective July 1, 1995. L. 2009: (2) added by revision, (HB 09-1287), ch. 310, pp. 1674, 1688, §§ 6, 17.

**Editor's note:** (1) This section was similar to former § 15-11-108 as it existed prior to 1995.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2010. (See L. 2009, pp. 1674, 1688.)

(3) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act repealing this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**15-11-109. Advancements.** (1) If an individual dies intestate as to all or a portion of his or her estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if (i) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement, or (ii) the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

(2) For the purposes of subsection (1) of this section, property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever first occurs.



(3) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.

(4) An heir who has received from the intestate estate more than his or her share shall in no case be required to refund, except as otherwise provided by section 15-11-203.

**Source:** L. 94: Entire part R&RE, p. 979, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-110 as it existed prior to 1995.

#### ANNOTATION

**Annotator's note.** Since § 15-11-109 is similar to repealed CSA, C. 176, § 5, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Definition of advancement.** "In its strict technical sense an advancement is a perfect and irrevocable gift, not required by law, made by a parent, during his lifetime, to his child, with the intention on the part of the donor that such gift shall represent a part of the whole of the portion of the donor's estate that the donee would be entitled to on the death of the donor intestate." 1 R.C.L., p. 653. Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927); Albers v. Young, 119 Colo. 37, 199 P.2d 890 (1948).

**Expenditures incurred in the discharge of the ordinary parental duties will not be considered advancements** to the child. Albers v. Young, 119 Colo. 37, 199 P.2d 890 (1948).

**Where the decedent retained control of, and dominion over, an account, including the**

absolute right to withdraw all or any part of the funds at any time, an advancement will not be created. Albers v. Young, 119 Colo. 37, 199 P.2d 890 (1948).

**Presumption that substantial remittance is an advancement.** In the absence of a contrary intent, the presumption arises that the remittance of a substantial amount to a child by his father is intended as an advancement to be taken into account upon the final distribution of the father's estate, if he dies intestate. This presumption is rebuttable as the intent is controlling. Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927).

**Such intent is determined as of the time each remittance is made.** The intention of a parent in making remittances to a child, as to whether the same are to be considered gifts or advancements, is to be determined as of the very time each remittance is made. Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927).

**15-11-110. Debts to decedent.** A debt owed to a decedent is not charged against the intestate share of any individual except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants.

**Source:** L. 94: Entire part R&RE, p. 979, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-111 as it existed prior to 1995.

**Cross references:** For an offset against a successor's interest for a noncontingent indebtedness to an estate, see § 15-12-903.

**15-11-111. Alienage.** No individual is disqualified to take as an heir, devisee, grantee, lessee, mortgagee, assignee, or other transferee because the individual or an individual through whom he or she claims is or has been an alien.

**Source:** L. 94: Entire part R&RE, p. 980, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-112 as it existed prior to 1995.

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provision similar to this section.

**This section is valid** and does not violate § 27 of art. II, Colo. Const. *McConville v. Howell*, 17 F. 104 (8th Cir. 1883).

**This section is illustrative of the fact that the policy towards aliens has been one of**

**marked liberality.** *Patek v. Am. Smelting & Ref. Co.*, 154 F. 190 (8th Cir. 1907).

**Under this section an alien is possessed of right and title indefeasible** as against all the world, save the sovereign, and defeasible by the latter only by direct proceedings for that purpose. *Billings v. Aspen Mining & Smelting Co.*, 51 F. 338 (8th Cir. 1892).

**15-11-112. Dower and courtesy abolished.** The estates of dower and courtesy are abolished.

**Source:** L. 94: Entire part R&RE, p. 980, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-113 as it existed prior to 1995.

**15-11-113. Individuals related to decedent through two blood lines.** An individual who is related to the decedent through two blood lines of relationship is entitled to only a single share based upon the relationship which would entitle the individual to the larger share.

**Source:** L. 94: Entire part R&RE, p. 980, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-114 as it existed prior to 1995.

**15-11-114. Parent barred from inheriting in certain circumstances.** (1) A parent is barred from inheriting from or through a child of the parent if:

(a) The parent's parental rights were terminated and the parent-child relationship was not judicially reestablished; or

(b) The child died before reaching eighteen years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under the laws of this state other than this code on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

(2) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.

**Source:** L. 94: Entire part R&RE, p. 980, § 3, effective July 1, 1995. L. 2009: (2) amended, (HB 09-1260), ch. 107, p. 444, § 9, effective July 1; entire section amended, (HB 09-1287), ch. 310, p. 1674 § 7, effective July 1, 2010.

**Editor's note:** (1) This section is similar to former § 15-11-109 as it existed prior to 1995.

(2) Subsection (2) was amended in House Bill 09-1260. Those amendments were superseded by the amendments made to that section by House Bill 09-1287.

(3) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of



time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For legal effects of a final decree of adoption, see § 19-5-211; for the legal effect of a final order of relinquishment, see § 19-5-104.

## COMMENT

**2008 Revisions.** In 2008, this section replaced former Section 2-114(c), which provided: “(c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.”

Subsection (a)(1) recognizes that a parent whose parental rights have been terminated is no longer legally a parent.

Subsection (a)(2) addresses a situation in which a parent’s parental rights were not actually terminated. Nevertheless, a parent can still be barred from inheriting from or through a child if the child died before reaching [18] years of age and there is clear and convincing evi-

dence that immediately before the child’s death the parental rights of the parent could have been terminated under law of this state other than this [code], but only if those parental rights could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

Statutes providing the grounds for termination of parental rights include: Ariz. Rev. Stat. Ann. § 8-533; Conn. Gen. Stat. § 45a-717; Del. Code Ann. tit. 13 § 1103; Fla. Stat. Ann. § 39.806; Iowa Code § 600A.8; Kan. Stat. Ann. § 38-2269; Mich. Comp. L. Ann. § 712A.19b; Minn. Stat. Ann. § 260C.301; Miss. Code Ann. § 93-15-103; Mo. Rev. Stat. § 211.447; Tex. Fam. Code §§ 161.001 to .007.

## SUBPART 2

### PARENT-CHILD RELATIONSHIP

**Editor’s note:** (1) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act adding this subpart 2 (§§ 15-11-115 to 15-11-122):

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For other provisions on parent-child relationships, see the “Uniform Parentage Act”, article 4 of title 19.

#### 15-11-115. Definitions. In this subpart 2:

- (1) “Adoptee” means an individual who is adopted.
- (2) “Assisted reproduction” means a method of causing pregnancy other than sexual intercourse.
- (3) “Divorce” includes an annulment, dissolution of marriage, and declaration of invalidity of a marriage.
- (4) “Functioned as a parent of the child” means behaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household.
- (5) “Genetic father” means the man whose sperm fertilized the egg of a child’s genetic mother. If the father-child relationship is established under the presumption of paternity

under section 19-4-105, C.R.S., the term means only the man for whom that relationship is established.

(6) "Genetic mother" means the woman whose egg was fertilized by the sperm of a child's genetic father.

(7) "Genetic parent" means a child's genetic father or genetic mother.

(8) "Incapacity" means the inability of an individual to function as a parent of a child because of the individual's physical or mental condition.

(9) "Relative" means a grandparent or a descendant of a grandparent.

**Source:** L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1675, § 8, effective July 1, 2010.

## COMMENT

**Scope.** This section sets forth definitions that apply for purposes of the intestacy rules contained in Subpart 2 (Parent-Child Relationship).

**Definition of "Adoptee".** The term "adoptee" is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult.

**Definition of "Assisted Reproduction".** The definition of "assisted reproduction" is copied from the Uniform Parentage Act § 102. Current methods of assisted reproduction include intra-uterine insemination (previously and sometimes currently called artificial insemination), donation of eggs, donation of embryos, in-vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection.

**Definition of "Functioned as a Parent of the Child".** The term "functioned as a parent of the child" is derived from the Restatement (Third) of Property: Wills and Other Donative Transfers. The Reporter's Note No. 4 to § 14.5 of the Restatement lists the following parental functions:

*Custodial responsibility* refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility.

*Decisionmaking responsibility* refers to authority for making significant life decisions on behalf of the child, including decisions about the child's education, spiritual guidance, and health care.

*Caretaking functions* are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:

(a) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child's physical safety, and providing transportation;

(b) directing the child's various developmental needs, including the acquisition of motor

and language skills, toilet training, self-confidence, and maturation;

(c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child's needs for behavioral control and self-restraint;

(d) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;

(e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(f) arranging for health-care providers, medical follow-up, and home health care;

(g) providing moral and ethical guidance;

(h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

*Parenting functions* are tasks that serve the needs of the child or the child's residential family. Parenting functions include caretaking functions, as defined [above], and all of the following additional functions:

(a) providing economic support;

(b) participating in decisionmaking regarding the child's welfare;

(c) maintaining or improving the family residence, including yard work, and house cleaning;

(d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks supporting the consumption and savings needs of the household;

(e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development.

Ideally, a parent would perform all of the above functions throughout the child's minority. In cases falling short of the ideal, the trier of fact



must balance both time and conduct. The question is, did the individual perform sufficient parenting functions over a sufficient period of time to justify concluding that the individual functioned as a parent of the child. Clearly, insubstantial conduct, such as an occasional gift or social contact, would be insufficient. Moreover, merely obeying a child support order would not, by itself, satisfy the requirement. Involuntarily providing support is inconsistent with functioning as a parent of the child.

The context in which the question arises is also relevant. If the question is whether the individual claiming to have functioned as a parent of the child inherits from the child, the court might require more substantial conduct over a more substantial period of time than if the question is whether a child inherits from an individ-

ual whom the child claims functioned as his or her parent.

**Definition of “Genetic Father”.** The term “genetic father” means the man whose sperm fertilized the egg of a child’s genetic mother. If the father-child relationship is established under the presumption of paternity recognized by the law of this state, the term means only the man for whom that relationship is established. As stated in the Legislative Note, a state that has enacted the Uniform Parentage Act (2000, as amended) should insert a reference to Section 201(b)(1), (2), or (3) of that Act.

**Definition of “Relative”.** The term “relative” does not include any relative no matter how remote but is limited to a grandparent or a descendant of a grandparent, as determined under this subpart 2.

**15-11-116. Effect of parent-child relationship.** Except as otherwise provided in section 15-11-119, if a parent-child relationship exists or is established under this subpart 2, the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.

**Source: L. 2009:** Entire section added, (HB 09-1287), ch. 310, p. 1676, § 8, effective July 1, 2010.

**Cross references:** For other provisions on establishing parent-child relationships, see the “Uniform Parentage Act”, article 4 of title 19.

#### COMMENT

**Scope.** This section provides that if a parent-child relationship exists or is established under any section in subpart 2, the consequence is that the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession by, from, or through the parent

and the child. The exceptions in Section 2-119(b) through (e) refer to cases in which a parent-child relationship exists but only for the purpose of the right of an adoptee or a descendant of an adoptee to inherit from or through one or both genetic parents.

**15-11-117. No distinction based on marital status.** Except as otherwise provided in section 15-11-114, 15-11-119, 15-11-120, or 15-11-121, a parent-child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status.

**Source: L. 2009:** Entire section added, (HB 09-1287), ch. 310, p. 1676, § 8, effective July 1, 2010.

**Cross references:** For another provision on marital status, see § 19-4-103.

#### COMMENT

**Scope.** This section, adopted in 2008, provides the general rule that a parent-child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status. Exceptions to this general rule are contained in Sections 2-114 (Parent Barred from Inheriting in Certain Circumstances), 2-119 (Adoptee and Adoptee’s Genetic Parents), 2-120 (Child Conceived by Assisted Reproduction

Other than Child Born to Gestational Carrier), and 2-121 (Child Born to Gestational Carrier).

This section replaces former Section 2-114(a), which provided: “(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be estab-

lished under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].”

**Defined Terms.** *Genetic parent* is defined in Section 2-115 as the child’s genetic father or

genetic mother. *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of a child’s genetic father. *Genetic father* is defined as the man whose sperm fertilized the egg of a child’s genetic mother.

**15-11-118. Adoptee and adoptee’s adoptive parent or parents.** (1) **Parent-child relationship between adoptee and adoptive parent or parents.** A parent-child relationship exists between an adoptee and the adoptee’s adoptive parent or parents.

(2) **Individual in process of being adopted by married couple - stepchild in process of being adopted by stepparent.** For purposes of subsection (1) of this section:

(a) An individual who is in the process of being adopted by a married couple when one of the spouses dies is treated as adopted by the deceased spouse if the adoption is subsequently granted to the decedent’s surviving spouse; and

(b) A child of a genetic parent who is in the process of being adopted by a genetic parent’s spouse when the spouse dies is treated as adopted by the deceased spouse if the genetic parent survives the deceased spouse by one hundred twenty hours.

(2.5) **Individual in process of being adopted by second parent.** For purposes of subsection (1) of this section, a child who is in the process of being adopted by a second adult in a second-parent adoption when the second adult dies is treated as adopted by the second adult if the child’s parent survives the second adult by one hundred twenty hours.

(3) **Child of assisted reproduction or gestational child in process of being adopted.** If, after a parent-child relationship is established between a child of assisted reproduction and a parent under section 15-11-120 or between a gestational child and a parent under section 15-11-121, the child is in the process of being adopted by the parent’s spouse or another individual when that spouse or individual dies, the child is treated as adopted by the deceased spouse or individual for the purpose of paragraph (b) of subsection (2) of this section.

**Source:** L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1676, § 8, effective July 1, 2010. L. 2010: (2.5) added and (3) amended, (SB 10-199), ch. 374, p. 1749, § 6, effective July 1.

**Editor’s note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act adding subsection (2.5) and amending subsection (3):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For other provisions on assisted reproduction and paternity, see § 19-4-106; for legal effects of a final decree of adoption, see § 19-5-211; for the legal effect of a final order of relinquishment, see § 19-5-104.

## COMMENT

**2008 Revisions.** In 2008, this section and Section 2-119 replaced former Section 2-114(b), which provided: “(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relation-

ship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent”. The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Subsection (a) of this section covered that part of former Section 2-114(b) that provided



that an adopted individual is the child of his or her adopting parent or parents. Section 2-119(a) and (b)(1) covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

The 2008 revisions also added subsections (b)(2) and (c), which are explained below.

**Data on Adoptions.** Official data on adoptions are not regularly collected. Partial data are sometimes available from the Children's Bureau of the U.S. Department of Health and Human Services, the U.S. Census Bureau, and the Evan B. Donaldson Adoption Institute.

For an historical treatment of adoption, from ancient Greece, through the Middle Ages, 19<sup>th</sup>- and 20<sup>th</sup>-century America, to open adoption and international adoption, see Debora L. Spar, *The Baby Business* ch. 6 (2006) and sources cited therein.

**Defined Term.** *Adoptee* is defined in Section 2-115 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult.

**Subsection (a): Parent-Child Relationship Between Adoptee and Adoptive Parent or Parents.** Subsection (a) states the general rule that adoption creates a parent-child relationship between the adoptee and the adoptee's adoptive parent or parents.

**Subsection (b)(1): Individual in Process of Being Adopted by Married Couple.** If the spouse who subsequently died had filed a legal proceeding to adopt the individual before the

spouse died, the individual is "in the process of being adopted" by the deceased spouse when the spouse died. However, the phrase "in the process of being adopted" is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

**Subsection (b)(2): Stepchild in Process of Being Adopted by Stepparent.** If the stepparent who subsequently died had filed a legal proceeding to adopt the stepchild before the stepparent died, the stepchild is "in the process of being adopted" by the deceased stepparent when the stepparent died. However, the phrase "in the process of being adopted" is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

**Subsection (c): Child of Assisted Reproduction or Gestational Child in Process of Being Adopted.** Subsection (c) provides that if, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, the child is in the process of being adopted by the parent's spouse when that spouse dies, the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). An example would be a situation in which an unmarried mother or father is the parent of a child of assisted reproduction or a gestational child, and subsequently marries an individual who then begins the process of adopting the child but who dies before the adoption becomes final. In such a case, subsection (c) provides that the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). The phrase "in the process of being adopted" carries the same meaning under subsection (c) as it does under subsection (b)(2).

**15-11-119. Adoptee and adoptee's genetic parents.** (1) **Parent-child relationship between adoptee and genetic parents.** Except as otherwise provided in this section, a parent-child relationship does not exist between an adoptee and the adoptee's genetic parents.

(2) **Stepchild adopted by stepparent.** A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and:

(a) The genetic parent whose spouse adopted the individual; and

(b) The other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

(2.5) **Child of a second-parent adoption.** A parent-child relationship exists between an individual who is adopted by a second parent and:

(a) A genetic parent who consented to a second-parent adoption; and

(b) Another genetic parent who is not a third-party donor, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

(3) **Individual adopted by relative of genetic parent.** A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent.

(4) **Individual adopted after death of both genetic parents.** A parent-child relationship exists between both genetic parents and an individual who is adopted after the death of both genetic parents, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit through either genetic parent.

(5) **Child of assisted reproduction or gestational child who is subsequently adopted.** If, after a parent-child relationship is established between a child of assisted reproduction and a parent or parents under section 15-11-120 or between a gestational child and a parent or parents under section 15-11-121, the child is adopted by another or others, the child's parent or parents under section 15-11-120 or 15-11-121 are treated as the child's genetic parent or parents for the purpose of this section.

**Source:** L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1676, § 8, effective July 1, 2010. L. 2010: (2.5)(a) and (2.5)(b) amended, (SB 10-199), ch. 374, p. 1749, § 7, effective July 1.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsections (2.5)(a) and (2.5)(b):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For other provisions on assisted reproduction and paternity, see § 19-4-106; for legal effects of a final decree of adoption, see § 19-5-211; for the legal effect of a final order of relinquishment, see § 19-5-104.

## COMMENT

**2008 Revisions.** In 2008, this section and Section 2-118 replaced former Section 2-114(b), which provided: "(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent". The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Section 2-118(a) covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Subsections (a) and (b) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

The 2008 revisions also added subsections (c), (d), and (e), which are explained below.

**Defined Terms.** Section 2-119 uses terms that are defined in Section 2-115.

*Adoptee* is defined in Section 2-115 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor, but includes an individual who is adopted as an adult.

*Genetic parent* is defined in Section 2-115 as the child's genetic father or genetic mother. *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of a child's genetic father. *Genetic father* is defined as the man whose sperm fertilized the egg of a child's genetic mother.

*Relative* is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

**Subsection (a): Parent-Child Relationship Between Adoptee and Adoptee's Genetic Parents.** Subsection (a) states the general rule that a parent-child relationship does not exist between an adopted child and the child's genetic parents. This rule recognizes that an adoption severs the parent-child relationship between the adopted child and the child's genetic parents. The adoption gives the adopted child a replacement family, sometimes referred to in the case law as "a fresh start". For further elaboration of this the-



ory, see Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5(2)(A) & cmts. d & e (1999). Subsection (a) also states, however, that there are exceptions to this general rule in subsections (b) through (d).

**Subsection (b): Stepchild Adopted by Stepparent.** Subsection (b) continues the so-called “stepparent exception” contained in the Code since its original promulgation in 1969. When a stepparent adopts his or her stepchild, Section 2-118 provides that the adoption creates a parent-child relationship between the child and his or her adoptive stepparent. Section 2-119(b)(1) provides that a parent-child relationship continues to exist between the child and the child’s genetic parent whose spouse adopted the child. Section 2-119(b)(2) provides that a parent-child relationship also continues to exist between an adopted stepchild and his or her other genetic parent (the noncustodial genetic parent) for purposes of inheritance from and through that genetic parent, but not for purposes of inheritance by the other genetic parent and his or her relatives from or through the adopted stepchild.

*Example 1—Post-Widowhood Remarriage.* A and B were married and had two children, X and Y. A died, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are treated as B’s children and under Section 2-118(a) as C’s children for all purposes of inheritance. Under subsection (b)(2), X and Y are treated as A’s children for purposes of inheritance from and through A but not for purposes of inheritance from or through X or Y. Thus, if A’s father, G, died intestate, survived by X and Y and by G’s daughter (A’s sister), S, G’s heirs would be S, X, and Y. S would take half and X and Y would take one-fourth each.

*Example 2—Post-Divorce Remarriage.* A and B were married and had two children, X and Y. A and B got divorced, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are treated as B’s children and under Section 2-118(a) as C’s children for all purposes of inheritance. Under subsection (b)(2), X and Y are treated as A’s children for purposes of inheritance from and through A. On the other hand, neither A nor any of A’s relatives can inherit from or through X or Y.

**Subsection (c): Individual Adopted by Relative of a Genetic Parent.** Under subsection (c), a child who is adopted by a maternal or a paternal relative of either genetic parent, or by the spouse or surviving spouse of such a relative, remains a child of both genetic parents.

*Example 3.* F and M, a married couple with a four-year old child, X, were badly injured in an automobile accident. F subsequently died. M, who was in a vegetative state and on life support, was unable to care for X. Thereafter, M’s sister, A, and A’s husband, B, adopted X. F’s father, PGF, a widower, then died intestate. Under subsection (c), X is treated as PGF’s grandchild (F’s child).

**Subsection (d): Individual Adopted After Death of Both Genetic Parents.** Usually, a post-death adoption does not remove a child from contact with the genetic families. When someone with ties to the genetic family or families adopts a child after the deaths of the child’s genetic parents, even if the adoptive parent is not a relative of either genetic parent or a spouse or surviving spouse of such a relative, the child continues to be in a parent-child relationship with both genetic parents. Once a child has taken root in a family, an adoption after the death of both genetic parents is likely to be by someone chosen or approved of by the genetic family, such as a person named as guardian of the child in a deceased parent’s will. In such a case, the child does not become estranged from the genetic family. Such an adoption does not “remove” the child from the families of both genetic parents. Such a child continues to be a child of both genetic parents, as well as a child of the adoptive parents.

*Example 4.* F and M, a married couple with a four-year-old child, X, were involved in an automobile accident that killed F and M. Neither M’s parents nor F’s father (F’s mother had died before the accident) nor any other relative was in a position to take custody of X. X was adopted by F and M’s close friends, A and B, a married couple approximately of the same ages as F and M. F’s father, PGF, a widower, then died intestate. Under subsection (d), X is treated as PGF’s grandchild (F’s child). The result would be the same if F’s or M’s will appointed A and B as the guardians of the person of X, and A and B subsequently successfully petitioned to adopt X.

**Subsection (e): Child of Assisted Reproduction or Gestational Child Who Is Subsequently Adopted.** Subsection (e) puts a child of assisted reproduction and a gestational child on the same footing as a genetic child for purposes of this section. The results in Examples 1 through 4 would have been the same had the child in question been a child of assisted reproduction or a gestational child.

**15-11-120. Child conceived by assisted reproduction other than child born to gestational carrier. (1) Definitions.** In this section:

(a) “Birth mother” means a woman, other than a gestational carrier under section 15-11-121, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child’s genetic mother.

(b) “Child of assisted reproduction” means a child conceived by means of assisted reproduction by a woman other than a gestational carrier under section 15-11-121.

(c) “Third-party donor” means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

(I) A husband who provides sperm, or a wife who provides eggs, that are used for assisted reproduction by the wife;

(II) The birth mother of a child of assisted reproduction; or

(III) An individual who has been determined under subsection (5) or (6) of this section to have a parent-child relationship with a child of assisted reproduction.

(2) **Third-party donor.** A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.

(3) **Parent-child relationship with birth mother.** A parent-child relationship exists between a child of assisted reproduction and the child’s birth mother.

(4) **Parent-child relationship with husband whose sperm were used during his lifetime by his wife for assisted reproduction.** Except as otherwise provided in subsections (9) and (10) of this section, a parent-child relationship exists between a child of assisted reproduction and the husband of the child’s birth mother if the husband provided the sperm that the birth mother used during his lifetime for assisted reproduction.

(5) **Birth certificate - presumptive effect.** A birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction presumptively establishes a parent-child relationship between the child and that individual.

(6) **Parent-child relationship with another.** Except as otherwise provided in subsections (7), (9), and (10) of this section, and unless a parent-child relationship is established under subsection (4) or (5) of this section, a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:

(a) Before or after the child’s birth, signed a record that, considering all the facts and circumstances, evidences the individual’s consent; or

(b) In the absence of a signed record under paragraph (a) of this subsection (6):

(I) Functioned as a parent of the child no later than two years after the child’s birth;

(II) Intended to function as a parent of the child no later than two years after the child’s birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or

(III) Intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.

(7) **Record signed more than two years after the birth of the child - effect.** For the purpose of paragraph (a) of subsection (6) of this section, neither an individual who signed a record more than two years after the birth of the child, nor a relative of that individual who is not also a relative of the birth mother, inherits from or through the child unless the individual functioned as a parent of the child before the child reached eighteen years of age.

(8) **Presumption - birth mother is married or surviving spouse.** For the purpose of paragraph (b) of subsection (6) of this section, the following rules apply:

(a) If the birth mother is married at the time of conception and no divorce proceeding is then pending, her spouse is presumed to satisfy the requirements of subparagraph (I) or (II) of paragraph (b) of subsection (6) of this section.

(b) If the birth mother is a surviving spouse and at her deceased spouse’s death no divorce proceeding was pending, her deceased spouse is presumed to satisfy the requirements of subparagraph (II) or (III) of paragraph (b) of subsection (6) of this section.

(9) **Divorce before placement of eggs, sperm, or embryos.** If a married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother’s former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse’s child.

(10) **Withdrawal of consent before placement of eggs, sperm, or embryos.** If, in a record, an individual withdraws consent to assisted reproduction before placement of eggs,



sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies subsection (6) of this section.

(11) **When posthumously conceived child treated as in gestation.** If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the time of the individual's death for purposes of section 15-11-104 (1) (b) if the child is:

- (a) In utero not later than thirty-six months after the individual's death; or
- (b) Born not later than forty-five months after the individual's death.

**Source:** L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1677, § 8, effective July 1, 2010. L. 2010: (8) amended, (SB 10-199), ch. 374, p. 1750, § 8, effective July 1.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (8):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For other provisions on assisted reproduction and paternity, see § 19-4-106.

## COMMENT

**Data on Children of Assisted Reproduction.** The Center for Disease Control (CDC) of the U.S. Department of Health and Human Services collects data on children of assisted reproduction (ART). See Center for Disease Control, 2004 Assisted Reproductive Technology Success Rates (Dec. 2006) (2004 CDC Report), available at <http://www.cdc.gov/ART/ART2004>. The data, however, is of limited use because the definition of ART used in the CDC Report excludes intrauterine (artificial) insemination (2004 CDC Report at 3), which is probably the most common form of assisted reproductive procedures. The CDC estimates that in 2004 ART procedures (excluding intrauterine insemination) accounted for slightly more than one percent of total U.S. births. 2004 CDC Report at 13. According to the Report: "The number of infants born who were conceived using ART increased steadily between 1996 and 2004. In 2004, 49,458 infants were born, which was more than double the 20,840 born in 1996." 2004 CDC Report at 57. "The average age of women using ART services in 2004 was 36. The largest group of women using ART services were women younger than 35, representing 41% of all ART cycles carried out in 2004. Twenty-one percent of ART cycles were carried out among women aged 35-37, 19% among women aged 38-40, 9% among women aged 41-42, and 9% among women older than 42." 2004 CDC Report at 15. Updates of the 2004 CDC Report

are to be posted at <http://www.cdc.gov/ART/ART2004>.

**AMA Ethics Policy on Posthumous Conception.** The ethics policies of the American Medical Association concerning artificial insemination by a known donor state that "[i]f semen is frozen and the donor dies before it is used, the frozen semen should not be used or donated for purposes other than those originally intended by the donor. If the donor left no instructions, it is reasonable to allow the remaining partner to use the semen for intrauterine insemination but not to donate it to someone else. However, the donor should be advised of such a policy at the time of donation and be given an opportunity to override it." Am. Med. Assn. Council on Ethical & Judicial Affairs, Code of Medical Ethics: Current Opinions E-2.04 (Issued June 1993; updated December 2004), available at [http://www0.ama-assn.org/apps/pf\\_new/pf\\_online?f\\_n=browse&doc=policyfiles/HnE/E-2.0](http://www0.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/E-2.0) (last visited October 16, 2008).

**Subsection (a): Definitions.** Subsection (a) defines the following terms:

*Birth mother* is defined as the woman (other than a gestational carrier under Section 2-121) who gave birth to a child of assisted reproduction.

*Child of assisted reproduction* is defined as a child conceived by means of assisted reproduction by a woman other than a gestational carrier under Section 2-121.

**Third-party donor.** The definition of third-party donor is based on the definition of “donor” in the Uniform Parentage Act § 102.

**Other Defined Terms.** In addition to the terms defined in subsection (a), this section uses terms that are defined in Section 2-115.

**Assisted reproduction** is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

**Divorce** is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

**Functioned as a parent of the child** is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household. See also the Comment to Section 2-115 for additional explanation of the term.

**Genetic father** is defined in Section 2-115 as the man whose sperm fertilized the egg of a child’s genetic mother.

**Genetic mother** is defined as the woman whose egg was fertilized by the sperm of the child’s genetic father.

**Incapacity** is defined in Section 2-115 as the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.

**Subsection (b): Third-Party Donor.** Subsection (b) is consistent with the Uniform Parentage Act § 702. Under subsection (b), a third-party donor does not have a parent-child relationship with a child of assisted reproduction, despite the donor’s genetic relationship with the child.

**Subsection (c): Parent-Child Relationship With Birth Mother.** Subsection (c) is in accord with the Uniform Parentage Act § 201 in providing that a parent-child relationship exists between a child of assisted reproduction and the child’s birth mother. The child’s birth mother, defined in subsection (a) as the woman (other than a gestational carrier) who gave birth to the child, made the decision to undergo the procedure with intent to become pregnant and give birth to the child. Therefore, in order for a parent-child relationship to exist between her and the child, no proof that she consented to the procedure with intent to be treated as the parent of the child is necessary.

**Subsection (d): Parent-Child Relationship with Husband Whose Sperm Were Used During His Lifetime By His Wife for Assisted Reproduction.** The principal application of subsection (d) is in the case of the assisted reproduction procedure known as intrauterine insemination husband (IIH), or, in older terminology, artificial insemination husband (AIH). Subsec-

tion (d) provides that, except as otherwise provided in subsection (i), a parent-child relationship exists between a child of assisted reproduction and the husband of the child’s birth mother if the husband provided the sperm that were used during his lifetime by her for assisted reproduction and the husband is the genetic father of the child. The exception contained in subsection (i) relates to the withdrawal of consent in a record before the placement of eggs, sperm, or embryos. Note that subsection (d) only applies if the husband’s sperm were used during his lifetime by his wife to cause a pregnancy by assisted reproduction. Subsection (d) does not apply to posthumous conception.

**Subsection (e): Birth Certificate: Presumptive Effect.** A birth certificate will name the child’s birth mother as mother of the child. Under subsection (c), a parent-child relationship exists between a child of assisted reproduction and the child’s birth mother. Note that the term “birth mother” is a defined term in subsection (a) as not including a gestational carrier as defined in Section 2-121.

Subsection (e) applies to the individual, if any, who is identified on the birth certificate as the child’s other parent. Subsection (e) grants presumptive effect to a birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction. In the case of unmarried parents, federal law requires that states enact procedures under which “the name of the father shall be included on the record of birth,” but only if the father and mother have signed a voluntary acknowledgment of paternity or a court of an administrative agency of competent jurisdiction has issued an adjudication of paternity. See 42 U.S.C. § 666(a)(5)(D). This federal statute is included as an appendix to the Uniform Parentage Act.

The federal statute applies only to unmarried opposite-sex parents. Section 2-120(e)’s presumption, however, could apply to a same-sex couple if state law permits a woman who is not the birth mother to be listed on the child’s birth certificate as the child’s other parent. Even if state law does not permit that listing, the woman who is not the birth mother could be the child’s parent by adoption of the child (see Section 2-118) or under subsection (f) as a result of her consent to assisted reproduction by the birth mother “with intent to be treated as the other parent of the child,” or by satisfying the “function as a parent” test in subsection (f)(2).

Section 2-120 does not apply to same-sex couples that use a gestational carrier. For same-sex couples using a gestational carrier, the parent-child relationship can be established by adoption (see Section 2-118 and Section 2-121(b)), or it can be established under subsection 2-121(d) if the couple enters into a gestational agreement with the gestational carrier under which the couple agrees to be the parents of



the child born to the gestational carrier. It is irrelevant whether either intended parent is a genetic parent of the child. See Section 2-121(a)(4).

**Subsection (f): Parent-Child Relationship with Another.** In order for someone other than the birth mother to have a parent-child relationship with the child, there needs to be proof that the individual consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. The other individual's genetic material might or might not have been used to create the pregnancy. Except as otherwise provided in this section, merely depositing genetic material is not, by itself, sufficient to establish a parent-child relationship with the child.

**Subsection (f)(1): Signed Record Evidencing Consent, Considering All the Facts and Circumstances, to Assisted Reproduction with Intent to Be Treated as the Other Parent of the Child.** Subsection (f)(1) provides that a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction with intent to be treated as the other parent of the child is established if the individual signed a record, before or after the child's birth, that considering all the facts and circumstances evidences the individual's consent. Recognizing consent in a record not only signed before the child's birth but also at any time after the child's birth is consistent with the Uniform Parentage Act §§ 703 and 704.

As noted, the signed record need not explicitly express consent to the procedure with intent to be treated as the other parent of child, but only needs to evidence such consent considering all the facts and circumstances. An example of a signed record that would satisfy this requirement comes from *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, the New York Surrogate's Court held that a child of posthumous conception was included in a class gift in a case in which the deceased father had signed a form that stated: "In the event of my death I agree that my spouse shall have the sole right to make decisions regarding the disposition of my semen samples. I authorize repro lab to release my specimens to my legal spouse [naming her]." Another form he signed stated: "I, [naming him], hereby certify that I am married or intimately involved with [naming her] and the cryopreserved specimens stored at repro lab will be used for future inseminations of my wife/intimate partner." Although these forms do not explicitly say that the decedent consented to the procedure with intent to be treated as the other parent of the child, they do evidence such consent in light of all of the facts and circumstances and would therefore satisfy subsection (f)(1).

**Subsection (f)(2):** Ideally an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child will have signed a record that satisfies subsection (f)(1). If not, subsection (f)(2) recognizes that actions speak as loud as words. Under subsection (f)(2), consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual functioned as a parent of the child no later than two years after the child's birth. Under subsection (f)(2)(B), the same result applies if the evidence establishes that the individual had that intent but death, incapacity, or other circumstances prevented the individual from carrying out that intent. Finally, under subsection (f)(2)(C), the same result applies if it can be established by clear and convincing evidence that the individual intended to be treated as a parent of a posthumously conceived child.

**Subsection (g): Record Signed More than Two Years after the Birth of the Child: Effect.** Subsection (g) is designed to prevent an individual who has never functioned as a parent of the child from signing a record in order to inherit from or through the child or in order to make it possible for a relative of the individual to inherit from or through the child. Thus, subsection (g) provides that, for purposes of subsection (f)(1), an individual who signed a record more than two years after the birth of the child, or a relative of that individual, does not inherit from or through the child unless the individual functioned as a parent of the child before the child reached the age of [18].

**Subsection (h): Presumption: Birth Mother is Married or Surviving Spouse.** Under subsection (h), if the birth mother is married and no divorce proceeding is pending, then in the absence of clear and convincing evidence to the contrary, her spouse satisfies subsection (f)(2)(A) or (B) or if the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, then in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).

**Subsection (i): Divorce Before Placement of Eggs, Sperm, or Embryos.** Subsection (i) is derived from the Uniform Parentage Act § 706(b).

**Subsection (j): Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos.** Subsection (j) is derived from the Uniform Parentage Act § 706(a). Subsection (j) provides that if, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies the requirements of subsection (f).

**Subsection (k): When Posthumously Conceived Gestational Child Treated as in Gestation.** Subsection (k) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (i) in utero no later than 36 months after the individual's death or (ii) born no later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of all or part of the distribution of the estate.

The 36-month period in subsection (k) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted

reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

**15-11-121. Child born to gestational carrier. (1)** In this section:

(a) "Gestational agreement" means an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents, or an individual described in subsection (5) of this section.

(b) "Gestational carrier" means a woman who is not an intended parent who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child's genetic mother.

(c) "Gestational child" means a child born to a gestational carrier under a gestational agreement.

(d) "Intended parent" means an individual who entered into a validated gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

(2) **Court order adjudicating parentage - effect.** A parent-child relationship is conclusively established by a court order designating the parent or parents of a gestational child.

(3) **Gestational carrier.** A parent-child relationship between a gestational child and the child's gestational carrier does not exist unless the gestational carrier is:

(a) Designated as a parent of the child in a court order described in subsection (2) of this section; or

(b) The child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

(4) **Parent-child relationship with intended parent or parents.** In the absence of a court order under subsection (2) of this section, a parent-child relationship exists between a gestational child and an intended parent who:

(a) Functioned as a parent of the child no later than two years after the child's birth; or

(b) Died while the gestational carrier was pregnant if:

(I) There were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth;

(II) There were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or

(III) There was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child's birth.

(5) **Gestational agreement after death or incapacity.** In the absence of a court order under subsection (2) of this section, a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or



incapacity to conceive a child under a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by:

(a) A record signed by the individual which considering all the facts and circumstances evidences the individual's intent; or

(b) Other facts and circumstances establishing the individual's intent by clear and convincing evidence.

(6) **Presumption - gestational agreement after spouse's death or incapacity.** Except as otherwise provided in subsection (7) of this section, and unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of paragraph (b) of subsection (5) of this section if:

(a) The individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child;

(b) When the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and

(c) The individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

(7) **Subsection (6) presumption inapplicable.** The presumption under subsection (6) of this section does not apply if there is:

(a) A court order under subsection (2) of this section; or

(b) A signed record that satisfies paragraph (a) of subsection (5) of this section.

(8) **When posthumously conceived gestational child treated as in gestation.** If, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the time of the individual's death for purposes of section 15-11-104 (1) (b) if the child is:

(a) In utero not later than thirty-six months after the individual's death; or

(b) Born not later than forty-five months after the individual's death.

(9) **No effect on other laws.** This section does not affect laws of this state other than this code regarding the enforceability or validity of a gestational agreement.

**Source: L. 2009:** Entire section added, (HB 09-1287), ch. 310, p. 1679, § 8, effective July 1, 2010.

**Cross references:** For other provisions on assisted reproduction and paternity, see § 19-4-106.

## COMMENT

**Subsection (a): Definitions.** Subsection (a) defines the following terms:

**Gestational agreement.** The definition of gestational agreement is based on the Comment to Article 8 of the Uniform Parentage Act, which states that the term "gestational carrier" "applies to both a woman who, through assisted reproduction, performs the gestational function without being genetically related to a child, and a woman who is both the gestational and genetic mother. The key is that an agreement has been made that the child is to be raised by the intended parents." The Comment also points out that "The [practice in which the woman is both the gestational and genetic mother] has elicited disfavor in the ART community, which has concluded that the gestational carrier's genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement."

**Gestational carrier** is defined as a woman who is not an intended parent and who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child's genetic mother.

**Gestational child** is defined as a child born to a gestational carrier under a gestational agreement.

**Intended parent** is defined as an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

**Other Defined Terms.** In addition to the terms defined in subsection (a), this section uses terms that are defined in Section 2-115.

**Child of assisted reproduction** is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

*Divorce* is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

*Functioned as a parent of the child* is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household. See also the Comment to Section 2-115 for additional explanation of the term.

*Genetic mother* is defined as the woman whose egg was fertilized by the sperm of the child's genetic father.

*Incapacity* is defined in Section 2-115 as the inability of an individual to function as a parent of a child because of the individual's physical or mental condition.

*Relative* is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

**Subsection (b): Court Order Adjudicating Parentage: Effect.** A court order issued under § 807 of the Uniform Parentage Act (UPA) would qualify as a court order adjudicating parentage for purposes of subsection (b). UPA § 807 provides:

UPA § 807. Parentage under Validated Gestational Agreement. (a) Upon birth of a child to a gestational carrier, the intended parents shall file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

- (1) confirming that the intended parents are the parents of the child;
- (2) if necessary, ordering that the child be surrendered to the intended parents; and
- (3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.

(b) If the parentage of a child born to a gestational carrier is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

(c) If the intended parents fail to file notice required under subsection (a), the gestational carrier or the appropriate State agency may file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

**Subsection (c): Gestational Carrier.** Under subsection (c), the only way that a parent-child relationship exists between a gestational child

and the child's gestational carrier is if she is (1) designated as a parent of the child in a court order described in subsection (b) or (2) the child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

**Subsection (d): Parent-Child Relationship With Intended Parent or Parents.** Subsection (d) only applies in the absence of a court order under subsection (b). If there is no such court order, subsection (b) provides that a parent-child relationship exists between a gestational child and an intended parent who functioned as a parent of the child no later than two years after the child's birth. A parent-child also exists between a gestational child and an intended parent if the intended parent died while the gestational carrier was pregnant, but only if (A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth; (B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or (C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child's birth.

**Subsection (e): Gestational Agreement After Death or Incapacity.** Subsection (e) only applies in the absence of a court order under subsection (b). If there is no such court order, a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or incapacity to conceive a child under a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by a record signed by the individual which considering all the facts and circumstances evidences the individual's intent or by other facts and circumstances establishing the individual's intent by clear and convincing evidence.

**Subsections (f) and (g): Presumption: Gestational Agreement After Spouse's Death or Incapacity.** Subsection (f) and (g) are connected. Subsection (f) provides that unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if (1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child, (2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and (3) the



individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

Subsection (g) provides, however, that the presumption under subsection (f) does not apply if there is a court order under subsection (b) or a signed record that satisfies subsection (e)(1).

**Subsection (h): When Posthumously Conceived Gestational Child is Treated as in Gestation.** Subsection (h) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (i) in utero not later than 36 months after the individual's death or (ii) born not later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of the distribution of part or all of the estate.

The 36-month period in subsection (g) is designed to allow a surviving spouse or partner a

period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The three-year period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

**15-11-122. Equitable adoption.** This subpart 2 does not affect the doctrine of equitable adoption.

**Source: L. 2009:** Entire section added, (HB 09-1287), ch. 310, p. 1682, § 8, effective July 1, 2010.

## COMMENT

On the doctrine of equitable adoption, see Restatement (Third) of Property: Wills and

Other Donative Transfers § 2.5, cmt. k & Reporter's Note No. 7 (1999).

## PART 2

### ELECTIVE-SHARE OF SURVIVING SPOUSE

**Cross references:** For clarification of the term "surviving spouse", see § 15-11-802; for the "Colorado Marital Agreement Act", see part 3 of article 2 of title 14.

**Law reviews:** For article, "The Surviving Spouse Elective Share and the Augmented Estate", see 17 Colo. Law. 985 (1988); for article, "Working with the New Augmented Estate", see 24 Colo. Law. 2337 (1995).

## GENERAL COMMENT

The elective share of the surviving spouse was fundamentally revised in 1990 and was reorganized and clarified in 1993 and 2008. The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable-distribution system applied in both the common-law and community-property states when a marriage ends in divorce. When a marriage ends in death, that theory is also already implemented under

the community-property system and under the system promulgated in the Model Marital Property Act. In the common-law states, however, elective-share law has not caught up to the partnership theory of marriage.

The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of a surviving spouse in a

long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life marriage (typically a post-widowhood remarriage) in which neither spouse contributed much, if anything, to the acquisition of the other's wealth, except that a special supplemental elective-share amount is provided in cases in which the surviving spouse would otherwise be left without sufficient funds for support.

### **The Partnership Theory of Marriage**

The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." M. Glendon, *The Transformation of Family Law* 131 (1989). Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost." *Id.* See also American Law Institute, *Principles of Family Dissolution* § 4.09 Comment c (2002).

No matter how the rationale is expressed, the community-property system, including that version of community law promulgated in the Model Marital Property Act, recognizes the partnership theory, but it is sometimes thought that the common-law system denies it. In the ongoing marriage, it is true that the basic principle in the common-law (title-based) states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage. By granting each spouse upon acquisition an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple's enterprise is in essence collaborative.

The common-law states, however, also give effect or purport to give effect to the partnership theory when a marriage is dissolved by divorce.

If the marriage ends in divorce, a spouse who sacrificed his or her financial-earning opportunities to contribute so-called domestic services to the marital enterprise (such as child rearing and homemaking) stands to be recompensed. All states now follow the equitable-distribution system upon divorce, under which "broad discretion [is given to] trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce." J. Gregory, *The Law of Equitable Distribution* ¶ 1.03, at p. 1-6 (1989).

The other situation in which spousal property rights figure prominently is disinheritance at death. The original (pre-1990) Uniform Probate Code, along with almost all other non-UPC common-law states, treats this as one of the few instances in American law where the decedent's testamentary freedom with respect to his or her title-based ownership interests must be curtailed. No matter what the decedent's intent, the original Uniform Probate Code and almost all of the non-UPC common-law states recognize that the surviving spouse does have some claim to a portion of the decedent's estate. These statutes provide the spouse a so-called forced share. The forced share is expressed as an option that the survivor can elect or let lapse during the administration of the decedent's estate, hence in the UPC the forced share is termed the "elective" share.

Elective-share law in the common-law states, however, has not caught up to the partnership theory of marriage. Under typical American elective-share law, including the elective share provided by the original Uniform Probate Code, a surviving spouse may claim a one-third share of the decedent's estate—not the 50 percent share of the couple's combined assets that the partnership theory would imply.

*Long-term Marriages.* To illustrate the discrepancy between the partnership theory and conventional elective-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. The original elective-share fraction of one-third of the decedent's estate plainly does not implement a partnership principle. The actual result depends on which spouse happens to die first and on how the property accumulated during the marriage was nominally titled.



*Example 1—Long-term Marriage under Conventional Forced-share Law.* Consider A and B, who were married in their twenties or early thirties; they never divorced, and A died at age, say, 70, survived by B. For whatever reason, A left a will entirely disinheriting B.

Throughout their long life together, the couple managed to accumulate assets worth \$600,000, marking them as a somewhat affluent but hardly wealthy couple.

Under conventional elective-share law, B's ultimate entitlement depends on the manner in which these \$600,000 in assets were nominally titled as between them. B could end up much poorer or much richer than a 50/50 partnership principle would suggest. The reason is that under conventional elective-share law, B has a claim to one-third of A's "estate."

*Marital Assets Disproportionately Titled in Decedent's Name; Conventional Elective-share Law Frequently Entitles Survivor to Less Than Equal Share of Marital Assets.* If all the marital assets were titled in A's name, B's claim against A's estate would only be for \$200,000—well below B's \$300,000 entitlement produced by the partnership/marital-sharing principle.

If \$500,000 of the marital assets were titled in A's name, B's claim against A's estate would still only be for \$166,500 (1/3 of \$500,000), which when combined with B's "own" \$100,000 yields a \$266,500 cut for B—still below the \$300,000 figure produced by the partnership/marital-sharing principle.

*Marital Assets Equally Titled; Conventional Elective-share Law Entitles Survivor to Disproportionately Large Share.* If \$300,000 of the marital assets were titled in A's name, B would still have a claim against A's estate for \$100,000, which when combined with B's "own" \$300,000 yields a \$400,000 cut for B—well above the \$300,000 amount to which the partnership/marital-sharing principle would lead.

*Marital Assets Disproportionately Titled in Survivor's Name; Conventional Elective-share Law Entitles Survivor to Magnify the Disproportion.* If only \$200,000 were titled in A's name, B would still have a claim against A's estate for \$66,667 (1/3 of \$200,000), even though B was already overcompensated as judged by the partnership/marital-sharing theory.

*Short-term, Later-in-Life Marriages.* Short-term marriages, particularly the post-widowhood remarriage occurring later in life, present different considerations. Because each spouse in this type of marriage typically comes into the marriage owning assets derived from a former marriage, the one-third fraction of the decedent's estate far exceeds a 50/50 division of assets acquired during the marriage.

*Example 2—Short-term, Later-in-Life Marriage under Conventional Elective-share Law.* Consider B and C. A year or so after A's death,

B married C. Both B and C are in their seventies, and after five years of marriage, B dies survived by C. Both B and C have adult children and a few grandchildren by their prior marriages, and each naturally would prefer to leave most or all of his or her property to those children.

The value of the couple's combined assets is \$600,000, \$300,000 of which is titled in B's name (the decedent) and \$300,000 of which is titled in C's name (the survivor).

For reasons that are not immediately apparent, conventional elective-share law gives the survivor, C, a right to claim one-third of B's estate, thereby shrinking B's estate (and hence the share of B's children by B's prior marriage to A) by \$100,000 (reducing it to \$200,000) while supplementing C's assets (which will likely go to C's children by C's prior marriage) by \$100,000 (increasing their value to \$400,000).

Conventional elective-share law, in other words, basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one-third of the "loser's" estate. The "winning" spouse who chanced to survive gains a windfall, for this "winner" is unlikely to have made a contribution, monetary or otherwise, to the "loser's" wealth remotely worth one-third.

### **The Redesigned Elective Share**

The redesigned elective share is intended to bring elective-share law into line with the partnership theory of marriage.

In the long-term marriage illustrated in Example 1, the effect of implementing a partnership theory is to increase the entitlement of the surviving spouse when the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of the surviving spouse when the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. Put differently, the effect is both to reward the surviving spouse who sacrificed his or her financial-earning opportunities in order to contribute so-called domestic services to the marital enterprise and to deny an additional windfall to the surviving spouse in whose name the fruits of a long-term marriage were mostly titled.

In the short-term, later-in-life marriage illustrated in Example 2, the effect of implementing a partnership theory is to decrease or even eliminate the entitlement of the surviving spouse because in such a marriage neither spouse is likely to have contributed much, if anything, to the acquisition of the other's wealth. Put differently, the effect is to deny a windfall to the survivor who contributed little to the decedent's wealth, and ultimately to deny a windfall to the survivor's children by a prior marriage at the expense of the decedent's children by a prior marriage. Bear in mind that in such a marriage,

which produces no children, a decedent who disinherits or largely disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a natural instinct to want to leave most or all of his or her property to the children of his or her former, long-term marriage. In hardship cases, however, as explained later, a special supplemental elective-share amount is provided when the surviving spouse would otherwise be left without sufficient funds for support.

**2008 Revisions.** When first promulgated in the early 1990s, the statute provided that the “elective-share percentage” increased annually according to a graduated schedule. The “elective-share percentage” ranged from a low of 0 percent for a marriage of less than one year to a high of 50 percent for a marriage of fifteen years or more. The “elective-share percentage” did double duty. The system equated the “elective-share percentage” of the couple’s combined assets with 50 percent of the marital-property portion of the couple’s assets — the assets that are subject to equalization under the partnership theory of marriage. Consequently, the elective share effected the partnership theory rather indirectly. Although the schedule was designed to represent by approximation a constant fifty percent of the marital-property portion of the couple’s assets (the augmented estate), it did not say so explicitly.

The 2008 revisions are designed to present the system in a more direct form, one that makes the system more transparent and therefore more understandable. The 2008 revisions disentangle the elective-share percentage from the system that approximates the marital-property portion of the augmented estate. As revised, the statute provides that the “elective-share percentage” is always 50 percent, but it is not 50 percent of the augmented estate but 50 percent of the “marital-property portion” of the augmented estate. The marital-property portion of the augmented estate is computed by approximation—by applying the percentages set forth in a graduated schedule that increases annually with the length of the marriage (each “marital-portion percentage” being double the percentage previously set forth in the “elective-share percentage” schedule). Thus, for example, under the former system, the elective-share amount in a marriage of ten years was 30 percent of the augmented estate. Under the revised system, the elective-share amount is 50 percent of the marital-property portion of the augmented estate, the marital-property portion of the augmented estate being 60 percent of the augmented estate.

The primary benefit of these changes is that the statute, as revised, presents the elective-share’s implementation of the partnership theory of marriage in a direct rather than indirect form, adding clarity and transparency to the system. An important byproduct of the revision is that it

facilitates the inclusion of an alternative provision for enacting states that want to implement the partnership theory of marriage but prefer not to define the marital-property portion by approximation but by classification. Under the deferred marital-property approach, the marital-property portion consists of the value of the couple’s property that was acquired during the marriage other than by gift or inheritance. (See below.)

The 2008 revisions are based on a proposal presented in Waggoner, “The Uniform Probate Code’s Elective Share: Time for a Reassessment,” 37 U. Mich. J. L. Reform 1 (2003), an article that gives a more extensive explanation of the rationale of the 2008 revisions.

### **Specific Features of the Redesigned Elective Share**

Because ease of administration and predictability of result are prized features of the probate system, the redesigned elective share implements the marital-partnership theory by means of a mechanically determined approximation system. Under the redesigned elective share, there is no need to identify which of the couple’s property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance. For further discussion of the reasons for choosing this method, see Waggoner, “Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code,” 26 Real Prop. Prob. & Tr. J. 683 (1992).

**Section 2-202(a)—The “Elective-share Amount.”** Under Section 2-202(a), the elective-share amount is equal to 50 percent of the value of the “marital-property portion of the augmented estate.” The marital-property portion of the augmented estate, which is determined under Section 2-203(b), increases with the length of the marriage. The longer the marriage, the larger the “marital-property portion of the augmented estate.” The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple’s marital property in a marriage of 15 years than in a marriage of 15 days. Specifically, the “marital-property portion of the augmented estate” starts low and increases annually according to a graduated schedule until it reaches 100 percent. After one year of marriage, the marital-property portion of the augmented estate is six percent of the augmented estate and it increases with each additional year of marriage until it reaches the maximum 100 percent level after 15 years of marriage.

**Section 2-203(a)—the “Augmented Estate.”** The elective-share percentage of 50 percent is applied to the value of the “marital-property portion of the augmented estate.” As defined in Section 2-203, the “augmented estate” equals the value of the couple’s *combined* assets, not merely the value of the assets nominally titled in the decedent’s name.



More specifically, the “augmented estate” is composed of the sum of four elements:

Section 2-204—the value of the decedent’s net probate estate;

Section 2-205—the value of the decedent’s nonprobate transfers to others, consisting of will-substitute-type inter-vivos transfers made by the decedent to others than the surviving spouse;

Section 2-206—the value of the decedent’s nonprobate transfers to the surviving spouse, consisting of will-substitute-type inter-vivos transfers made by the decedent to the surviving spouse; and

Section 2-207—the value of the surviving spouse’s net assets at the decedent’s death, plus any property that would have been in the surviving spouse’s nonprobate transfers to others under Section 2-205 had the surviving spouse been the decedent.

Section 2-203(b)—the “Marital-property portion” of the Augmented Estate. Section 2-203(b) defines the marital-property portion of the augmented estate.

Section 2-202(a)—the “Elective-share Amount.” Section 2-202(a) requires the elective-share percentage of 50 percent to be applied to the value of the marital-property portion of the augmented estate. This calculation yields the “elective-share amount”—the amount to which the surviving spouse is entitled. If the elective-share percentage were to be applied only to the marital-property portion of the decedent’s assets, a surviving spouse who has already been overcompensated in terms of the way the marital-property portion of the couple’s assets have been nominally titled would receive a further windfall under the elective-share system. The marital-property portion of the couple’s assets, in other words, would not be equalized. By applying the elective-share percentage of 50 percent to the marital-property portion of the augmented estate (the couple’s combined assets), the redesigned system denies any significance to how the spouses took title to particular assets.

Section 2-209—Satisfying the Elective-share Amount. Section 2-209 determines how the elective-share amount is to be satisfied. Under Section 2-209, the decedent’s net probate estate and nonprobate transfers to others are liable to contribute to the satisfaction of the elective-share amount only to the extent the elective-share amount is not fully satisfied by the sum of the following amounts:

Subsection (a)(1)—amounts that pass or have passed from the decedent to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206, i.e., the value of the decedent’s nonprobate transfers to the surviving spouse; and

Subsection (a)(2)—the marital-property portion of amounts included in the augmented estate under Section 2-207.

If the combined value of these amounts equals or exceeds the elective-share amount, the surviving spouse is not entitled to any further amount from recipients of the decedent’s net probate estate or nonprobate transfers to others, unless the surviving spouse is entitled to a supplemental elective-share amount under Section 2-202(b).

*Example 3—15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent’s Name.* A and B were married to each other more than 15 years. A died, survived by B. A’s will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of \$100,000 as defined in Section 2-205.

	Aug- mented Estate	Marital- Property Portion (100%)
A’s net probate estate	\$300,000	\$300,000
A’s nonprobate transfers to others	\$100,000	\$100,000
A’s nonprobate transfers to B	\$0	\$0
B’s net assets and nonprobate transfers to others	\$200,000	\$200,000
Augmented Estate	\$600,000	\$600,000
Elective-Share Amount (50 % of Marital-prop- erty portion) .....		\$300,000
Less Amount Already Satisfied .....		\$200,000
Unsatisfied Balance .....		\$100,000

Under Section 2-209(a)(2), the full value of B’s assets (\$200,000) counts first toward satisfying B’s entitlement. B, therefore, is treated as already having received \$200,000 of B’s ultimate entitlement of \$300,000. Section 2-209(c) makes A’s net probate estate and nonprobate transfers to others liable for the unsatisfied balance of the elective-share amount, \$100,000, which is the amount needed to bring B’s own \$200,000 up to \$300,000.

*Example 4—15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Survivor’s Name.* As in Example 3, A and B were married to each other more than 15 years. A died, survived by B. A’s will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of \$50,000 as defined in Section 2-205.

	Aug- mented Estate	Marital- Property Portion (100%)
A’s net probate estate	\$150,000	\$150,000
A’s nonprobate transfers to others	\$50,000	\$50,000

A's nonprobate transfers to B	\$0	\$0
B's assets and nonprobate transfers to others	\$400,000	\$400,000
Augmented Estate	\$600,000	\$600,000
Elective-Share Amount (50% of Marital-property portion) .....		\$300,000
Less Amount Already Satisfied .....		\$400,000
Unsatisfied Balance .....		\$0

Under Section 2-209(a)(2), the full value of B's assets (\$400,000) counts first toward satisfying B's entitlement. B, therefore, is treated as already having received more than B's ultimate entitlement of \$300,000. B has no claim on A's net probate estate or nonprobate transfers to others.

In a marriage that has lasted less than 15 years, only a portion of the survivor's assets—not all—count toward making up the elective-share amount. This is because, in these shorter-term marriages, the marital-property portion of the survivor's assets under Section 2-203(b) is less than 100% and, under Section 2-209(a)(2), the portion of the survivor's assets that count toward making up the elective-share amount is limited to the marital-property portion of those assets.

To explain why this is appropriate requires further elaboration of the underlying theory of the redesigned system. The system avoids the classification and tracing-to-source problems in determining the marital-property portion of the couple's assets. This is accomplished under Section 2-203(b) by applying an ever-increasing percentage, as the length of the marriage increases, to the couple's combined assets without regard to when or how those assets were acquired. By approximation, the redesigned system equates the marital-property portion of the couple's combined assets with the couple's marital assets—assets subject to equalization under the partnership/marital-sharing theory. Thus, in a marriage that has endured long enough for the marital-property portion of their assets to be 60% under Section 2-203(b), 60% of each spouse's assets are treated as marital assets. Section 2-209(a)(2) therefore counts only 60% of the survivor's assets toward making up the elective-share amount.

*Example 5—Under 15-Year Marriage under the Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent's Name.* A and B were married to each other more than 5 but less than 6 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of \$100,000 as defined in Section 2-205.

	Aug-mented Estate	Marital-Property Portion (30%)
A's net probate estate	\$300,000	\$90,000
A's nonprobate transfers to others	\$100,000	\$30,000
A's nonprobate transfers to B	\$0	\$0
B's assets and nonprobate transfers to others	\$200,000	\$60,000
Augmented Estate	\$600,000	\$180,000
Elective-Share Amount (50% of Marital-property portion) .....		\$90,000
Less Amount Already Satisfied .....		\$60,000
Unsatisfied Balance .....		\$30,000

Under Section 2-209(a)(2), the marital-property portion of B's assets (30% of \$200,000, or \$60,000) counts first toward satisfying B's entitlement. B, therefore, is treated as already having received \$60,000 of B's ultimate entitlement of \$90,000. Under Section 2-209(c), B has a claim on A's net probate estate and nonprobate transfers to others of \$30,000.

Deferred Marital-Property Alternative

By making the elective share percentage a flat 50 percent of the marital-property portion of the augmented estate, the 2007 revision disentangles the elective share percentage from the approximation schedule, thus allowing the marital-property portion of the augmented estate to be defined either by the approximation schedule or by the deferred-marital-property approach. Although one of the benefits of the 2007 revision is added clarity, an important byproduct of the revision is that it facilitates the inclusion of an alternative provision for enacting states that prefer a deferred marital-property approach. See Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: the Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 Emory L.J. 487 (2000).

The Support Theory

The partnership/marital-sharing theory is not the only driving force behind elective-share law. Another theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate. Current elective-share law implements this theory poorly. The fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual need. A one-third share may be inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, in a very large estate, it may go far beyond the survivor's needs. In either a



modest or a large estate, the survivor may or may not have ample independent means, and this factor, too, is disregarded in conventional elective-share law. The redesigned elective share system implements the support theory by granting the survivor a supplemental elective-share amount related to the survivor's actual needs. In implementing a support rationale, the length of the marriage is quite irrelevant. Because the duty of support is founded upon status, it arises at the time of the marriage.

*Section 2-202(b)—the “Supplemental Elective-share Amount.”* Section 2-202(b) is the provision that implements the support theory by providing a supplemental elective-share amount of \$75,000. The \$75,000 figure is bracketed to indicate that individual states may wish to select a higher or lower amount.

In satisfying this \$75,000 amount, the surviving spouse's own titled-based ownership interests count first toward making up this supplemental amount; included in the survivor's assets for this purpose are amounts shifting to the survivor at the decedent's death and amounts owing to the survivor from the decedent's estate under the accrual-type elective-share apparatus discussed above, but excluded are (1) amounts going to the survivor under the Code's probate exemptions and allowances and (2) the survivor's Social Security benefits (and other governmental benefits, such as Medicare insurance coverage). If the survivor's assets are less than the \$75,000 minimum, then the survivor is entitled to whatever additional portion of the decedent's estate is necessary, up to 100 percent of it, to bring the survivor's assets up to that minimum level. In the case of a late marriage, in which the survivor is perhaps aged in the mid-seventies, the minimum figure plus the probate exemptions and allowances (which under the Code amount to a minimum of another \$64,500) is pretty much on target — in conjunction with Social Security payments and other governmental benefits — to provide the survivor with a fairly adequate means of support.

*Example 6—Supplemental Elective-share Amount.* After A's death in Example 1, B married C. Five years later, B died, survived by C. B's will left nothing to C, and B made no nonprobate transfers to C. B made no nonprobate transfers to others as defined in Section 2-205.

	Aug- mented Estate	Marital- Property Portion (30%)
B's net probate estate	\$90,000	\$27,000
B's nonprobate transfers to others	\$0	\$0
B's nonprobate transfers to C	\$0	\$0
C's assets and nonprobate transfers to others	\$10,000	\$3,000

Augmented Estate	\$100,000	\$30,000
Elective-Share Amount (50% of Marital-property portion) .....	\$15,000	
Less Amount Already Satisfied .....		\$3,000
Unsatisfied Balance .....		\$12,000

*Solution under Redesigned Elective Share.* Under Section 2-209(a)(2), \$3,000 (30%) of C's assets count first toward making up C's elective-share amount; under Section 2-209(c), the remaining \$12,000 elective-share amount would come from B's net probate estate.

Application of Section 2-202(b) shows that C is entitled to a supplemental elective-share amount. The calculation of C's supplemental elective-share amount begins by determining the sum of the amounts described in sections:

2-207 .....	\$10,000
2-209(a)(1) .....	0
Elective-share amount payable from decedent's probate estate under Section 2-209(c) ..	\$12,000
Total .....	\$22,000

The above calculation shows that C is entitled to a supplemental elective-share amount under Section 2-202(b) of \$53,000 (\$75,000 minus \$22,000). The supplemental elective-share amount is payable entirely from B's net probate estate, as prescribed in Section 2-209(c).

The end result is that C is entitled to \$65,000 (\$12,000 + \$53,000) by way of elective share from B's net probate estate (and nonprobate transfers to others, had there been any). Sixty-five thousand dollars is the amount necessary to bring C's \$10,000 in assets up to \$75,000.

#### Decedent's Nonprobate Transfers to Others

The original Code made great strides toward preventing “fraud on the spouse's share.” The problem of “fraud on the spouse's share” arises when the decedent seeks to evade the spouse's elective share by engaging in various kinds of nominal inter-vivos transfers. To render that type of behavior ineffective, the original Code adopted the augmented-estate concept, which extended the elective-share entitlement to property that was the subject of specified types of inter-vivos transfer, such as revocable inter-vivos trusts.

In the redesign of the elective share, the augmented-estate concept has been strengthened. The pre-1990 Code left several loopholes ajar in the augmented estate—a notable one being life insurance the decedent buys, naming someone other than his or her surviving spouse as the beneficiary. With appropriate protection for the insurance company that pays off before receiving notice of an elective-share claim, the redesigned elective-share system includes these types of insurance policies in the augmented estate as part of the decedent's nonprobate transfers to others under Section 2-205.

**Historical Note.** This General Comment was revised in 1993 and in 2008.

**15-11-201. Right to elective-share.** (1) **Elective-share amount.** The surviving spouse of a decedent who dies domiciled in this state has a right of election, under the limitations and conditions stated in this part 2, to take an elective-share amount not greater than one-half of the value of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

If the decedent and the spouse were married to each other:

The elective-share percentage is:

Less than 1 year	Supplemental amount only.
1 year but less than 2 years	5% of the augmented estate.
2 years but less than 3 years	10% of the augmented estate.
3 years but less than 4 years	15% of the augmented estate.
4 years but less than 5 years	20% of the augmented estate.
5 years but less than 6 years	25% of the augmented estate.
6 years but less than 7 years	30% of the augmented estate.
7 years but less than 8 years	35% of the augmented estate.
8 years but less than 9 years	40% of the augmented estate.
9 years but less than 10 years	45% of the augmented estate.
10 years or more	50% of the augmented estate.

(2) (a) **Supplemental elective-share amount.** If the sum of the amounts described in sections 15-11-202 (2) (d), 15-11-203 (1) (a), and that part of the elective-share amount payable from the decedent's probate estate and nonprobate transfers to others under section 15-11-203 (2) and (3) is less than fifty thousand dollars, the surviving spouse is entitled to a supplemental elective-share amount equal to fifty thousand dollars, minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in section 15-11-203 (2) and (3).

(b) The dollar amount stated in paragraph (a) of this subsection (2) shall be increased or decreased based on the cost of living adjustment as calculated and specified in section 15-10-112.

(3) **Effect of election on statutory benefits.** If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's exempt property and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.

(4) **Nondomiciliary.** The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective-share in property in this state is governed by the law of the decedent's domicile at death.

**Source:** L. 94: Entire part R&RE, p. 980, § 3, effective July 1, 1995. L. 2009: (2) amended, (HB 09-1287), ch. 310, p. 1682, § 9, effective July 1, 2010.

**Editor's note:** (1) This section is similar to former § 15-11-201 as it existed prior to 1995.

(2) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (2):

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of



time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

**Pre-1990 Provision.** The pre-1990 provisions granted the surviving spouse a one-third share of the augmented estate. The one-third fraction was largely a carry over from common-law dower, under which a surviving widow had a one-third interest for life in her deceased husband's land.

**Purpose and Scope of Revisions.** The revision of this section is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage, with a support theory back-up.

**Subsection (a).** Subsection (a) implements the partnership theory by providing that the elective-share amount is 50 percent of the value of the marital-property portion of the augmented estate. The augmented estate is defined in Section 2-203(a) and the marital-property portion of the augmented estate is defined in Section 2-203(b).

**Subsection (b).** Subsection (b) implements the support theory of the elective share by providing a \$75,000 supplemental elective-share amount, in case the surviving spouse's assets and other entitlements are below this figure.

**2008 Cost-of-Living Adjustments.** As originally promulgated in 1990, the dollar amount in subsection (b) was \$50,000. To adjust for inflation, this amount was increased in 2008 to \$75,000. The dollar amount in this subsection is subject to annual cost-of-living adjustments under Section 1-109.

**Subsection (c).** The homestead, exempt property, and family allowances provided by Article II, Part 4, are not charged to the electing spouse as a part of the elective share. Consequently, these allowances may be distributed from the probate estate without reference to whether an elective share right is asserted.

**Cross Reference.** To have the right to an elective share under subsection (a), the decedent's spouse must survive the decedent. Under Section 2-702(a), the requirement of survivorship is satisfied only if it can be established that the spouse survived the decedent by 120 hours.

**Historical Note.** This Comment was revised in 2008.

## ANNOTATION

**Law reviews.** For article, "Revocation of Wills — How Accomplished and the Effect", see 6 Dicta 7 (Oct. 1929). For article, "Express Trusts in Colorado", see 10 Rocky Mt. L. Rev. 9 (1937). For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "Some Will Drafting Pointers on Marital Deduction", see 27 Dicta 65 (1950). For article, "Practical Administrative Problems in Average-Sized Estates", see 27 Dicta 285 (1950). For article, "Restrictions on Charitable Gifts in Colorado", see 23 Rocky Mt. L. Rev. 434 (1951). For note, "Widow's Right in Colorado to Set Aside Husband's Inter Vivos Transfer", see 26 Rocky Mt. L. Rev. 180 (1954). For article, "Marital Property Interests", see 27 Rocky Mt. L. Rev. 180 (1955). For article, "Election to Take the Statutory Share", see 29 Rocky Mt. L. Rev. 506 (1957). For note, "The Effect on Future Interests of a Widow's Election Against the Will", see 37 Dicta 293 (1960). For article, "Estate Planning and the Widow's Election", see 34 Rocky Mt. L. Rev. 281 (1962). For article, "The Revocable Trust and the Surviving Spouse's Statutory Share in Colorado", see 36 U. Colo. L. Rev. 461 (1964). For article, "The Awkward Status of Colorado Real Property in a Decedent's Estate", see 41 Den. L. Ctr. J. 129 (1964). For article, "Ownership of Personal

Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (February 2000).

**Annotator's note.** The following annotations include cases decided under former provision similar to this section.

**In contrast to the Uniform Probate Code provisions concerning the augmented estate,** which do not allow the surviving spouse to opt out of his beneficial interest in a trust established by the decedent, and which describe their second purpose as to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent through other means, the sole purpose of the Colorado provisions is to protect the surviving spouse. *Matter of Estate of Grasseschi*, 776 P.2d 1136 (Colo. App. 1989), cert. denied, 785 P.2d 1253 (Colo. 1989).

**Widow is entitled to statutory allowance even though mutual wills are executed.** Where a husband leaves a will, his widow is entitled to the statutory widow's allowance regardless of whether she intends to take under the statute or the will, and the fact that the husband and wife may have executed mutual wills, in itself, in the absence of an effective waiver of the widow's

allowance by the wife, in no manner changes the rule. In *re Williams, Estate*, 101 Colo. 262, 72 P.2d 476 (1937).

**Widow electing to take one-half of estate is entitled to such remaining moiety after discharge of debts.** Where under this section a widow renounces the will of her deceased husband, and elects to take one-half of the whole estate of the deceased, she is entitled to such remaining moiety after the discharge of the debts against the estate. *Hanna v. Palmer*, 6 Colo. 156, 45 Am. R. 524 (1882).

**A devise by wife to husband of a life estate in the whole of her property is not the equivalent of one-half thereof.** *Wolfe v. Mueller*, 46 Colo. 335, 104 P. 487 (1909).

**Renouncing where estate is insolvent.** Where the widow renounces under this section, giving her in such case one-half of the whole estate, and the estate is solvent, she is entitled to half the rents arising out of land devised under the will to one not an heir at law of the testator. *Logan v. Logan*, 11 Colo. 44, 17 P. 99 (1887).

**Any election to renounce is contingent upon validity of will.** Whether expressed therein or not, any election to renounce a will and take under the statute is contingent upon the establishment of the ultimate validity of the will. In *re Stitzer's Estate*, 103 Colo. 529, 87 P.2d 745 (1939).

**A widow who renounces all benefits under the will of her deceased husband is entitled to one-half of his estate** under the provisions of this section. *Hart v. Hart*, 95 Colo. 471, 37 P.2d 754 (1934).

**Right of a surviving spouse applies to property of which the husband dies seized and possessed.** *Hageman v. First Nat'l Bank*, 32 Colo. App. 406, 514 P.2d 328 (1973).

**If by a will the husband attempts to dispose of his property in a manner adverse to the interest of the wife,** she has the right to elect to take against the will and receive one-half of the husband's estate. *Hageman v. First Nat'l Bank*, 32 Colo. App. 406, 514 P.2d 328 (1973).

**15-11-202. Augmented estate.** (1) **Definitions.** (a) As used in this section, unless the context otherwise requires:

(I) "Bona fide purchaser" means a purchaser for value in good faith and without notice of an adverse claim. The notation of a state documentary fee on a recorded instrument pursuant to section 39-13-103, C.R.S., is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

(II) "Decedent's nonprobate transfers to others" means the decedent's nonprobate transfers to persons, other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors, that are included in the augmented estate under paragraph (b) of subsection (2) of this section.

(III) "Fractional interest in property held in joint tenancy with the right of survivorship", whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.

**Property transferred to inter vivos trust.** Where the settlor, in creating an inter vivos trust, transferred title to property owned by him, and his interest therein passed immediately to the trustee and a valid trust was established, the rights retained by the settlor in the trust did not defeat the trust nor the resulting exclusion of the trust property from the settlor's probate estate, and the transferred property was not subject to the surviving spouse's elective share. *Hageman v. First Nat'l Bank*, 32 Colo. App. 406, 514 P.2d 328 (1973).

**This section is not limited to cases in which Colorado is the domiciliary state.** In *re Estate of Piazza*, 34 Colo. App. 296, 526 P.2d 155 (1974).

**Election in case of ancillary administration.** Nothing in this section expressly requires, in the case of an ancillary administration, that a valid election against the will be filed in the domiciliary state. In *re Estate of Piazza*, 34 Colo. App. 296, 526 P.2d 155 (1974).

**Rule which prohibits taking against the will and receiving benefits under the will is based upon the doctrine of equitable estoppel** and is designed to prevent a surviving spouse from taking unfair advantage of the multijurisdictional distribution of an estate. In *re Estate of Piazza*, 34 Colo. App. 296, 526 P.2d 155 (1974).

**Rule precludes election in ancillary administration inconsistent with election in domiciliary estate.** The rule which prohibits taking against the will and receiving benefits under the will at the same time precludes an election by the surviving spouse in an ancillary administration which is inconsistent with an election already taken in the domiciliary estate. In *re Estate of Piazza*, 34 Colo. App. 296, 526 P.2d 155 (1974).

**Assertion of a contrary election is an affirmative defense** which must be pleaded and proved by the party asserting the estoppel. In *re Estate of Piazza*, 34 Colo. App. 296, 526 P.2d 155 (1974).

**Applied** in *Lopata v. Metzel*, 641 P.2d 952 (Colo. 1982); *Snyder v. Macy*, 674 P.2d 972 (Colo. App. 1983).



(IV) "Marriage", as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent's surviving spouse.

(V) "Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he or she possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

(VI) "Power" or "power of appointment" includes a power to designate the beneficiary of a beneficiary designation, including beneficiary designations under individual retirement accounts and annuities described in section 408 of the federal "Internal Revenue Code of 1986", as amended, as well as other pension plans or arrangements not subject to part 2 (section 201 et seq.) of the federal "Employee Retirement Income Security Act of 1974", as amended (29 U.S.C. sec. 1051 et seq.).

(VII) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent, whether or not he or she then had the capacity to exercise the power, held a power to create a present or future interest in himself or herself, his or her creditors, his or her estate, or the creditors of his or her estate, and includes a power to revoke or invade the principal of a trust or other property arrangement.

(VIII) "Probate estate" means property, whether real or personal, movable or immovable, wherever situated, that would pass by intestate succession if the decedent died without a valid will.

(IX) (Reserved)

(X) (Reserved)

(XI) "Transfer", as it relates to a transfer by, or on behalf of, the decedent, includes:

(A) An exercise or release of a presently exercisable general power of appointment held by the decedent;

(B) A lapse at death of a presently exercisable general power of appointment held by the decedent; and

(C) An exercise, release, or lapse of a presently exercisable general power of appointment that the decedent created in himself or herself and of a power described in sub-subparagraph (B) of subparagraph (II) of paragraph (b) of subsection (2) of this section that the decedent conferred on a nonadverse party.

(XII) "Value", unless otherwise indicated, means fair market value as of the decedent's date of death.

(b) In sub-subparagraph (A) of subparagraph (III) of paragraph (b) of subsection (2) of this section, "termination", with respect to a right or interest in property, means that the right or interest terminated by the terms of the governing instrument or that the decedent transferred or relinquished the right or interest; and, with respect to a power over property, means that the power terminated by exercise, release, lapse, in default, or otherwise; except that, with respect to a power described in sub-subparagraph (A) of subparagraph (I) of paragraph (b) of subsection (2) of this section, "termination" means that the power terminated by exercise or release, but not by lapse nor in default or otherwise.

(2) **Property included in augmented estate.** The augmented estate consists of the sum of:

(a) The value of the decedent's probate estate, reduced by funeral and administrative expenses, family allowance, exempt property, and enforceable claims;

(b) The value of the decedent's nonprobate transfers to others, which are composed of all property, whether real or personal, movable or immovable, wherever situated, not included in the decedent's probate estate, of any of the following types:

(I) Property of any of the following types that passed outside probate at the decedent's death:

(A) Property over which the decedent alone, immediately before death, held or retained a presently exercisable general power of appointment; the amount included is the value of the property subject to the power, to the extent that the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise to, or for the benefit of, any person other than the decedent's estate or surviving spouse; except that property over which the

decedent had only a testamentary power of appointment is not included. Property over which the decedent had a general inter vivos power of appointment or withdrawal created in the decedent by a third party is includable unless the governing instrument contains a provision for its termination or lapse, in full or in part, during the life of the decedent.

(B) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship; the amount included is the value of the decedent's fractional interest, to the extent that the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse;

(C) The decedent's ownership interest in multiple-party accounts (within the meaning of section 15-15-201 (5)) and property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship; the amount included is the value of the decedent's ownership interest, to the extent that the decedent's ownership interest passed at the decedent's death to, or for the benefit of, any person other than the decedent's estate or surviving spouse; or

(D) Except as provided in paragraph (b) of subsection (3) of this section, proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent that the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds; the amount included is the value of the proceeds, to the extent that they were payable at the decedent's death to, or for the benefit of, the decedent's estate or surviving spouse;

(II) Property transferred in any of the following forms by the decedent during marriage:

(A) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent that the decedent's right terminated at or continued beyond the decedent's death; the amount included is the value of the fraction of the property to which the decedent's right related, to the extent that the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse; or

(B) Any transfer in which the decedent created a power over the income or principal of the transferred property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, for the benefit of the decedent, the decedent's creditors, the decedent's estate, or the creditors of the decedent's estate; the amount included is the value of the property subject to the power, to the extent that the power was exercisable at the decedent's death to, or for the benefit of, any person other than the decedent's surviving spouse or to the extent that the property subject to the power passed at the decedent's death, by exercise, release, lapse, in default, or otherwise to, or for the benefit of, any person other than the decedent's estate or surviving spouse; and

(III) Property transferred during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(A) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under sub-subparagraph (A), (B), or (C) of subparagraph (I) of this paragraph (b), or under subparagraph (II) of this paragraph (b), if the right, interest, or power had not terminated until the decedent's death; the amount included is the value of the property that would have been included under sub-subparagraph (A), (B), or (C) of subparagraph (I) or subparagraph (II) of this paragraph (b); except that the property is valued at the time that the right, interest, or power terminated, and is included only to the extent that the property passed upon termination to, or for the benefit of, any person other than the decedent or the decedent's estate, spouse, or surviving spouse;

(B) Any transfer of, or relating to, an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under sub-subparagraph (D) of subparagraph (I) of this paragraph (b) had the transfer not occurred; the amount included is the value of the insurance proceeds to the extent that the proceeds were payable at the decedent's death to, or for the benefit of, the decedent's estate or surviving spouse; or

(C) Any transfer of property, to the extent not otherwise included in the augmented estate, made to, or for the benefit of, a person other than the decedent's surviving spouse;



the amount included is the value of the transferred property to the extent that the aggregate transfers to any one donee in either of the two years exceeded ten thousand dollars;

(c) The value of the decedent's nonprobate transfers to the decedent's surviving spouse, which are composed of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including (i) the decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant, (ii) the decedent's ownership interest in multiple-party accounts (within the meaning of section 15-15-201 (5)) and property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner, and (iii) all other property that would have been included in the augmented estate under subparagraph (I) or (II) of paragraph (b) of this subsection (2) had it passed to, or for the benefit of, a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors, but excluding property passing to the surviving spouse under the federal social security system; and

(d) To the extent not included in or expressly excluded from the augmented estate under paragraph (a) or (c) of this subsection (2), the value of:

(I) Property that was owned by the decedent's surviving spouse at the decedent's death, including:

(A) The surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship;

(B) The surviving spouse's ownership interest in multiple-party accounts (within the meaning of section 15-15-201 (5)) and property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship; and

(C) Property that passed to the surviving spouse by reason of the decedent's death; and

(II) Property that would have been included in the surviving spouse's nonprobate transfers to others, other than the spouse's fractional and ownership interests included under sub-subparagraphs (A) and (B) of subparagraph (I) of this paragraph (d), had the spouse been the decedent. Property included under this paragraph (d) is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account; except that, for purposes of sub-subparagraphs (A) and (B) of subparagraph (I) of this paragraph (d), the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of this subparagraph (II), proceeds of insurance that would have been included in the spouse's nonprobate transfers to others under sub-subparagraph (D) of subparagraph (I) of paragraph (b) of this subsection (2) are not valued as if he or she were deceased. The value of property included under this paragraph (d) is reduced in each category by enforceable claims against the included property and is reduced by enforceable claims against the surviving spouse.

(3) **Exclusions.** Notwithstanding anything stated in subsection (2) of this section, the following exclusions shall control:

(a) The value of any property is excluded from the decedent's nonprobate transfers to others (i) to the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property; or (ii) if the property was transferred with the written joinder of, or if the transfer was consented to in writing by, the surviving spouse; or (iii) if the property was transferred to a bona fide purchaser. For purposes of this section, in the absence of a finding of a contrary intent, joinder in the filing of a gift tax return does not constitute consent or joinder.

(b) Any life insurance maintained pursuant to a marriage dissolution settlement agreement or court order or any distribution from a plan qualified under section 401(a) of the federal "Internal Revenue Code of 1986", as amended, is excluded from the decedent's nonprobate transfers to others to the extent such items are payable to a person other than the surviving spouse.

(c) Life insurance, accident insurance, pension, profit sharing, retirement, and other benefit plans payable to persons other than the decedent's surviving spouse or the decedent's estate are excluded from the augmented estate.

(d) Any completed transfers made by the decedent prior to July 1, 1974, are excluded from the decedent's nonprobate transfers to others.

(e) The decedent's fractional interest in real property held in joint tenancy with the right of survivorship, if such joint tenancy was created by a transfer by the decedent prior to marriage to the surviving spouse, is excluded from the decedent's nonprobate transfers to others.

(f) The decedent's fractional interest in real property held in joint tenancy with the right of survivorship, if such joint tenancy was created by a transfer by someone other than the decedent or by someone other than the surviving spouse, is excluded from the decedent's nonprobate transfers to others.

(g) The surviving spouse's fractional interest in real property held in joint tenancy with the right of survivorship, if such joint tenancy was created by a transfer by someone other than the decedent or by someone other than the surviving spouse, is excluded from the augmented estate.

(h) Except with respect to joint tenancies between the surviving spouse and the decedent, the surviving spouse's fractional interest in real property held in joint tenancy with the right of survivorship, if such joint tenancy was created by a transfer by the surviving spouse prior to marriage to the decedent, is excluded from the augmented estate.

(4) **Valuation.** The value of property includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system.

(5) **Overlapping application; no double inclusion.** In case of overlapping application to the same property referred to in sub-subparagraph (A), (B), or (C) of subparagraph (I) or subparagraph (II) of paragraph (b) of subsection (2) of this section, the property is included in the augmented estate under the provision yielding the highest value, but under any one, but only one, of the overlapping provisions if they all yield the same value.

**Source:** L. 94: Entire part R&RE, p. 981, § 3, effective July 1, 1995. L. 95: (2)(b)(I)(A), (3)(a), (3)(e), and (3)(h) amended, p. 355, § 4, effective July 1.

**Editor's note:** This section is similar to former § 15-11-202 as it existed prior to 1995.

## ANNOTATION

**Law reviews.** For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988).

**The legislative purpose in enacting the concept of the augmented estate was twofold:** (1) To attempt to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share and (2) to insure that the spouse is adequately provided for. *Matter of Estate of Grasseschi*, 776 P.2d 1136 (Colo. App. 1989), cert. denied, 785 P.2d 1253 (Colo. 1989).

**Sections 15-11-402 and 15-11-403 (now §§ 15-11-403 and 15-11-404) to be read with subsection (1).** Sections 15-11-402 and 15-11-403 (now §§ 15-11-403 and 15-11-404) providing for family and exempt property allowances must be read in conjunction with the definition of "augmented estate" in subsection (1) of this section to determine whether distributing such allowances from the "augmented estate" is consistent and harmonious with the creation of an

"augmented estate" under the statute. In re *Estate of Novitt*, 37 Colo. App. 524, 549 P.2d 805 (1976).

**Family and exempt property allowances are items to be claimed from probate estate.** The language of subsection (1) clearly reflects a legislative intent to establish the family allowance and exempt property allowance as items to be claimed from the probate estate, if any, to which are then added certain items to create the augmented estate. In re *Estate of Novitt*, 37 Colo. App. 524, 549 P.2d 805 (1976).

**Election of the surviving spouse to one-half of the augmented estate was disallowed** insofar as it would affect assets transferred to a revocable inter vivos trust prior to July 1, 1974, the effective date of the Colorado probate code. In re *Estate of Novitt*, 37 Colo. App. 524, 549 P.2d 805 (1976).

**Except where inter-vivos transfers reduce the probate estate** below a threshold amount, then all claims and expenses should be allowed against the total assets of the augmented estate



and the surviving spouse's elective share awarded from a net value. *Matter of Estate of Smith*, 718 P.2d 1069 (Colo. App. 1986).

**And computation of a negative value** for the probate estate is merely an accounting tool to arrive at a proper allocation of the benefits and burdens accruing to the estate. *Matter of Estate of Smith*, 718 P.2d 1069 (Colo. App. 1986).

**Application to joint tenancies.** The probate court properly refused to apply the augmented estate provisions of this section to joint tenancies where the joint tenancies vested prior to the effective date of the Colorado probate code. *Estate of Barnhart v. Burkhardt*, 38 Colo. App. 544, 563 P.2d 972 (1977), *aff'd*, 194 Colo. 505, 574 P.2d 500 (1978).

**15-11-203. Sources from which elective-share payable. (1) Elective-share amount only.** In a proceeding for an elective-share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:

(a) Amounts included in the augmented estate under section 15-11-202 (2) (a) which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under section 15-11-202 (2) (c). For the purposes of this subsection (1), if the surviving spouse disclaims any property, including interests in trust created by the decedent, such property shall not be applied under this subsection (1) to the extent that such property passes to a person other than the surviving spouse;

(b) Amounts included in the augmented estate under section 15-11-202 (2) (d) up to the applicable percentage thereof. For the purposes of this subsection (1), the "applicable percentage" is twice the elective-share percentage set forth in the schedule in section 15-11-201 (1) appropriate to the length of time the spouse and the decedent were married to each other.

(2) **Unsatisfied balance of elective-share amount; supplemental elective-share amount.** If, after the application of subsection (1) of this section, the elective-share amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's probate estate and in the decedent's nonprobate transfers to others, other than amounts included under section 15-11-202 (2) (b) (III) (A) or (2) (b) (III) (C), are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(3) **Unsatisfied balance of elective-share and supplemental elective-share amounts.** If, after the application of subsections (1) and (2) of this section, the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably apportioned among the recipients of that remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

**Source:** L. 94: Entire part R&RE, p. 988, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-207 as it existed prior to 1995.

## ANNOTATION

**Law reviews.** For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (February 2000).

**15-11-204. Personal liability of recipients.** (1) Only original recipients of the decedent's nonprobate transfers to others, and the donees of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have the property or its proceeds, are

liable to make a proportional contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the decedent's nonprobate transfers to him or her or to pay the value of the amount for which he or she is liable.

(2) If any section or any part of any section of this part 2 is preempted by any federal law (other than the federal "employee retirement income security act of 1974", as amended) with respect to a payment, an item of property, or any other benefit included in the decedent's nonprobate transfers to others, a person, other than a bona fide purchaser, who receives the payment, item of property, or any other benefit is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of that payment or the value of that item of property or benefit, as provided in section 15-11-203, to the person who would have been entitled to it were that section or part of that section not preempted.

(3) A bona fide purchaser who purchases property from a recipient or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this part 2 to return the payment, item of property, or benefit nor is liable under this part 2 for the amount of the payment or the value of the item of property or benefit.

**Source: L. 94:** Entire part R&RE, p. 989, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-207 as it existed prior to 1995.

**15-11-205. Proceeding for elective-share; time limit.** (1) Except as provided in subsection (2) of this section, the election shall be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective-share within nine months after the date of the decedent's death, or within six months after the decedent's will is admitted to probate, whichever limitation expires later. The surviving spouse shall serve a copy of the petition for the elective share on, and shall give written notice of the time and place set for hearing to, persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests may be adversely affected by the taking of the elective-share.

(2) Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's nonprobate transfers to others, the court, for cause shown by the surviving spouse, may extend the time for election.

(3) The surviving spouse may withdraw his or her demand for an elective-share at any time before entry of a final determination by the court. Written notice of such withdrawal shall be given to persons interested in the estate and the distributees and recipients of portions of the augmented estate whose interests may be adversely affected by the taking of the elective-share.

(4) After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under sections 15-11-203 and 15-11-204. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he or she would have been under sections 15-11-203 and 15-11-204 had relief been secured against all persons subject to contribution.

(5) An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.



**Source:** L. 94: Entire part R&RE, p. 989, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-205 as it existed prior to 1995.

## ANNOTATION

**Law reviews.** For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988).

**Annotator's note.** The following annotations include cases decided under former provision similar to this section.

**Purpose of section.** The purpose of this section is to assure timely notice to the court, administrative officials, and interested parties, that the surviving spouse is dissatisfied with the will and elects to take and receive one-half of the estate of the testator. In re Stitzer's Estate, 103 Colo. 529, 87 P.2d 745 (1939).

**This section is simply one of limitation** fixing a definite time after which an election, if filed, cannot be considered. In re Stitzer's Estate, 103 Colo. 529, 87 P.2d 745 (1939).

**This section is not directory only, but mandatory.** In re Sheely's Estate, 102 Colo. 194, 78 P.2d 378 (1938).

**Widow's election must be made within time allowed.** In re Sheely's Estate, 102 Colo. 194, 78 P.2d 378 (1938).

**Section 15-11-205 sets forth the time limits within which the surviving spouse must elect to take an augmented share of the estate.** Because the renunciation described in § 15-11-

207 is inextricably intertwined with the entire election procedure, the time constraints enunciated in this section must also apply to it. Matter of Estate of Grasseschi, 776 P.2d 1136 (Colo. App. 1989), cert. denied, 785 P.2d 1253 (Colo. 1989).

**Right to oppose petition.** The requirement for notice and an opportunity to appear must be deemed to include the right to oppose a petition for an elective share. In re Estate of Abbott, 39 Colo. App. 536, 571 P.2d 311 (1977).

**Sufficiency of notice of election.** Under this section any written form of notice which accomplishes the purpose of informing those charged with the administration of the estate that the surviving spouse is dissatisfied with the will and is asserting statutory rights is sufficient. In re Stitzer's Estate, 103 Colo. 529, 87 P.2d 745 (1939).

**Express election must be made.** Husband who applied for probate of the will of his wife and insisted, during a long litigation, upon the jurisdiction of the district court will not be heard to afterwards question the probate, for the absence of an express election by him. Whipple v. Wessels, 66 Colo. 120, 180 P. 309 (1919).

**15-11-206. Right of election personal to surviving spouse; incapacitated surviving spouse.** (1) **Surviving spouse must be living at time of election.** The right of election may be exercised only by a surviving spouse who is living when the petition for the elective-share is filed in the court under section 15-11-205 (1). If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his or her conservator, guardian, or agent under the authority of a power of attorney.

(2) **Incapacitated surviving spouse.** If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court shall set aside that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under section 15-11-203 (2) and (3) and shall appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection (2), an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee shall administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:

(a) Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse and benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.

(b) During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the

surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.

(c) Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against whom the elective-share was taken, as if that predeceased spouse died immediately after the surviving spouse; or (ii) to that predeceased spouse's heirs under section 15-11-711.

**Source:** L. 94: Entire part R&RE, p. 990, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-203 as it existed prior to 1995.

**Cross references:** For protected persons and protective proceedings, see article 14 of this title.

### ANNOTATION

**Law reviews.** For article, "Probate and Non-probate Distribution Issues in the Case of a Murder/Suicide", see 17 Colo. Law. 1061 (1988).

**Annotator's note.** The following annotations include cases decided under former provision similar to this section.

**This section is constitutional.** Sweeney v. Summers, 194 Colo. 149, 571 P.2d 1067 (1977).

This section does not set up an unconstitutional classification in distinguishing between a competent surviving spouse and an incompetent surviving spouse. Sweeney v. Summers, 194 Colo. 149, 571 P.2d 1067 (1977).

**Court not bound by mathematical formula.** The court, in determining whether to authorize the right of election by the conservator, has the power to grant or refuse such right without being bound by a mathematical formula. Sweeney v. Summers, 194 Colo. 149, 571 P.2d 1067 (1977).

**Creditor has no right to compel husband to renounce will.** Neither spouse has any right, vested or inchoate, in the estate of the other. The husband's consent to the wife's testamentary disposition of her property is effective as against his creditors, and this even though such consent

was given with the active purpose to defeat the right which, the husband surviving the wife, the creditors might otherwise have to resort to the husband's moiety of the wife's estate. The creditor has no right to compel the husband to take as against the provisions of the will, and no standing to afterwards question the probate of the will or the disposition of the wife's property made thereby. Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123 (1912).

**A surviving husband who dies without making an election not to take under the will is conclusively presumed to have consented to its terms.** Gallup v. Rule, 81 Colo. 335, 255 P. 463 (1927).

**A right of election is a personal privilege which does not pass to the heirs.** Gallup v. Rule, 81 Colo. 335, 255 P. 463 (1927).

**The court erred in attempting to shield the assets of the trust for the purpose of determining Medicaid eligibility because § 15-1412.6 (2) prohibits any trust that has been "established by an individual that has the effect of qualifying or purports to qualify the trust beneficiary for public assistance," and that section does not except from this prohibition elective-share trusts created pursuant to this section.** In re Estate of Faller, 66 P.3d 114 (Colo. App. 2002).

**15-11-207. Waiver of right to elect and of other rights.** (1) The rights of election of a surviving spouse and the rights of the surviving spouse to exempt property, family allowance, and the decedent's homestead exemption may be waived, wholly or partially, before or after marriage, by a writing signed by the waiving party after fair disclosure. Unless the writing provides to the contrary, a waiver of "all rights upon death" (or equivalent language) in the property or estate of a present or prospective spouse is:

(a) A waiver of all rights to elective-share, exempt property, family allowance, and the decedent's homestead exemption by the waiving party in the property of the other;

(b) A waiver of the statutory priority of the waiving party to serve as personal representative, executor, or administrator of the estate of the other; and

(c) A renunciation and disclaimer by the waiving party of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of the provisions of any will executed before the writing. Provisions of a will executed before the writing are given effect as if the waiving party:



- (I) Disclaimed all interests passing to him or her under the will; and
- (II) Became disqualified to serve as personal representative, executor, administrator, or trustee.
- (2) A surviving spouse's waiver is not enforceable if such waiver would not be enforceable under section 14-2-307, C.R.S.
- (3) In addition to all other available procedures, a person may revoke all benefits that would otherwise pass upon death by virtue of the provisions of any will executed before the revocation to relatives of such person's spouse, wholly or partially, before or after marriage, by a writing signed by the revoking party. Unless the writing provides to the contrary, a revocation of "all benefits passing upon death to the relatives of my spouse" (or equivalent language) is a revocation of all benefits that would otherwise pass upon death to the relatives of the spouse from the revoking party by virtue of the provisions of any will executed before the writing. Provisions of a will executed before the writing are given effect as if the relatives:
  - (a) Disclaimed all interests passing to them under the will; and
  - (b) Became disqualified to serve as personal representative, executor, administrator, or trustee.
- (4) For purposes of this section, "relative" of an individual's spouse means a person who is related to the spouse by blood, adoption, or affinity and who, if the individual and the individual's spouse were divorced, would not be related to the individual by blood, adoption, or affinity.
- (5) The amendments to this section, as contained in House Bill 96-1342, shall take effect July 1, 1996, and shall apply only to waivers and revocations which are executed on or after said date.

**Source:** L. 94: Entire part R&RE, p. 991, § 3, effective July 1, 1995. L. 96: Entire section amended, p. 652, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-11-204 as it existed prior to 1995.

**Cross references:** For rights of election, see § 15-11-201; for right to exempt property and family allowance, see §§ 15-11-403 and 15-11-404.

## ANNOTATION

**Law reviews.** For article, "Pre-Nuptial Agreements Revisited", see 11 Colo. Law. 1882 (1982). For article, "Prenuptial Agreements and the Dead Man's Statute", see 23 Colo. Law. 357 (1994).

**Annotator's note.** The following annotations include cases decided under former provision similar to this section.

**Right of election may be waived.** Where a husband and wife agree with each other to waive any and all claims of every kind to any property that might be due to either from the estate of the other, it is held that a claim of the widow for an allowance from the husband's estate was properly denied. *Brimble v. Sickler*, 83 Colo. 494, 266 P. 497 (1928).

**Waiver does not have to be express.** It is sufficient if some term which clearly comprehends the scope of those words, and admits of no doubt, is used. *Vincent v. Martin*, 91 Colo. 106, 11 P.2d 1089 (1932).

**Language constituting waiver.** Where by contract between husband and wife the latter agreed to accept certain bequests under a will to be, and which was, executed by the husband "in

full satisfaction of any and all rights of dower, statutory allowances and rights of inheritance as surviving widow", it is held that she thereby waived her right to a widow's allowance. *Vincent v. Martin*, 91 Colo. 106, 11 P.2d 1089 (1932).

**Wife did not waive her statutory right to take against her husband's will** when neither the will, nor a signed statement by the wife, contained specific language of waiver of her statutory entitlement to one-half her husband's estate. *Snyder v. Macy*, 674 P.2d 972 (Colo. App. 1983).

**Waiver cannot arise from presumption**, assumption, or construction. It must be in terms clearly and definitely indicating a purpose to waive the specific statutory right. *In re Williams' Estate*, 101 Colo. 262, 72 P.2d 476 (1937); *In re Bradley's Estate*, 106 Colo. 500, 106 P.2d 1063 (1940); *In re Griffie's Estate*, 108 Colo. 366, 117 P.2d 823 (1941).

**State's interest in certainty of waiver.** One reason why a waiver of the right should appear beyond any doubt is that the state also is vitally interested. If the husband fails to provide sup-

port for his widow, the state may have to do so. In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940).

**Intention to waive allowance must be established beyond doubt.** The right to a widow's allowance is strongly favored by our representative legislative bodies as is indicated by long-standing laws upon the subject, and the right will not be held to have been waived or relinquished except in cases where the intention to waive or relinquish is established beyond doubt. In re McLaughlin's Estate, 117 Colo. 67, 184 P.2d 130 (1947).

**A stipulation as to division of property entered into in a suit for divorce** and incorporated in the interlocutory decree was not intended to waive any statutory allowance which the wife might enjoy as her husband's widow, and, on the death of the husband before the divorce became final, the widow was entitled to her allowance. In re McLaughlin's Estate, 117 Colo. 67, 184 P.2d 130 (1947).

**A complete property settlement entered into in anticipation of divorce is a waiver "unless it provides to the contrary."** A property settlement which disposes of every item of property owned by the parties at the time of execution is complete within the meaning of this section. In re Estate of Morrell, 687 P.2d 1319 (Colo. App. 1984).

**Nuptial agreements are valid and enforceable** and will generally be given full force and effect. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

**Nuptial agreement will be upheld** unless the person attacking it proves fraud, concealment, or failure to disclose material information, and the burden of proof does not shift to the estate even if the amount received by the surviving spouse under the nuptial agreement is disproportionate to the value of the decedent's estate. In re Estate of Lewin v. First Nat'l Bank, 42 Colo. App. 129, 595 P.2d 1055 (1979).

Once the proponent of an antenuptial agreement has established the existence of the agreement itself, the party contesting the validity of the antenuptial agreement has the burden of proving fraud, concealment or failure to disclose material information. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

**Confidential relationship requires good faith and fairness in dealings.** Parties to nuptial agreements do not deal at arm's length as a confidential relationship exists between them, and each has a responsibility to act with good faith and fairness to the other. Such a responsibility contemplates that each party will make fair disclosure of his or her assets to the pro-

spective spouse prior to the execution of the agreement. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

**What constitutes fair disclosure.** Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement since they are not assumed to have lost their judgmental faculties because of their pending marriage. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

**Absence of detailed disclosure insufficient to set aside agreement.** Fair disclosure is not synonymous with detailed disclosure such as a financial statement of net worth and income, and the mere fact that detailed disclosure was not made will not necessarily be sufficient to set aside an otherwise properly executed agreement and will not raise a presumption of fraudulent concealment. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

**Concept of "inquiry notice" is inapposite to duty of fair disclosure.** While the concept of "inquiry notice" is relevant when it is alleged that a party is guilty of fraud or concealment, this concept is inapposite to the duty of fair disclosure imposed by this section. Lebsock v. Lebsock, 44 Colo. App. 220, 618 P.2d 683 (1980).

**Fair disclosure is not required if the wife already has a knowledge of the husband's assets.** Lebsock v. Lebsock, 44 Colo. App. 220, 618 P.2d 683 (1980).

**Inquiry not required merely because information would lead reasonably prudent person to make inquiry.** While a general and approximate knowledge by one party of the other's worth may, in some circumstances, abrogate the duty to make a fair disclosure, a party has no duty to make inquiry merely because she has information which would lead a reasonably prudent person to make such inquiry in conjunction with a commercial transaction. Lebsock v. Lebsock, 44 Colo. App. 220, 618 P.2d 683 (1980).

**Antenuptial agreement not sufficiently specific to constitute waiver.** In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940).

**Where a valid antenuptial contract contained a specific provision that the wife to-be "doth acquit, release and discharge" the other contractor from all claim to a "widow's award", she thereby waived her right to any future demand for a widow's allowance against his estate, under the statute or otherwise.** In re Griffie's Estate, 108 Colo. 366, 117 P.2d 823 (1941).

**15-11-208. Protection of payors and other third parties.** (1) Although under this part 2, a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payor or other third party is not liable for having made a payment or



transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party has received written notice as described in subsection (2) of this section. A payor or other third party is only liable for actions taken two or more business days after the payor or other third party has actual receipt of such written notice. Any form or service of notice other than that described in subsection (2) of this section shall not be sufficient to impose liability on a payor or other third party for actions taken pursuant to the governing instrument.

(2) The written notice shall indicate the name of the decedent, the name of the surviving spouse, the nature of the payment or item of property or other benefit, and a statement that the surviving spouse intends to file a petition for the elective share or that a petition for the elective share has been filed. The written notice shall be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Notice to a sales representative of the payor or other third party shall not constitute notice to the payor or other third party.

(3) Upon receipt of the written notice described in subsection (2) of this section, a payor or other third party may pay to the court any amount owed, or transfer to or deposit with the court any item of property held by it. The availability of such actions under this section shall not prevent the payor or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payor or other third party shall file with the court a copy of the written notice received by the payor or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payor or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any item of property even if no probate proceedings have been commenced before such payment, transfer, or deposit. Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payor or other third party discharges the payor or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(4) The court shall hold the funds or item of property and, upon its determination under section 15-11-205 (4), shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under section 15-11-205 (1), or, if filed, the demand for an elective share is withdrawn under section 15-11-205 (3), the court shall order disbursement to the designated beneficiary in the governing instrument. A filing fee, if any, shall be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court.

(5) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

**Source:** L. 94: Entire part R&RE, p. 991, § 3, effective July 1, 1995.

### PART 3

#### SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

**Cross references:** For clarification of the term "surviving spouse", see § 15-11-802.

**15-11-301. Entitlement of spouse; premarital will.** (1) If a testator's surviving spouse married the testator after the testator executed his or her will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate

he or she would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised outright to nor in trust for the benefit of a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is so devised to a descendant of such a child, or passes under section 15-11-603 or 15-11-604 to such a child or to a descendant of such a child, unless:

(a) It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(b) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(c) The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(2) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise outright to or in trust for the benefit of a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under section 15-11-603 or 15-11-604 to a descendant of such a child, abate as provided in section 15-12-902.

**Source:** L. 94: Entire part R&RE, p. 993, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-301 as it existed prior to 1995.

#### ANNOTATION

**Law reviews.** For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (February 2000).

**15-11-302. Omitted children.** (1) Except as provided in subsection (2) of this section, if a testator fails to provide in his or her will for any of his or her children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

(a) If the testator had no child living when he or she executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(b) If the testator has one or more children living when he or she executed the will, and the will devised property or an interest in property to one or more of the then living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(I) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then living children under the will.

(II) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (I) of this paragraph (b), that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

(III) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section shall be of the same character, whether equitable or legal, present or future, as that devised to the testator's then living children under the will.

(IV) In satisfying a share provided by this paragraph (b), devises to the testator's children who were living when the will was executed abate ratably. In abating the devises



of the then living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

(2) Neither paragraph (a) nor (b) of subsection (1) of this section applies if:

(a) It appears from the will that the omission was intentional; or

(b) The testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(3) If at the time of execution of the will the testator fails to provide in his or her will for a living child solely because he or she believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

(4) In satisfying a share provided by paragraph (a) of subsection (1) of this section, devises made by the will abate under section 15-12-902.

**Source:** L. 94: Entire part R&RE, p. 993, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-302 as it existed prior to 1995.

#### ANNOTATION

**Posthumous child takes as though testator had died intestate.** Testator leaving a widow and one child devises all his estate to his widow, not expressing any intention to disinherit an after-born child. The posthumous child takes one-fourth of the lands whereof the testator died

seized, which is the interest the minor would have inherited had her father died intestate. *Lowrey v. Harlow*, 22 Colo. App. 73, 123 P. 143 (1912) (decided under repealed laws antecedent to repealed CSA, C. 176, § 41).

#### PART 4

##### EXEMPT PROPERTY AND ALLOWANCES

**Cross references:** For clarification of the term "surviving spouse", see § 15-11-802.

**15-11-401. Applicable law.** This part 4 applies to the estate of a decedent who dies domiciled in this state. Rights to exempt property and a family allowance for a decedent who dies not domiciled in this state are governed by the law of the decedent's domicile at death.

**Source:** L. 94: Entire part R&RE, p. 995, § 3, effective July 1, 1995. L. 96: Entire section amended, p. 657, § 5, effective July 1.

**15-11-402. Homestead.** The provisions of sections 38-41-201 and 38-41-204, C.R.S., provide for a homestead exemption but shall not create an allowance for the surviving spouse or minor children. A personal representative's obligation to distribute property as an exempt property allowance under section 15-11-403, to pay money as a family allowance under section 15-11-404, or to distribute property to devisees, heirs, or beneficiaries shall not be considered a debt, contract, or civil obligation, as referred to under sections 38-41-201 and 38-41-202, C.R.S.

**Source:** L. 94: Entire part R&RE, p. 995, § 3, effective July 1, 1995.

**15-11-403. Exempt property.** (1) (a) Prior to January 1, 2012, the decedent's surviving spouse is entitled to exempt property from the estate in the form of cash in the amount of or other property of the estate in the value of twenty-six thousand dollars in excess of any security interests therein. If there is no surviving spouse, the decedent's dependent children are entitled jointly to the same exempt property. Rights to exempt property have priority over all claims against the estate, except claims for the costs and

expenses of administration, and reasonable funeral and burial, interment, or cremation expenses, which shall be paid in the priority and manner set forth in section 15-12-805. The right to exempt property shall abate as necessary to permit payment of the family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or dependent children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective-share.

(b) On and after January 1, 2012, the decedent's surviving spouse is entitled to exempt property from the estate in the form of cash in the amount of or other property of the estate in the value of thirty thousand dollars in excess of any security interests therein. If there is no surviving spouse, the decedent's dependent children are entitled jointly to the same exempt property. Rights to exempt property have priority over all claims against the estate, except claims for the costs and expenses of administration, and reasonable funeral and burial, interment, or cremation expenses, which shall be paid in the priority and manner set forth in section 15-12-805. The right to exempt property shall abate as necessary to permit payment of the family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or dependent children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective-share.

(2) The dollar amount stated in paragraph (a) or (b) of subsection (1) of this section shall be increased or decreased based on the cost of living adjustment as calculated and specified in section 15-10-112; except that, when the increase in the dollar amount stated in paragraph (b) of subsection (1) of this section, as enacted in Senate Bill 11-016, enacted in 2011, takes effect, the next regularly scheduled cost of living adjustment will be suspended for one year.

**Source:** **L. 94:** Entire part R&RE, p. 995, § 3, effective July 1, 1995. **L. 96:** Entire section amended, p. 657, § 6, effective July 1. **L. 2002:** Entire section amended, p. 652, § 5, effective July 1. **L. 2009:** Entire section amended, (HB 09-1287), ch. 310, p. 1682, § 10, effective July 1, 2010. **L. 2011:** Entire section amended, (SB 11-016), ch. 77, p. 211, § 1, effective August 10.

**Editor's note:** (1) This section is similar to former § 15-11-402 as it existed prior to 1995.

(2) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

As originally adopted in 1969, the dollar amount exempted was set at \$3,500. To adjust for inflation, the amount was increased to \$10,000 in 1990 and to \$15,000 in 2008. The dollar amount in this section is subject to annual cost-of-living adjustments under Section 1-109.

Unlike the exempt amount described in Sections 2-402 and 2-404, the exempt amount described in this section is available in a case in which the decedent left no spouse but left only adult children. The provision in this section that

establishes priorities is required because of possible difference between beneficiaries of the exemptions described in this section and those described in Sections 2-402 and 2-404.

Section 2-204 covers waiver of exempt property rights. This section indicates that a decedent's will may put a spouse to an election with reference to exemptions, but that no election is presumed to be required.

**Historical Note.** This Comment was revised in 2008.



## ANNOTATION

**Law reviews.** For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987). For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988). For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (February 2000).

**Annotator's note:** Since § 15-11-403 is similar to §§ 15-11-402 and 15-11-405 as they existed prior to the 1994 repeal and reenactment of this entire part, relevant cases construing those provisions have been included in this section. For additional cases, see the annotations under former §§ 15-11-402 and 15-11-405 in the 1987 replacement volume.

**The general assembly did not intend to limit claims for exempt property to living persons; rather, it only intended to limit the claim to spouses who survive the decedent by five or more days.** The right to an exempt property allowance that automatically vested in a surviving spouse after she survived her husband by more than one hundred twenty hours therefore rightfully passed to her estate following her death ten months later. *Foiles v. Whittman*, 233 P.3d 697 (Colo. 2010).

**This section and § 15-11-404 to be read with § 15-11-202 (1).** This section and § 15-11-404, providing for family and exempt property allowances, must be read in conjunction with the definition of "augmented estate" in

§ 15-11-202 (1) to determine whether distributing such allowances from the "augmented estate" is consistent and harmonious with the creation of an "augmented estate" under the statute. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

**Allowances to be claimed from probate estate.** The language of § 15-11-202 (1) clearly reflects a legislative intent to establish the family allowance and exempt property allowance as items to be claimed from the probate estate, if any, to which are then added certain items to create the augmented estate. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

**Medical services reimbursement funds not recoverable by treating physicians.** Medical services reimbursement funds received by the personal representative are a part of the surviving spouse's exempt property allowance when there exists no basis to impress a constructive trust on such funds. The legislature in enacting this section clearly intended that a surviving spouse's exempt property allowance have priority over all claims against the state. *Timothy C. Wirt, M.D., P.C. v. Prout*, 754 P.2d 429 (Colo. App. 1988).

**Exempt property claim automatically vested in decedent's wife when she survived him** and it passed to the estate following her subsequent death. In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), *aff'd*, 233 P.3d 697 (Colo. 2010).

**Applied in** *Lopata v. Metzel*, 641 P.2d 952 (Colo. 1982); *Snyder v. Macy*, 674 P.2d 972 (Colo. App. 1983).

**15-11-404. Family allowance.** (1) In addition to the right to exempt property, the decedent's surviving spouse and minor children who the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his or her guardian or other person having the child's care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except claims for the costs and expenses of administration, and reasonable funeral and burial, interment, or cremation expenses, which shall be paid in the priority and manner set forth in section 15-12-805.

(2) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective-share. The death of any person entitled to a family allowance terminates the right to receive an allowance for any period arising after his or her death, but does not affect the right of his or her estate to recover the unpaid allowance for periods prior to his or her death.

**Editor's note:** This section is similar to former § 15-11-403 as it existed prior to 1995.

## ANNOTATION

**Law reviews.** For article, "The Widow's Allowance", see 6 Dicta 11 (April 1929). For article, "Widow's Allowance", see 25 Dicta 240 (1948). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For article, "Child Support Obligations after Death of the Supporting Parent", see 16 Colo. Law. 790 (1987). For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988). For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (February 2000).

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Section 15-11-403 and this section to be read with § 15-11-202 (1).** Section 15-11-403 and this section, providing for family and exempt property allowances, must be read in conjunction with the definition of "augmented estate" in § 15-11-202 (1) to determine whether distributing such allowances from the "augmented estate" is consistent and harmonious with the creation of an "augmented estate" under the statute. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

**This section is based upon sound public policy** which the courts are zealous to effectuate. In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940); Lyons v. Egan, 107 Colo. 32, 108 P.2d 873 (1940).

**The purpose of this section is to secure support to the widow and children during the period of administration,** and the prolonged litigation which sometimes ensues. Wilson v. Wilson, 55 Colo. 70, 132 P. 67 (1913); In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940); Lyons v. Egan, 107 Colo. 32, 108 P.2d 873 (1940).

The policy of providing a widow's allowance is to protect the surviving spouse during the period until a final distribution of the estate can be made. In re Estate of Piazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

**Rights in general.** A widow may claim her allowance or waive it. She may take specific items or cash. Until her position is made known, or her right is terminated by limitation, property of the estate cannot be disposed of and claims against it can often not be settled. Wigington v. Wigington, 112 Colo. 78, 145 P.2d 980 (1944).

**A claim for a widow's allowance is a claim against the estate of her deceased husband.** Hale v. Burford, 73 Colo. 197, 214 P. 543

(1923); Brimble v. Sickler, 83 Colo. 494, 266 P. 497 (1928); In re Williams' Estate, 101 Colo. 262, 72 P.2d 476 (1937); In re Elam's Estate, 104 Colo. 126, 89 P.2d 243 (1939).

**The allowance is a part of the expense of the administration of an estate.** Deeble v. Alerton, 58 Colo. 166, 143 P. 1096 (1914); Hale v. Burford, 73 Colo. 197, 214 P. 543 (1923); Ahlf v. King, 88 Colo. 425, 298 P. 647 (1931).

**Allowances to be claimed from probate estate.** The language of § 15-11-202 (1) clearly reflects a legislative intent to establish the family allowance and exempt property allowance as items to be claimed from the probate estate, if any, to which are then added certain items to create the augmented estate. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

**Factors set forth for consideration as to whether family allowance should be extended and in what amount.** In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978).

**When ordered paid, an allowance is not in custodia legis.** Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co., 75 Colo. 451, 226 P. 293 (1924).

**The allowance is subject to garnishment under C.R.C.P. 103.** Whatever the public policy may be as to garnishment of a widow's allowance, these sections control. Policy in such a case is for the consideration of the general assembly and not the courts. Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co., 75 Colo. 451, 226 P. 293 (1924); Brimble v. Sickler, 83 Colo. 494, 266 P. 497 (1928).

**The allowance is given independent of her distributive share in her husband's estate.** Wilson v. Wilson, 55 Colo. 70, 132 P. 67 (1913).

**The basic reason for a surviving spouse's allowance is that it is the duty of the husband to support her.** Brimble v. Sickler, 83 Colo. 494, 266 P. 497 (1928); In re Williams' Estate, 101 Colo. 262, 72 P.2d 476 (1937).

**There is no statutory allowance to a widow other than a widow's allowance.** Vincent v. Martin, 91 Colo. 106, 11 P.2d 1089 (1932); Moher v. Knauss, 150 Colo. 108, 370 P.2d 1017 (1962).

**A widow's allowance is controlled by the law of the decedent's domicile.** In re Estate of Piazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

**Colorado need not be domiciliary state.** Under this statute there is no requirement that the surviving spouse be a resident of this state or that this state be the domiciliary state. In re Estate of Piazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

There is no statutory bar to filing for a widow's allowance in Colorado, where Colorado is



the ancillary jurisdiction. In re Estate of Piazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

**Where the assets of the domiciliary estate have been insufficient to satisfy a widow's allowance** awarded in the domiciliary proceeding, the spouse is entitled to satisfaction of the domiciliary allowance from the assets in the ancillary estate. In re Estate of Piazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

**When allowance is vested.** The remarriage of a widow does not divest her or her minor children of an allowance already vested before her remarriage. A surviving spouse's allowance is vested when the court enters an order approving the estimate of the appraisers and setting aside specific articles of property to her. Hale v. Burford, 73 Colo. 197, 214 P. 543 (1923).

**Widow entitled to allowance regardless of election.** The fact that a widow accepted her widow's allowance held of no significance one way or the other in determining whether or not there had been an election under § 15-11-201, for she was entitled to such allowance whether she intended to claim under the statute or under the will. Hodgkins v. Ashby, 56 Colo. 553, 139 P. 538 (1914).

**Allowance protected against liability of husband.** The last sentence of subsection (1) is a declaration of the legislative policy that the allowance should be protected against any indebtedness or liability of the husband. In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940).

**15-11-405. Source, determination, and documentation.** (1) (a) (I) If the estate is otherwise sufficient, property specifically devised or disposed of by memorandum under section 15-11-513 to any person other than a person entitled to exempt property may not be used to satisfy rights to exempt property. Subject to this restriction, the surviving spouse, the guardians of minor children, or dependent children who are adults may select property of the estate as their exempt property. The personal representative may make these selections if the surviving spouse, the dependent children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as exempt property allowance. Prior to January 1, 2012, the personal representative may determine the family allowance in a lump sum not exceeding twenty-four thousand dollars or periodic installments not exceeding two thousand dollars per month for one year and may disburse funds of the estate in payment of the family allowance. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may provide a family allowance other than that which the personal representative determined or could have determined.

(II) If the estate is otherwise sufficient, property specifically devised or disposed of by memorandum under section 15-11-513 to any person other than a person entitled to exempt property may not be used to satisfy rights to exempt property. Subject to this restriction, the surviving spouse, the guardians of minor children, or dependent children who are adults may select property of the estate as their exempt property. The personal representative may make these selections if the surviving spouse, the dependent children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as exempt property allowance. On and after January 1, 2012, the personal representative may determine the family

**Where allowance satisfied.** Where a widow is the sole heir of her deceased husband and receives his entire net estate, amounting to more than \$2,000, it is immaterial whether she receives the amount to which she is entitled as a widow's allowance as such, or as a part of the estate, and in such circumstances where "other estate of the deceased" is discovered after final settlement and discharge of the widow as administratrix, and which was not inventoried or accounted for, as between the widow and a creditor whose claim had not been theretofore presented for allowance, the latter is entitled to the proceeds of the newly discovered estate in preference to the former's demand for a widow's allowance therefrom. Ahlf v. King, 88 Colo. 425, 298 P. 647 (1931).

**An apportionment of the family allowance between a surviving spouse and a minor child will not be disturbed on review** where there is evidence on the record to support it. In re Estate of Frazier, 30 Colo. App. 458, 494 P.2d 845 (1972).

Under this section, the court acting in probate may apportion the award of the family allowance between a surviving spouse and dependent children not living with the surviving spouse, as their needs may appear. In re Estate of Meek v. Meek, 669 P.2d 628 (Colo. App. 1983).

**Applied in** Lopata v. Metzel, 641 P.2d 952 (Colo. 1982); Snyder v. Macy, 674 P.2d 972 (Colo. App. 1983).

allowance in a lump sum not exceeding thirty thousand dollars or periodic installments not exceeding two thousand five hundred dollars per month for one year and may disburse funds of the estate in payment of the family allowance. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may provide a family allowance other than that which the personal representative determined or could have determined.

(b) The dollar amount stated in subparagraph (I) or (II) of paragraph (a) of this subsection (1) shall be increased or decreased based on the cost of living adjustment as calculated and specified in section 15-10-112; except that, when the increase in the dollar amount stated in subparagraph (II) of paragraph (a) of this subsection (1), as enacted in Senate Bill 11-016, enacted in 2011, takes effect, the next regularly scheduled cost of living adjustment will be suspended for one year.

(2) If the right to an elective-share is exercised on behalf of a surviving spouse who is an incapacitated person, the personal representative may add any unexpended portions payable under the exempt property and family allowance to the trust established under section 15-11-206 (2).

(3) No exempt property or family allowance shall be payable unless the person entitled to payment thereof requests such payment within six months after the first publication of notice to creditors for filing claims which arose before the death of the decedent, or within one year after the date of death, whichever time limitation first expires. The court may extend the time for presenting such request as it sees fit for cause shown by the person entitled to payment before the time limitation has expired; except that the time for presenting the request shall not be extended beyond two years after the date of death. The request shall be made to the personal representative, or, if none is appointed, to any other person having possession of the decedent's assets. A request on behalf of a minor or dependent child may be made by the child's guardian or other person having his or her care and custody.

**Source:** L. 94: Entire part R&RE, p. 996, § 3, effective July 1, 1995. L. 96: (1) amended, p. 658, § 7, effective July 1. L. 2002: (1) amended, p. 652, § 6, effective July 1. L. 2009: (1) amended, (HB 09-1287), ch. 310, p. 1682, § 11, effective July 1, 2010. L. 2011: (1) amended, (SB 11-016), ch. 77, p. 212, § 2, effective August 10.

**Editor's note:** (1) This section is similar to former § 15-11-404 as it existed prior to 1995.

(2) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (1):

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

**Scope and Purpose of 1990 Revision.** As originally adopted in 1969, the maximum family allowance the personal representative was authorized to determine without court order was a lump sum of \$6,000 or periodic installments of \$500 per month for one year. To adjust for inflation, the amounts were increased in 1990 to \$18,000 and \$1,500 respectively and in 2008 to \$22,500 and \$2,250. The dollar amount in this

section is subject to annual cost-of-living adjustments under Section 1-109.

A new subsection (b) was added to provide for the case where the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person. In that case, the personal representative is authorized to add any unexpended portions under the homestead allowance, exempt property, and family allowance



to the custodial trust established by Section 2-212(b).

**If Domiciliary Assets Insufficient.** Note that a domiciliary personal representative can collect against out of state assets if domiciliary assets are insufficient.

**Cross References.** See Sections 3-902, 3-906, and 3-907.

**Historical Note.** This Comment was revised in 1993 and 2008.

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Factors set forth for consideration as to whether family allowance should be extended** and in what amount. In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978).

**Surviving spouse need not file a claim before his or her death** to be necessarily timely filed. In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

**Apportionment of family allowance.** Under § 15-14-404, the court acting in probate may apportion the award of the family allowance between a surviving spouse and dependent children not living with the surviving spouse, as their needs may appear. In re Estate of Meek, 669 P.2d 628 (Colo. App. 1983).

**Applied in** In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

## PART 5

### WILLS AND WILL CONTRACTS AND CUSTODY AND DEPOSIT OF WILLS

**15-11-501. Who may make a will.** An individual eighteen or more years of age who is of sound mind may make a will.

**Source:** L. 94: Entire part R&RE, p. 997, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-501 as it existed prior to 1995.

## ANNOTATION

**Law reviews.** For note, "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933). For note, "Some Problems Relating to Testamentary Witnesses", see 23 Rocky Mt. L. Rev. 458 (1951). For article, "Transmissibility of Future Interests in Colorado", see 27 Rocky Mt. L. Rev. 1 (1954). For article on will drafting, see 27 Rocky Mt. L. Rev. 306 (1955). For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969). For article, "Will Execution Ceremonies: Securing a Client's Last Wishes", see 23 Colo. Law. 47 (1994). For article, "Legal Guidelines and Methods for Evaluating Capacity", see 32 Colo. Law. 65 (June 2003).

**Annotator's note.** Since § 15-11-501 is similar to repealed § 152-5-2, CRS 53, CSA, C. 176, § 36, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**A testator's soundness of mind may be evaluated under either the test set forth in** *Cunningham v. Stender*, 127 Colo. 293, 255

**P.2d 977 (1953), or the insane delusion test.** In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**The test of testamentary capacity** is a positive showing that at the time of executing the will, the testator understood the nature and extent of his property, understood the effect of the proposed testamentary disposition, knew the natural objects of his bounty, and that the proposed will represented his wishes. *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 P. 956 (1910); *Cunningham v. Stender*, 127 Colo. 293, 255 P.2d 977 (1953); In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Testamentary capacity consists of mentality and memory sufficient to understand intelligently the nature and purpose of the transaction, to comprehend generally the nature and extent of property to be disposed of, to remember who are the natural objects of the testator's bounty, and to understand the nature and effect of the desired disposition. *Columbia Sav. & Loan Ass'n v. Carpenter*, 33 Colo. App. 360, 521 P.2d 1299 (1974), rev'd on other grounds sub nom.

Judkins v. Carpenter, 189 Colo. 95, 537 P.2d 737 (1975).

**An individual lacks testamentary capacity under the insane delusion test when he or she suffers from an insane delusion that materially affects the disposition of the will.** Breeden v. Stone, 992 P.2d 1167 (Colo. 2000); In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**An insane delusion** is a persistent belief in something that has no existence in fact, which belief is adhered to in spite of all evidence to the contrary. Breeden v. Stone, 992 P.2d 1167 (Colo. 2000); In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**A contestant may challenge a testator's soundness of mind based on both or either of the Cunningham and insane delusion tests.** Breeden v. Stone, 992 P.2d 1167 (Colo. 2000).

**Testamentary capacity is a matter of fact** to be determined by the trial court. Scott v. Leonard, 117 Colo. 54, 184 P.2d 138 (1947).

**Testator held to be of sound mind when evidence reveals he had not been drinking at time will executed.** In re Piercen's Estate, 118 Colo. 264, 195 P.2d 725 (1948).

**Contractual capacity and testamentary capacity are the same.** Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946); Breeden v. Stone, 992 P.2d 1167 (Colo. 2000); In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**Symptoms of senile dementia prior to making a will are not conclusive of incapacity.** Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946).

**Likewise, an adjudication of unsoundness of mind and the appointment of a guardian is not conclusive evidence of testamentary incapacity,** although the guardianship existed at the time the will was executed. In re McGrove's Estate, 106 Colo. 69, 101 P.2d 25 (1940).

**Findings that warrant appointment of a guardian or conservator do not equate to a determination of testamentary incapacity.** In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**Effect of § 15-14-409, appointment of a conservator or guardianship, on testamentary capacity.** Section 15-14-409 specifically provides that the appointment of a conservator or the entry of another protective order is not a determination of decedent's testamentary capacity. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**In addition, § 28-5-219 provides** that neither the fact that a person has been rated incompetent by the veterans administration nor the fact that a guardian has been appointed for the person shall be construed as a legal adjudication of insanity or mental incompetency. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**Testator held not to be mentally incapacitated at time will executed by reason of drugs administered.** In re Rentfro's Estate, 102 Colo. 400, 79 P.2d 1042 (1938).

**Disinheritance of son by virtue of will does not indicate lack of testamentary capacity.** Since one making a will is not bound to dispose of his property according to the rules of intestate succession, the fact that a testatrix practically disinherited her son in her will is no reason for regarding her as lacking testamentary capacity. In re Cole's Estate, 75 Colo. 264, 226 P. 143 (1924).

**Burden of proving want of testamentary capacity is on proponent of will.** In re Roeber's Estate, 70 Colo. 196, 199 P. 481 (1921).

**Burden of proof of lack of testamentary capacity.** Once the proponent of a holographic will has offered prima facie proof that it was duly executed, the contestant must bear the burden of introducing prima facie evidence that the person who executed the will lacked testamentary capacity. Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

**Effect of § 15-12-407 on burden of proof.** Enactment of § 15-12-407 changes the long-established Colorado rule that the proponent of a will has the burden of proof and persuasion with regard to testamentary capacity. Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

**For testatrix's mental capacity to direct making and execution of will,** see In re Stitzer's Estate, 100 Colo. 521, 68 P.2d 561 (1937).

**The fact that the testator believed the will contestant was not his son does not justify a conclusion of mental incompetency,** even though for years the testator treated and recognized him as a son. Miller v. Weston, 67 Colo. 534, 189 P. 610 (1920).

**A testator's preference to a niece or nephew, or even to a stranger, creates no suspicion as to his mental capacity** despite the fact that he thereby disinherits brothers and sisters or even children. Nelson v. Nelson, 27 Colo. App. 104, 146 P. 1079 (1915).

**Decedent's lack of knowledge of the actual value of estate** is not, by itself, proof of lack of testamentary capacity. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**Decedent's failure to accurately estimate the value of estate does not, in itself, amount to an insane delusion.** The court found that decedent would not have left a larger bequest to the contestants even if decedent had been aware of the actual value of his or her estate. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**Evidence of testamentary capacity.** If the testamentary disposition is consistent with the testator's situation and in congruity with his affections and previous declarations and if the disposition might have been expected from one



so situated, this is rational and legal evidence of testamentary capacity. In re Shapter's Estate, 35 Colo. 578, 85 P. 688 (1905).

**In order to prove that a testator is not possessed of sufficient mental capacity** to execute a valid will, evidence offered has to be calculated to establish his mental incapacity at the time of the will's execution. In re Estate of Southwick v. First Nat'l Bank, 33 Colo. App. 86, 515 P.2d 484 (1973).

Testamentary incapacity to execute a valid will on a given day may be proven by evidence of incompetency at times prior to the date of execution. In re Estate of Southwick v. First Nat'l Bank, 33 Colo. App. 86, 515 P.2d 484 (1973).

**Expert opinion evidence describing mental incapacity** at a time prior to the execution of a will, if not too remote in time, provides an inference, the weight of which is left to the trier of fact, that the testator continued to be incompetent at the date of the will's execution, and the admissibility of such evidence is largely within the discretion of the trial court. In re Estate of Southwick v. First Nat'l Bank, 33 Colo. App. 86, 515 P.2d 484 (1973).

**Probate court erred when it denied proponent's motion for partial summary judgment regarding the decedent's testamentary capac-**

**ity at the time he or she executed the second codicil** since decedent's testamentary capacity was a question of fact that needed to be determined by application of the Cunningham test. Proponent's pleadings submitted evidence that satisfied each element of the Cunningham test. The physician's letter submitted by the objector referred to a remote time 21 months prior to the execution of the second codicil and did not address any of the elements of the Cunningham test and therefore was insufficient to create a genuine issue of material fact. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

**For evidence of lack of testamentary capacity**, see In re D'Avignon's Will, 12 Colo. App. 489, 55 P. 936 (1899).

**For cases in which undue influence by proponent of will is submitted as grounds for will's invalidity**, see Gehm v. Brown, 125 Colo. 555, 245 P.2d 865 (1952); Igo v. Marshall, 140 Colo. 560, 345 P.2d 724 (1961); Krueger v. Ary, 205 P.3d 1150 (Colo. 2009).

**At common law a feme covert was incapable of disposing of a freehold estate by will.** Mitchell v. Hughes, 3 Colo. App. 43, 32 P. 185 (1893).

**Applied in** In re Hayes' Estate, 55 Colo. 340, 135 P. 449 (1913).

**15-11-502. Execution - witnessed or notarized wills - holographic wills.** (1) Except as otherwise provided in subsection (2) of this section and in sections 15-11-503, 15-11-506, and 15-11-513, a will shall be:

- (a) In writing;
- (b) Signed by the testator, or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
- (c) Either:
  - (I) Signed by at least two individuals, either prior to or after the testator's death, each of whom signed within a reasonable time after he or she witnessed either the testator's signing of the will as described in paragraph (b) of this subsection (1) or the testator's acknowledgment of that signature or acknowledgment of the will; or
  - (II) Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments.
- (2) A will that does not comply with subsection (1) of this section is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.
- (3) Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.
- (4) For purposes of this section, "conscious presence" requires physical proximity to the testator but not necessarily within testator's line of sight.
- (5) For purposes of this part 5, "will" does not include a designated beneficiary agreement that is executed pursuant to article 22 of this title.

**Source:** L. 94: Entire part R&RE, p. 997, § 3, effective July 1, 1995. L. 2001: (1)(c) amended, p. 886, § 1, effective June 1. L. 2009: (1) amended, (HB 09-1287), ch. 310, p. 1683, § 12, effective July 1, 2010. L. 2010: (5) added, (SB 10-199), ch. 374, p. 1750, § 9, effective July 1.

**Editor's note:** (1) This section is similar to former §§ 15-11-502 and 15-11-503 as they existed prior to 1995.

(2) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (1):

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

(3) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act adding subsection (5):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

**Subsection (a): Witnessed or Notarized Wills.** Three formalities for execution of a witnessed or notarized will are imposed. Subsection (a)(1) requires the will to be in writing. Any reasonably permanent record is sufficient. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. i (1999).

Under subsection (a)(2), the testator must sign the will or some other individual must sign the testator's name in the testator's presence and by the testator's direction. If the latter procedure is followed, and someone else signs the testator's name, the so-called "conscious presence" test is codified, under which a signing is sufficient if it was done in the testator's conscious presence, i.e., within the range of the testator's senses such as hearing; the signing need not have occurred within the testator's line of sight. For application of the "conscious-presence" test, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. n (1999); *Cunningham v. Cunningham*, 83 N.W. 58 (Minn. 1900) (conscious-presence requirement held satisfied where "the signing was within the sound of the testator's voice; he knew what was being done ..."); *Healy v. Bartless*, 59 A. 617 (N.H. 1904) (individuals are in the decedent's conscious presence "whenever they are so near at hand that he is conscious of where they are and of what they are doing, through any of his senses, and where he can readily see them if he is so disposed."); *Demaris' Estate*, 110 P.2d 571 (Or. 1941) ("[W]e do not believe that sight is the only test of presence. We are con-

vinced that any of the senses that a testator possesses, which enable him to know whether another is near at hand and what he is doing, may be employed by him in determining whether [an individual is] in his [conscious] presence ...").

Signing may be by mark, nickname, or initials, subject to the general rules relating to that which constitutes a "signature." See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. j (1999). There is no requirement that the testator "publish" the document as his or her will, or that he or she request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses, if he or she later acknowledges to the witnesses that the signature is his or hers (or that his or her name was signed by another) or that the document is his or her will. An acknowledgment need not be expressly stated, but can be inferred from the testator's conduct. *Norton v. Georgia Railroad Bank & Tr. Co.*, 285 S.E.2d 910 (Ga. 1982).

There is no requirement that the testator's signature be at the end of the will; thus, if the testator writes his or her name in the body of the will and intends it to be his or her signature, the statute is satisfied. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmts. j & k (1999).

Subsection (a)(3) requires that the will either be (A) signed by at least two individuals, each of whom witnessed at least one of the following:



(i) the signing of the will; (ii) the testator's acknowledgment of the signature; or (iii) the testator's acknowledgment of the will; or (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. Subparagraph (B) was added in 2008 in order to recognize the validity of notarized wills.

Under subsection (a)(3)(A), the witnesses must sign as witnesses (see, e.g., *Mossler v. Johnson*, 565 S.W.2d 952 (Tex. Civ.App. 1978)), and must sign within a reasonable time after having witnessed the testator's act of signing or acknowledgment. There is, however, no requirement that the witnesses sign before the testator's death. In a particular case, the reasonable-time requirement could be satisfied even if the witnesses sign after the testator's death.

Under subsection (a)(3)(B), a will, whether or not it is properly witnessed under subsection (a)(3)(A), can be acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. Note that a signature guarantee is not an acknowledgment before a notary public or other person authorized by law to take acknowledgments. The signature guarantee program, which is regulated by federal law, is designed to facilitate transactions relating to securities. See 17 C.F.R. § 240.17Ad-15.

Allowing notarized wills as an optional method of execution addresses cases that have begun to emerge in which the supervising attorney, with the client and all witnesses present, circulates one or more estate-planning documents for signature, and fails to notice that the client or one of the witnesses has unintentionally neglected to sign one of the documents. See, e.g., *Dalk v. Allen*, 774 So.2d 787 (Fla. Dist. Ct. App. 2000); *Sisson v. Park Street Baptist Church*, 24 E.T.R.2d 18 (Ont. Gen. Div. 1998). This often, but not always, arises when the attorney prepares multiple estate-planning documents — a will, a durable power of attorney, a health-care power of attorney, and perhaps a revocable trust. It is common practice, and sometimes required by state law, that the documents other than the will be notarized. It would reduce confusion and chance for error if all of these documents could be executed with the same formality.

In addition, lay people (and, sad to say, some lawyers) think that a will is valid if notarized, which is not true under non-UPC law. See, e.g., *Estate of Saueressig*, 136 P.3d 201 (Cal. 2006). In *Estate of Hall*, 51 P.3d 1134 (Mont. 2002), a notarized but otherwise unwitnessed will was upheld, but not under the pre-2008 version of Section 2-502, which did not authorize notarized wills. The will was upheld under the harmless-error rule of Section 2-503. There are also cases in which a testator went to his or her bank to get the will executed, and the bank's notary

notarized the document, mistakenly thinking that notarization made the will valid. Cf., e.g., *Orrell v. Cochran*, 695 S.W.2d 552 (Tex. 1985). Under non-UPC law, the will is usually held invalid in such cases, despite the lack of evidence raising any doubt that the will truly represented the decedent's wishes.

Other uniform acts affecting property or person do not require either attesting witnesses or notarization. See, e.g., Uniform Trust Code § 402(a)(2); Power of Attorney Act § 105; Uniform Health-Care Decisions Act § 2(f).

A will that does not meet the requirements of subsection (a) may be valid under subsection (b) as a holograph or under the harmless-error rule of Section 2-503.

**Subsection (b): Holographic Wills.** This subsection authorizes holographic wills. On holographic wills, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2 (1999). Subsection (b) enables a testator to write his or her own will in handwriting. There need be no witnesses. The only requirement is that the signature and the material portions of the document be in the testator's handwriting.

By requiring only the "material portions of the document" to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be "entirely" in the decedent's handwriting), a holograph may be valid even though immaterial parts such as date or introductory wording are printed, typed, or stamped.

A valid holograph can also be executed on a printed will form if the material portions of the document are handwritten. The fact, for example, that the will form contains printed language such as "I give, devise, and bequeath to \_\_\_\_\_" does not disqualify the document as a holographic will, as long as the testator fills out the remaining portion of the dispositive provision in his or her own hand.

**Subsection (c): Extrinsic Evidence.** Under subsection (c), testamentary intent can be shown by extrinsic evidence, including for holographic wills the printed, typed, or stamped portions of the form or document. Handwritten alterations, if signed, of a validly executed nonhandwritten will can operate as a holographic codicil to the will. If necessary, the handwritten codicil can derive meaning, and hence validity as a holographic codicil, from nonhandwritten portions of the document. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2 cmt. g (1999). This position intentionally contradicts *Estate of Foxley*, 575 N.W.2d 150 (Neb. 1998), a decision condemned in Reporter's Note No. 4 to the Restatement as a decision that "reached a manifestly unjust result".

**2008 Revisions.** In 2008, this section was amended by adding subsection (a)(3)(B). Subsection (a)(3)(B) and its rationale are discussed

in Waggoner, The UPC Authorizes Notarized Wills, 34 ACTEC J. 58 (2008).

**Historical Note.** This Comment was revised in 2008.

## ANNOTATION

**Law reviews.** For note, "Control of Trust Property by the Settlor", see 11 Rocky Mt. L. Rev. 42 (1938). For article, "Family Law, Probate Law, and Constitutional Law", see 31 Dicta 471 (1954). For comment on *In re McLaughlin's Will*, appearing below, see 26 Rocky Mt. L. Rev. 337 (1954). For article on the necessity of attestation clause or proof of attestation, see 29 Rocky Mt. L. Rev. 475 (1957). For article, "The Sight and Sense Tests in Colorado", see 35 Dicta 114 (1958). For article, "Holographic and Nonconforming Wills: Dispensing With Formalities—Part I", see 31 Colo. Law. 57 (December 2002). For article, "Holographic and Nonconforming Wills: Dispensing With Formalities—Part II", see 32 Colo. Law. 53 (January 2003).

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**The requirements of this section are plain.** They are, to reiterate: The will must be written; it must be signed by the testator, or someone for him in his presence and by his direction; it must be signed or acknowledged by the testator in the presence of two or more witnesses; and the testator must request two persons to sign the instrument as witnesses. *McGary v. Blakely*, 127 Colo. 495, 258 P.2d 770 (1953).

**A will not meeting the requirements of this section is void for all purposes.** *McGary v. Blakely*, 127 Colo. 495, 258 P.2d 770 (1953).

**The formalities required for valid will execution require strict adherence in order to prevent fraud** because statutes governing execution are designed to safeguard and protect the decedent's estate. *In re Estate of Royal*, 826 P.2d 1236 (Colo. 1992).

**For a will, so far as execution goes, is an entirety**, and if defective because not executed in accordance with the requirements of law, it is void for all purposes. *Twilley v. Durkee*, 72 Colo. 444, 211 P. 668 (1922).

**With reference to wills made by residents of the state, the provisions of this section are mandatory.** *Reed v. McLaughlin*, 128 Colo. 581, 265 P.2d 691 (1954).

**Where testamentary capacity, sufficient witnessing, and a valid bequest are shown, a refusal to probate a will held error**, regardless of whether a testamentary trust therein was valid or not. *Frazier v. Frazier*, 83 Colo. 188, 263 P. 413 (1927).

**Court has duty as matter of law to hold will properly executed.** Where proof of due execution has been made and no evidence presented to the contrary, it is the duty of the court to hold as

a matter of law that the will was properly executed, and to remove that question from the jury's consideration. *O'Brien v. Wallace*, 145 Colo. 291, 359 P.2d 1029 (1961).

**A will must be reduced to writing** but its continued existence as a will should not be held to depend at all events upon the production and exhibition of the writing. *Estate of Eder*, 94 Colo. 173, 29 P.2d 631 (1934).

**Attempted creation of a trust by will held invalid as depending on oral instructions** for its execution, since such instructions given before or after the execution of a will are in violation of this section requiring wills to be in writing. *Frazier v. Frazier*, 83 Colo. 188, 263 P. 413 (1927).

**What constitutes "presence".** If in the act of attesting the will the witnesses are where the testator can see them if he desires, they are in his presence within the meaning of this section. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913).

**This section requires that the witnesses shall sign the will.** This means that something more is required of witnesses than the mere placing of their names on the document. It requires an observation by the witnesses to see that the will was executed by the testator and that the testator had capacity to make the will. *McGary v. Blakeley*, 127 Colo. 495, 258 P.2d 770 (1953).

Witnesses must actually sign the will and may not substitute oral testimony to affirm testator's signature. *In re Estate of Royal*, 813 P.2d 790 (Colo. App. 1991), *aff'd*, 826 P.2d 1236 (Colo. 1992).

**Will is valid despite failure of witnesses to sign on same page as testator.** Although the witnesses' signatures do not appear on the same page as the signature of the testator, the witnesses did "subscribe" their names to the will and the will is valid. Additionally, all three witnesses testified as to the proper execution of the will in every essential element, therefore the will was properly admitted to probate. *Brock v. Erickson*, 28 Colo. App. 555, 475 P.2d 346 (1970).

**Witnesses may attest to a will after the testator's death** but only upon a showing of exceptional circumstances which made it impossible or extremely impractical for the witnesses to have signed the will before the testator's death. *In re Estate of Royal*, 813 P.2d 790 (Colo. App. 1991), *aff'd*, 826 P.2d 1236 (Colo. 1992).

**Witnesses' signatures should be affixed to the document at least by the time the will becomes operative, namely the death of the**



**testator.** If the will speaks as of the date of the testator's death, it follows that the document should be complete at that time. In re Estate of Royal, 826 P.2d 1236 (Colo. 1992).

**An attestation clause is prima facie evidence of the facts stated in such clause.** Butcher v. Butcher, 21 Colo. App. 416, 122 P. 397 (1921); Lenahan v. White, 79 Colo. 347, 245 P. 711 (1926); Wehrkamp v. Burnett, 82 Colo. 5, 256 P. 630 (1927); Aquilini v. Chamblin, 94 Colo. 367, 30 P.2d 325 (1934); McGary v. Blakeley, 127 Colo. 495, 258 P.2d 770 (1953); Brock v. Erickson, 28 Colo. App. 555, 475 P.2d 346 (1970).

**In the absence of an attestation clause, no presumption may be indulged as to due execution** simply by the proof of signatures. If there is no attestation clause the facts of the execution may be shown by other evidence. McGary v. Blakeley, 127 Colo. 495, 258 P.2d 770 (1953).

**Sufficient publication.** The testator said that he understood and asked them to sign as witnesses to his will. That constituted a publication of the will in compliance with this section. Wehrkamp v. Burnett, 82 Colo. 5, 256 P. 630 (1927); Aquilini v. Chamblin, 94 Colo. 367, 30 P.2d 325 (1934).

**Acknowledgment sufficient if testator clearly indicates that the instrument is his last will and testament.** There was no evidence that the testator acknowledged that the writing was his last will and testament, as required by this section. But it is not necessary for testators to use the very words of this section, and they seldom do. If the testator, by word or deed, clearly indicates that the instrument is his last will and testament, it is sufficient. Aquilini v. Chamblin, 94 Colo. 367, 30 P.2d 325 (1934).

**A will is void and not entitled to probate** where it appears that the testator did not declare the writing to be his last will and testament, did not know its contents, and did not request the subscribing witnesses to attest the same. Wagner v. Heldt, 93 Colo. 442, 26 P.2d 813 (1933).

**The provisions of this section, by force of the following section, are extended to codicils of wills.** Int'l Trust Co. v. Anthony, 45 Colo. 474, 101 P. 781 (1909).

**Thus a codicil attested by only one witness is without effect.** Freeman v. Hart, 61 Colo. 455, 158 P. 305 (1916).

**And the same is true where one witness did not sign in the presence of the testator.** A codicil, the execution of which was witnessed by two witnesses, one of whom signed it in the testator's presence and the other at a later day, and not in his presence, will be rejected. Int'l Trust Co. v. Anthony, 45 Colo. 474, 101 P. 781 (1909).

**No requirement that deed comply with statutory requirements of a will.** First Nat'l Bank v. Groussman, 29 Colo. App. 215, 483 P.2d 398 (1971).

**Testamentary intent required.** To be a holographic will, the evidence must establish that the decedent intended the writing itself to make a testamentary disposition of decedent's property. In re Estate of Fegley, 42 Colo. App. 47, 589 P.2d 80 (1978); Matter of Estate of Olschansky, 735 P.2d 927 (Colo. App. 1987).

The informal character of the decedent's letter as well as the statement she would leave something for her granddaughter reflected that the decedent did not intend the letter to make a testamentary disposition. Matter of Estate of Olschansky, 735 P.2d 927 (Colo. App. 1987).

**Circumstantial evidence used in proving testator's signature.** Where owing to the failure of the memory of the subscribing witnesses it is impossible to obtain direct testimony that the testator's signature was upon the paper when the witnesses subscribed it, circumstances may be resorted to. In re Carey's Estate, 56 Colo. 77, 136 P. 1175 (1913).

**Burden is on contestants to overthrow will duly admitted to probate.** The weight of authority is to the effect that, in a contest of a will which has theretofore been duly admitted to probate, the burden of proof is on the contestant to establish his grounds of contest. The probate is held to be prima facie evidence of the due attestation, execution, and validity of the will, and the burden is upon the contestants to overthrow the will. Aquilini v. Chamblin, 94 Colo. 367, 30 P.2d 325 (1934).

**Burden is on proponent who presents will for probate to show due execution.** Upon the proponent who presents a will for probate rests the burden of proof to show its execution in accordance with the requirements of the law. Snodgrass v. Smith, 42 Colo. 60, 94 P. 312 (1908); Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922); O'Brien v. Wallace, 145 Colo. 291, 359 P.2d 1029 (1961).

**Onus of proof.** Where a will has been executed and witnessed under such circumstances that it is presumed the testator knew its contents, the onus of proving the contrary is upon him who alleges it. In re Shapter's Estate, 35 Colo. 578, 85 P. 688 (1906); Kavanagh v. Jamison, 79 Colo. 115, 244 P. 476 (1926).

**Testator's signature creates presumption of his awareness of its contents.** Ordinarily, where the will has been executed under the formalities prescribed by law, and proof thereof has been made by the witnesses, the testator's bare signature to the will is taken as proof thereof, and it will be presumed that the will had been read by or to him, and that he was aware of its contents. Snodgrass v. Smith, 42 Colo. 60, 94 P. 312 (1908); Kavanagh v. Jamison, 79 Colo. 115, 244 P. 476 (1926).

**Signature not required by a cross-out** to effectuate a partial revocation. When a holographic will was properly executed, no additional signature or acknowledgment is necessary

to allow compliance with a cross-out if the testator's intent has been proved by clear and convincing evidence. In re Estate of Schumacher, 253 P.3d 1280 (Colo. App. 2011).

**Agreement as to disposition of joint bank account.** Where testator placed money in joint bank account with another with agreement that at testator's death the other would withdraw money and give it to testator's beneficiaries, this agreement failed to comply with provisions of this section and testator's executor could recover money in action for conversion. Urbancich v. Jersin, 123 Colo. 88, 226 P.2d 316 (1950).

**Probate not denied where portions are illegible or missing.** A holographic will may not

be denied probate merely because portions of the date not at issue are abbreviated, missing, or illegible, where the critical elements of the date are certain and unambiguous. Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

**Handwritten list found in safe deposit box of deceased may be found to be a valid holographic codicil to will** if signature and material provisions are in handwriting of deceased, but evidence must show the writing was executed with testamentary intent and evidence failed to make such showing. Matter of Estate of Harrington, 850 P.2d 158 (Colo. App. 1993).

**Applied** in Friedholm v. Fegley, 42 Colo. App. 47, 589 P.2d 80 (1978); Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

**15-11-503. Writings intended as wills.** (1) Although a document, or writing added upon a document, was not executed in compliance with section 15-11-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

- (a) The decedent's will;
- (b) A partial or complete revocation of the will;
- (c) An addition to or an alteration of the will; or
- (d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will.

(2) Subsection (1) of this section shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse.

(3) Whether a document or writing is treated under this section as if it had been executed in compliance with section 15-11-502 is a question of law to be decided by the court, in formal proceedings, and is not a question of fact for a jury to decide.

(4) Subsection (1) of this section shall not apply to a designated beneficiary agreement under article 22 of this title.

**Source:** L. 94: Entire part R&RE, p. 998, § 3, effective July 1, 1995. L. 2001: Entire section amended, p. 886, § 2, effective June 1. L. 2010: (4) added, (SB 10-199), ch. 374, p. 1750, § 10, effective July 1.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act adding subsection (4):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

**Purpose of New Section.** By way of dispensing power, this new section allows the probate Court to excuse a harmless error in complying

with the formal requirements for executing or revoking a will. The measure accords with legislation in force in the Canadian province of



Manitoba and in several Australian jurisdictions. The Uniform Laws Conference of Canada approved a comparable measure for the Canadian Uniform Wills Act in 1987.

Legislation of this sort was enacted in the state of South Australia in 1975. The experience there has been closely studied by a variety of law reform commissions and in the scholarly literature. See, e.g., *Law Reform Commission of British Columbia, Report on the Making and Revocation of Wills* (1981); *New South Wales Law Reform Commission, Wills: Execution and Revocation* (1986); *Langbein, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 *Colum. L. Rev.* 1 (1987). A similar measure has been in effect in Israel since 1965 (see *British Columbia Report, supra*, at 44-46; *Langbein, supra*, at 48-51).

Consistent with the general trend of the revisions of the UPC, Section 2-503 unifies the law of probate and nonprobate transfers, extending to will formalities the harmless error principle that has long been applied to defective compliance with the formal requirements for nonprobate transfers. See, e.g., *Annot.*, 19 A.L.R.2d 5 (1951) (life insurance beneficiary designations).

Evidence from South Australia suggests that the dispensing power will be applied mainly in two sorts of cases. See *Langbein, supra*, at 15-33. When the testator misunderstands the attestation requirements of Section 2-502(a) and neglects to obtain one or both witnesses, new Section 2-503 permits the proponents of the will to prove that the defective execution did not result from irresolution or from circumstances suggesting duress or trickery - in other words, that the defect was harmless to the purpose of the formality. The measure reduces the tension between holographic wills and the two-witness requirement for attested wills under Section 2-502(a). Ordinarily, the testator who attempts to make an attested will but blunders will still have achieved a level of formality that compares favorably with that permitted for holographic wills under the Code.

The other recurrent class of case in which the dispensing power has been invoked in South Australia entails alterations to a previously executed will. Sometimes the testator adds a clause, that is, the testator attempts to interpolate a defectively executed codicil. More frequently, the amendment has the character of a revision - the testator crosses out former text and inserts replacement terms. Lay persons do not always

understand that the execution and revocation requirements of Section 2-502 call for fresh execution in order to modify a will; rather, lay persons often think that the original execution has continuing effect.

By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence (which Courts at the trial and appellate levels are urged to police with rigor), Section 2-503 imposes procedural standards appropriate to the seriousness of the issue. Experience in Israel and South Australia strongly supports the view that a dispensing power like Section 2-503 will not breed litigation. Indeed, as an Israeli judge reported to the British Columbia Law Reform Commission, the dispensing power "actually prevents a great deal of unnecessary litigation," because it eliminates disputes about technical lapses and limits the zone of dispute to the functional question of whether the instrument correctly expresses the testator's intent. *British Columbia Report, supra*, at 46.

The larger the departure from Section 2-502 formality, the harder it will be to satisfy the Court that the instrument reflects the testator's intent. Whereas the South Australian and Israeli Courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement. See *Langbein, supra*, at 23-29, 49-50. The main circumstance in which the South Australian Courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other. E.g., *Estate of Blakely*, 32 S.A.S.R. 473 (1983). Recently, the New York Court of Appeals remedied such a case without aid of statute, simply on the ground "what has occurred is so obvious, and what was intended so clear." *In re Snide*, 52 N.Y.2d 193, 196, 418 N.E.2d 656, 657, 437 N.Y.S.2d 63, 64 (1981).

Section 2-503 means to retain the intent-serving benefits of Section 2-502 formality without inflicting intent-defeating outcomes in cases of harmless error.

**Reference.** The rule of this section is supported by the Restatement (Third) of Property: Wills and Other Donative Transfers § 3.3 (1999).

## ANNOTATION

**Law reviews.** For article, "Probating Flawed Wills: Colorado's New CRS § 15-11-503", see 25 *Colo. Law.* 85 (November 1996). For article, "Holographic and Nonconforming Wills: Dis-

pensing With Formalities—Part II", see 32 *Colo. Law.* 53 (January 2003).

**The statute does not apply to unexecuted instruments purporting to be wills.** *In re Es-*

tate of Sky Dancer, 13 P.3d 1231 (Colo. App. 2000).

**A decedent need not both sign and acknowledge a document as his or her will** for it to be admitted into probate. The language “signed or acknowledged” found in subsection (2) should be read in the disjunctive, not conjunctive. There is no restriction in the statute requiring the decedent to state, “This is my will”. In re Estate of Wiltfong, 148 P.3d 465 (Colo. App. 2006).

**Signature not required by a cross-out** to effectuate a partial revocation. When a holographic will was properly executed, no additional signature or acknowledgment is necessary to allow compliance with a cross-out if the testator’s intent has been proved by clear and convincing evidence. In re Estate of Schumacher, 253 P.3d 1280 (Colo. App. 2011).

**15-11-504. Self-proved will.** (1) A will that is executed with attesting witnesses may be simultaneously executed, attested, and made self-proved by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer’s certificate, under official seal, in substantially the following form:

I, \_\_\_\_\_, the testator, sign my name to this instrument this \_\_\_\_ day of \_\_\_\_, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_  
Testator

We, \_\_\_\_\_, \_\_\_\_\_ the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as [his] [her] will and that [he] [she] signs it willingly (or willingly directs another to sign for [him] [her]), and that [he] [she] executes it as [his] [her] free and voluntary act for the purposes therein expressed, and that each of us, in the conscious presence of the testator, hereby signs this will as witness to the testator’s signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

THE STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

Subscribed, sworn to and acknowledged before me by \_\_\_\_\_, the testator, and subscribed and sworn to before me by \_\_\_\_\_ and \_\_\_\_\_, witnesses, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

(SEAL) (SIGNED) \_\_\_\_\_

\_\_\_\_\_  
(Official capacity of officer)

(2) A will that is executed with attesting witnesses may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer’s certificate, under the official seal, attached or annexed to the will in substantially the following form:



THE STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

We, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that [he] [she] had signed willingly (or willingly directed another to sign for [him] [her]), and that [he] [she] executed it as [his] [her] free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the conscious presence of the testator, signed the will as witness and that to the best of [his] [her] knowledge the testator was at that time eighteen years of age or older, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_

Testator

\_\_\_\_\_

Witness

\_\_\_\_\_

Witness

Subscribed, sworn to, and acknowledged before me by \_\_\_\_\_, the testator, and subscribed and sworn to before me by \_\_\_\_\_ and \_\_\_\_\_, witnesses, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

(SEAL)

(SIGNED)\_\_\_\_\_

\_\_\_\_\_

(Official capacity of officer)

(3) A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will if necessary to prove the will's due execution.

**Source:** L. 94: Entire part R&RE, p. 998, § 3, effective July 1, 1995. L. 2001: (2) amended, p. 887, § 3, effective June 1. L. 2009: (1) and (2) amended, (HB 09-1287), ch. 310, p. 1683, § 13, effective July 1, 2010.

**Editor's note:** (1) This section is similar to former § 15-11-504 as it existed prior to 1995.

(2) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsections (1) and (2):

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

COMMENT

A self-proved will may be admitted to probate as provided in Sections 3-303, 3-405, and 3-406 without the testimony of any attesting witness, but otherwise it is treated no differently from a will not self proved. Thus, a self-proved will may be contested (except in regard to questions of proper execution), revoked, or amended by a codicil in exactly the same fashion as a will not self proved. The procedural advantage of a self-proved will is limited to formal testacy proceedings because Section 3-303, which deals with informal probate, dispenses with the necessity

of testimony of witnesses even though the instrument is not self proved under this section.

Subsection (c) was added in 1990 to counteract an unfortunate judicial interpretation of similar self-proving will provisions in a few states, under which a signature on the self-proving affidavit was held not to constitute a signature on the will, resulting in invalidity of the will in cases in which the testator or witnesses got confused and only signed on the self-proving affidavit. See Mann, Self-proving Affidavits and Formalism in Wills Adjudication, 63 Wash. U.

L.Q. 39 (1985); Estate of Ricketts, 773 P.2d 93 (Wash.Ct.App. 1989).

**2008 Revision.** Section 2-502(a) was amended in 2008 to add an optional method of execution by having a will notarized rather than witnessed by two attesting witnesses. The amendment to Section 2-502 necessitated amending this section so that it only applies to a will that is executed with attesting witnesses.

**Historical Note.** This Comment was revised in 2008.

**15-11-505. Who may witness.** (1) An individual generally competent to be a witness may act as a witness to a will.

(2) The signing of a will by an interested witness does not invalidate the will or any provision of it.

**Source: L. 94:** Entire part R&RE, p. 1000, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-505 as it existed prior to 1995.

#### ANNOTATION

**Law reviews.** For note, "Some Problems Relating to Testamentary Witnesses", see 23 Rocky Mt. L. Rev. 458 (1951). For article, "Evidence in Estate Proceedings", see 24 Rocky Mt. L. Rev. 437 (1952). For article, "Age Requirements in Colorado: A Guide for Estate Planners", see 34 Colo. Law. 87 (August 2005).

**Annotator's note.** Since § 15-11-505 is similar to repealed laws antecedent to CSA, C. 176, § 42, relevant cases construing those provisions have been included in the annotations to this section.

**Under this section a legatee is competent as an attesting witness;** but unless sufficiently at-

tested by other competent witnesses, the will is void as to his legacy. *White v. Bower*, 56 Colo. 575, 136 P. 1053 (1913).

**Competency of attesting witnesses to wills must be tested by the general law relating to competency of witnesses** as provided by statute, and not by the common law. The test is whether she would have been a competent witness in court, at the time of attesting the will, to testify to the facts of its execution. *White v. Bower*, 56 Colo. 575, 136 P. 1053 (1913).

**15-11-506. Choice of law as to execution.** A written will is valid if executed in compliance with section 15-11-502 or 15-11-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where, at the time of execution or at the time of death, the testator is domiciled, has a place of abode, or is a national.

**Source: L. 94:** Entire part R&RE, p. 1000, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-506 as it existed prior to 1995.

**15-11-507. Revocation by writing or by act.** (1) A will or any part thereof is revoked:

(a) By executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or

(b) By performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part of it or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this paragraph (b), "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or



canceled is a “revocatory act on the will”, whether or not the burn, tear, or cancellation touched any of the words on the will.

(2) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

(3) The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator’s estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator’s death.

(4) The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator’s estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator’s death to the extent they are not inconsistent.

**Source:** L. 94: Entire part R&RE, p. 1000, § 3, effective July 1, 1995.

**Editor’s note:** This section is similar to former § 15-11-507 as it existed prior to 1995.

#### ANNOTATION

**Law reviews.** For article, “Revocation of Wills — How Accomplished and the Effect”, see 6 Dicta 7 (Oct. 1929). For article, “Colorado Legislature Grants Supreme Court Rule-Making Power”, see 16 Dicta 90 (1939). For article, “The Colorado View on Alteration of Testamentary Instruments”, see 16 Dicta 113 (1939). For article, “Revocation of Wills”, see 29 Rocky Mt. L. Rev. 492 (1957). For comment, “No Revocation of Prior Will by Revocation of Subsequent Revoking Will”, see 49 Den. L.J. 593 (1973). For article, “Partial Revocation of a Will by Revocatory Act”, see 40 Colo. Law. 79 (November 2011).

**Annotator’s note.** Since § 15-11-507 is similar to repealed § 153-5-3, C.R.S. 1963, § 152-5-4, CRS 53, CSA, C. 176, § 40, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Will can be revoked only in manner provided by statute,** and the statutory provisions for revocation of wills must be strictly construed. *Scheer v. First Nat’l Bank*, 43 Colo. App. 296, 605 P.2d 65 (1979).

**Will is revoked if, with intent to revoke, testator performs any one of the acts deemed sufficient by statute to effectuate a revocation.** *Tong v. Tong*, 619 P.2d 91 (Colo. App. 1980).

**Acts of revocation are presumed to be intentional** absent contrary evidence. *Tong v. Tong*, 619 P.2d 91 (Colo. App. 1980).

**Where there is no provision for partial revocation of will by cancellation, tearing, etc.,** the courts are not at liberty to introduce such a provision into the statute by construction. *Scheer v. First Nat’l Bank*, 43 Colo. App. 296, 605 P.2d 65 (1979).

**Ineffective attempt to revoke portion of will.** A portion of a will cannot be revoked subsequent to its execution by the testator’s cancelling or obliterating that portion. *Scheer v. First Nat’l Bank*, 43 Colo. App. 296, 605 P.2d 65 (1979).

**Revocation becomes complete and effective by a subsequent will at the time the revoking instrument is executed** as provided in § 15-11-502. *Bailey v. Kennedy*, 162 Colo. 135, 425 P.2d 304 (1967).

**Will not revoked in accordance with this section must be held to be in existence.** The original of a will must, of course, be produced if it is available, but if it is not, secondary evidence thereof may be adduced, and if it shall then appear that the will had not, prior to the testator’s death, been revoked in accordance with this section, it must be held to be in existence. *Estate of Eder*, 94 Colo. 173, 29 P.2d 631 (1934).

**For the language of this section plainly indicates** that only such testamentary instruments as have for their sole purpose the complete destruction or obliteration of a will fall within its provisions. That such is the purpose and intent of the section is manifest from the significant expressions used therein. It provides for the revocation of a will by burning, tearing, or obliterating. These terms must mean and refer to the utter annihilation and destruction of a will. Then the section follows with the further provision that a will may be revoked, that is set aside and annulled in toto, by some other will or codicil in writing declaring the same, that is declaring the total revocation and destruction thereof. Only instruments having such effect and

purpose, and such effect and purpose alone, fall within the purview of this section. In re Carey's Estate, 56 Colo. 77, 136 P. 1175 (1913); Freeman v. Hart, 61 Colo. 455, 158 P. 305 (1916).

**Under this section no former will can be revoked by a writing, unless the revoking writing is itself a will.** Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922).

**Instrument sufficient to revoke prior will.** Generally, any instrument executed with the requisite statutory formalities for wills is sufficient to revoke a prior will. In re Estate of White, 39 Colo. App. 445, 566 P.2d 720 (1977).

**A will which expressly revokes former wills must be signed by the testator** in the presence of two or more witnesses, otherwise it will be invalid, and this is true even if the will be a disposing as well as a revoking document. Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922).

**Revocation of a particular will by mere inference of law or presumption is limited** to a very few instances in our modern practice. Woodward v. Woodward, 33 Colo. 457, 81 P. 322 (1905).

**Presumption when will cannot be found.** When a will, last seen in the possession of the testatrix, cannot be found following her death, there is a presumption that the testatrix destroyed the will with the intent to revoke it. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

**This presumption may be rebutted** by evidence of decedent's declarations tending to prove decedent believed the will to be in existence unrevoked. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

**Testator's cancellation of fully executed carbon copy of will raises presumption of intent to cancel.** A testator's cancellation of a duplicate original or fully executed carbon copy of a will which is in the testator's possession at his death raises a presumption that the testator intended to cancel the other duplicate original or the original will in the possession of another. Tong v. Tong, 619 P.2d 91 (Colo. App. 1980).

**Thus, a subsequent conveyance of devised land does not revoke the will.** Where a will devised real estate in fee, a subsequent conveyance of the real estate to the devisee in trust for the benefit of the deviser, did not revoke the will, and, at the death of the deviser, all the title which he had to the land devised, both legal and equitable, passed to the devisee. Woodward v. Woodward, 33 Colo. 457, 81 P. 322 (1905).

**The word "will"** in this section is used in the sense of a testamentary instrument which disposes of the testator's property, to take effect at his death. A written instrument under the section, unless it disposes of property, to take effect at the testator's death, is not a will within the meaning of our statute. Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922).

**The express revocation of a former will is at least prima facie evidence that such a former will was in existence** at the time the will containing the revocation clause was made, and where the question becomes material, it is incumbent upon the proponent to show the non-existence of a former will. Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922).

**Evidence satisfying language of statute.** Competent evidence received by the court that there was a writing executed, declared and attested to on a certain date, expressly revoking all previous wills, satisfies the language of the statute. Any other interpretation would give undue prominence and unwarranted preference to the actions of burning, tearing, or obliterating (which effectively at the moment of action accomplishes a revocation) and would hold in abeyance the efficacy of the other portion of the statute. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

**Evidence insufficient to show revocation.** In re Chance's Estate, 124 Colo. 436, 238 P.2d 879 (1951).

**No revocation by second testamentary instrument except by express language.** While in certain cases it is possible to construe a second testamentary instrument as revoking a former, or as revoking certain bequests, or devises thereof, the second instrument may not effectuate the revocation of the former except by express language, or by necessary implication arising from express provisions of the later instrument. In re Estate of McKeown v. Macrum, 28 Colo. App. 49, 470 P.2d 611 (1970).

**However, the use of the word "revocation" or "revoke" is not necessary.** If the codicil amends and reamends, the effect is to remove the first article as it appears in the will. The first codicil removes the first article of the will and substitutes a new first article. The second codicil then removes the amended first article and substitutes a completely new first article. In re Estate of McKeown v. Macrum, 28 Colo. App. 49, 470 P.2d 611 (1970).

**The same degree of mental capacity is required for the revocation of a will as is necessary for its execution.** In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

**The presumption of revocation arising from the unavailability of a will may be rebutted by evidence that the testator was mentally incapacitated** to revoke it. In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

**Nothing in the statute implies that the revocation does not really take effect until the day when the will is admitted to probate.** Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

**If any of the acts called for by this section are done with animus revocandi, the revocation becomes complete.** Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).



**Intent to revive not inferred from continued existence of revoked will.** The mere continued existence physically of a will that has been expressly revoked by one of the means provided in the statute cannot support an inference that the decedent intends such will to be revived at some later date. *Bailey v. Kennedy*, 162 Colo. 135, 425 P.2d 304 (1967).

**Both methods of revocation contemplate utter destruction and annihilation.** Since the general assembly provided two methods one by burning, etc., the other by a written will, and as the burning consumed the paper on which the earlier will was written, and with it the completed will itself, this language meant utter destruction and annihilation, whether revocation was effected by physical force, or by the execution of a later will by the testator. In the absence of a provision in the revoking statute to the contrary, courts will not assume that the general assembly intended solely and only to effect an entire destruction by the first, and either a partial

or entire destruction by the second method. *Bailey v. Kennedy*, 162 Colo. 135, 425 P.2d 304 (1967).

**Determination of "exclusive possession" contingent on the factual circumstances of each case and not to be construed too narrowly.** Because the secretary was in the employ of the decedent, the decedent was still considered to have possession of the will when it was in the secretary's physical possession. *In re Estate of Schumacher*, 253 P.3d 1280 (Colo. App. 2011).

**Signature not required by a cross-out to effectuate a partial revocation.** When a holographic will was properly executed, no additional signature or acknowledgment is necessary to allow compliance with a cross-out if the testator's intent has been proved by clear and convincing evidence. *In re Estate of Schumacher*, 253 P.3d 1280 (Colo. App. 2011).

**Applied in** *In re Estate of Decker*, 194 Colo. 143, 570 P.2d 832 (1977).

**15-11-508. Revocation by change of circumstances.** Except as provided in sections 15-11-803 and 15-11-804, a change of circumstances does not revoke a will or any part of it.

**Source:** L. 94: Entire part R&RE, p. 1001, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-508 as it existed prior to 1995.

#### ANNOTATION

**Law reviews.** For article, "Dissolution of Marriage and Estate Planning Issues", see 18 Colo. Law. 439 (1989).

**New probate code inapplicable to will automatically revoked by statute.** Where decedent's will was automatically revoked by operation of statute that was in effect at the time of

decedent's marriage, the new probate code did not apply to will of decedent even though he died after 1974. *Phillips v. Liechty*, 674 P.2d 1001 (Colo. App. 1983).

**Applied in** *Wimbush v. Wimbush*, 41 Colo. App. 289, 587 P.2d 796 (1978).

**15-11-509. Revival of revoked will.** (1) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under section 15-11-507 (1) (b), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

(2) If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under section 15-11-507 (1) (b), a revoked part of the previous will is revived unless it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed.

(3) If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later will, the previous will remains revoked in whole or in part, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect.

**Source:** L. 94: Entire part R&RE, p. 1001, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-509 as it existed prior to 1995.

#### ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Requisites for revival of revoked but undestroyed will.** If the decedent intends to revive an existing previous will which has been revoked but undestroyed, that intention can only be manifest by declaration in compliance with § 15-11-502, thus accomplishing a republication of the will. *Bailey v. Kennedy*, 162 Colo. 135, 425 P.2d 304 (1967).

**Situation in which "dependent relative revocation" will not apply.** The doctrine of "dependent relative revocation" which makes the revocation of a will ineffective and entitles the copy to be probated, cannot be applied where the will is lost or destroyed, and where the decedent tore up the will. *Bailey v. Kennedy*, 162 Colo. 135, 425 P.2d 304 (1967).

**15-11-510. Incorporation by reference.** A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

**Source:** L. 94: Entire part R&RE, p. 1001, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-510 as it existed prior to 1995.

#### ANNOTATION

**This section allows a court interpreting the intent of the testator of a trust to read and interpret all relevant documents as a whole.**

*Denver Found. v. Wells Fargo Bank*, 163 P.3d 1116 (Colo. 2007).

**15-11-511. Testamentary additions to trusts.** (1) A will may validly devise property to the trustee of a trust established or to be established (i) during the testator's lifetime by the testator, by the testator and some other person, or by some other person, including a funded or unfunded life insurance trust, although the settlor has reserved any or all rights of ownership of the insurance contracts, or (ii) at the testator's death by the testator's devise to the trustee, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust. The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

(2) Unless the testator's will provides otherwise, property devised to a trust described in subsection (1) of this section is not held under a testamentary trust of the testator, but it becomes a part of the trust to which it is devised, and is administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(3) A revocation or termination of the trust before the death of the testator causes the devise to lapse, but exhaustion of trust corpus between the time of execution of the testator's will and the testator's death shall not constitute a lapse; a revocation or termination of the trust before the death of the testator shall not cause the devise to lapse, if the testator provides that, in such event, the devise shall constitute a devise to the trustee of the trust identified in the testator's will, and on the terms thereof, as they existed at the time of the execution of testator's will, or as they existed at the time of the revocation or termination of the trust, as the testator's will provides.

**Source:** L. 94: Entire part R&RE, p. 1001, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-511 as it existed prior to 1995.



## ANNOTATION

**Unfunded trust not invalid.** The fact that a trust was not funded after it was created, or that a trust corpus did not exist, does not affect the

validity of the trust. *Ayres v. King*, 643 P.2d 788 (Colo. App. 1981), rev'd on other grounds, 665 P.2d 594 (Colo. 1983).

**15-11-512. Events of independent significance.** A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of another individual's will is such an event.

**Source:** L. 94: Entire part R&RE, p. 1002, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-512 as it existed prior to 1995.

**15-11-513. Separate writing or memorandum identifying devise of certain types of tangible personal property.** Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing shall be either in the handwriting of the testator or be signed by the testator and shall describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.

**Source:** L. 94: Entire part R&RE, p. 1002, § 3, effective July 1, 1995. L. 95: Entire section amended, p. 355, § 5, effective July 1.

**Editor's note:** This section is similar to former § 15-11-513 as it existed prior to 1995.

## ANNOTATION

**Law reviews.** For article, "Estate Planning for Young Lawyers", see 14 Colo. Law. 53 (1985).

**Handwritten list found in safe deposit box of deceased may be found to be a valid holographic codicil to will** if signature and material provisions are in handwriting of deceased, but evidence must show the writing was executed with testamentary intent and evidence failed to make such showing since the list was undated and had no language indicating it was to operate as codicil. In the *Estate of Harrington*, 850 P.2d 158 (Colo. App. 1993).

**If a contemplated post-will memorandum disposing of certain items of personal property** is not in existence at the time of the decedent's death, the items of personal property sought to be transferred are limited to items of "tangible personal property", which could be disposed of by such memorandum. In the *Estate of Sandstead*, 897 P.2d 883 (Colo. App. 1995).

**Applied in** *Robinson v. Blake*, 638 P.2d 809 (Colo. App. 1981).

**15-11-514. Contracts concerning succession.** A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after July 1, 1995, may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

**Source:** L. 94: Entire part R&RE, p. 1002, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-701 as it existed prior to 1995.

### ANNOTATION

**Law reviews.** For article, "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "Reciprocal Wills and Contracts to Will", see 29 Rocky Mt. L. Rev. 453 (1957). For article, "Trust Termination and Modification", see 15 Colo. Law. 389 (1986).

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Section prescribes the only way in which a contract to make a will or devise, or not to revoke a will or devise, can be established.** Rieck v. Rieck, 724 P.2d 674 (Colo. App. 1986).

**Agreements as to heirship are not against public policy.** In a controversy over the estate of a deceased person, there is no rule under which it is the absolute duty of the district court to decide the question of heirship irrespective of agreements between the parties; such agreements are not against public policy, and when valid and not questioned, are controlling of the rights of the parties thereto. In re Schofield's Estate, 101 Colo. 443, 73 P.2d 1381 (1937).

**When the clear and unambiguous terms of a will are not the same as those of an alleged contract, the will does not constitute a sufficient**

memorandum of the agreement. Witmer v. Perini, 32 Colo. App. 110, 508 P.2d 413 (1973).

**This section is analogous to the customary statute of frauds, the application of which requires that a sufficient memorandum must contain the terms of the contract sought to be enforced.** Witmer v. Perini, 32 Colo. App. 110, 508 P.2d 413 (1973).

**A claim alleging fraudulent conduct is not precluded by the succession statute even if the alleged fraudulent conduct consists of oral statements that could not be enforced as creating contractual obligations because they fail to satisfy the requirements of the succession statute.** Brody v. Bock, 897 P.2d 769 (Colo. 1995).

**Whether a will is a contract will must be determined under the laws of the state in which the will was drafted.** Using the law of the state of residence of the second to die at the time of death would allow surviving spouses to move to a state where contract wills are not recognized, or where more stringent requirements are imposed, and thereafter unilaterally revoke the contract will. In re Estate of Loflin, 81 P.3d 1112 (Colo. App. 2003).

**Applied in** Tarr v. Hicks, 155 Colo. 159, 393 P.2d 557 (1964).

**15-11-515. Deposit of will with court in testator's lifetime.** A will may be deposited by the testator or the testator's agent with any court for safekeeping, under rules of the court. The will shall be sealed and kept confidential. During the testator's lifetime, a deposited will shall be delivered only to the testator or to a person authorized in writing signed by the testator to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible and to ensure that it will be resealed and kept on deposit after the examination.

**Source:** L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995. L. 96: Entire section amended, p. 658, § 8, effective July 1.

**Editor's note:** This section is similar to former § 15-11-901 as it existed prior to 1995.

### ANNOTATION

**Applied in** Jenkins v. Mesa County Dist. Court, 620 P.2d 721 (Colo. 1980) (decided un-

der former § 15-11-901 as it existed prior to the 1994 repeal and reenactment of part 9).

**15-11-516. Duty of custodian of will; lodging of will after death; transfer of lodged will; liability.** (1) Within ten days after a testator's death or as soon thereafter as the death becomes known to the custodian of an instrument purporting to be the testator's will, the custodian shall deliver the will to the court having probate jurisdiction in the Colorado county where the decedent resided or was domiciled at death for lodging in the records of such court. If the decedent was not a Colorado resident or domiciliary, the custodian shall deliver the will to the court having probate jurisdiction where the decedent was a resident



or domiciliary at death, if known to the custodian, but if such residence or domicile is not known, to the court having probate jurisdiction in any Colorado county where property of the decedent was located at death. If the domicile, residence, and location of property are unknown to the custodian, or if the court having probate jurisdiction outside of Colorado refuses to accept delivery of the will, the custodian shall deliver the will to the court having probate jurisdiction in the Colorado county where the will was located. Upon being informed of the testator's death, a court holding a deposited will shall lodge the will in its records.

(2) Upon the filing of a petition or application showing appropriate venue to be in another state or in another Colorado county, the court shall order the lodged will transferred to the court having probate jurisdiction in that state or county. Any person who willfully fails to deliver an instrument purporting to be a will is liable to any person aggrieved for the damages that may be sustained by the failure.

(3) Any person who willfully refuses or fails to deliver an instrument purporting to be a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.

**Source:** L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995. L. 96: Entire section amended, p. 658, § 9, effective July 1.

**Editor's note:** This section is similar to former § 15-11-902 as it existed prior to 1995.

#### ANNOTATION

**This section requires that any person having in possession any last will shall within a certain time** after the death of the testator present the same to the district court of the county for probate. But no statute requires that he shall thereby become a party to a suit or to any proceeding by which he might become liable for any costs. It is immaterial by whom a will is presented. In fact, there are no parties to the

proceeding in a district court to probate a will. When the will is produced, the court may proceed of its own motion. The proceeding is in rem. The judgment is in rem, and is not for or against any party. From it any person interested may appeal. *Blackman v. Edsall*, 17 Colo. App. 429, 68 P. 790 (1902) (decided under repealed laws antecedent to CSA, C. 176, § 47).

**15-11-517. Penalty clause for contest.** A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

**Source:** L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995.

#### PART 6

#### RULES OF CONSTRUCTION APPLICABLE ONLY TO WILLS

**15-11-601. Scope.** In the absence of a finding of a contrary intention, the rules of construction in this part 6 control the construction of a will. In the absence of a finding of a contrary intention, the provisions of sections 15-11-603 and 15-11-604 shall apply to wills and codicils executed or republished or reaffirmed on or after July 1, 1995, and prior law (sections 15-11-605 and 15-11-606) shall apply to wills and codicils executed prior to July 1, 1995, and not republished or reaffirmed on or after that date. In the process of determining whether a contrary intention exists, the rules of construction of this part 6 shall not apply.

**Source:** L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995. L. 95: Entire section amended, p. 356, § 6, effective July 1.

## ANNOTATION

The cardinal rule in the interpretation of wills or other testamentary documents is that the testator's intent should be ascertained from the instrument itself and given effect. *Meier v. Denver United States Nat'l Bank*, 164 Colo. 25, 431 P.2d 1019 (1967); *Massachusetts Co. v. Evans*, 924 P.2d 1119 (Colo. App. 1996).

Executor of decedent's estate was entitled to principal of trust created by decedent as a

fiduciary, and not personally, under trust provision indicating that principal should go to executor. The mere addition of a codicil to will that named executor in place of previously named corporate executor was not clear manifestation of a new intent to make the executor the trust beneficiary. *Massachusetts Co. v. Evans*, 924 P.2d 1119 (Colo. App. 1996).

**15-11-602. Will may pass all property and after-acquired property.** A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death.

**Source:** L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-604 as it existed prior to 1995.

## ANNOTATION

**After-acquired property may pass by will.** Unless a testator clearly shows an intention to not convey after-acquired property, all the property of which he died seized passes by the will.

*Woodward v. Woodward*, 33 Colo. 457, 81 P. 322 (1905) (decided under repealed laws antecedent to CSA, C. 176, § 40).

**15-11-603. Antilapse; deceased devisee; class gifts. (1) Definitions.** As used in this section, unless the context otherwise requires:

(a) "Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(b) "Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he or she survived the testator.

(c) "Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(d) "Devisee" includes (i) a class member if the devise is in the form of a class gift, (ii) the beneficiary of a trust but not the trustee, (iii) an individual or class member who was deceased at the time the testator executed his or her will as well as an individual or class member who was then living but who failed to survive the testator, and (iv) an appointee under a power of appointment exercised by the testator's will.

(e) (Reserved)

(f) "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under section 15-11-702.

(g) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(2) **Substitute gift.** If a devisee fails to survive the testator and is a grandparent or a descendant of a grandparent of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(a) Except as provided in paragraph (d) of this subsection (2), if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift



is created in the devisee's surviving descendants. They take per capita at each generation the property to which the devisee would have been entitled had the devisee survived the testator.

(b) Except as provided in paragraph (d) of this subsection (2), if the devise is in the form of a class gift, other than a devise to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the deceased devisee's or devisees' surviving descendants. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he or she would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee takes per capita at each generation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph (b), "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(c) For purposes of this part 6, words of survivorship, such as in a devise to an individual "if he survives me" or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. The use of language such as "and if he does not survive me the gift shall lapse" or "to A and not to A's descendants" shall be sufficient indication of an intent contrary to the application of this section.

(d) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (a) or (b) of this subsection (2), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will.

(e) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

(3) **Dispositions under separate writing.** The provisions of this section shall not apply to dispositions of tangible personal property made under section 15-11-513.

(4) **More than one substitute gift; which one takes.** If, under subsection (2) of this section, substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(a) Except as provided in paragraph (b) of this subsection (4), the devised property passes under the primary substitute gift.

(b) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

(c) In this subsection (4):

(I) "Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

(II) "Primary substitute gift" means the substitute gift created with respect to the primary devise.

(III) "Younger-generation devise" means a devise that:

- (A) Is to a descendant of a devisee of the primary devise;
- (B) Is an alternative devise with respect to the primary devise;
- (C) Is a devise for which a substitute gift is created; and
- (D) Would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

(IV) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.

**Source:** L. 94: Entire part R&RE, p. 1004, § 3, effective July 1, 1995. L. 95: (2)(a) and (2)(b) amended, p. 356, § 7, effective July 1.

**Editor's note:** This section is similar to former § 15-11-605 as it existed prior to 1995.

### ANNOTATION

**Law reviews.** For comments on *In re Boyle's Estate*, appearing below, see 23 Rocky Mt. L. Rev. 220 (1950) and 28 Dicta 223 (1951). For note, "Problems Under the Anti-Lapse Statute of Colorado", see 25 Rocky Mt. L. Rev. 334 (1953).

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Plain meaning of section is that it is not limited to class gifts**, but applies to any devisee who is a lineal descendant of a grandparent of the testator and leaves issue who survive the testator. *In re Estate of Kerk v. Christy*, 624 P.2d 373 (Colo. App. 1981).

**Section does not include lapse of residuary legacy.** This section refers to the lapsing of legacies outside the residue, and is not so all inclusive as to include the lapsing of a residuary legacy under any and all circumstances. The general assembly was treating that part of an estate which had not yet become a part of the

residue. *In re Boyle's Estate*, 121 Colo. 599, 221 P.2d 357 (1950); *In re Boyle's Estate*, 123 Colo. 448, 231 P.2d 465 (1951).

**And lapse of specific legacy to testator's sister is part of residue.** The sister of a testator is not a descendant of the testator as provided in this section to prevent a lapse of the legacy, so that where a testator left a specific legacy to his sister and failed to provide for the contingency that occurred — the death of the sister before the testator — the estate disposed of by such specific legacy was deemed a part of the residue of the testator's estate. *In re Boyle's Estate*, 121 Colo. 599, 221 P.2d 357 (1950); *In re Boyle's Estate*, 123 Colo. 448, 231 P.2d 465 (1951).

**Section is not applicable to children of collateral line.** Plaintiffs in error are not named as devisees or legatees of the residuary estate; they are children of a collateral line, and so this section has no legitimate employment here. *Gibson v. Hills*, 84 Colo. 596, 272 P. 660 (1928).

**15-11-604. Failure of testamentary provision.** (1) Except as provided in section 15-11-603, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(2) Except as provided in section 15-11-603, if the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

**Source: L. 94:** Entire part R&RE, p. 1006, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-606 as it existed prior to 1995.

### ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Failure of residuary devise is controlled by rule of construction established by subsection (2);** however, rule is inapplicable if will indicates contrary intent. *Matter of Estate of Fryer*, 874 P.2d 490 (Colo. App. 1994) (decided under former § 15-11-606).

**Where no contrary intent is evidenced in will, application of rule of construction set forth in subsection (2) is proper.** *Matter of Estate of Fryer*, 874 P.2d 490 (Colo. App. 1994) (decided under former § 15-11-606).

**Rule of construction set forth in subsection (2) properly applied to construe effect of omission** where will left estate to niece and three friends and provided for the possibility of the three friends predeceasing testatrix but did

not provide for niece predeceasing testatrix. Deceased niece's share properly went to surviving friends. *Matter of Estate of Fryer*, 874 P.2d 490 (Colo. App. 1994) (decided under former § 15-11-606).

**The rule of construction codified by this section** does not apply if it is contrary to the testator's intent as expressed in the will. *Haskins v. Garrett*, 820 P.2d 350 (Colo. App. 1991).

**If the life beneficiary of the trust predeceases the testator**, the remainder beneficiary takes as if the provision for the life estate was not made. But this majority rule of construction will only apply if it is consistent with the language of the will and the circumstances existing at the time the will was executed. *Haskins v. Garrett*, 820 P.2d 350 (Colo. App. 1991).

**Applied in** *Lujan v. United Bank of Greeley*, 701 P.2d 1258 (Colo. App. 1985).



**15-11-605. Increase in securities; accessions.** (1) If a testator executes a will that devises securities and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at death to the extent the additional securities were acquired by the testator after the will was executed as a result of the testator's ownership of the described securities and are securities of any of the following types:

(a) Securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options;

(b) Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization; or

(c) Securities of the same organization acquired as a result of a plan of reinvestment.

(2) Distributions in cash before death with respect to a described security are not part of the devise.

**Source:** L. 94: Entire part R&RE, p. 1006, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-607 as it existed prior to 1995.

#### ANNOTATION

**Absent a contrary intent by the testatrix, a specific devisee is entitled to receive any additional shares of stock resulting from action initiated by the issuing company,** regardless of whether the issuing company takes action before

or after execution of the will. *Shriners Hospitals for Crippled Children v. United Bank of Denver*, 821 P.2d 300 (Colo. App. 1991) (decided under former § 15-11-607 as it existed prior to the 1994 repeal and reenactment of this part).

**15-11-606. Nonademption of specified devises; unpaid proceeds of sale, condemnation, or insurance; sale by conservator or agent.** (1) A specific devisee has a right to the specifically devised property in the testator's estate at death and:

(a) Any balance of the purchase price, together with any security agreement, owing from a purchaser to the testator at death by reason of sale of the property;

(b) Any amount of a condemnation award for the taking of the property unpaid at death;

(c) Any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;

(d) Property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;

(e) Real or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real or tangible personal property; and

(f) Unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution, the value of the specifically devised property to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by paragraphs (a) to (e) of this subsection (1).

(2) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or if a condemnation award, insurance proceeds, or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(3) The right of a specific devisee under subsection (2) of this section is reduced by any right the devisee has under subsection (1) of this section.

(4) For the purposes of the references in subsection (2) of this section to a conservator, subsection (2) of this section does not apply if after the sale, mortgage, condemnation,

casualty, or recovery it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication by one year.

(5) For the purposes of the references in subsection (2) of this section to an agent acting within the authority of a durable power of attorney for an incapacitated principal, (i) "Incapacitated principal" means a principal who is an incapacitated person, (ii) no adjudication of incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

**Source: L. 94:** Entire part R&RE, p. 1007, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-608 as it existed prior to 1995.

**15-11-607. Nonexoneration.** A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

**Source: L. 94:** Entire part R&RE, p. 1008, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-609 as it existed prior to 1995.

**15-11-608. Exercise of power of appointment.** In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a general residuary clause in a will or a will making general disposition of all of the testator's property, expresses an intention to exercise a power of appointment held by the testator only if (i) the power is a general power and the creating instrument does not contain a gift if the power is not exercised or (ii) the testator's will manifests an intention to include the property subject to the power. For rules of construction regarding powers of appointment created in a governing instrument under part 7 of this article, see sections 15-11-701 and 15-11-704.

**Source: L. 94:** Entire part R&RE, p. 1008, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-610 as it existed prior to 1995.

**15-11-609. Ademption by satisfaction.** (1) Property a testator gave in his or her lifetime to a person is treated as a satisfaction of a devise in whole or in part, only if (i) the will provides for deduction of the gift, (ii) the testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise, or (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

(2) For purposes of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.

(3) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying sections 15-11-603 and 15-11-604, unless the testator's contemporaneous writing provides otherwise.

**Source: L. 94:** Entire part R&RE, p. 1008, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-612 as it existed prior to 1995.

## PART 7

### RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER GOVERNING INSTRUMENTS

**15-11-701. Scope.** For the purposes of this part 7, the term "governing instrument" shall be as defined in section 15-10-201 (22); except:



(1) “Governing instrument” shall not include a deed that transfers any interest in real property; however, section 15-11-712 shall apply to such deeds.

(2) As the application of a particular section is limited by its terms to a specific type of provision or governing instrument. In the absence of a finding of a contrary intention, the rules of construction in this part 7 control the construction of a governing instrument executed or republished or reaffirmed on or after July 1, 1995, and the rules of construction under prior law control the construction of a governing instrument executed prior to July 1, 1995, and not a governing instrument republished or reaffirmed after that date. In the process of determining whether a contrary intention exists, the rules of construction of this part 7 shall not apply.

(3) In the absence of a finding of a contrary intention, the rules of construction in section 15-11-705 apply to a governing instrument executed or republished or reaffirmed on or after July 1, 2010, and the rules of construction under section 15-11-705, as it existed prior to July 1, 2010, apply to a governing instrument executed prior to July 1, 2010, and not republished or reaffirmed after that date.

**Source:** **L. 94:** Entire part R&RE, p. 1009, § 3, effective July 1, 1995. **L. 95:** (2) amended, p. 357, § 8, effective July 1. **L. 2010:** (1) amended and (3) added, (SB 10-199), ch. 374, p. 1750, § 11, effective July 1.

**Editor’s note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (1) and adding subsection (3):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

The rules of construction in this Part apply to governing instruments of any type, except as the application of a particular section is limited by its terms to a specific type or types of provision or governing instrument.

The term “governing instrument” is defined in Section 1-201 as “a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.”

Certain of the sections in this Part are limited in their application to donative dispositions or governing instruments of a certain type or types. Section 2-704, for example, applies only to a

governing instrument creating a power of appointment. Section 2-706 applies only to governing instruments that are “beneficiary designations,” a term defined in Section 1-201 as referring to “a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.” Section 2-707 applies only to governing instruments creating a future interest under the terms of a trust.

**Cross References.** See the Comment to Section 2-601.

**Historical Note.** This Comment was revised in 1993. For the prior version, see 8 U.L.A. 138 (Supp. 1992).

**15-11-702. Requirement of survival by one hundred twenty hours.** (1) **Requirement of survival by one hundred twenty hours under probate code.** For the purposes of this code, except as provided in subsection (4) of this section, an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by one hundred twenty hours is deemed to have predeceased the

event.

(2) **Requirement of survival by one hundred twenty hours under other governing instrument.** Except as provided in subsection (4) of this section, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by one hundred twenty hours is deemed to have predeceased the event.

(3) **Co-owners with right of survivorship; requirement of survival by one hundred twenty hours.** Except as provided in subsection (4) of this section, if (i) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by one hundred twenty hours, one-half of the property passes as if one had survived by one hundred twenty hours and one-half as if the other had survived by one hundred twenty hours, and (ii) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by one hundred twenty hours, the property passes in the proportion that one bears to the whole number of co-owners. For the purposes of this subsection (3), “co-owners with right of survivorship” includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of one or more of the others.

(4) **Exceptions.** Survival by one hundred twenty hours is not required if:

(a) The governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and if that language is operable under the facts of the case;

(b) The governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event by a specified period; but survival of the event or the specified period shall be established by clear and convincing evidence;

(c) The imposition of a one-hundred-twenty-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under section 15-11-1102 (1) (a), (2) (a), or (3) (a) or section 15-11-1102.5 (1) (b) (I), (1) (b) (II), (1) (b) (III), (2) (b) (I) (A), (2) (b) (II) (A), or (2) (b) (III) (A), or to become invalid under section 15-11-1102 (1) (b), (2) (b), or (3) (b) or section 15-11-1102.5 (1) (b) (I), (1) (b) (II), or (1) (b) (III); but survival shall be established by clear and convincing evidence; or

(d) The application of a one-hundred-twenty-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival shall be established by clear and convincing evidence.

(5) **Protection of payors and other third parties.** (a) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property, or for having taken any other action in reliance on the beneficiary’s apparent entitlement under the terms of the governing instrument, before the payor or other third party received written notice as described in paragraph (b) of this subsection (5). A payor or other third party shall have no duty or obligation to inquire as to the application of the one-hundred-twenty-hour survival or to seek any evidence with respect to any such survival. A payor or other third party is only liable for actions taken two or more business days after the payor or other third party has actual receipt of such written notice. Any form or service of notice other than that described in paragraph (b) of this subsection (5) shall not be sufficient to impose liability on a payor or other third party for actions taken pursuant to the governing instrument.

(b) The written notice shall indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that the beneficiary designated in the governing instrument failed to survive the decedent by one hundred twenty hours. The written notice shall be mailed to the payor’s or other third party’s main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Notice to a sales representative of the payor or other third party shall not constitute notice to the payor or other third party.



(c) Upon receipt of the written notice described in paragraph (b) of this subsection (5), a payor or other third party may pay to the court any amount owed, or transfer to or deposit with the court any item of property held by it. The availability of such actions under this section shall not prevent the payor or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payor or other third party shall file with the court a copy of the written notice received by the payor or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payor or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any item of property, even if no probate proceedings have been commenced before such payment, transfer, or deposit. Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payor or other third party discharges the payor or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(d) The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, shall be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court.

(e) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(6) **Protection of bona fide purchasers; personal liability of recipient.** (a) A person who purchases property for value and without notice or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law (other than the federal "Employee Retirement Income Security Act of 1974", as amended) with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

**Source:** L. 94: Entire part R&RE, p. 1009, § 3, effective July 1, 1995. L. 2006: (4)(c) amended, p. 393, § 28, effective July 1.

**Editor's note:** This section is similar to former § 15-11-601 as it existed prior to 1995.

**Cross references:** For requirement that an heir survive a decedent by one hundred twenty hours, see § 15-11-104.

#### ANNOTATION

**Law reviews.** For article, "Probate and Non- Murder/Suicide", see 17 Colo. Law. 1061 probate Distribution Issues in the Case of a (1988).

**Applied** in *In re Estate of Whittman*, 220 P.3d 961 (Colo. App. 2009), *aff'd*, 233 P.3d 697 (Colo. 2010).

**15-11-703. Choice of law as to meaning and effect of governing instrument.** The meaning and legal effect of a governing instrument is determined by the local law of the state selected by the transferor in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective-share described in part 2 of this article, the provisions relating to exempt property and allowances described in part 4 of this article, or any other public policy of this state otherwise applicable to the disposition.

**Source:** L. 94: Entire part R&RE, p. 1012, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-602 as it existed prior to 1995.

**15-11-704. Power of appointment; meaning of specific reference requirement.** If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intention, in requiring that the donee exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.

**Source:** L. 94: Entire part R&RE, p. 1012, § 3, effective July 1, 1995.

**15-11-705. Class gifts construed to accord with intestate succession. (1) Definitions.** In this section:

- (a) "Adoptee" has the meaning set forth in section 15-11-115.
- (b) "Child of assisted reproduction" has the meaning set forth in section 15-11-120.
- (c) "Distribution date" means the date when an immediate or postponed class gift takes effect in possession or enjoyment.
- (d) "Functioned as a parent of the adoptee" has the meaning set forth in section 15-11-115, substituting "adoptee" for "child" in that definition.
- (e) "Functioned as a parent of the child" has the meaning set forth in section 15-11-115.
- (f) "Genetic parent" has the meaning set forth in section 15-11-115.
- (g) "Gestational child" has the meaning set forth in section 15-11-121.
- (h) "Relative" has the meaning set forth in section 15-11-115.

(2) **Terms of relationship.** A class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction, a gestational child, and, except as otherwise provided in subsections (5) and (6) of this section, an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships.

(3) **Relatives by marriage.** Terms of relationship in a governing instrument that do not differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces, or nephews, standing alone shall be construed to exclude relatives by marriage.

(4) **Half-blood relatives.** Terms of relationship in a governing instrument that do not differentiate relationships by the half blood from those by the whole blood, such as brothers, sisters, nieces, or nephews, standing alone shall be construed to include both types of relationships.

(5) **Transferor not genetic parent.** In construing a dispositive provision of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of the genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached eighteen years of age.



(6) **Transferor not adoptive parent.** In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:

- (a) The adoption took place before the adoptee reached eighteen years of age;
- (b) The adoptive parent was the adoptee's stepparent or foster parent; or
- (c) The adoptive parent functioned as a parent of the adoptee before the adoptee reached eighteen years of age.

(7) **Class-closing rules.** The following rules apply for purposes of the class-closing rules:

- (a) A child in utero at a particular time is treated as living at that time if the child lives one hundred twenty hours after birth.
- (b) If a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent's death, the child is treated as living on the distribution date if the child lives one hundred twenty hours after birth and was in utero not later than thirty-six months after the deceased parent's death or born not later than forty-five months after the deceased parent's death.
- (c) An individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted.

**Source:** L. 94: Entire part R&RE, p. 1012, § 3, effective July 1, 1995. L. 2009: Entire section amended, (HB 09-1287), ch. 310, p. 1685, § 14, effective July 1, 2010. L. 2010: (3) and (4) amended, (SB 10-199), ch. 374, p. 1751, § 12, effective July 1.

**Editor's note:** (1) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

(2) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsections (3) and (4):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

This section facilitates a modern construction of gifts that identify the recipient by reference to a relationship to someone; usually these gifts will be class gifts. The rules of construction contained in this section are substantially consistent with the rules of construction contained in the Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.5 through 14.9. These sections of the Restatement apply to

the treatment for class-gift purposes of an adoptee, a nonmarital child, a child of assisted reproduction, a gestational child, and a relative by marriage.

The rules set forth in this section are rules of construction, which under Section 2-701 are controlling in the absence of a finding of a contrary intention. With two exceptions, Section 2-705 invokes the rules pertaining to intestate

succession as rules of construction for interpreting terms of relationship in private instruments.

**Subsection (a): Definitions.** With one exception, the definitions in subsection (a) rely on definitions contained in intestacy sections. The one exception is the definition of “distribution date,” which is relevant to the class-closing rules contained in subsection (g). *Distribution date* is defined as the date when an immediate or postponed class gift takes effect in possession or enjoyment.

**Subsection (b): Terms of Relationship.** Subsection (b) provides that a class gift that uses a term of relationship to identify the takers includes a child of assisted reproduction and a gestational child, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of a child of assisted reproduction or a gestational child in a class is subject to the class-closing rules. See Examples 11 through 15.

Subsection (b) also provides that, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession regarding parent-child relationships. The subsection (e) exception relates to situations in which the transferor is not the genetic parent of the child. The subsection (f) exception relates to situations in which the transferor is not the adoptive parent of the adoptee. Consequently, if the transferor is the genetic or adoptive parent of the child, neither exception applies, and the class gift or other term of relationship is construed in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of an adoptee or a child born to parents who are not married to each other in a class is subject to the class-closing rules. See Examples 9 and 10.

**Subsection (c): Relatives by Marriage.** Subsection (c) provides that terms of relationship that do not differentiate relationships by blood from those by marriage, such as “uncles”, “aunts”, “nieces”, or “nephews”, are construed to exclude relatives by marriage.

**Subsection (d): Half Blood Relatives.** In providing that terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as “brothers”, “sisters”, “nieces”, or “nephews”, are construed to include both types of relationships, subsection (d) is consistent with the rules for intestate succession regarding parent-child relationships. See Section 2-107 and the phrase “or either of them” in Section 2-103(3) and (4). As provided in subsection (g), inclusion of a half

blood relative in a class is subject to the class-closing rules.

**Subsection (e): Transferor Not Genetic Parent.** The general theory of subsection (e) is that a transferor who is not the genetic parent of a child would want the child to be included in a class gift as a child of the genetic parent only if the genetic parent (or one or more of the specified relatives of the child’s genetic parent functioned as a parent of the child before the child reached the age of [18]. As provided in subsection (g), inclusion of a genetic child in a class is subject to the class-closing rules.

*Example 9.* G’s will created a trust, income to G’s son, A, for life, remainder in corpus to A’s descendants who survive A, by representation. A fathered a child, X; A and X’s mother, D, never married each other, and A never functioned as a parent of the child, nor did any of A’s relatives or spouses or surviving spouses of any of A’s relatives. D later married E; D and E raised X as a member of their household. Because neither A nor any of A’s specified relatives ever functioned as a parent of X, X would not be included as a member of the class of A’s descendants who take the corpus of G’s trust on A’s death.

If, however, A executed a will containing a devise to his children or designated his children as beneficiary of his life insurance policy, X would be included in the class. Under Section 2-117, X would be A’s child for purposes of intestate succession. Subsection (c) is inapplicable because the transferor, A, is the genetic parent.

**Subsection (f): Transferor Not Adoptive Parent.** The general theory of subsection (f) is that a transferor who is not the adoptive parent of an adoptee would want the child to be included in a class gift as a child of the adoptive parent only if (i) the adoption took place before the adoptee reached the age of [18]; (ii) the adoptive parent was the adoptee’s stepparent or foster parent; or (iii) the adoptive parent functioned as a parent of the adoptee before the adoptee reached the age of [18]. As provided in subsection (g), inclusion of an adoptee in a class is subject to the class-closing rules.

*Example 10.* G’s will created a trust, income to G’s daughter, A, for life, remainder in corpus to A’s descendants who survive A, by representation. A and A’s husband adopted a 47-year old man, X. Because the adoption did not take place before X reached the age of [18], A was not X’s stepparent or foster parent, and A did not function as a parent of X before X reached the age of [18]. X would not be included as a member of the class of A’s descendants who take the corpus of G’s trust on A’s death.

If, however, A executed a will containing a devise to her children or designated her children as beneficiary of her life insurance policy, X would be included in the class. Under Section 2-118, X would be A’s child for purposes of



intestate succession. Subsection (d) is inapplicable because the transferor, A, is an adoptive parent.

**Subsection (g): Class-Closing Rules.** In order for an individual to be a taker under a class gift that uses a term of relationship to identify the class members, the individual must (i) qualify as a class member under subsection (b), (c), (d), (e), or (f) and (ii) not be excluded by the class-closing rules. For an exposition of the class-closing rules, see Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1. Section 15.1 provides that, “unless the language or circumstances establish that the transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants on the distribution date if a beneficiary of the class gift is then entitled to distribution.”

**Subsection (g)(1): Child in Utero.** Subsection (g)(1) codifies the well-accepted rule that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

**Subsection (g)(2): Children of Assisted Reproduction and Gestational Children; Class Gift in Which Distribution Date Arises At Deceased Parent’s Death.** Subsection (g)(2) changes the class-closing rules in one respect. If a child of assisted reproduction (as defined in Section 2-120) or a gestational child (as defined in Section 2-121) is conceived posthumously, and if the distribution date arises at the deceased parent’s death, then the child is treated as living on the distribution date if the child lives 120 hours after birth and was either (i) in utero no later than 36 months after the deceased parent’s death or (ii) born no later than 45 months after the deceased parent’s death.

The 36-month period in subsection (g)(2) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent’s death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a normal period of pregnancy.

*Example 11.* G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G’s will devised “90 percent of my estate to my wife W and 10 percent of my estate to my children.” G also left frozen sperm at a sperm bank in case he should be killed in action. G consented to be treated as the parent of the child within the meaning of § 2-120(f). G was killed in action. After G’s death, W decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36 months after G’s death or (ii) born within 45 months after G’s death, and if the child lived 120 hours after birth, the child is treated as living at G’s death and is included in the class.

*Example 12.* G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G’s will devised “90 percent of my estate to my husband H and 10 percent of my estate to my issue by representation.” G also left frozen embryos in case she should be killed in action. G consented to be the parent of the child within the meaning of § 2-120(f). G was killed in action. After G’s death, H arranged for the embryos to be implanted in the uterus of a gestational carrier. If the child so produced was either (i) in utero within 36 months after G’s death or (ii) born within 45 months after the G’s death, and if the child lived 120 hours after birth, the child is treated as living at G’s death and is included in the class.

*Example 13.* The will of G’s mother created a testamentary trust, directing the trustee to pay the income to G for life, then to distribute the trust principal to G’s children. When G’s mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G’s death, G’s widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36 months after G’s death or (ii) born within 45 months after the G’s death, and if the child lived 120 hours after birth, the child is treated as living at G’s death and is included in the class under the rule of convenience.

**Subsection (g)(2) Inapplicable Unless Child of Assisted Reproduction or Gestational Child is Conceived Posthumously and Distribution Date Arises At Deceased Parent’s Death.** Subsection (g)(2) only applies if a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date arises at the deceased parent’s death. Subsection (g)(2) does not apply if a child of assisted reproduction or a gestational child is not

conceived posthumously. It also does not apply if the distribution date arises before or after the deceased parent's death. In cases to which subsection (g)(2) does not apply, the ordinary class-closing rules apply. For purposes of the ordinary class-closing rules, subsection (g)(1) provides that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

This means, for example, that, with respect to a child of assisted reproduction or a gestational child, a class gift in which the distribution date arises after the deceased parent's death is not limited to a child who is born before or in utero at the deceased parent's death or, in the case of posthumous conception, either (i) in utero within 36 months after the deceased parent's death or (ii) born within 45 months after the deceased parent's death. The ordinary class-closing rules would only exclude a child of assisted reproduction or a gestational child if the child was not yet born or in utero on the distribution date (or who was then in utero but who failed to live 120 hours after birth).

A case that reached the same result that would be reached under this section is *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, two children (who were conceived posthumously and were born to a deceased father's widow around three and five years after his death) were included in class gifts to the deceased father's "issue" or "descendants". The children would be included under this section because (i) the deceased father signed a record that would satisfy Section 2-120(f)(1), (ii) the distribution dates arose after the deceased father's death, and (iii) the children were living on the distribution dates, thus satisfying subsection (g)(1).

**Example 14.** G created a revocable inter vivos trust shortly before his death. The trustee was directed to pay the income to G for life, then "to pay the income to my wife, W, for life, then to distribute the trust principal by representation to my descendants who survive W." When G died, G and W had no children. Shortly before G's death and after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G's death, W decided to become inseminated with G's frozen sperm so that she could have his child. The child, X, was born five years after G's death. W raised X. Upon W's death many years later, X was a grown adult. X is entitled to receive the trust principal, because a parent-child relation-

ship between G and X existed under § 2-120(f) and X was living on the distribution date.

**Example 15.** The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then "to pay the income by representation to G's issue from time to time living, and at the death of G's last surviving child, to distribute the trust principal by representation to G descendants who survive G's last surviving child." When G's mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G's death, G's widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36 months after G's death or (ii) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class-gift of income under the rule of convenience. If G's widow later decides to use his frozen sperm to have another child or children, those children would be included in the class-gift of income (assuming they live 120 hours after birth) even if they were not in utero within 36 months after G's death or born within 45 months after the G's death. The reason is that an income interest in class-gift form is treated as creating separate class gifts in which the distribution date is the time of payment of each subsequent income payment. See Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1 cmt. p. Regarding the remainder interest in principal that takes effect in possession on the death of G's last living child, the issue of the posthumously conceived children who are then living would take the trust principal.

**Subsection (g)(3).** For purposes of the class-closing rules, an individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted. An individual is "in the process of being adopted" if a legal proceeding to adopt the individual had been filed before the class closed. However, the phrase "in the process of being adopted" is not intended to be limited to the filing of a legal proceeding, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

**Companion Statute.** A state enacting this provision should also consider enacting the Uniform Status of Children of Assisted Conception Act (1988).

**Historical Note.** This Comment was revised in 1993 and 2008.

**15-11-706. Nonprobate transfers; deceased beneficiary. (1) Definitions.** This section shall not apply to wills; beneficiary deeds; insurance or annuity policies; or pension, profit sharing, retirement, or similar benefit plans. As used in this section, unless the context



otherwise requires:

(a) "Alternative beneficiary designation" means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another beneficiary designation on the happening of one or more events, including survival of the decedent or failure to survive the decedent, whether an event is expressed in condition-precedent, condition-subsequent, or any other form.

(b) "Beneficiary" means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes (i) a class member if the beneficiary designation is in the form of a class gift and (ii) an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account.

(c) "Beneficiary designation" includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift.

(d) "Class member" includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had he or she survived the decedent.

(e) (Reserved)

(f) "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under section 15-11-702.

(2) **Substitute gift.** If a beneficiary fails to survive the decedent and is a grandparent, or a descendant of a grandparent of the decedent, the following apply:

(a) Except as provided in paragraph (d) of this subsection (2), if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take per capita at each generation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.

(b) Except as provided in paragraph (d) of this subsection (2), if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the deceased beneficiary's or beneficiaries' surviving descendants. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he or she would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take per capita at each generation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this paragraph (b), "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants.

(c) Except as otherwise provided in a governing instrument, for the purposes of this part 7, words of survivorship, such as in a beneficiary designation to an individual "if he survives me", or in a beneficiary designation to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. The use of language such as "and if he does not survive me the gift shall lapse" or "to A and not to A's descendants" shall be sufficient indication of an intent contrary to the application of this section.

(d) If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by paragraph (a) or (b) of this subsection (2), the substitute gift is superseded by the alternative beneficiary designation only if an expressly designated beneficiary of the alternative beneficiary designation is entitled to take.

(3) **More than one substitute gift; which one takes.** If, under subsection (2) of this section, substitute gifts are created and not superseded with respect to more than one beneficiary designation and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(a) Except as provided in paragraph (b) of this subsection (3), the property passes under the primary substitute gift.

(b) If there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(c) As used in this subsection (3), unless the context otherwise requires:

(I) "Primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent.

(II) "Primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation.

(III) "Younger-generation beneficiary designation" means a beneficiary designation that:

(A) Is to a descendant of a beneficiary of the primary beneficiary designation;

(B) Is an alternative beneficiary designation with respect to the primary beneficiary designation;

(C) Is a beneficiary designation for which a substitute gift is created; and

(D) Would have taken effect had all the deceased beneficiaries who left surviving descendants survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.

(IV) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation beneficiary designation.

(4) **Protection of payors.** (a) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payor or other third party has received written notice as described in paragraph (b) of this subsection (4). A payor or other third party shall have no duty or obligation to inquire as to the existence of a substituted gift under this section or to seek any evidence with respect to any such substituted gift. A payor or other third party is only liable for actions taken two or more business days after the payor or other third party has actual receipt of such written notice. Any form or service of notice other than that described in paragraph (b) of this subsection (4) shall not be sufficient to impose liability on a payor or other third party for actions taken pursuant to the governing instrument.

(b) The written notice shall indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a claim to a substitute gift is being made under this section. The written notice shall be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action.

(c) Upon receipt of the written notice described in paragraph (b) of this subsection (4), a payor or other third party may pay to the court any amount owed or transfer to or deposit with the court any item of property held by it. The availability of such actions under this section shall not prevent the payor or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payor or other third party shall file with the court a copy of the written notice received by the payor or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payor or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any



item of property, even if no probate proceedings have been commenced before such payment, transfer, or deposit. Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payor or other third party discharges the payor or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(d) The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, shall be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court.

(e) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(5) **Protection of bona fide purchasers; personal liability of recipient.** (a) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law (other than the federal "Employee Retirement Income Security Act of 1974", as amended) with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

**Source:** L. 94: Entire part R&RE, p. 1013, § 3, effective July 1, 1995. L. 95: (2) amended, p. 357, § 9, effective July 1. L. 2004: IP(1) amended, p. 733, § 2, effective August 4.

**15-11-707. Survivorship with respect to future interests under terms of trust; substitute takers.** (1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Alternative future interest" means an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.

(b) "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(c) "Class member" includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had he or she survived the distribution date.

(d) "Distribution date", with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but may occur at a time during the course of a day.

(e) "Future interest" includes an alternative future interest and a future interest in the form of a class gift.

(f) “Future interest under the terms of a trust” means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

(g) “Surviving beneficiary” or “surviving descendant” means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 15-11-702.

(2) **Survivorship required; substitute gift.** A future interest under the terms of a trust is contingent on the beneficiary’s surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

(a) Except as provided in paragraph (d) of this subsection (2), if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary’s surviving descendants. They take per capita at each generation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.

(b) Except as provided in paragraph (d) of this subsection (2), if the future interest is in the form of a class gift, other than a future interest to “issue”, “descendants”, “heirs of the body”, “heirs”, “next of kin”, “relatives”, or “family”, or a class described by language of similar import, a substitute gift is created in the deceased beneficiary’s or beneficiaries’ surviving descendants. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he or she would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary’s surviving descendants who are substituted for the deceased beneficiary take per capita at each generation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this paragraph (b), “deceased beneficiary” means a class member who failed to survive the distribution date and left one or more surviving descendants.

(c) For the purposes of this part 7, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form.

(d) If a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (a) or (b) of this subsection (2), the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

(3) **More than one substitute gift; which one takes.** If, under subsection (2) of this section, substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(a) Except as provided in paragraph (b) of this subsection (3), the property passes under the primary substitute gift.

(b) If there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(c) As used in this subsection (3), unless the context otherwise requires:

(I) “Primary future interest” means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interests who left surviving descendants survived the distribution date.

(II) “Primary substitute gift” means the substitute gift created with respect to the primary future interest.

(III) “Younger-generation future interest” means a future interest that:

(A) Is to a descendant of a beneficiary of the primary future interest;

(B) Is an alternative future interest with respect to the primary future interest;



(C) Is a future interest for which a substitute gift is created; and

(D) Would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest.

(IV) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation future interest.

(4) **If no other takers, property passes under residuary clause or to transferor's heirs.** Except as provided in subsection (5) of this section, if, after the application of subsections (2) and (3) of this section, there is no surviving taker, the property passes in the following order:

(a) If the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(b) If no taker is produced by the application of paragraph (a) of this subsection (4), the property passes to the transferor's heirs under section 15-11-711.

(5) **If no other takers and if future interest created by exercise of power of appointment.** If, after the application of subsections (2) and (3) of this section, there is no surviving taker and if the future interest was created by the exercise of a power of appointment:

(a) The property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and

(b) If no taker is produced by the application of paragraph (a) of this subsection (5), the property passes as provided in subsection (4) of this section. For purposes of subsection (4) of this section, "transferor" means the donor if the power was a nongeneral power and means the donee if the power was a general power.

**Source: L. 94:** Entire part R&RE, p. 1017, § 3, effective July 1, 1995. **L. 95:** (2)(a) and (2)(b) amended, p. 358, § 10, effective July 1.

**15-11-708. Class gifts to "descendants", "issue", or "heirs of the body"; form of distribution if none specified.** If a class gift in favor of "descendants", "issue", or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession, if the designated ancestor had then died intestate owning the subject matter of the class gift.

**Source: L. 94:** Entire part R&RE, p. 1021, § 3, effective July 1, 1995.

**15-11-709. By representation; per capita at each generation; per stirpes. (1) Definitions.** As used in this section, unless the context otherwise requires:

(a) "Deceased child" or "deceased descendant" means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under section 15-11-702.

(b) "Distribution date", with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but may occur at a time during the course of a day.

(c) "Surviving ancestor", "surviving child", or "surviving descendant" means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 15-11-702.

(2) **Per capita at each generation.** If an applicable statute or a governing instrument calls for property to be distributed "per capita at each generation", the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving

descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

(3) **Per stirpes.** If a governing instrument calls for property to be distributed “per stirpes”, the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

(4) **Deceased descendant with no surviving descendant disregarded.** For the purposes of subsections (2), (3), and (5) of this section, an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

(5) **By representation.** For all governing instruments executed before, on, or after July 1, 1995, unless the governing instrument provides otherwise, the following definition of “by representation” shall apply: If “by representation” is called for, the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share and the share of each deceased descendant in the same generation is divided among his or her descendants in the same manner.

**Source:** L. 94: Entire part R&RE, p. 1021, § 3, effective July 1, 1995. L. 95: Entire section amended, p. 358, § 11, effective July 1.

**15-11-710. Worthier-title doctrine abolished.** The doctrine of worthier-title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor’s “heirs”, “heirs at law”, “next of kin”, “distributees”, “relatives”, or “family”, or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

**Source:** L. 94: Entire part R&RE, p. 1022, § 3, effective July 1, 1995.

**15-11-711. Interests in “heirs” and like.** If an applicable statute or a governing instrument calls for a present or future distribution to, or creates a present or future interest in, a designated individual’s “heirs”, “heirs at law”, “next of kin”, “relatives”, or “family”, or language of similar import, the property passes to those persons in such shares as would succeed to the designated individual’s intestate estate under the intestate succession law of the designated individual’s domicile if the designated individual died when the donative disposition is to take effect in possession or enjoyment. If the designated individual’s surviving spouse is living but is remarried at the time the interest is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

**Source:** L. 94: Entire part R&RE, p. 1022, § 3, effective July 1, 1995.

**15-11-712. Simultaneous death; disposition of property.** The rules of construction in this section shall control in those situations not subject to the control of section 15-11-702.

(1) Where the title to property or the devolution thereof depends upon priority of death and there is no clear and convincing evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he or she had survived, except as provided otherwise in this section.

(2) (a) If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his or her surviving another person, and both persons



die, and there is no clear and convincing evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived.

(b) If there is no clear and convincing evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their deaths each of such beneficiaries would have been entitled to the property if he or she had survived the others, the property shall be divided into as many equal portions as there were beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

(3) Where there is no clear and convincing evidence that two joint tenants have died otherwise than simultaneously, the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died, the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants. For the purposes of this section, the term "joint tenants" includes owners of property held under circumstances which entitled one or more to the whole of the property on the death of the other or others.

(4) Where a husband and wife have died leaving community property and there is no clear and convincing evidence that they have died otherwise than simultaneously, one-half of all the community property shall pass as if the husband had survived, and as if said one-half were his separate property, and the other one-half thereof shall pass as if the wife had survived, and as if said other one-half were her separate property.

(5) Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no clear and convincing evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary; except that, if the policy is community property of the insured and his or her spouse, and there is no alternative beneficiary, or no alternative beneficiary except the estate or personal representative of the insured, the proceeds shall be distributed as community property.

(6) This section shall not apply in the case of wills, living trusts, deeds, or contracts of insurance or any other situation where provision is made for distribution of property different from the provisions of this section or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

**Source:** L. 94: Entire part R&RE, p. 1022, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-613 as it existed prior to 1995.

## ANNOTATION

**Law reviews.** For article, "The Will in Estate Planning", see 29 Dicta 367 (1952). For comment, "Lovato v. District Court: The Dilemma of Defining Death", see 58 Den. L.J. 627 (1981).

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**This section is inapplicable if there is evidence as to which one of the parties survived the other** or if there are particular circumstances from which the fact of survivorship may be inferred. The presumption of simultaneous death of the parties was not intended to take the place of competent, positive and direct evidence, and the fact of survivorship requires no higher degree of proof than any other fact in the case. *Sauers v. Stolz*, 121 Colo. 456, 218 P.2d 741 (1950).

**Provisions of separate trust not controlling over subsection (5).** In cases when the beneficiary and insured die simultaneously, and where there are no words in the contract of insurance in any way reversing the statutory presumption of subsection (5), nor is there anything said in the beneficiary's will pertaining to simultaneous death, a presumption as to survivorship contained in the insured's trust does not result in a distribution of property different from that provided for by use of the statutory presumption. *Estate of Ohre v. State Dept. of Rev.*, 41 Colo. App. 113, 585 P.2d 920 (1978).

**Applied** in *Lovato v. District Court*, 198 Colo. 419, 601 P.2d 1072 (1979); *In re Estate of Whittman*, 220 P.3d 961 (Colo. App. 2009), *aff'd*, 233 P.3d 697 (Colo. 2010).

**15-11-713. Construction of wills and trusts containing formula marital clauses.**

(1) If a decedent dies leaving a will that was executed or a trust that was created before September 12, 1981, which will or trust contains a formula expressly providing that the decedent's spouse or a qualifying trust is to receive the maximum amount of property qualifying for the marital deduction allowable by federal law, such formula provision shall be construed as referring to the amount of property which, after utilization of the credits available to the decedent's estate, produces the least possible federal estate tax and is eligible for the marital deduction as allowed under the federal "Internal Revenue Code", as amended by section 403 (a) of the federal "Economic Recovery Tax Act of 1981", P. L. No. 97-34, in effect at the time of the decedent's death; except that such construction shall not be made if its effect is to reduce the amount of property passing to the surviving spouse or a qualifying trust. Such construction shall only be made if the following requirements are met:

(a) The decedent died after December 31, 1988;

(b) The formula referred to in this subsection (1) was not amended to refer specifically to an unlimited marital deduction under federal law at any time after September 12, 1981, and before the death of the decedent;

(c) The will or trust contains a devise to, or is in trust for the benefit of, the decedent's spouse which qualifies for a marital deduction pursuant to section 2056 of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 2056, as amended;

(d) There is no finding by the court having jurisdiction over the decedent's estate that the decedent intended to refer to the maximum marital deduction of the internal revenue code in effect at the time that the will or trust was drafted; and

(e) All distributions in satisfaction of the surviving spouse's share of the estate or the qualifying trust for the surviving spouse have not been completed.

(2) For the purposes of this section:

(a) "Amount" includes a fractional, pecuniary, or residual amount.

(b) "Optimum marital deduction formula" means any formula in a will or trust that provides that the decedent's spouse or a qualifying trust is to receive the maximum amount of property that qualifies for the estate tax marital deduction allowable by federal law that produces the least possible or no federal estate tax. A formula subject to construction under subsection (1) of this section is, as construed by subsection (1) of this section, an optimum marital deduction formula.

(c) "Qualifying trust" means any trust for the benefit of the decedent's spouse which qualifies for the marital deduction allowed under section 2056 of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 2056, as amended.

(3) In the case of an optimum marital deduction formula that contains a general reference to federal estate tax credits or otherwise requires the state death tax credit to be taken into account without a specific reference to such tax credit, the decedent is presumed to have intended that such tax credit be taken into account to reduce the amount that the decedent's spouse or a qualifying trust is to receive, only to the extent that the overall estate tax burden on the decedent's estate is not thereby increased. However, if a preponderance of the evidence shows that the decedent intended to increase the overall estate tax burden on the estate, the state death tax credit shall be taken into account fully for the purposes of reducing the amount that the decedent's spouse or a qualifying trust is to receive. Any formula subject to construction under subsection (1) of this section is subject to the presumption set forth in this subsection (3).

(4) In the case of an optimum marital deduction formula that specifically requires the state death tax credit to be taken into account and does not contain any words limiting the extent to which such credit shall be taken into account, the decedent is presumed to have intended that such credit be taken into account fully for the purpose of reducing the amount that the decedent's spouse or a qualifying trust is to receive, notwithstanding any resulting increase in the overall estate tax burden on the estate.

(5) Subsections (3) and (4) of this section apply with respect to any decedent who dies after December 31, 1988, unless all distributions in satisfaction of the surviving spouse's share of the estate or the qualifying trust for the surviving spouse are completed by July 1, 1994.



**Source:** L. 94: Entire part R&RE, p. 1024, § 3, effective July 1, 1995. L. 95: IP(1) amended, p. 360, § 12, effective July 1.

**Editor's note:** This section is similar to former § 15-11-614 as it existed prior to 1995.

## PART 8

### GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

#### GENERAL COMMENT

Part 8 contains five general provisions that cut across probate and nonprobate transfers. Part 8 previously contained a sixth provision, Section 2-801, which dealt with disclaimers. Section 2-801 was replaced in 2002 by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§ 2-1101 to 2-1117). To avoid renumbering the other sections in this Part, Section 2-801 is reserved for possible future use.

Section 2-802 deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share.

Section 2-803 spells out the legal consequence of intentional and felonious killing on the right of the killer to take as heir and under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Section 2-804 deals with the consequences of a divorce on the right of the former spouse (and relatives of the former spouse) to take under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Sections 2-805 and 2-806, added in 2008, bring the reformation provisions in the Uniform Trust Code into the UPC.

**Application to Pre-Existing Governing Instruments.** Under Section 8-101(b), for decedents

dying after the effective date of enactment, the provisions of this Code apply to governing instruments executed prior to as well as on or after the effective date of enactment. The Joint Editorial Board for the Uniform Probate Code has issued a statement concerning the constitutionality under the Contracts Clause of this feature of the Code. The statement, titled "Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents", can be found at 17 ACTEC Notes 184 (1991) or can be obtained from the headquarters office of the National Conference of Commissioners on Uniform State Laws, 676 N. St. Clair St., Suite 1700, Chicago, IL 60611, Phone 312/915-0195, FAX 312/915-0187.

**Historical Note.** This General Comment was revised in 1993 and 2008.

**2002 Amendment Relating to Disclaimers.** In 2002, the Code's former disclaimer provision (§ 2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§ 2-1101 to 2-1117). The statutory references in this Comment to former Section 2-801 have been replaced by appropriate references to Part 11. Updating these statutory references has not changed the substance of this Comment.

#### 15-11-801. Disclaimer of property interests. (Repealed)

**Source:** L. 94: Entire part R&RE, p. 1024, § 3, effective July 1, 1995. L. 95: (4) amended, p. 360, § 13, effective July 1. L. 2011: Entire section repealed, (SB 11-166), ch. 203, p. 868, § 2, effective August 10.

**15-11-802. Effect of divorce, annulment, and decree of separation.** (1) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he or she is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(2) For purposes of parts 1, 2, 3, and 4 of this article, and of section 15-12-203, a surviving spouse does not include:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized

as valid in this state, unless subsequently they participate in a marriage ceremony purporting to marry each to the other or enter into a common-law marriage;

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony or enters into a common-law marriage with a third individual; or

(c) An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

**Source:** L. 94: Entire part R&RE, p. 1027, § 3, effective July 1, 1995.

**Editor's note:** This section is similar to former § 15-11-802 as it existed prior to 1995.

#### ANNOTATION

**This section in no way limits a testator's authority to bequeath property to a person by name, whether that person is a former spouse or not.** What the statute does prevent is a former spouse from taking property which the decedent has expressly devised to the "surviving spouse". Where a decedent has bequeathed

property to a "surviving spouse" by specifically using the term "surviving spouse", this section bars the former spouse from taking that property. *Christensen v. Sabad*, 773 P.2d 538 (Colo. 1989).

**Applied** in *McDonald v. Hutchins*, 43 Colo. App. 135, 602 P.2d 889 (1979).

**15-11-803. Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations.** (1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(b) "Felonious killing", except as provided in subsection (7) of this section, is the killing of the decedent by an individual who, as a result thereof, is convicted of, pleads guilty to, or enters a plea of *nolo contendere* to the crime of murder in the first or second degree or manslaughter, as said crimes are defined in sections 18-3-102 to 18-3-104, C.R.S.

(c) "Governing instrument" means a governing instrument executed by the decedent.

(d) "Killer" is any individual who has committed a felonious killing.

(e) "Revocable", with respect to a disposition, appointment, provision, or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the killer, whether or not the decedent was then empowered to designate himself or herself in place of his or her killer and or the decedent then had capacity to exercise the power.

(2) **Forfeiture of statutory benefits.** An individual who feloniously kills the decedent forfeits all benefits with respect to the decedent's estate, including an intestate share, an elective-share, an omitted spouse's or child's share, the decedent's homestead exemption under section 38-41-204, C.R.S., exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share.

(3) **Revocation of benefits under governing instruments.** The felonious killing of the decedent:

(a) Revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the killer, and (iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and

(b) Severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship or as community property with the right of survivorship, transforming the interests of the decedent and killer into tenancies in common.



(4) **Effect of severance.** A severance under paragraph (b) of subsection (3) of this section does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(5) **Effect of revocation.** Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.

(6) **Wrongful acquisition of property.** A wrongful acquisition of property or interest by a killer not covered by this section shall be treated in accordance with the principle that a killer cannot profit from his or her wrong.

(7) **Felonious killing; how determined - time limitations on civil proceedings.** (a) **Criminal proceedings.** After all right to appeal has been waived or exhausted following the entry of a judgment of conviction establishing criminal accountability for the felonious killing of the decedent, such judgment conclusively establishes the convicted individual as the decedent's killer for purposes of this section.

(b) **Civil proceedings.** Notwithstanding the status or disposition of a criminal proceeding, a court of competent jurisdiction, upon the petition of an interested person, shall determine whether, by a preponderance of evidence standard, each of the elements of felonious killing of the decedent has been established. If such elements have been so established, such determination conclusively establishes that individual as the decedent's killer for purposes of this section.

(c) **Time limitations on civil proceedings.** (I) A petition brought under paragraph (b) of this subsection (7) may not be filed more than three years after the date of the decedent's death.

(II) Notwithstanding any provision of subparagraph (I) of this paragraph (c) to the contrary, if a criminal proceeding is commenced in a court of this state or in another jurisdiction against an individual for the felonious killing of the decedent, a petition brought under paragraph (b) of this subsection (7) may be filed so long as the petition is filed no later than one year after all right to appeal has been waived or exhausted following an entry of a judgment of conviction, or a dismissal, or an acquittal in the criminal proceeding. However, if the death and the possible culpability of the slayer for the felonious slaying of the decedent is not known to the petitioner within the three-year period of limitations established pursuant to subparagraph (I) of this paragraph (c), the accrual of the action under paragraph (b) of this subsection (7) and the possibility of the tolling of the running of the three-year period of limitation under subparagraph (I) of this paragraph (c) shall be determined according to the principles of accrual and tolling established by case law with respect to similar limitations established under section 13-80-108, C.R.S.

(d) **Judgment of conviction.** For the purposes of this subsection (7), a "judgment of conviction" includes a judgment of conviction on a plea of guilty or nolo contendere, or a judgment of conviction on a verdict of guilty by the court or by a jury.

(8) **Protection of payors and other third parties.** (a) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a felonious killing, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payor or other third party has received written notice as described in paragraph (b) of this subsection (8). A payor or other third party shall have no duty or obligation to make any determination as to whether or not the decedent was the victim of a felonious killing or to seek any evidence with respect to any such felonious killing even if the circumstances of the decedent's death are suspicious or questionable as to the beneficiary's participation in any such felonious killing. A payor or other third party is only liable for actions taken two or more business days after the payor or other third party has actual receipt of such written notice. Any form or service of notice other than that described in paragraph (b) of this subsection (8) shall not be sufficient to impose liability on a payor or other third party for actions taken pursuant to the governing instrument.

(b) The written notice shall indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a claim of forfeiture or revocation is being made under this section. The written notice shall be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action.

(c) Upon receipt of the written notice described in paragraph (b) of this subsection (8), a payor or other third party may pay to the court any amount owed or transfer to or deposit with the court any item of property held by it. The availability of such actions under this section shall not prevent the payor or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payor or other third party shall file with the court a copy of the written notice received by the payor or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payor or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any item of property, even if no probate proceedings have been commenced before such payment, transfer, or deposit. Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payor or other third party discharges the payor or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(d) The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, shall be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court.

(e) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

**(9) Protection of bona fide purchasers; personal liability of recipient.** (a) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

**Source:** L. 94: Entire part R&RE, p. 1027, § 3, effective July 1, 1995. L. 2011: (7) amended, (SB 11-083), ch. 101, p. 302, § 3, effective August 10.

**Editor's note:** This section is similar to former § 15-11-803 as it existed prior to 1995.



## ANNOTATION

**Law reviews.** For article, "Revocation of Wills — How Accomplished and the Effect", see 6 Dicta 7 (1929). For article, "Some Will Drafting Pointers on Marital Deduction", see 27 Dicta 65 (1950). For article, "Probate and Non-probate Distribution Issues in the Case of a Murder/Suicide", see 17 Colo. Law. 1061 (1988).

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**This section does not apply in the absence of a conviction.** *Smith v. Greenburg*, 121 Colo. 417, 218 P.2d 514 (1950).

**Thus, where a husband murdered his wife and adopted daughter before committing suicide**, one-half of the wife's property held as a tenant in common with her husband passed to her adopted daughter and thence to her husband, while the other half of her property passed directly to her husband. *Smith v. Greenburg*, 121 Colo. 417, 218 P.2d 514 (1950).

**Husband convicted of murdering his wife may not take.** Though convict was the husband of the deceased, he could not have taken any of his wife's property "by descent, devise, inheritance, or any other manner", because he was convicted of murdering his wife. The petitioners, claiming through convict, would have had no interest in the estate had there been any assets to administer. That the court, in such circumstances, should not have appointed an administrator upon their application is clear. *Rosenboom v. Cline*, 90 Colo. 1, 6 P.2d 453 (1931).

**For purposes of inheritance, convicted killer of decedent must be treated as having predeceased the decedent**, and proceeds of life insurance policies pass directly to named con-

tingent beneficiary as successor-owner. *Seidlitz v. Eames*, 753 P.2d 775 (Colo. App. 1987).

**Convicted killer of spouse may not recover life insurance proceeds.** If a court of competent jurisdiction finds by a preponderance of the evidence that a beneficiary of a life insurance policy is guilty of first or second-degree murder or manslaughter of his spouse, the named insured, the killer, may not recover under that policy. *Bernstein v. Rosenthal*, 671 P.2d 979 (Colo. App. 1983).

**The term "kills" as used in this section is not to be construed narrowly.** It encompasses anyone who causes the death of another, as either principal or accessory, and does not imply actual delivery of the fatal blows. In re Estate of Walker, 847 P.2d 162 (Colo. App. 1992).

**Trial court did not err in determining that decedent's death was caused by a felonious killing and that the statutory cap on noneconomic damages therefore did not apply.** The language, "[n]otwithstanding the status or disposition of a criminal proceeding", is broad enough to allow a court of competent jurisdiction to make a civil determination whether the elements of felonious killing have been established by a preponderance of the evidence, even where the person was acquitted or was convicted of a lesser offense, or where no criminal proceeding was ever initiated. *Estate of Wright ex rel. Wright v. United Serv. Auto. Assn.*, 53 P.3d 683 (Colo. App. 2001).

**This section does not apply** to immunize insurers when the guilt of a beneficiary is established after an insurer's payment of policy proceeds. Instead, a court must apply a negligence standard to the insurer's conduct in paying insurance proceeds to the insured's killer. *Lunsford v. Western States Life Ins. Co.*, 908 P.2d 79 (Colo. 1995) (decided under law in effect prior to the 1994 repeal and reenactment).

**15-11-804. Revocation of probate and nonprobate transfers by divorce; no revocation by other changes of circumstances.** (1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(b) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of section 15-11-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(c) "Divorced individual" includes an individual whose marriage has been annulled.

(d) "Governing instrument" refers to a governing instrument executed by the divorced individual before the divorce or annulment of his or her marriage to his or her former spouse.

(e) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(f) "Revocable" with respect to a disposition, appointment, provision, or nomination,

means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his or her former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself or herself in place of his or her former spouse or in place of his or her former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(2) **Revocation upon divorce.** Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(a) Revokes any revocable (i) disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomination in a governing instrument nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(b) Severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship or as community property with the right of survivorship, transforming the interests of the former spouses into tenancies in common.

(3) **Effect of severance.** A severance under paragraph (b) of subsection (2) of this section does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(4) **Effect of revocation.** Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

(5) **Revival if divorce nullified.** Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(6) **No revocation for other change of circumstances.** No change of circumstances other than as described in this section and in section 15-11-803 effects a revocation.

(7) **Protection of payors and other third parties.** (a) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payor or other third party has received written notice as described in paragraph (b) of this subsection (7). A payor or other third party shall have no duty or obligation to inquire as to the continued marital relationship between the decedent and such beneficiary or to seek any evidence with respect to any such marital relationship. A payor or other third party is only liable for actions taken two or more business days after the payor or other third party has actual receipt of such written notice. Any form or service of notice other than that described in paragraph (b) of this subsection (7) shall not be sufficient to impose liability on a payor or other third party for actions taken pursuant to the governing instrument.

(b) The written notice shall indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a divorce, annulment, or remarriage of the decedent and the designated beneficiary occurred. The written notice shall be mailed to the payor's or other third party's



main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action.

(c) Upon receipt of the written notice described in paragraph (b) of this subsection (7), a payor or other third party may pay to the court any amount owed or transfer to or deposit with the court any item of property held by it. The availability of such actions under this section shall not prevent the payor or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payor or other third party shall file with the court a copy of the written notice received by the payor or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payor or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any item of property, even if no probate proceedings have been commenced before such payment, transfer, or deposit. Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payor or other third party discharges the payor or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(d) The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, shall be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court.

(e) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(8) **Protection of bona fide purchasers; personal liability of recipient.** (a) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. However, a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

**Source:** L. 94: Entire part R&RE, p. 1031, § 3, effective July 1, 1995. L. 95: (2)(a) amended, p. 361, § 14, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (February 2000). For article, "Divorce and the Effects of CRS

§ 15-11-804 on Estate Planning Documents", see 34 Colo. Law. 93 (January 2005).

**Revocation of life insurance policy upon divorce does not violate the prohibition**

**against retrospective legislation**, when statute is enacted after divorce, but before the death of a spouse. Subsection (2) is not retrospective with regard to beneficiaries' and decedents' interests. In re Estate of Becker, 32 P.3d 557 (Colo. App. 2000), aff'd sub nom. In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002).

**Subsection (2) is procedural** because it relates only to a mode of procedure to enforce the right of each decedent to designate a beneficiary. In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002).

**Subsection (2) does not violate the contract clause of either the Colorado or United States Constitution.** This subsection addresses the donative aspect of an insurance contract, and does not impair contracts between decedents and insurance companies. Subsection (2) merely creates a default rule by changing the identity of the presumptive beneficiary, and does not impact any contractual obligations. In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002).

**Real property that was divided in separation agreement and in control of husband did not become former wife's property** by virtue of a joint tenancy right of survivorship after former husband's death due to former wife's failure to execute deed or otherwise transfer her interest in the property to him; instead, decree of dissolution severed former wife's interest in the property. Camack v. Camack, 62 P.3d 1097 (Colo. App. 2002).

**Subsection (7)(c) is in direct conflict with the federal Employee Retirement Income Security Act of 1974 (ERISA) and is thus preempted** (citing Boggs v. Boggs, 520 U.S. 833, 117 S. Ct. 1754, 138 L.Ed.2d 45 (1997)). The relevant "act or omission"—the death of the maker of the annuity contracts—occurred after the effective date of ERISA and the application of federal common law is not appropriate. In re Estate of MacAnally, 20 P.3d 1197 (Colo. App. 2000).

**15-11-805. Ownership of personal property between spouses.** (1) For purposes of this article; tangible personal property in the joint possession or control of the decedent and his or her surviving spouse at the time of the decedent's death is presumed to be owned by the decedent and the decedent's spouse in joint tenancy with right of survivorship if ownership is not otherwise evidenced by a certificate of title, bill of sale, or other writing. This presumption shall not apply to:

- (a) Property acquired by either spouse before the marriage;
- (b) Property acquired by either spouse by gift or inheritance during the marriage;
- (c) Property used by the decedent spouse in a trade or business in which the surviving spouse has no interest; or
- (d) Property held for another.
- (e) (Deleted by amendment, L. 2002, p. 653, § 8, effective July 1, 2002.)
- (2) The presumption created in this section may be overcome by a preponderance of the evidence demonstrating that ownership was held other than in joint tenancy with right of survivorship.

**Source: L. 99:** Entire section added, p. 466, § 4, effective July 1. **L. 2002:** Entire section amended, p. 653, § 8, effective July 1.

#### ANNOTATION

**Applied** in In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

**15-11-806. Reformation to correct mistakes.** The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.

**Source: L. 2009:** Entire section added, (HB 09-1287), ch. 310, p. 1687, § 15, effective July 1, 2010.

**Editor's note:** (1) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act adding this section:

- (a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced



regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

### COMMENT

Added in 2008, Section 2-805 is based on Section 415 of the Uniform Trust Code, which in turn was based on Section 12.1 of the Restatement (Third) of Property: Wills and Other Donative Transfers (2003).

Section 2-805 is broader in scope than Section 415 of the Uniform Trust Code because Section 2-805 applies but is not limited to trusts.

Section 12.1, and hence Section 2-805, is explained and illustrated in the Comments to Section 12.1 of the Restatement and also, in the case of a trust, in the Comment to Section 415 of the Uniform Trust Code.

### ANNOTATION

**Law reviews.** For article, "Correcting Documentary Misdescription With Reformation", see 39 Colo. Law. 97 (August 2010).

**15-11-807. Modification to achieve transferor's tax objectives.** To achieve the transferor's tax objectives, the court may modify the terms of a governing instrument in a manner that is not contrary to the transferor's probable intention. The court may provide that the modification has retroactive effect.

**Source: L. 2009:** Entire section added, (HB 09-1287), ch. 310, p. 1687, § 15, effective July 1, 2010.

**Editor's note:** (1) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act adding this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

### COMMENT

Added in 2008, Section 2-806 is based on Section 416 of the Uniform Trust Code, which in turn was based on Section 12.2 of the Restatement (Third) of Property: Wills and Other Donative Transfers (2003).

Section 2-806 is broader in scope than Section 416 of the Uniform Trust Code because Section 2-806 applies but is not limited to trusts.

Section 12.2, and hence Section 2-806, is explained and illustrated in the Comments to Section 12.2 of the Restatement and also, in the case of a trust, in the Comment to Section 416 of the Uniform Trust Code.

## PART 9

## HONORARY TRUSTS; TRUSTS FOR PETS

**15-11-901. Honorary trusts; trusts for pets.** (1) **Honorary trust.** Subject to subsection (3) of this section, and except as provided under sections 38-30-110, 38-30-111, and 38-30-112, C.R.S., if (i) a trust is for a specific, lawful, noncharitable purpose or for lawful, noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for twenty-one years but no longer, whether or not the terms of the trust contemplate a longer duration.

(2) **Trust for pets.** Subject to this subsection (2) and subsection (3) of this section, a trust for the care of designated domestic or pet animals and the animals' offspring in gestation is valid. For purposes of this subsection (2), the determination of the "animals' offspring in gestation" is made at the time the designated domestic or pet animals become present beneficiaries of the trust. Unless the trust instrument provides for an earlier termination, the trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection (2), to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent. Any trust under this subsection (2) shall be an exception to any statutory or common law rule against perpetuities.

(3) **Additional provisions applicable to honorary trusts and trusts for pets.** In addition to the provisions of subsection (1) or (2) of this section, a trust covered by either of those subsections is subject to the following provisions:

(a) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee, other than reasonable trustee fees and expenses of administration, or to any use other than for the trust's purposes or for the benefit of a covered animal or animals.

(b) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(I) As directed in the trust instrument;

(II) If the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and

(III) If no taker is produced by the application of subparagraph (I) or (II) of this paragraph (b), to the transferor's heirs under part 5 of this article.

(c) (Reserved)

(d) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument, by the person having custody of an animal for which care is provided by the trust instrument, by a remainder beneficiary, or, if none, by an individual appointed by a court upon application to it by an individual.

(e) All trusts created under this section shall be registered and all trustees shall be subject to the laws of this state applying to trusts and trustees.

(f) (Reserved)

(g) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.

**Source:** L. 94: Entire part R&RE, p. 1034, § 3, effective July 1, 1995. L. 95: (2) amended, p. 361, § 15, effective July 1.



## ANNOTATION

**Law reviews.** For article, "The Basics of Pet Trusts for Estate Planning Attorneys", see 37 Colo. Law. 49 (May 2008).

## PART 10

## INTERNATIONAL WILLS

**Law reviews:** For article, "Foreign Jurisdiction Property Interests — the Case for Multiple Wills", see 18 Colo. Law. 1519 (1989).

**15-11-1001. Short title.** This part 10 shall be known and may be cited as the "Uniform International Wills Act".

**Source: L. 89:** Entire part added, p. 811, § 1, effective April 17.

**15-11-1002. Definitions.** As used in this part 10, unless the context otherwise requires:

(1) "Authorized person" and "person authorized to act in connection with international wills" means a person who, by section 15-11-1010 or the laws of the United States, including members of the diplomatic and consular service of the United States designated by Foreign Service Regulations, is empowered to supervise the execution of international wills.

(2) "International will" means a will executed in conformity with sections 15-11-1003 to 15-11-1006.

**Source: L. 89:** Entire part added, p. 811, § 1, effective April 17.

**15-11-1003. International wills - validity.** (1) A will is valid as regards form irrespective particularly of the place where it is made, of the location of the assets, and of the nationality, domicile, or residence of the testator, if it is made in the form of an international will complying with the requirements of this part 10.

(2) The invalidity of a will as an international will does not affect its formal validity as a will of another kind.

(3) This part 10 does not apply to the form of testamentary dispositions made by two or more persons in one instrument.

**Source: L. 89:** Entire part added, p. 811, § 1, effective April 17.

**15-11-1004. International wills - requirements.** (1) An international will shall be made in writing. It need not be written by the testator himself. It may be written in any language by hand or by any other means.

(2) A testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof. Such testator need not inform the witnesses or the authorized person of the contents of the will.

(3) In the presence of the witnesses and of the authorized person the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

(4) If the testator is unable to sign, the absence of his signature shall not affect the validity of the international will if such testator indicates the reason for his inability to sign and the authorized person makes note thereof on the will. In such case, it is permissible for any other person present, including the authorized person or one of the witnesses, at the direction of the testator, to sign the testator's name for him if the authorized person makes note of this on the will, but it is not required that any person sign the testator's name for him.

(5) The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

(6) The provisions of section 15-11-501 shall apply.

**Source: L. 89:** Entire part added, p. 812, § 1, effective April 17.

**15-11-1005. International wills - other points of form.** (1) All the signatures shall be placed at the end of the will. If the will consists of several sheets, each sheet must be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet must be numbered.

(2) The date of the will shall be the date of its signature by the authorized person. Such date shall be noted at the end of the will by the authorized person.

(3) The authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator, the place where he intends to have his will kept shall be mentioned in the certificate provided for in section 15-11-1006.

(4) A will executed in compliance with section 15-11-1004 shall not be invalid as an international will merely because it does not comply with this section.

**Source: L. 89:** Entire part added, p. 812, § 1, effective April 17.

**15-11-1006. Certificate that requirements for an international will have been met.**

(1) The authorized person shall attach to the will a certificate to be signed by him establishing that the requirements of this part 10 for valid execution of an international will have been fulfilled. The authorized person shall keep a copy of the certificate and deliver another to the testator.

(2) The certificate shall be substantially in the following form:

#### CERTIFICATE

1. I, \_\_\_\_\_ (name, address, and capacity), a person authorized to act in connection with international wills,
2. certify that on \_\_\_\_\_ (date) at \_\_\_\_\_ (place)
3. (testator) \_\_\_\_\_  
(name, address, and date and place of birth) in my presence and that of the witnesses
4. (a) \_\_\_\_\_ (name, address, and date and place of birth)  
(b) \_\_\_\_\_ (name, address, and date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.  
\*(c) \_\_\_\_\_ (social security number or any other individual-identifying number established by law)
5. I furthermore certify that:
6. (a) In my presence and in that of the witnesses  
(1) the testator has signed the will or has acknowledged his signature previously affixed.  
\*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason \_\_\_\_\_, I have mentioned this declaration on the will,  
\* and the signature has been affixed by \_\_\_\_\_ (name and address)  
(to be completed if testator unable to sign)
7. (b) the witnesses and I have signed the will;
8. \*(c) each page of the will has been signed by \_\_\_\_\_ and numbered  
(to be completed if testator unable to sign);
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;



\*(f) the intended place of deposit of safekeeping of the instrument pending the death of the testator is \_\_\_\_\_.

11. \*(g) the testator has requested me to include the following statement concerning the safekeeping of his will:

- 
12. PLACE OF EXECUTION  
13. DATE  
14. SIGNATURE

\* to be completed if appropriate

**Source: L. 89:** Entire part added, p. 812, § 1, effective April 17.

**15-11-1007. Effect of certificate.** In the absence of evidence to the contrary, the certificate of the authorized person is conclusive of the formal validity of the instrument as a will under this part 10. The absence or irregularity of a certificate does not affect the formal validity of a will under this part 10.

**Source: L. 89:** Entire part added, p. 814, § 1, effective April 17.

**15-11-1008. Revocation.** An international will is subject to the rules of revocation of wills set forth in part 5 of this article.

**Source: L. 89:** Entire part added, p. 814, § 1, effective April 17.

**15-11-1009. Source and construction of this part.** Sections 15-11-1001 to 15-11-1008 derive from Annex to Convention of October 26, 1973, Providing a Uniform Law on the Form of an International Will. In interpreting and applying this part 10, regard shall be had to its international origin and to the need for uniformity in its interpretation.

**Source: L. 89:** Entire part added, p. 814, § 1, effective April 17.

**15-11-1010. Persons authorized to act in relation to international will - eligibility - recognition by authorizing agency.** Individuals who have been admitted to practice law before the courts of this state and are currently licensed so to do are authorized persons in relation to international wills.

**Source: L. 89:** Entire part added, p. 814, § 1, effective April 17.

**15-11-1011. Filing of international will - certificate and deposit of will.** (1) (a) The authorized person may file, at the time the international will is made, a completed copy of the certificate required by this part 10 with the clerk of the court having probate jurisdiction in the county in which the testator is domiciled.

(b) If the testator is not domiciled in Colorado, the authorized person may file the completed copy of the certificate with the clerk of the court having probate jurisdiction in the county where the international will was executed.

(c) The failure of the authorized person to correctly file a properly completed certificate with the appropriate court shall not in and of itself invalidate the international will.

(2) Nothing in this section shall be construed to limit the ability of the testator or the testator's agent to deposit an international will with any court for safekeeping as authorized in section 15-11-515.

**Source: L. 89:** Entire part added, p. 814, § 1, effective April 17. **L. 94:** (2) amended, p. 1037, § 8, effective July 1, 1995.

## PART 11

## COLORADO STATUTORY RULE AGAINST PERPETUITIES ACT

**Law reviews:** For article, “Colorado Revisits the Rule Against Perpetuities”, see Colo. Law. 75 (November 2006).

**15-11-1101. Short title.** This part 11 shall be known and may be cited as the “Colorado Statutory Rule Against Perpetuities Act”.

**Source: L. 91:** Entire part added, p. 1445, § 9, effective May 31.

**15-11-1102. Statutory rule against perpetuities - applicability - repeal. (Repealed)**

**Source: L. 91:** Entire part added, p. 1445, § 9, effective May 31. **L. 2001:** (1) amended, p. 888, § 4, effective June 1. **L. 2006:** (6) and (7) added, p. 377, § 7, effective July 1.

**Editor’s note:** Subsection (7) provided for the repeal of this section, effective July 1, 2008. (See L. 2006, p. 377.)

**15-11-1102.5. Statutory rule against perpetuities. (1) Year 2001 rule.** (a) Paragraph (b) of this subsection (1) shall apply to interests in trust and powers of appointment with respect to all or any part of a trust, which interest or power is created after May 31, 2001.

(b) (I) A nonvested property interest is invalid unless it either vests or terminates within one thousand years after its creation.

(II) A general power of appointment not presently exercisable because of a condition precedent is invalid unless the condition precedent either is satisfied or becomes impossible to satisfy within one thousand years after its creation.

(III) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless the power is irrevocably exercised or otherwise terminates within one thousand years after its creation.

(2) **Year 1991 rule.** (a) Paragraph (b) of this subsection (2) shall apply to interests and powers created on or after May 31, 1991, other than interests and powers subject to paragraph (b) of subsection (1) of this section.

(b) (I) A nonvested property interest is invalid unless:

(A) When the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual who is then alive; or

(B) The interest either vests or terminates within ninety years after its creation.

(II) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(A) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than twenty-one years after the death of an individual who is then alive; or

(B) The condition precedent either is satisfied or becomes impossible to satisfy within ninety years after its creation.

(III) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(A) When the power is created, it is certain to be irrevocably exercised or to otherwise terminate no later than twenty-one years after the death of an individual who is then alive; or

(B) The power is irrevocably exercised or otherwise terminates within ninety years after its creation.

(IV) In determining whether a nonvested property interest or a power of appointment is valid under subparagraphs (I) to (III) of paragraph (b) of this subsection (2), the



possibility that a child will be born to an individual after the individual's death is disregarded.

(V) If, in measuring a period from the creation of a trust or other property arrangement for purposes of interests, powers, and trusts subject to this paragraph (b), language in a governing instrument seeks to disallow the vesting or termination of any interest or trust beyond, seeks to postpone the vesting or termination of any interest or trust until, or seeks to operate in effect in any similar fashion upon the later of the expiration of a period of time not exceeding twenty-one years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or the expiration of a period of time that exceeds or might exceed twenty-one years after the death of the survivor or lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds twenty-one years after the death of the survivor of the specified lives.

(3) **Nonvested interest or power created by the exercise of a power.** (a) For the purposes of paragraph (a) of subsection (1) of this section, paragraph (a) of subsection (2) of this section, and subparagraph (II) of paragraph (c) of this subsection (3), a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) For the purposes of paragraph (b) of subsection (1) of this section and paragraph (b) of subsection (2) of this section, a power of appointment created by the exercise of a nongeneral power of appointment shall be considered as created when the first power of appointment is created. This paragraph (b) shall be applied and construed in a manner that is consistent with the treatment of the exercise of a nongeneral power of appointment as nontaxable for purposes of the estate and gift tax under the federal internal revenue laws.

(c) (I) Paragraph (b) of subsection (1) of this section shall not apply with respect to nonvested property interests and powers of appointment created by the exercise of a nongeneral power of appointment over all or any part of a trust that was irrevocable on September 25, 1985.

(II) Nonvested property interests and powers of appointment, which interests or powers are so created on or after May 31, 1991, shall be subject to paragraph (b) of subsection (2) of this section.

(III) This paragraph (c) shall be applied and construed in a manner that is consistent with the treatment of such a trust as exempt from the generation-skipping transfer tax under the federal internal revenue laws.

**Source: L. 2006:** Entire section added, p. 378, § 8, effective July 1.

**15-11-1103. When nonvested property interest or power of appointment created.**

(1) Except as provided in subsections (2) and (3) of this section and in sections 15-11-1102.5 (3) (a) and 15-11-1106 (1), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(2) For purposes of this part 11, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of either a nonvested property interest or a property interest subject to a power of appointment described in section 15-11-1102 (2) or (3), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates. For purposes of this part 11, a joint power with respect to community property or to marital property under the "Uniform Marital Property Act" held by individuals married to each other is a power exercisable by one person alone.

(3) For purposes of this part 11, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

**Source: L. 91:** Entire part added, p. 1446, § 9, effective May 31. **L. 2006:** (1) amended, p. 381, § 11, effective July 1.

**15-11-1104. Reformation - repeal. (Repealed)**

**Source:** L. 91: Entire part added, p. 1446, § 9, effective May 31. L. 2006: (2) and (3) added, p. 380, § 9, effective July 1.

**Editor's note:** Subsection (3) provided for the repeal of this section, effective July 1, 2008. (See L. 2006, p. 380.)

**15-11-1104.5. Reformation. (1) Year 2001 rule.** Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the one thousand years allowed by section 15-11-1102.5 (1) (b) (I), (1) (b) (II), or (1) (b) (III) if:

(a) A nonvested property interest or a power of appointment becomes invalid under section 15-11-1102.5 (1) (b); or

(b) A class gift is not, but might become, invalid under section 15-11-1102.5 (1) (b), and the time has arrived when the share of any class member is to take effect in possession or enjoyment.

**(2) Year 1991 rule.** Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety years allowed by section 15-11-1102.5 (2) (b) (I) (B), (2) (b) (II) (B), or (2) (b) (III) (B) if:

(a) A nonvested property interest or a power of appointment becomes invalid under section 15-11-1102.5 (2) (b);

(b) A class gift is not, but might become, invalid under section 15-11-1102.5 (2) (b), and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(c) A nonvested property interest that is not validated by section 15-11-1102.5 (2) (b) (I) (A) can vest but not within ninety years after its creation.

**Source:** L. 2006: Entire section added, p. 380, § 10, effective July 1.

**15-11-1105. Exclusions from statutory rule against perpetuities. (1)** The statutory rule against perpetuities, as set forth in sections 15-11-1102 and 15-11-1102.5, does not apply to invalidate:

(a) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of:

(I) A premarital or postmarital agreement;

(II) A separation or divorce settlement;

(III) A spouse's election;

(IV) A similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties;

(V) A contract to make or not to revoke a will or trust;

(VI) A contract to exercise or not to exercise a power of appointment; or

(VII) A transfer in satisfaction of a duty of support.

(VIII) (Deleted by amendment, L. 2006, p. 381, § 12, effective July 1, 2006.)

(b) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(c) A power to appoint a fiduciary;

(d) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(e) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;



(f) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(g) A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this state.

**Source:** **L. 91:** Entire part added, p. 1447, § 9, effective May 31. **L. 2006:** IP(1) and (1)(a) amended, p. 381, § 12, effective July 1.

**15-11-1106. Prospective application.** (1) Except as extended by subsection (2) of this section, this part 11 applies to a nonvested property interest or a power of appointment that is created on or after May 31, 1991. For purposes of this section and section 15-11-1107, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(2) If a nonvested property interest or a power of appointment was created before May 31, 1991, and is determined in a judicial proceeding, commenced on or after May 31, 1991, to violate this state's rule against perpetuities as that rule existed before May 31, 1991, a court upon the petition of an interested person shall reform the disposition by inserting a savings clause that preserves most closely the transferor's manifested plan of distribution and that brings that plan within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

**Source:** **L. 91:** Entire part added, p. 1448, § 9, effective May 31. **L. 2006:** (1) amended, p. 381, § 13, effective July 1.

#### ANNOTATION

Subsection (2) does not allow a party to bring a new action for reformation after a judicial determination that a property interest violated the common law rule against perpetuities. The statute does not authorize a party to file a second lawsuit, because there is no evidence of the general assembly's intent to create an exception to the doctrine of claim preclusion. *Argus Real Estate, Inc. v. E-470 Pub. Hwy. Auth.*, 109 P.3d 604 (Colo. 2005).

The reformation provision in subsection (2) applies to nondonative transfers, including commercial options. The use of probate terminology to describe the manner in which courts must conduct reformation does not limit the broad language identifying the interests subject to reformation. *Whiting Oil & Gas Co. v. Atl. Richfield Co.*, \_\_ P.3d \_\_ (Colo. App. 2010).

**15-11-1106.5. Retroactive application of certain provisions - notice of election.** (1) Sections 15-11-1102.5 and 15-11-1104.5 shall apply retroactively with respect to an interest in a trust or a power of appointment over all or any part of a trust, which interest or power was created before July 1, 2006, unless a person who owns or holds such interest or power makes and delivers a notice of election as provided in this section.

(2) (a) The notice of election pursuant to subsection (1) of this section shall be a written statement of such person's election against the retroactive application of sections 15-11-1102.5 and 15-11-1104.5. The notice of election shall include a reference to this section, the name and date of the trust, the names of the settlor and the trustee of the trust, a description of the interest or power, and the name and address of the person making the election. The notice of election shall be signed and acknowledged by such person.

(b) The notice of election shall be delivered to a trustee of such trust on or before July 1, 2008. If there is no person serving as trustee at the time delivery is to be made, the notice

of election may instead be delivered to a person authorized to appoint a successor trustee of the trust. When the successor trustee is appointed, the person to whom the notice of election was delivered shall deliver it to the successor trustee.

(c) The notice of election shall be considered delivered to the person to whom delivery is required to be made when the notice of election or a copy thereof is delivered in person or when mailed by registered or certified mail, return receipt requested, to such person.

(d) The trustee of the trust shall file the notice of election with the records maintained by the trustee for the trust. There shall be a rebuttable presumption that the notice of election was not delivered as provided in this section unless the notice of election or a copy of such notice is in the records of the trust maintained by the trustee.

(3) No fiduciary for any trust, estate, individual, or other person with an interest, right, or power affected by the retroactive application of such amendments shall be required to make such election, nor shall such fiduciary be held responsible for not making such election.

**Source: L. 2006:** Entire section added, p. 392, § 27, effective July 1.

**15-11-1107. Uniformity of application and construction.** (1) This part 11 shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this part 11 among states enacting the “Uniform Statutory Rule Against Perpetuities Act”. With respect to any matter relating to the validity of an interest within the rule against perpetuities, unless a contrary intent appears, it shall be presumed that the transferor of the interest intended that the interest be valid.

(2) This part 11 supersedes and abolishes the rule of the common law known as the rule against perpetuities for nonvested interests created after May 31, 1991.

**Source: L. 91:** Entire part added, p. 1448, § 9, effective May 31. **L. 2006:** (2) amended, p. 382, § 14, effective July 1.

## PART 12

### UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT

**15-11-1201. Short title.** This part 12 shall be known and may be cited as the “Uniform Disclaimer of Property Interests Act”.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 859, § 1, effective August 10.

**15-11-1202. Definitions.** As used in this part 12, unless the context otherwise requires:

(1) “Disclaimant” means the person to whom a disclaimed interest or power would have passed if the disclaimer had not been made.

(2) “Disclaimed interest” means the interest that would have passed to the disclaimant if the disclaimer had not been made.

(3) “Disclaimer” means the refusal to accept an interest in or power over property.

(4) “Fiduciary” means a personal representative, trustee, agent acting under a power of attorney, or other person authorized to act as a fiduciary with respect to the property of another person.

(5) “Jointly held property” means property held in the name of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property.

(6) “Person” means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(7) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the



jurisdiction of the United States. The term includes an Indian tribe or band or an Alaskan native village recognized by federal law or formally acknowledged by a state.

(8) “Trust” means:

(a) An express trust, charitable or noncharitable, with additions thereto, whenever and however created; and

(b) A trust created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 859, § 1, effective August 10.

**15-11-1203. Scope.** This part 12 applies to disclaimers of any interest in or power over property, whenever created.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 860, § 1, effective August 10.

**15-11-1204. Part supplemented by other law.** (1) Unless displaced by a provision of this part 12, the principles of law and equity supplement this part 12.

(2) This part 12 does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a law other than this part 12.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 860, § 1, effective August 10.

**15-11-1205. Power to disclaim - general requirements - when irrevocable.** (1) A person may disclaim, in whole or in part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

(2) Except to the extent a fiduciary’s right to disclaim is expressly restricted or limited by another statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity. A fiduciary may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim, or if an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

(3) To be effective, a disclaimer shall be in writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed, and, with regard to an interest in real property, be recorded in the manner provided for in section 15-11-1212. In this subsection (3), “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(4) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.

(5) A disclaimer becomes irrevocable when it is delivered or filed and, with regard to an interest in real property, recorded pursuant to section 15-11-1212, or when it becomes effective as provided for in sections 15-11-1206 through 15-11-1211, whichever occurs later.

(6) A disclaimer made pursuant to this part 12 is not a transfer, assignment, or release.

(7) No person obligated to distribute an interest disclaimed under this part 12 shall be liable to any person for distributing the interest as if the interest were not disclaimed unless the person obligated to distribute the interest receives a copy of the disclaimer prior to distributing the interest.

**Source:** L. 2011: Entire part added, (SB 11-166), ch. 203, p. 860, § 1, effective August 10.

**15-11-1206. Disclaimer of interest in property.** (1) As used in this section, unless the context otherwise requires:

(a) “Future interest” means an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation.

(b) “Method of representation” includes any method of division described in section 15-11-709.

(c) “Time of distribution” means the time when a disclaimed interest would have taken effect in possession or enjoyment.

(2) Except for a disclaimer governed by section 15-11-1207 or 15-11-1208, the following rules apply to a disclaimer of an interest in property:

(a) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate’s death.

(b) The disclaimed interest passes according to any provision in the instrument creating the interest, providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(c) If the instrument does not contain a provision described in paragraph (b) of this subsection (2), the following rules apply:

(I) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant had ceased to exist immediately before the time of distribution.

(II) If the disclaimant is an individual, except as otherwise provided for in subparagraphs (III) and (IV) of this paragraph (c), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(III) If, by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died immediately before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(IV) (A) If the disclaimed interest would pass as part of the disclaimant’s estate had the disclaimant died immediately before the time of distribution, the disclaimed interest instead passes as if by representation to the descendants of the disclaimant who are living at the time of distribution.

(B) If the disclaimed interest would pass as part of the disclaimant’s estate had the disclaimant died immediately before the time of distribution and no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state to which such interest would escheat, but excluding the disclaimant, and in such shares as such persons would succeed to the transferor’s intestate estate under the applicable law had the transferor died at the time of distribution. However, for purposes of this sub-subparagraph (B), if the transferor’s surviving spouse is living but remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.

(C) As used in sub-subparagraph (B) of this subparagraph (IV), “applicable law” refers to the intestate succession law of the transferor’s domicile with respect to a disclaimer of an interest in personal property and refers to the intestate succession law of this state with respect to a disclaimed interest that is real property located in this state.

(D) In addition to other applications of this sub-subparagraph (D) that are apparent, the general assembly declares its intent to have the rules of this sub-subparagraph (D) apply with respect to present interests in real property and personal property that are transferred outright or in trust to an individual by a transferor during the lifetime of the transferor where the interest disclaimed would, if not disclaimed, have vested in the individual to whom the property is transferred and would be part of that individual’s estate if he or she had died immediately after the transfer. Accordingly, this sub-subparagraph (D) shall be so construed to determine the disposition of the present interest. For purposes of the application of the rules to such present interests, the reference to “immediately before the time of distribu-



tion" in sub-subparagraphs (A) and (B) of this subparagraph (IV) shall instead be considered as references to "immediately after the time of distribution".

(E) In sub-subparagraph (D) of this subparagraph (IV), "present interest" means an interest that takes effect in possession or enjoyment, if at all, at the time of its creation.

(d) Upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 861, § 1, effective August 10.

**15-11-1207. Disclaimer of rights of survivorship in jointly held property.**

(1) Upon the death of a holder of jointly held property, a surviving holder may disclaim, in whole or in part, the incremental portion of the jointly held property devolving to the surviving holder by right of survivorship.

(2) A disclaimer pursuant to subsection (1) of this section takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

(3) In the event of a disclaimer pursuant to subsection (1) of this section with only one holder surviving the death of the holder to whose death the disclaimer relates, the incremental portion disclaimed shall, as a consequence of the disclaimer, pass as part of the estate of the deceased holder.

(4) In the event of a disclaimer pursuant to subsection (1) of this section with two or more of the holders surviving the death of the holder to whose death the disclaimer relates:

(a) The disclaimer does not sever the joint tenancy with respect to the jointly held property as among the surviving holders;

(b) The incremental portion disclaimed shall, as a consequence of a disclaimer, devolve to the surviving holders in proportion to their respective interests in the jointly held property excluding the disclaimant and any other surviving holder who disclaims to the extent of his or her disclaimer of the incremental portion;

(c) An incremental portion devolving to a surviving holder, as a consequence of one or more disclaimers, may be disclaimed by the surviving holder;

(d) To the extent that all of the surviving holders disclaim an incremental portion devolving to them, the portion shall instead pass as part of the estate of the deceased holder; and

(e) The proportion of each of the surviving holders with respect to the jointly held property shall be adjusted to take into account the devolution of the incremental portion to the extent that the portion is disclaimed.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 863, § 1, effective August 10.

**15-11-1208. Disclaimer of interest by trustee.** If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 864, § 1, effective August 10.

**15-11-1209. Disclaimer of power of appointment or other power not held in fiduciary capacity.** (1) If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the disclaimer applies only to that holder, and the following rules apply:

(a) If the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable;

(b) If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power; and

(c) The instrument creating the power is construed as if the power expired when the disclaimer became effective.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 864, § 1, effective August 10.

**15-11-1210. Disclaimer by appointee, object, or taker in default of exercise of power of appointment.** (1) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(2) A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 864, § 1, effective August 10.

**15-11-1211. Disclaimer of power held in fiduciary capacity.** (1) If a fiduciary disclaims a power held in a fiduciary capacity that has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(2) If a fiduciary disclaims a power held in a fiduciary capacity that has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(3) A disclaimer pursuant to this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 864, § 1, effective August 10.

**15-11-1212. Delivery or filing.** (1) As used in this section, “beneficiary designation” means an instrument, other than an instrument creating a trust, naming the beneficiary of:

- (a) An annuity or insurance policy;
- (b) An account with a designation for payment on death;
- (c) A security registered in beneficiary form;
- (d) A pension, profit-sharing, retirement, or other employment-related benefit plan; or
- (e) Any other nonprobate transfer at death.

(2) Subject to subsections (3) to (15) of this section, delivery of a disclaimer may be effected by personal delivery, first class mail, or any other method likely to result in its receipt.

(3) In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

(a) A disclaimer shall be delivered to the personal representative of the decedent’s estate; or

(b) If no personal representative is then serving, a disclaimer shall be filed with a court having jurisdiction to appoint a personal representative.

(4) In the case of an interest in a testamentary trust:

(a) A disclaimer shall be delivered to the trustee then serving or, if no trustee is then serving, to the personal representative of the decedent’s estate; or

(b) If no personal representative is then serving, the disclaimer shall be filed with a court having jurisdiction to enforce the trust.

(5) In the case of an interest in an inter vivos trust:

(a) A disclaimer shall be delivered to the trustee then serving;



(b) If no trustee is then serving, the disclaimer shall be filed with a court having jurisdiction to enforce the trust; or

(c) If the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it shall be delivered to the settlor of a revocable trust or the transferor of the interest.

(6) In the case of an interest created by a beneficiary designation made before the time the designation becomes irrevocable, a disclaimer shall be delivered to the person making the beneficiary designation.

(7) In the case of an interest created by a beneficiary designation made after the time the designation becomes irrevocable, a disclaimer shall be delivered to the person obligated to distribute the interest.

(8) In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer shall be delivered to the person to whom the disclaimed interest passes.

(9) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:

(a) The disclaimer shall be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(b) If no fiduciary is then serving, the disclaimer shall be filed with a court having authority to appoint a fiduciary.

(10) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(a) The disclaimer shall be delivered to the holder, the personal representative of the holder's estate, or to the fiduciary under the instrument that created the power; or

(b) If no fiduciary is then serving, the disclaimer shall be filed with a court having authority to appoint a fiduciary.

(11) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer shall be delivered as provided for in subsection (3), (4), or (5) of this section, as if the power disclaimed were an interest in property.

(12) In the case of a disclaimer of a power by an agent, the disclaimer shall be delivered to the principal or the principal's agent, guardian, or conservator.

(13) In the case of a disclaimer of a power not held in a fiduciary capacity, the disclaimer shall be delivered to the fiduciary under the instrument that created the power, or to the person obligated to distribute the property.

(14) Except as provided for in subsections (3) to (8) of this section, in the case of an interest the disposition of which is determined pursuant to section 15-11-1206 (2) (c) (IV), the disclaimer shall be delivered or filed as follows:

(a) Delivered to the transferor of the interest if the transferor is then living;

(b) Delivered to the personal representative of the estate of the transferor, if the transferor is not then living; or

(c) Filed with a court having jurisdiction to appoint a personal representative for the estate of the transferor, if the transferor is not then living and a personal representative of the estate of the transferor is not then serving.

(15) In the case of a disclaimer of an interest in real property in which the disclaimant has a recorded interest, a copy of the disclaimer shall be recorded in the office of the clerk and recorder of the county in which the interest disclaimed is located. For purposes of this subsection (15) and section 15-11-1215, "recorded interest" means an interest in real property that has been recorded in the office of the county clerk and recorder of the county in which the real property is located.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 865, § 1, effective August 10.

**15-11-1213. When disclaimer barred or limited.** (1) A disclaimer is barred by a written waiver of the right to disclaim.

(2) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

(a) The disclaimant accepts the interest sought to be disclaimed;

(b) The disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so; or

(c) A judicial sale of the interest sought to be disclaimed occurs.

(3) A disclaimer, in whole or in part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

(4) A disclaimer, in whole or in part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

(5) A disclaimer is barred or limited if so provided by law other than this part 12.

(6) A disclaimer of a power over property that is barred by this section is ineffective. A disclaimer of an interest in property that is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under this part 12 had the disclaimer not been barred.

(7) Notwithstanding any other provision in this part 12, this part 12 shall not modify the construction of law or application of law with respect to:

(a) A disqualification of medical assistance benefits under title 25.5, C.R.S., to a disclaimant who is or was an applicant for or recipient of such benefits; or

(b) A recovery from the estate of a deceased recipient of such medical assistance benefits.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 867, § 1, effective August 10.

**15-11-1214. Tax-qualified disclaimer.** Notwithstanding any other provision of this part 12, if, as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated pursuant to the provisions of title 26 of the United States internal revenue code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer pursuant to this part 12.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10.

**15-11-1215. Filing or registering of disclaimer.** If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed or registered, the disclaimer may be filed or registered. Failure to file or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer, provided, however, that a disclaimer of an interest in real property in which the disclaimant has a recorded interest is not effective and therefore is not valid as between any persons until a copy of the disclaimer is recorded in section 15-11-1212 (14).

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10.

**15-11-1216. Application to existing relationships.** Except as otherwise provided for in section 15-11-1213, an interest in or power over property existing on August 10, 2011, for which the time for delivering or filing a disclaimer under law superseded by this part 12 has not expired may be disclaimed after August 10, 2011.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10.



**15-11-1217. Uniformity of application and construction.** In applying and construing this part 12, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10.

**15-11-1218. Severability.** If any provision of this part 12 or its application to any person or circumstance is held invalid, the invalidity shall not affect any other provision or application of this part 12 that can be given effect without the invalid provision or application.

**Source: L. 2011:** Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10.

## ARTICLE 12

### Probate of Wills and Administration

**Editor's note:** For historical information concerning the repeal and reenactment of articles 10 to 17 of this title, see the editor's note immediately preceding article 10.

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PART 1

GENERAL PROVISIONS

**15-12-101. Devolution of estate at death; restrictions.** The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of the testate estate or, in the absence of testamentary disposition, to his heirs or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to exempt property and family allowances, rights of creditors, elective share of the surviving spouse, and administration.



**Source:** L. 73: R&RE, p. 1565, § 1. C.R.S. 1963: § 153-3-101. L. 75: Entire section amended, p. 594, § 22, effective July 1.

**Cross references:** For intestate succession, see article 11 of this title; for the elective share of a surviving spouse, see § 15-11-201; for exempt property allowance and family allowance, see §§ 15-11-403 and 15-11-404, respectively; for lapse of a devise, see § 15-11-511 (3); for renunciation of succession, see the “Uniform Disclaimer of Property Interests Act”, part 12 of article 11 of this title; for rights of creditors, see part 8 of this article.

**15-12-102. Necessity of order of probate for will.** Except as provided in sections 15-12-901, 15-12-1201, 15-13-204, and 15-13-205 and in part 13 of this article, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court.

**Source:** L. 73: R&RE, p. 1565, § 1. C.R.S. 1963: § 153-3-102. L. 2011: Entire section amended, (SB 11-083), ch. 101, p. 303, § 4, effective August 10.

**15-12-103. Necessity of appointment for administration.** Except as otherwise provided in article 13 of this title, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or registrar, qualify, and be issued letters. Administration of an estate is commenced by the issuance of letters.

**Source:** L. 73: R&RE, p. 1565, § 1. C.R.S. 1963: § 153-3-103.

**15-12-104. Claims against decedent.** No claim may be presented and no proceeding to enforce a claim against the estate of a decedent or his or her successors may be revived or commenced before the appointment of a personal representative, except as permitted by section 15-12-804. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article. After distribution, a creditor whose claim has not been barred may recover from the distributees as provided in section 15-12-1004 or from a former personal representative individually liable as provided in section 15-12-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his or her right to his or her security except as to any deficiency judgment that might be sought therein.

**Source:** L. 73: R&RE, p. 1565, § 1. C.R.S. 1963: § 153-3-104. L. 2006: Entire section amended, p. 373, § 1, effective July 1.

#### ANNOTATION

**Applied** in *Price v. Sommermeyer*, 195 Colo. 285, 577 P.2d 752 (1978).

**15-12-105. Proceedings affecting devolution and administration - jurisdiction of subject matter.** Persons interested in decedents' estates may apply to the registrar for determination in the informal proceedings provided in this article and may petition the court for orders in formal proceedings within the court's jurisdiction. The court has jurisdiction as provided in section 15-10-302.

**Source:** L. 73: R&RE, p. 1566, § 1. C.R.S. 1963: § 153-3-105.

**15-12-106. Proceedings within the exclusive jurisdiction of court - service - jurisdiction over persons.** In proceedings where notice is required by this code or by rule, interested persons may be bound by the orders of the court in respect to property in or

subject to the laws of this state by notice in conformity with section 15-10-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

**Source:** L. 73: R&RE, p. 1566, § 1. C.R.S. 1963: § 153-3-106.

**15-12-107. Scope of proceedings - proceedings independent - exception.** (1) Unless supervised administration as described in part 5 of this article is involved:

(a) Each proceeding before the court or registrar is independent of any other proceeding involving the same estate;

(b) Petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this article, no petition is defective because it fails to embrace all matters which might then be the subject of a final order;

(c) Proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and

(d) A proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

**Source:** L. 73: R&RE, p. 1566, § 1. C.R.S. 1963: § 153-3-107.

#### ANNOTATION

This section, along with the definition of “proceeding” in § 15-10-201, instructs that unsupervised administration of an estate may involve multiple proceedings, that a petition initiates an independent proceeding and defines its scope, and that a single proceeding may dispose of multiple claims. *Scott v. Scott*, 136 P.3d 892 (Colo. 2006).

The initial petition outlines a set of claims and begins a proceeding. Subsequent pleadings that relate to that set of claims are part of the same proceeding. *Scott v. Scott*, 136 P.3d 892 (Colo. 2006).

Section inapplicable to informal proceeding regarding a claim for services against the

estate, as section specifically relates to petitions for formal orders of the court. In *re Estate of Bell*, 4 P.3d 504 (Colo. App. 2000).

**Res judicata does not apply to bar** challenge to the validity of a will when former informal dispute was over distribution of the estate and not a claim against the estate. Res judicata only operates as a bar to a second action on a claim that was litigated in a prior proceeding when there is a final judgment and identity of subject matter, claims for relief, and parties to the action. In *re Estate of Bell*, 4 P.3d 504 (Colo. App. 2000).

#### **15-12-108. Probate, testacy, and appointment proceedings - ultimate time limit.**

(1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

(a) If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceedings;

(b) Appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person; and

(c) A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within the later of twelve months from the informal probate or three years from the decedent's death.



- (2) These limitations do not apply to:
- (a) Proceedings to construe probated wills; or
  - (b) Proceedings to determine heirs of an intestate and related appointment proceedings;
- or
- (c) Appointment proceedings and testacy proceedings if no previous testacy proceedings or proceedings determining heirship relating to the decedent's estate have been concluded in this state.
- (3) In cases under subsection (1) of this section, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purpose of other limitation provisions of this code which relate to the date of death.

**Source:** L. 73: R&RE, p. 1566, § 1. C.R.S. 1963: § 153-3-108. L. 77: (2) R&RE, p. 833, § 14, effective July 1. L. 79: (2)(b) and (2)(c) amended, p. 657, § 1, effective May 25.

### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

The Colorado probate code cannot be deemed to indicate a legislative intent to eradicate all time limitations. In re Estate of Wehling, 37 Colo. App. 276, 547 P.2d 1289 (1976), aff'd sub nom. Kropp v. Farmers Ins. Exch., 93 Colo. 144, 563 P.2d 943 (1977).

**This statute is a statute of limitations, and not a non-claim statute depriving the probate court of jurisdiction.** In re Estate of Kubby, 929 P.2d 55 (Colo. App. 1996).

**Because § 15-10-106 provides an adequate legal remedy for plaintiff's claim that her son fraudulently induced her into not contesting her husband's will, the statute of limitations in this section is not subject to equitable tolling.** In re Kubby, 929 P.2d 55 (Colo. App. 1996).

**15-12-109. Statutes of limitations on decedent's cause of action.** No statute of limitations running on a cause of action belonging to a decedent which had not been barred as of the date of his death shall apply to bar a cause of action surviving the decedent's death sooner than one year after death. A cause of action which, but for this section, would have been barred less than one year after death is barred after one year unless tolled.

**Source:** L. 73: R&RE, p. 1567, § 1. C.R.S. 1963: § 153-3-109. L. 79: Entire section amended, p. 629, § 2, effective July 1.

### PART 2

#### VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER; DEMAND FOR NOTICE

**15-12-201. Venue for first and subsequent estate proceedings - location of property.** (1) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

- (a) In the county where the decedent had his domicile or his residence at the time of his death; or
- (b) If the decedent was not domiciled in nor a resident of this state, in any county where property of the decedent was located at the time of his death.

(2) Venue for all subsequent proceedings within the exclusive jurisdiction of the court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in section 15-10-303 or subsection (3) of this section.

(3) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

(4) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving nondomiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a nondomiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper, and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

**Source:** L. 73: R&RE, p. 1567, § 1. C.R.S. 1963: § 153-3-201. L. 77: (1)(a) amended, p. 833, § 15, effective July 1. L. 96: (1)(b) amended, p. 659, § 10, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Administration of Testate Estates", see 29 Rocky Mt. L. Rev. 557 (1957). For article, "One Year Review of Torts", see 36 Dicta 64 (1959). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "Decedents' Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986).

**Annotator's note.** Since § 15-12-201 is similar to repealed § 152-1-3, CRS 53, CSA, C. 176, § 71, and laws antecedent thereto relevant cases construing those provisions have been included in the annotations to this section.

A will should be first admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed prima facie to base its adjudication respecting the last domicile upon sufficient evidence, and under such circumstances, the probate and record thereof can only be questioned by some appellate or direct proceeding. *Corrigan v. Jones*, 14 Colo. 311, 23 P. 913 (1890); *Estate of Vilm v. Vilm*, 134 Colo. 43, 299 P.2d 513 (1956).

Although provision of section is mandatory it may be waived. The provisions of this section, that administration of the estate of every decedent shall be had in the district court of his last known residence, is mandatory; but it may nevertheless be waived. *Miller v. Weston*, 25 Colo. App. 231, 138 P. 424 (1914).

A district court sitting in probate has exclusive jurisdiction to hear all claims presented, and a claimant has no option to file

suit in another court after the issuance of letters, hence a district court is without jurisdiction of an action against the executor of deceased's estate in an action for wrongful death, for which a claim had been filed in the estate. *Miller v. Weston*, 25 Colo. App. 231, 138 P. 424 (1914); *Koon v. Barmettler*, 134 Colo. 221, 301 P.2d 713 (1956); *Weller v. Bank of Vernal*, 137 Colo. 32, 321 P.2d 216 (1958); *Meyers v. Williams*, 137 Colo. 325, 324 P.2d 788 (1958).

Where jurisdiction depends upon a question of fact, it must be taken advantage of in apt time and in the right manner. *Miller v. Weston*, 67 Colo. 534, 189 P. 610 (1920).

If a case is pending at the time of the death of a decedent, then the jurisdiction lies in that court having acquired jurisdiction during the lifetime, and the filing of the claims in the probate court is only for the purpose of showing assets, in other words, complying with that portion of the statute concerning the unliquidated or unmatured claims. *Film Enters., Inc. v. Wolfberg*, 137 Colo. 84, 321 P.2d 218 (1958).

**Administrator subject to direction of court.** The administrator of the estate of a deceased person is a creature of the court, wholly subject to its directions in estate matters, and the court retains jurisdiction until the estate is finally closed and the administrator discharged. *People v. Cartwright*, 99 Colo. 437, 63 P.2d 454 (1936).

**Situs courts have usually applied their own local law** to determine the validity of a will insofar as it affects interests in local land even though the testator died domiciled in another state. *Wimbush v. Wimbush*, 41 Colo. App. 289, 587 P.2d 796 (1978).

**15-12-202. Reserved.**

**15-12-203. Priority among persons seeking appointment as personal representative.** (1) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(a) The person with priority as determined by a probated will including a person nominated by a power conferred in a will;

(b) The surviving spouse of the decedent who is a devisee of the decedent;



(b.5) A person given priority to be a personal representative in a designated beneficiary agreement made pursuant to article 22 of this title;

(c) Other devisees of the decedent;

(d) The surviving spouse of the decedent;

(e) Other heirs of the decedent;

(f) Forty-five days after the death of the decedent, any creditor.

(2) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in subsection (1) of this section apply, except that:

(a) If the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;

(b) In case of objection to appointment of a person, other than one whose priority is determined by will, by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value or, in default of this accord, any suitable person.

(3) A person entitled to letters under paragraphs (b) to (e) of subsection (1) of this section and a person between the ages of eighteen and twenty-one who would be entitled to letters but for his age may nominate a qualified person to act as personal representative. Any person eighteen years of age or older may renounce his right to nominate or to an appointment by appropriate writing filed with the court. When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them or in applying for appointment.

(4) Conservators of the estates of protected persons or, if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(5) Appointment of a person with priority, a person who is nominated pursuant to subsection (3) of this section, or a person whose entitlement to appointment results from renunciation by another person with priority may be made in an informal proceeding. Before formal appointment of one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment and that administration is necessary.

(6) No person is qualified to serve as a personal representative who is:

(a) Under the age of twenty-one;

(b) A person whom the court finds unsuitable in formal proceedings.

(7) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(8) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

(9) If there be more than one fiduciary of an estate, and one of such fiduciaries shall die, resign, or be removed, the court may in its discretion appoint a successor fiduciary to act in place and instead of the former fiduciary, together with the remaining fiduciary or fiduciaries, or the court may permit the remaining fiduciary or fiduciaries to serve without any new or additional fiduciary; except that, if there be a will providing for the fiduciaries, the provisions of the will shall control when applicable.

**Source:** L. 73: R&RE, p. 1567, § 1. C.R.S. 1963: § 153-3-203. L. 91: (5) amended, p. 1449, § 10, effective July 1. L. 93: (2)(b) and (5) amended, p. 513, § 2, effective July 1. L. 2009: (1) amended, (HB 09-1260), ch. 107, p. 444, § 10, effective July 1. L. 2010: (1)(b.5) amended, (SB 10-199), ch. 374, p. 1751, § 13, effective July 1.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (1)(b.5):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

The priorities applicable to informal proceedings are applicable to formal proceedings. However, if the proceedings are formal, a person with a substantial interest may object to the selection of one having priority other than because of will provisions. The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the Court, and a judge capable of handling discretionary matters, will be involved.

In considering this section as it relates to a devise to a trustee for various beneficiaries, it is to be noted that "interested persons" is defined by 1-201(20) to include fiduciaries. Also, 1-403(2) and 3-912 show a purpose to make trustees serve as representatives of all beneficiaries. The provision in (d) is consistent.

If a state's statutes recognize a public administrator or public trustee as the appropriate agency to seek administration of estates in which the state may have an interest, it would be

appropriate to indicate in this section the circumstances under which such an officer may seek administration. If no officer is recognized locally, the state could claim as heir by virtue of 2-105.

Subsection (g) was inserted in connection with the decision to abandon the effort to describe ancillary administration in Article IV. Other provisions in Article III which are relevant to administration of assets in a state or other than that of the decedent's domicile are 1-301 (territorial effect), 3-201 (venue), 3-308 (informal appointment for non-resident decedent delayed 30 days), 3-309 (no informal appointment here if a representative has been appointed at domicile), 3-815 (duty of personal representative where administration is in more than one state) and 4-201 to 4-205 (local recognition of foreign personal representatives).

The meaning of "spouse" is determined by Section 2-802.

## ANNOTATION

**Law reviews.** For article, "Administration of Intestate Estates", see 29 Rocky Mt. L. Rev. 571 (1957). For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986). For article, "Decedents' Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986).

**Annotator's note.** Since § 15-12-203 is similar to repealed § 152-7-1, CRS 53, CSA, C. 176, § 74, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Section 15-12-619 of this title modifies this section** insofar as it defines the right to administer estates in any county having a population of more than 20,000. In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

**Exclusive right of husband to administer does not exist.** The common-law right of the husband surviving the wife to exclusively administer upon and enjoy her personal estate does not here exist. Goodrich v. Treat, 3 Colo. 408 (1877).

**Statutes which establish priorities of those preferentially entitled to administer estates are mandatory,** and may not be disregarded by courts if the person entitled to the preference is not otherwise disqualified, and this disqualification must be made to appear by competent evidence, and the burden of showing the disqualification is upon the one asserting it. Thompson v. Jack, 90 Colo. 470, 10 P.2d 947 (1932); In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

**In a collateral proceeding the court may not inquire whether the letters were issued to a person entitled to them or not.** As the judge of probate had competent jurisdiction of the cause, the regularity of the administrator's appointment can only be questioned in a direct proceeding for that purpose. Denver, etc., Ry. v. Woodward, 4 Colo. 1 (1877).

**This section gives husband, widow, or next of kin a preferential right of administration.** Rosenboom v. Cline, 90 Colo. 1, 6 P.2d 453



(1931).

**Child who was sole heir of natural father had statutory priority to be appointed personal representative** of father's estate pursuant to the provisions of this section and trial court improperly denied the child's motion to remove the personal representative as the child was not bound by the court's prior rulings when she was not a party or in privity with the movant. *Matter of Estate of Bomareto*, 757 P.2d 1135 (Colo. App. 1988).

**Where probate court finds that appointment of a special administrator is necessary** under § 15-12-614, court may appoint any proper person as such under § 15-12-615 notwithstanding this section's provisions governing priority of appointment of a personal representative. In *re Estate of Franchs*, 722 P.2d 422 (Colo. App. 1986).

**It is immaterial who presents the petition and facts as a result of which administration is granted.** *Rosenboom v. Cline*, 90 Colo. 1, 6 P.2d 453 (1931).

**Appointment of "next of kin" rests in the discretion of the court.** This section provides that in granting administration the husband or widow, if such there be, shall be preferred. If none such, or if that right be relinquished, then the preference, for 45 days, goes to the "other heirs of the decedent". In *re Woody's Estate*, 93 Colo. 169, 24 P.2d 754 (1933).

**Parties entitled to apply for administration may waive their rights.** *Denver, etc., Ry. v. Woodward*, 4 Colo. 1 (1877).

**Where petition of husband states grounds for relief from fraud.** Petition of a surviving husband who had not applied for letters of administration within the period of time prescribed

by this section to remove the administrator of his wife's estate and to set aside an order allowing a claim against it alleged to have been procured by fraud, states grounds for the relief sought. *Koshir v. Snedec*, 82 Colo. 245, 259 P. 4 (1927).

**Where appointment of noncreditor is reversible error.** Appointment of a noncreditor as the administrator of an estate over the objection and instead of a petitioning creditor is reversible error. In *re Webb's Estate*, 90 Colo. 470, 10 P.2d 947 (1932).

**No power of nomination for the appointment of administrators is conferred upon creditors** of an estate by this section, and they have nothing to relinquish so far as such appointments are concerned. In *re Webb's Estate*, 90 Colo. 470, 10 P.2d 947 (1932).

**Holder of option to purchase land at death of decedent is not "creditor"** of the estate within the meaning of subsection (1)(f) and cannot instigate the appointment of a personal representative. *Brown v. Brown*, 43 Colo. App. 535, 608 P.2d 840 (1980).

**The granting of letters of administration is a judicial act of the judge.** He may judicially determine whether he has jurisdiction over the matters before him, must determine the approximate value of the estate, determine the person to be appointed administrator, fix and approve the bond required, and administer the oath. These acts require judicial discretion. *Jackson v. Bates*, 133 Colo. 248, 293 P.2d 962 (1956).

**Nominee is conferred with priority status of nominating daughters.** Although nominee had no priority status in his own right, the daughters' priority was conferred to him. In *re Estate of Newton*, \_\_ P.3d \_\_ (Colo. App. 2011).

**15-12-204. Demand for notice of order or filing concerning decedent's estate.** Any person desiring notice of any order or filing pertaining to a decedent's estate in which he has a financial or property interest may file a demand for notice with the court at any time after the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant's address or that of his attorney. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in section 15-10-401 to the demandant or his attorney. The validity of an order which is issued or filing which is accepted without compliance with this requirement shall not be affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate.

**Source:** L. 73: R&RE, p. 1569, § 1. C.R.S. 1963: § 153-3-204.

## PART 3

### INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS

**15-12-301. Informal probate or appointment proceedings - application - contents.**  
(1) Applications for informal probate or informal appointment shall be directed to the

registrar and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the information required by this section.

(2) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special or successor representative, shall contain the following:

- (a) A statement of the interest of the applicant;
  - (b) The name and date of death of the decedent, his age, and the county and state of his domicile at the time of death, and the names and addresses of the spouse, children, heirs, and devisees, and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;
  - (c) If the decedent was not domiciled in the state at the time of his death, a statement showing venue;
  - (d) A statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated;
  - (e) A statement indicating whether the applicant has received a demand for notice or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere;
  - (f) A statement indicating that the time limit for informal probate or appointment provided in this article has not expired either because three years or less have passed since the decedent's death or, if more than three years have passed since the decedent's death, because the circumstances described in section 15-12-108 authorizing tardy probate or appointment have occurred.
- (3) An application for informal probate of a will shall state the following in addition to the statements required by subsection (2) of this section:
- (a) That the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of a will probated in another jurisdiction accompanies the application;
  - (b) That the applicant, to the best of his knowledge, believes the will to have been validly executed;
  - (c) That after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will.
  - (d) Repealed.
- (4) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address, and priority for appointment of the person whose appointment is sought.
- (5) An application for informal appointment of an administrator in intestacy shall state, in addition to the statements required by subsection (2) of this section:
- (a) That after the exercise of reasonable diligence, the applicant is unaware of any unrevoked will relating to property having a situs in this state under section 15-10-301 or a statement why any such will of which he may be aware is not being probated;
  - (b) The priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under section 15-12-203.
  - (6) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.
  - (7) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in section 15-12-610 (3) or whose appointment has been terminated by death or removal shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.



**Source:** L. 73: R&RE, p. 1569, § 1. C.R.S. 1963: § 153-3-301. L. 77: (2)(f) amended and (3)(d) repealed, pp. 833, 837, §§ 16, 27, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**15-12-302. Informal probate - duty of registrar - effect of informal probate.** Upon receipt of an application requesting informal probate of a will, the registrar, upon making the findings required by section 15-12-303, shall issue a written statement of informal probate. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

**Source:** L. 73: R&RE, p. 1571, § 1. C.R.S. 1963: § 153-3-302.

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**15-12-303. Informal probate - proof and findings required.** (1) In an informal proceeding for original probate of a will, the registrar shall determine that:

- (a) The application is complete;
- (b) The applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (c) The applicant appears from the application to be an interested person as defined in section 15-10-201 (27);
- (d) On the basis of the statements in the application, venue is proper;
- (e) An original, duly executed, and apparently unrevoked will is in the registrar's possession;
- (f) Any notice required by section 15-12-204 has been given and that the application is not within section 15-12-304;
- (g) It appears from the application that the time limit for original probate has not expired; and
- (h) One hundred twenty hours have elapsed since decedent's death.

(2) The application shall be denied if it indicates that a personal representative has been appointed in another county of this state or, except as provided in subsection (4) of this section, if it appears that this or another will of the decedent has been the subject of a previous probate order.

(3) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under section 15-11-502, 15-11-503, or 15-11-506 have been met shall be probated without further proof. In other cases, the registrar may assume execution if the will appears to have been properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(4) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(5) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (1) of this section may be probated in this

state upon receipt by the registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

**Source:** L. 73: R&RE, p. 1571, § 1. C.R.S. 1963: § 153-3-303. L. 94: (1)(c) amended, p. 1037, § 9, effective July 1, 1995.

**Cross references:** For establishment of lost or destroyed will, see § 15-12-402 (3).

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**Practice and procedure under this section.** It will be observed that the court is not required in express terms to hear the testimony of any witnesses except those who attested the will. No provision is made for a contest. Upon the hearing of "such proof", that is the testimony of the attesting witnesses that the will was properly signed and attested, and that they believe the testator was of sound mind and memory at the time it was signed and acknowledged, the court is compelled to admit the will to probate and record, provided that no proof of fraud, compulsion, or improper conduct be exhibited, which in the opinion of the court shall be deemed sufficient to invalidate or destroy it. It is true that the proviso in this section contains an implied permission, presumably to interested parties, to offer testimony tending to invalidate the will on account of fraud, compulsion, or other improper conduct, and there is of course implied authority to receive it, but no practice or procedure is

specified, and no provision made for a hearing or trial in which the persons offering such evidence shall have a standing as parties. It will be seen too, that no authority is given for the exhibition or reception of any proof impeaching the validity of the will for want of testamentary capacity by the testator. In either case, a would-be contestant therefore, although present in obedience to the citation of the court, would have no standing in the court as a party to a suit, with the rights and privileges thereto attaching, if it be held that the practice and procedure in this respect are only such as are in terms permitted or directed by the statute. The authority therefor is derived from the practice which prevailed before the enactment of the statute, so far as it has not been changed thereby nor become inconsistent therewith. The mode of procedure and practice on the hearing of probate wills is not expressly provided by statute. *Clough v. Clough*, 10 Colo. App. 433, 51 P. 513 (1897) (decided under repealed laws antecedent to CSA, C. 176, § 56).

**15-12-304. Informal probate - unavailable in certain cases.** Applications for informal probate which relate to one or more of a known series of testamentary instruments (other than a will and one or more codicils thereto), the latest of which does not expressly revoke the earlier, shall be declined.

**Source:** L. 73: R&RE, p. 1572, § 1. C.R.S. 1963: § 153-3-304. L. 77: Entire section amended, p. 834, § 17, effective July 1.

**15-12-305. Informal probate - registrar not satisfied.** If the registrar is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of sections 15-12-303 and 15-12-304 or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

**Source:** L. 73: R&RE, p. 1572, § 1. C.R.S. 1963: § 153-3-305.

**15-12-306. Informal probate - notice and information requirements.** The moving party must give notice as described by section 15-10-401 of his application for informal probate to any person demanding it pursuant to section 15-12-204 and to any personal representative of the decedent whose appointment has not been terminated. If a personal representative has not been appointed, then not later than thirty days after a will has been informally probated the moving party shall give information of the probate to the persons



and in the manner prescribed by section 15-12-705 and shall promptly file with the court a statement that such information has been given, to whom, and at what addresses, if mailed. No other notice of informal probate is required.

**Source:** L. 73: R&RE, p. 1572, § 1. C.R.S. 1963: § 153-3-306. L. 75: Entire section amended, p. 595, § 23, effective July 1.

**15-12-307. Informal appointment proceedings - delay in order - duty of registrar - effect of appointment.** (1) Upon receipt of an application for informal appointment of a personal representative other than a special administrator as provided in section 15-12-614, the registrar, after making the findings required by section 15-12-308, shall appoint the applicant subject to qualification and acceptance; except that, if the decedent was a nonresident, the registrar shall delay the order of appointment until thirty days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this state.

(2) The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in sections 15-12-608 to 15-12-612, but is not subject to retroactive vacation.

**Source:** L. 73: R&RE, p. 1572, § 1. C.R.S. 1963: § 153-3-307.

**15-12-308. Informal appointment proceedings - proof and findings required.**

(1) In informal appointment proceedings, the registrar must determine that:

- (a) The application for informal appointment of a personal representative is complete;
- (b) The applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (c) The applicant appears from the application to be an interested person as defined in section 15-10-201 (27);
- (d) On the basis of the statements in the application, venue is proper;
- (e) Any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;
- (f) Any notice required by section 15-12-204 has been given;
- (g) From the statements in the application, the person whose appointment is sought has priority entitling him to the appointment;
- (h) One hundred twenty hours have elapsed since the decedent's death.

(2) Unless section 15-12-612 controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in section 15-12-610 (3) has been appointed in this or another county of this state, that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met.

**Source:** L. 73: R&RE, p. 1572, § 1. C.R.S. 1963: § 153-3-308. L. 94: (1)(c) amended, p. 1037, § 10, effective July 1, 1995.

**15-12-309. Informal appointment proceedings - registrar not satisfied.** If the registrar is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of sections 15-12-307 and 15-12-308 or for any other reason, he may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

**Source:** L. 73: R&RE, p. 1573, § 1. C.R.S. 1963: § 153-3-309.

**15-12-310. Informal appointment proceedings - notice requirements.** (1) The moving party must give notice as described by section 15-10-401 of his intention to seek an appointment informally:

- (a) To any person demanding it pursuant to section 15-12-204; and
  - (b) To any person having a prior or equal right to appointment not waived in writing and filed with the court.
- (2) No other notice of an informal appointment proceeding is required.

**Source:** L. 73: R&RE, p. 1573, § 1. C.R.S. 1963: § 153-3-310.

**15-12-311. Informal appointment unavailable in certain cases.** If an application for informal appointment indicates the existence of a possible unrevoked will which may relate to property subject to the laws of this state and which is not filed for probate in this court, the registrar shall decline the application.

**Source:** L. 73: R&RE, p. 1573, § 1. C.R.S. 1963: § 153-3-311.

#### PART 4

#### FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

**Law reviews:** For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

**15-12-401. Formal testacy proceedings - nature - when commenced.** (1) A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in section 15-12-402 (1) in which he requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with section 15-12-402 (4) for an order that the decedent died intestate.

(2) A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

(3) During the pendency of a formal testacy proceeding, the registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

(4) Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

**Source:** L. 73: R&RE, p. 1573, § 1. C.R.S. 1963: § 153-3-401.

#### ANNOTATION

**Law reviews.** For article, "Recent Statutes", see 4 Den. B. Ass'n Rec. 11 (1927). For article, "In Re: The Mourners", see 6 Dicta 7 (1929). For note, "A Survey of the Colorado Torrens



Act", see 5 Rocky Mt. L. Rev. 149 (1933). For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Again — How Many Times?", see 21 Dicta 62 (1944). For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "Practical Problems of Evidence in Real Estate Titles", see 24 Rocky Mt. L. Rev. 430 (1952). For article, "Administration of Intestate Estates", see 29 Rocky Mt. L. Rev. 571 (1957). For article, "Court Proceedings Relating to Real Estate Titles", see 35 U. Colo. L. Rev. 65 (1962). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**Annotator's note.** Cases relevant to § 15-12-401 decided prior to its earliest source, § 153-3-401, C.R.S. 1963, have been included in the annotations to this section.

**The purpose of a proceeding to contest a will** is to divest the legatees and devisees of rights in the estate of the testator and to vest the property in his heirs at law or in the beneficiaries named in another will. Unless the contestant will take or may take by an adjudication that the will in question is invalid he has not sufficient interest to give him legal standing to contest its validity. *In re Stoiber's Estate*, 101 Colo. 192, 72 P.2d 276 (1937).

**The right to contest the validity of a probate may be exercised by any person whose interests are affected** by the will so established, whether such will be domestic or foreign. *Foster v. Kragh*, 107 Colo. 389, 113 P.2d 666 (1941).

**A guardian ad litem appointed to represent persons under legal disability in an estate matter is not an aggrieved person**, and has no standing to prosecute a writ of error to the supreme court from a decree of heirship entered in the probate court finding a named person to be the sole and only heir at law of the deceased. *Miller v. Clark*, 144 Colo. 431, 356 P.2d 965 (1960).

**Likewise, a wife has no standing to contest the will of her deceased husband where the husband and wife entered into a separation agreement**, and following its execution no claim of duress, overreaching, fraud, coercion, or complaint of any nature regarding the property settlement is made until after the death of the husband, during which time the wife kept possession of the assets acquired under the agreement. *Thomas v. Eaton*, 138 Colo. 512, 335 P.2d 270 (1959).

**Applied in** *In re Estate of Dandrea*, 40 Colo. App. 547, 577 P.2d 1112 (1978); *Ayres v. King*, 665 P.2d 594 (Colo. 1983).

### **15-12-402. Formal testacy or appointment proceedings - petition - contents.**

(1) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will shall:

(a) Request an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(b) Contain the statements required for informal applications as stated in section 15-12-301 (2) and the statements required by section 15-12-301 (3); and

(c) State whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

(2) If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.

(3) If a will has been lost or destroyed, or for any other reason is unavailable, and the fact of the execution thereof is established, as herein provided, and the contents thereof are likewise established to the satisfaction of the court, and the court is satisfied that the will has not been revoked by the testator, the court may admit the same to probate and record, as in other cases. In every such case the order admitting such will to probate shall set forth the contents of the will at length, and the names of the witnesses by whom the same was proved, and such order shall be recorded in the record of wills.

(4) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by section 15-12-301 (2) and (5), and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case the statements required by section 15-12-301 (5) (b) may be omitted.

**Source:** L. 73: R&RE, p. 1574, § 1. C.R.S. 1963: § 153-3-402. L. 79: (3) amended, p. 649, § 8, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "Evidence in Estate Proceedings", see 24 Rocky Mt. L. Rev. 437 (1952). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**Annotator's note.** Since § 15-12-402 is similar to repealed § 153-5-28, C.R.S. 1963, § 152-5-29, CRS 53, CSA, C. 176, § 57, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**The standards established in this section control whether a will may be admitted to probate.** Although C.R.E. 1003 and 1004 may allow for admission into evidence of duplicates in lieu of originals, when an original will is lost or destroyed, the standards specified in this section will control whether the will can be admitted to probate. In *re Estate of Perry*, 33 P.3d 1235 (Colo. App. 2001).

**To establish a lost will under this section, the proponent must prove that such will has been lost or destroyed or is otherwise unavailable and that it was properly executed; that it was in existence at the time of the death of the testator; and its contents.** Failure to prove any one of such elements results in denial of probate. *Todd v. Rennick*, 13 Colo. 546, 22 P. 898 (1889); *Estate of Eder*, 94 Colo. 173, 29 P.2d 631 (1934); *Estate of Varnum v. Witt*, 144 Colo. 422, 357 P.2d 370 (1960).

**To prove the contents of a purported last will, the standard is that the proof must be "clear and strong".** *Estate of Varnum v. Witt*, 144 Colo. 422, 357 P.2d 370 (1960).

**Likewise, proof of the existence of the will should be clear and strong.** *Estate of Eder*, 94 Colo. 173, 29 P.2d 631 (1934).

**The statute unmistakably requires proof that such lost will or destroyed will was actually in existence at the time of the death of the testator.** *Bailey v. Kennedy*, 162 Colo. 135, 425 P.2d 304 (1967).

**Despite its loss a properly executed will remains in existence.** A will once validly made and published remains a will, in the absence of a showing of intent to revoke, although the writing, the best evidence of it, is lost or destroyed; it is still in "existence" as that word is used in this section. *Estate of Eder*, 94 Colo. 173, 29 P.2d 631 (1934).

**Court properly considered the issue of revocation where the will was missing.** In the case of a missing or lost will, a court must be satisfied that a will has not been revoked by the testator before admitting a copy of the will to probate. In *re Estate of Perry*, 33 P.3d 1235 (Colo. App. 2001).

**And subsection (3) provides the will proponent adequate notice that she is required to**

establish that a missing will has not been revoked. In *re Estate of Perry*, 33 P.3d 1235 (Colo. App. 2001).

**No allegation of proper making, publication and declaration of will.** In *re Chance's Estate*, 124 Colo. 436, 238 P.2d 879 (1951).

**"Dependent relative revocation" not applicable in case of lost will.** The doctrine of "dependent relative revocation", which makes the revocation of a will ineffective and entitles the copy to be probated, cannot be applied in this case because of the statute on lost or destroyed wills, and because the decedent tore up the 1963 will. *Bailey v. Kennedy*, 162 Colo. 135, 425 P.2d 304 (1967).

**In the case of a missing or destroyed will, common law establishes a rebuttable presumption that the decedent destroyed the will with intent to revoke it.** Because neither this section nor §15-12-407 addresses the burden of proof when a will is lost or destroyed, the common law presumption applies. In *re Estate of Perry*, 33 P.3d 1235 (Colo. App. 2001).

**Presumption that unfound will was destroyed may be rebutted.** The universally recognized presumption that a will that may have been in the testator's possession and cannot be found at his death was destroyed *animo revocandi* may be rebutted by evidence of his declarations tending to prove he believed the will to be in existence unrevoked, and that the loss or destruction of the will without the knowledge or consent of the testator may be inferred from such declarations without positive proof of loss or destruction, when diligent search and inquiry have failed to locate it in the places where it would most probably have been found if in physical existence. *Estate of Eder*, 94 Colo. 173, 29 P.2d 631 (1934).

When a will, last seen in the possession of the testatrix, cannot be found following her death, there is a presumption that the testatrix destroyed the will with the intent to revoke it, but this presumption may be rebutted by evidence of decedent's declarations tending to prove decedent believed the will to be in existence unrevoked. In *re Estate of Enz*, 33 Colo. App. 24, 515 P.2d 1133 (1973).

**Decedent's attorney was not incompetent to testify in proceeding to establish lost will** although, as attorney for the estate, he had a financial interest in the estate. In *re Estate of Enz*, 33 Colo. App. 24, 515 P.2d 1133 (1973).

**Waiver of objection to competency of decedent's attorney to testify.** Where at trial to establish lost will, the caveators did not object to the competency of decedent's attorney or to the admissibility of his testimony, and subsequently cross-examined him concerning his conversations with decedent pertaining to the lost will, the actions of the caveators constituted a waiver



of their objection to the competency of the witness to testify concerning decedent's declarations. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

**Trial court's refusal to submit to jury instructions tendered by caveators in proceed-**

**ing to establish lost will held not error.** In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

**Applied** in Church of Jesus Christ of Latter Day Saints v. Tally, 654 P.2d 866 (Colo. App. 1982).

**15-12-403. Formal testacy proceedings - notice of hearing on petition.**

(1) (a) Upon commencement of a formal testacy proceeding, the court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by section 15-10-401 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under section 15-12-204.

(b) Notice shall be given to the following persons: The surviving spouse, children, and other heirs of the decedent, the devisees and executors named in any will that is being or has been probated or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons, if the petitioner has reasonable cause to believe that unknown persons may claim an interest, and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

(2) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered or certified mail to the alleged decedent at his last known address. The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(b) By notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(c) By engaging the services of an investigator. The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

**Source:** L. 73: R&RE, p. 1575, § 1. C.R.S. 1963: § 153-3-403. L. 77: (1)(b) amended, p. 847, § 1, effective March 26.

**ANNOTATION**

**Law reviews.** For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Again — How Many Times?", see 21 Dicta 62 (1944). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Notice and Due Process in Probate Revisited", see 14 Colo. Law. 29 (1985).

**This section provides for notice** by publication and that notice served upon all persons named in the petition. Cisneros v. Cisneros, 163 Colo. 245, 430 P.2d 86 (1967) (decided under repealed § 153-4-2, C.R.S. 1963).

**Applied** in Craig v. Rider, 651 P.2d 397 (Colo. 1982); Church of Jesus Christ of Latter Day Saints v. Tally, 654 P.2d 866 (Colo. App. 1982).

**15-12-404. Formal testacy proceedings - written objections to probate.** Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.

**Source:** L. 73: R&RE, p. 1575, § 1. C.R.S. 1963: § 153-3-404.

**15-12-405. Formal testacy proceedings - uncontested cases - hearings and proof.** If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of section 15-12-409 have been met, or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one of the attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

**Source:** L. 73: R&RE, p. 1575, § 1. C.R.S. 1963: § 153-3-405.

#### ANNOTATION

**Where there is no hint of objection to the probate of a will**, the probate court is not obliged to invite objections at the probate hear-

ing. In re Estate of Decker, 194 Colo. 143, 570 P.2d 832 (1977).

**15-12-406. Formal testacy proceedings - contested cases.** (1) In a contested case in which the proper execution of a will is at issue, the following rules apply:

(a) If the will is self-proved pursuant to section 15-11-504, the will satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit.

(b) If the will is notarized pursuant to section 15-11-502 (1) (c) (II), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will.

(c) If the will is witnessed pursuant to section 15-11-502 (1) (c) (I), but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

**Source:** L. 73: R&RE, p. 1576, § 1. C.R.S. 1963: § 153-3-406. L. 2009: Entire section amended, (HB 09-1287), ch. 310, p. 1687, § 16, effective July 1, 2010.

**Editor's note:** (1) Section 17 of chapter 310, Session Laws of Colorado 2009, as amended by section 24 of chapter 374, Session Laws of Colorado 2010, provides that the act amending this section:

(a) Applies on or after July 1, 2010, to governing instruments executed by decedents who die on or after July 1, 2010; and to any proceedings in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

#### COMMENT

**2008 Revisions.** This section, which applies in a contested case in which the proper execution of a will is at issue, was substantially revised and clarified in 2008.

**Self-Proved Wills:** Paragraph (1) provides that a will that is self-proved pursuant to Section

2-504 satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit. Paragraph (1)



does not preclude evidence of undue influence, lack of testamentary capacity, revocation, or any relevant evidence that the testator was unaware of the contents of the document.

**Notarized Wills:** Paragraph (2) provides that if the will is notarized pursuant to Section 2-502(a)(3)(B), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will.

**Witnessed Wills:** Paragraph (3) provides that if the will is witnessed pursuant to Section 2-502(a)(3)(A), but not notarized or self-proved, the testimony of at least one of the attesting

witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred. For further explanation of the effect of an attestation clause, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. q (1999).

**Historical Note.** This Comment was revised in 2008.

## ANNOTATION

**Law reviews.** For article, "In Defense of H.B. 109 — Re Serving Notice Before a Witness's Deposition May Be Taken", see 22 Dicta 152 (1945). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article on the necessity of attestation clause or proof of attestation, see 29 Rocky Mt. L. Rev. 475 (1957). For article, "One Year Review of Evidence", see 35 Dicta 44 (1958).

**Annotator's note.** Cases relevant to § 15-12-406 decided prior to its earliest source, § 153-3-406, C.R.S. 1963, have been included in the annotations to this section.

**Under the provisions of this section it is the duty of witnesses to a will to appear** when

duly summoned and testify concerning the execution and validity of the same. In re Ainsworth's Estate, 102 Colo. 392, 79 P.2d 1045 (1938).

**Trial judge may properly interrogate witnesses.** In a will contest proceeding, deficiencies of proof being evident from the answers of witnesses given in response to questions by counsel, not only is it proper for the trial judge to interrogate such witnesses on his own motion, but he would be derelict in his duty had he failed to do so, in view of the provisions of this section. In re Livingston's Estate, 102 Colo. 148, 77 P.2d 649 (1938).

**15-12-407. Formal testacy proceedings - burdens in contested cases.** In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and, if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

**Source:** L. 73: R&RE, p. 1576, § 1. C.R.S. 1963: § 153-3-407.

## ANNOTATION

**Law reviews.** For article, "In Re: The Mourners", see 6 Dicta 7 (1929). For article, "Powers and Perpetuities in Colorado", see 10 Rocky Mt. L. Rev. 249 (1938). For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency", see 19 Colo. Law. 1813 (1990).

**Annotator's note.** Since § 15-12-407 is similar to repealed § 153-5-27, C.R.S. 1963, § 152-5-34, CRS 53, and laws antecedent

thereto, relevant cases construing those provisions have been included in the annotations to this section.

**The burden rests upon the proponents to establish the mental capacity of the person executing the will.** This is a substantive question of fact, not a technical one of procedure. As a question of fact, it is for the trier of fact to make determination, based upon the presented evidence, as to whether the testatrix had the testamentary capacity to make a will. In re Es-

tate of *Murphy v. Warner*, 29 Colo. App. 297, 483 P.2d 1364 (1971) (decided under section prior to 1973 repeal and reenactment).

**Section changed burden of proof of testamentary capacity.** Enactment of this section changed the long-established Colorado rule that the proponent of a will has the burden of proof and persuasion with regard to testamentary capacity. *Nunez v. Jersin*, 635 P.2d 231 (Colo. App. 1981).

**Contestant has burden to prove lack of capacity.** Once the proponent of a holographic will has offered prima facie proof that it was duly executed, the contestant must bear the burden of introducing prima facie evidence that the person who executed the will lacked testamentary capacity. *Nunez v. Jersin*, 635 P.2d 231 (Colo. App. 1981).

**In order to establish that testator was not possessed of sufficient mental capacity to execute a valid will**, evidence offered by contestants must be calculated to establish mental incapacity at the time of the execution of the will. In *re Estate of Gardner*, 31 Colo. App. 361, 505 P.2d 50 (1972).

**Proof required is of facts from which mental incapacity may be inferred.** The law recognizes the difficulty if not the impossibility of establishing mental incapacity by direct or positive evidence such as is required to establish a tangible physical fact, and that the only positive and affirmative proof to be expected or required is of facts and circumstances from which mental incapacity may reasonably be inferred. In *re Estate of Sebben*, 151 Colo. 12, 375 P.2d 516 (1962).

**Under this section courts do not knowingly admit fraudulent wills to probate.** *Bigler v. Bigler*, 82 Colo. 463, 260 P. 1081 (1927).

**Where a will is presented for probate and an objection is filed, the burden of sustaining its allegations is upon objectors.** *Estate of Eder*, 94 Colo. 173, 29 P.2d 631 (1934).

**Burden of going forward with proof is on proponent of will.** In *re Estate of Sebben*, 151 Colo. 12, 375 P.2d 516 (1962).

**The burden of proof to show undue influence is upon the one who asserts it.** *Snodgrass v. Smith*, 42 Colo. 60, 94 P. 312 (1908).

**Rebuttable presumptions of undue influence and fairness do not continue in a case after they are sufficiently rebutted.** However, though the presumed facts may not be established as a matter of law at that point, the jury may nevertheless infer the presumed facts from the evidence that gave rise to the presumptions. *Krueger v. Ary*, 205 P.3d 1150 (Colo. 2009).

**The acts of friendship and kindness performed by one neighbor to another are not to be stigmatized as undue influence.** In *re Carey's Estate*, 56 Colo. 77, 136 P. 1175 (1913).

**The opportunity to exert undue influence creates no presumption against the will.** In *re Shell's Estate*, 28 Colo. 167, 63 P. 413 (1900); *Snodgrass v. Smith*, 42 Colo. 60, 94 P. 312 (1908).

**Trial court did not err by holding the caregiver rebutted the presumption of undue influence**, to the extent that the principles of *Taylor v. Taylor*, 79 Colo. 487, 247 P. 174 (1926), and *Lamborn v. Kirkpatrick*, 97 Colo. 421, 50 P.2d 542 (1935), still have vitality. In *re Estate of Schlager*, 89 P.3d 419 (Colo. App. 2003).

**The fact that the scrivener of a will is executor and legatee therein**, at most raises a suspicion, strong or weak, or, in some cases, of no force at all, depending upon the attending circumstances, which, in a proper case, should cause the court to require of proponent, in addition to proof of formal execution, other clear and satisfactory evidence, not necessarily that the will was real or by the testator, but that he knew its contents and was free from undue influence. *Snodgrass v. Smith*, 42 Colo. 60, 94 P. 312 (1908).

**Refusal of court to release will so that it could be destroyed has no effect on testator's right to execute subsequent will.** Retention by the court does not mean that the will ultimately will be probated, nor does it indicate any judgment by the court regarding testator's capacity to execute a valid will. *Jenkins v. Mesa County Dist. Court*, 620 P.2d 721 (Colo. 1980).

**This section does not address the issue of burden of proof in the case of a lost or missing will.** Thus, the rebuttable presumption that arises in such cases under common law, that the decedent destroyed the will with intent to revoke it, applies. In *re Estate of Perry*, 33 P.3d 1235 (Colo. App. 2001).

**15-12-408. Formal testacy proceedings - will construction - effect of final order in another jurisdiction.** A final order of a court of another state determining testacy or the validity or construction of a will made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made.



## ANNOTATION

**Law reviews.** For article, "In Re: The Mourners", see 6 Dicta 7 (1929). For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "Five New Real Estate Standards for Denver", see 26 Dicta 131 (1949). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Family Law, Probate Law, and Constitutional Law", see 31 Dicta 471 (1954). For comment on *In re McLaughlin's Will*, appearing below, see 26 Rocky Mt. L. Rev. 337 (1954). For article, "Administration of Testate Estates", see 29 Rocky Mt. L. Rev. 557 (1957). For article, "Another Decade of Colorado Conflicts", see 33 Rocky Mt. L. Rev. 139 (1961).

**Annotator's note.** Since § 15-12-408 is similar to repealed CSA, C. 176, § 62, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Constitutionally required notice.** Notice by publication in estate proceedings is constitutionally insufficient and inconsistent with *Mullane v. Central Hanover Bank & Trust Co.*, (339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)), and must be supplemented by personal service or mailing to interested persons whose names and addresses are known, or by reasonable diligence can be ascertained. *Wimbush v. Wimbush*, 41 Colo. App. 289, 587 P.2d 796 (1978).

**Waiver of notice limited by fairness.** To construe waiver of further notice of the admission to probate hearing of a will to include waiver of notice of the subsequent dismissal and intestacy proceedings would be fundamentally unfair. *Wimbush v. Wimbush*, 41 Colo. App. 289, 587 P.2d 796 (1978).

A "foreign will" is (a) an instrument in writing, (b) which has been admitted to probate as a last will, (c) before a court other than a court of this state, and (d) which court is authorized by the laws of such jurisdiction to admit the same to probate. *Reed v. McLaughlin*, 128 Colo. 581, 265 P.2d 691 (1954).

**This section sets forth procedures for probating a foreign will in this state.** *Sayre v. Sage*, 47 Colo. 559, 108 P. 160 (1910); *Reed v. McLaughlin*, 128 Colo. 581, 265 P.2d 691 (1954).

**There is an intent on the part of the general assembly to treat a foreign will as a validly executed will in Colorado.** *Reed v. McLaughlin*, 128 Colo. 581, 265 P.2d 691 (1954).

**Foreign will probated in another state is entitled to probate in this state.** A will admitted to probate in the court of another state having jurisdiction of such matters is, on the presentation of the duly certified record thereof,

entitled to be admitted to probate and record in this state, and letters testamentary or of administration may issue thereon as in other cases. The probate and record, under such circumstances, would seem to be mandatory; but the court is invested with discretion in the matter of issuing letters, but the discretion is not arbitrary. It must be sound and reasonable such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors. *Corrigan v. Jones*, 14 Colo. 311, 23 P. 913 (1890).

**Probate procedure concerning a foreign will devising real estate in this state** permits the transfer thereof in accordance with the terms of such will, subject to the statutory rights of creditors and such a will, as applied to real property in this state, is taken as valid unless a contest is instituted on or before the day set for the probate hearing and is successfully maintained. *Foster v. Kragh*, 107 Colo. 389, 113 P.2d 666 (1941).

**Laws of state in which foreign will devises property must permit it.** The probate of a will in one state does not establish its validity as a will devising real estate in another state unless the laws of the latter permit it. *Sayre v. Sage*, 47 Colo. 559, 108 P. 160 (1910); *Foster v. Kragh*, 107 Colo. 389, 113 P.2d 666 (1941).

**Situs courts have usually applied their own local law** to determine the validity of a will insofar as it affects interests in local land even though the testator died domiciled in another state. *Wimbush v. Wimbush*, 41 Colo. App. 289, 587 P.2d 796 (1978).

**The full faith and credit clause of the federal constitution** is not denied by disregarding the decree of probate of a foreign will. *Foster v. Kragh*, 107 Colo. 389, 113 P.2d 666 (1941).

**Filing of objections alone cannot destroy effect of section.** If this section gives validity to the will in the absence of objection to the formality of execution thereof, the mere filing of an objection cannot logically be held to destroy the force and effect of the section. *Reed v. McLaughlin*, 128 Colo. 581, 265 P.2d 691 (1954).

**Issue of residency.** In this section it is provided that a copy of a foreign will with appropriate accompanying documents showing probate in the foreign jurisdiction, on presentation to the court in this state, gives the court the right to inquire into only one issue. This issue is "Whether the decedent was, or was not, a resident of this state". If the court finds that the decedent was not a resident of this state the court shall by order admit such foreign will to probate without further proof of the execution thereof. *Reed v. McLaughlin*, 128 Colo. 581, 265 P.2d 691 (1954).

**15-12-409. Formal testacy proceedings - order - foreign will.** After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper, and that the proceeding was commenced within the limitation prescribed by section 15-12-108, it shall determine the decedent's domicile at death, his heirs, and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by section 15-12-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

**Source:** L. 73: R&RE, p. 1576, § 1. C.R.S. 1963: § 153-3-409.

**15-12-410. Formal testacy proceedings - probate of more than one instrument.** If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of section 15-12-412.

**Source:** L. 73: R&RE, p. 1576, § 1. C.R.S. 1963: § 153-3-410.

#### ANNOTATION

**Proposed will need not be filed with motion to vacate.** This section does not require the filing of a proposed will on the same date as the filing of a motion to vacate. However, it does require that any subsequent petition to probate

be filed no later than 12 months after the entry of the challenged order. *Church of Jesus Christ of Latter Day Saints v. Tally*, 654 P.2d 886 (Colo. App. 1982).

**15-12-411. Formal testacy proceedings - partial intestacy.** If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.

**Source:** L. 73: R&RE, p. 1577, § 1. C.R.S. 1963: § 153-3-411.

**15-12-412. Formal testacy proceedings - effect of order - vacation.** (1) Subject to appeal and subject to vacation as provided in this section and in section 15-12-413, a formal testacy order under sections 15-12-409 to 15-12-411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs; except that:

(a) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication;

(b) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted



from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death, or were given no notice of any proceeding concerning his estate, except by publication;

(c) A petition for vacation under either paragraph (a) or (b) of this subsection (1) must be filed prior to the earlier of the following time limits:

(I) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement;

(II) Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by section 15-12-108 when it is no longer possible to initiate an original proceeding to probate a will of the decedent;

(III) Twelve months after the entry of the order sought to be vacated.

(d) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs;

(e) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under section 15-12-403 (2) was made.

(2) If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances. An action for recovery from distributees not based on fraud or intentional wrongdoing shall not be brought by the alleged decedent or any person claiming through him more than three years from the date of such distribution. In no event shall any recovery be made by the alleged decedent against any person who, in accordance with law and in good faith and for adequate value, purchased or acquired a lien upon property of the alleged decedent.

**Source:** L. 73: R&RE, p. 1577, § 1. C.R.S. 1963: § 153-3-412.

## ANNOTATION

**Law reviews.** For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**A statute of limitations should not be applied to cases not clearly within its provisions.** Glenn v. Mitchell, 71 Colo. 394, 207 P. 84 (1922).

**This section involves no question of jurisdiction but is merely regulatory,** determining the period in which an order of probate may be attacked, under circumstances named, and the conclusiveness of such probate, if not so questioned. Glenn v. Mitchell, 71 Colo. 394, 207 P. 84 (1922).

**Remedy of heir.** The only remedy of the heir under this section seems to be to appear and object at the time of the hearing or, within one year thereafter, to ask for a revocation of the order admitting the will to probate. In re Dunphy's Will, 60 Colo. 196, 153 P. 89 (1915).

**One purpose of this section** is to permit the heir, upon whom the law casts the property at the death of the ancestor, to come into court and

object to the probate of a purported will which disinherits or cuts him off from participating in the ancestor's estate, and if he fails to do so, to bar any right of objecting which he might have had, within one year after probate. In re Dunphy's Will, 60 Colo. 196, 153 P. 89 (1915).

**Order admitting will to probate is conclusive of the legality of its contents.** In this case, the husband waived his right of election by appearing at the probate of the will and filing his written consent to and acceptance of its provisions, and the will was thereupon duly and solemnly admitted to probate. By his election thus made, he was irrevocably bound, and the order admitting the will to probate is conclusive of the legality and validity of its contents, as against all persons under this section. Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123 (1912).

**Subsection (1)(c)(III) is designed to encourage speedy resolution** of probate proceedings, for the benefit of all heirs and beneficiaries. Church of Jesus Christ of Latter Day Saints v. Tally, 654 P.2d 866 (Colo. App. 1982).

**Section fixes limitation on right to question finality of proceedings.** This section deals with the effect of probate orders and fixes a limitation upon the right of persons to question the finality of proceedings resulting in the admission or denial of a foreign will to probate in this state. *Reed v. McLaughlin*, 128 Colo. 581, 265 P.2d 691 (1954).

**Probate code's statute of limitations is applicable to action seeking imposition of a constructive trust upon the assets of an estate** because such an imposition would effectively negate the probate court's determination of heirship. *Mitchem v. First Interstate Bank of Denver*, 802 P.2d 1141 (Colo. App. 1990).

**Potential devisee is entitled to notice of hearing during which court will determine**

**validity of will.** If, at time of hearing, the court had yet to determine the validity of the will, the potential devisee must be given notice in order to have the opportunity to meet her burden to prove decedent's intent and overcome any presumption of revocation. *In re Estate of Evarts*, 166 P.3d 161 (Colo. App. 2007).

**Statute of limitations should have been tolled** with respect to potential devisee's claim if he or she did not receive the statutorily required notice. *In re Estate of Evarts*, 166 P.3d 161 (Colo. App. 2007).

**Applied in** *In re Estate of Decker*, 194 Colo. 143, 570 P.2d 832 (1977).

**15-12-413. Formal testacy proceedings - vacation of order for other cause.** For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

**Source:** L. 73: R&RE, p. 1578, § 1. C.R.S. 1963: § 153-3-413.

#### ANNOTATION

**Analogous to motion to set aside default judgment.** Where there has been no trial of any issues presented upon the pleadings, a motion to vacate an order admitting a will to probate is analogous to a motion to set aside a default judgment for good cause shown under C.R.C.P. 55(c) and 60(b). *Craig v. Rider*, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

**Criteria to be utilized** by a court in ruling on a motion to set aside a default judgment include whether the neglect that resulted in entry of judgment by default was excusable, whether the moving party has alleged a meritorious defense, and whether relief from the challenged order would be consistent with equitable considerations, such as the protection of action taken in reliance on the order and the prevention of prejudice by reason of evidence lost or impaired by the passage of time. *Craig v. Rider*, 651 P.2d 397 (Colo. 1982).

**Excusable neglect sufficient to vacate an order** results from circumstances which would cause a reasonably careful person to neglect a duty, and the issue of negligence is determined

by the trier of fact. *Craig v. Rider*, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

**Meritorious defense alone insufficient.** A party may not have a judgment vacated solely upon an allegation of the existence of a meritorious defense. *Craig v. Rider*, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

A movant must support a claim of meritorious defense by averments of fact, not simply legal conclusions. The factual allegations must be set forth with sufficient fullness and particularity to show that a defense is substantial, not technical; meritorious, not frivolous; and that it may change the result upon trial. *Craig v. Rider*, 651 P.2d 397 (Colo. 1982).

**Burden of proof.** The party seeking relief has the burden of establishing his grounds by clear, strong and satisfactory proof. *Craig v. Rider*, 651 P.2d 397 (Colo. 1982).

**Regardless of good cause for delay in filing challenge to formal probate orders, challenges filed after the time allowed by this section are barred.** *Matter of Estate of Anderson*, 727 P.2d 867 (Colo. App. 1986).

**15-12-414. Formal proceedings concerning appointment of personal representative.** (1) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by section 15-12-402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by section 15-12-301 (2) and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding



precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.

(2) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under section 15-12-203, make a proper appointment, and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under section 15-12-611.

**Source:** L. 73: R&RE, p. 1578, § 1. C.R.S. 1963: § 153-3-414.

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

#### PART 5

#### SUPERVISED ADMINISTRATION

**15-12-501. Supervised administration - nature of proceedings.** Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in sections 15-12-502 to 15-12-505, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

**Source:** L. 73: R&RE, p. 1578, § 1. C.R.S. 1963: § 153-3-501.

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**Applied in** In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978).

**15-12-502. Supervised administration - petition - order.** (1) A petition for supervised administration may be filed by any interested person or by a personal representative at any time, or the prayer for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding, and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied.

(1.5) A supervised administration proceeding may also be initiated by the court upon its own motion after notice and findings as required under subsection (2) of this section.

(2) After notice to interested persons, the court shall order supervised administration of a decedent's estate:

(a) If the decedent's will directs supervised administration, unless the court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration;

(b) If the decedent's will directs unsupervised administration such provision shall control unless the personal representative petitions for supervised administration, in which case such petition shall be granted unless the court finds that supervised administration is unnecessary for protection of persons interested in the estate; or

(c) In other cases if the court finds that supervised administration is necessary under the circumstances.

**Source:** L. 73: R&RE, p. 1579, § 1. C.R.S. 1963: § 153-3-502. L. 75: (1.5) added, p. 595, § 24, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**15-12-503. Supervised administration - effect on other proceedings.** (1) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.

(2) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by section 15-12-401.

(3) After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition.

**Source:** L. 73: R&RE, p. 1579, § 1. C.R.S. 1963: § 153-3-503.

**15-12-504. Supervised administration - powers of personal representative.** Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this code, but he shall not exercise his power to transfer, surrender, or release estate assets to a distributee without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on his letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

**Source:** L. 73: R&RE, p. 1579, § 1. C.R.S. 1963: § 153-3-504. L. 75: Entire section amended, p. 595, § 25, effective July 1.

**15-12-505. Supervised administration - interim orders - distribution and closing orders.** Unless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices, and contents of orders prescribed for proceedings under section 15-12-1001. Interim orders approving or directing partial distributions or granting other relief may be issued by the court at any time during the pendency of a supervised administration on the application of the personal representative or any interested person.

**Source:** L. 73: R&RE, p. 1580, § 1. C.R.S. 1963: § 153-3-505.



## PART 6

PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL,  
AND TERMINATION OF AUTHORITY

**15-12-601. Qualification.** Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office.

**Source:** L. 73: R&RE, p. 1580, § 1. C.R.S. 1963: § 153-3-601.

**15-12-602. Acceptance of appointment - consent to jurisdiction.** By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be provided to the personal representative pursuant to section 15-10-401.

**Source:** L. 73: R&RE, p. 1580, § 1. C.R.S. 1963: § 153-3-602. L. 2008: Entire section amended, p. 481, § 2, effective July 1.

**15-12-603. Bond not required without court order - exceptions.** (1) No bond is required of a personal representative appointed in informal proceedings, except:

- (a) Upon the appointment of a special administrator;
- (b) When an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond; or
- (c) When bond is required under section 15-12-605.

(2) Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding; except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested party and the court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties.

**Source:** L. 73: R&RE, p. 1580, § 1. C.R.S. 1963: § 153-3-603. L. 77: Entire section R&RE, p. 848, § 1, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986).

**15-12-604. Bond amount - security - procedure - reduction.** If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the registrar indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond with the registrar, or give other suitable security, in an amount not less than the estimate. The registrar shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. If the personal representative be a company or association with capital and surplus at least equal to that required by law of a corporate surety, the registrar may excuse a requirement of bond. The registrar may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in section 15-15-201)

whose deposits are insured to the satisfaction of the court in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person, the court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties.

**Source:** L. 73: R&RE, p. 1580, § 1. C.R.S. 1963: § 153-3-604. L. 90: Entire section amended, p. 921, § 6, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Title to Real Estate", see 16 Dicta 35 (1939).

**15-12-605. Demand for bond by interested person.** Subject to the provisions of sections 15-12-603 and 15-12-604, and to a determination by the court that bond is desirable, any person apparently having an interest worth in excess of five thousand dollars, or any creditor having a claim in excess of five thousand dollars, may make a written demand that a personal representative give bond. The demand must be filed with the registrar and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, the court may require bond in such amount as it may determine and notify the personal representative to file the same, but the requirement ceases if the person demanding bond ceases to be interested in the estate. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within thirty days after receipt of notice is cause for his removal and appointment of a successor personal representative.

**Source:** L. 73: R&RE, p. 1581, § 1. C.R.S. 1963: § 153-3-605.

**15-12-606. Terms and conditions of bonds.** (1) The following requirements and provisions apply to any bond required by sections 15-12-604 and 15-12-605:

(a) Bonds shall name the people of the state of Colorado as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law;

(b) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.

(c) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any such proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(d) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the court may be initiated against a surety for breach of the obligation of the bond of the personal representative;

(e) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted;

(f) Unless expressly stated in the bond to the contrary, no surety shall be liable for any actions of the personal representative taken prior to the date of such bond.

(2) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.



**Source:** L. 73: R&RE, p. 1581, § 1. C.R.S. 1963: § 153-3-606. L. 75: (1)(f) added, p. 595, § 26, effective July 1.

### ANNOTATION

**Law reviews.** For article, "In Re: The Mourners", see 6 Dicta 7 (1929).

**Annotator's note.** Since § 15-12-606 is similar to repealed § 153-10-45, C.R.S. 1963, CSA, C. 176, § 244, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**All that is required to expose the surety to liability on the executor's bond is the commission of the wrongful act.** *People ex rel. Barker v. Transamerica Ins. Co.*, 385 F.2d 61 (10th Cir. 1967).

**Under this section the obligee in an administrator's bond may sue all or any one or more of the obligors,** and where an action was brought against the principal and surety on such bond the action could be dismissed as to the principal and continued as to the surety without discharging the surety from liability. *McAllister v. People ex rel. Brisbane*, 28 Colo. 156, 63 P. 308 (1900).

**One sued as an administrator cannot be joined with other defendants who are sued in their individual capacity upon the bond.** *Metz v. People ex rel. Reid*, 6 Colo. App. 57, 40 P. 51 (1895).

**It is not essential that guardian be made a party to the action or that a judgment be first obtained.** It is not essential to a recovery against sureties on a guardian's bond, in an action against them on behalf of the minors for breaches of its conditions by the guardian, that the guardian be made party to the action, or that

a judgment should first have been obtained against him which he had failed to satisfy. The instrument itself stipulates for the faithful discharge by the guardian of the obligations imposed on him by this section, which provides that it may be put in suit against all or any one of the obligors to the use and benefit of any person entitled by breach thereof. Proceedings for accounting or orders of court need not precede an action for a breach of the bond. *Gebhard v. Smith*, 1 Colo. App. 342, 29 P. 303 (1892).

**Section permits recovery by any person who may be injured.** This and the next preceding section permit a recovery on an administrator's bond by any person who may be injured by the conduct of the representative. The enactment is a very broad one, and, in general, provides that any violation of the provisions of articles 10 to 17 of this title shall be treated as a devastavit, and shall entitle the party to maintain his suit. *Metz v. People ex rel. Reid*, 6 Colo. App. 57, 40 P. 51 (1895).

**It only gives strangers a right to sue on the bond when they have sustained some damage which they show.** When the plaintiffs failed to prove that they had a claim against the estate, or that the administrator had received any assets, they failed to establish some of the essential elements of their cause of action. They were not injured by the misconduct of the administrator, and consequently there came to them no cause of action on the bond. *Metz v. People ex rel. Reid*, 6 Colo. App. 57, 40 P. 51 (1895).

**15-12-607. Order restraining personal representative.** (1) On petition of any person who appears to have an interest in the estate, or on its own motion, a court by temporary order may restrain a personal representative pursuant to section 15-10-503.

(2) (Deleted by amendment, L. 2008, p. 482, § 3, effective July 1, 2008.)

**Source:** L. 73: R&RE, p. 1582, § 1. C.R.S. 1963: § 153-3-607. L. 2008: Entire section amended, p. 482, § 3, effective July 1.

### ANNOTATION

**Law reviews.** For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

**The court may terminate a personal representative at any time for various reasons in-**

**cluding mismanagement of the estate's assets or failure to perform any duty pertaining to the office.** In the *Estate of Sandstead*, 897 P.2d 883 (Colo. App. 1995).

**15-12-608. Termination of appointment - general.** Termination of appointment of a personal representative occurs as indicated in sections 15-12-609 to 15-12-612. Termination ends the right and power pertaining to the office of personal representative as conferred by this code or any will; except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the

estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor, and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

**Source:** L. 73: R&RE, p. 1582, § 1. C.R.S. 1963: § 153-3-608.

**Editor's note:** Termination under this section does not discharge the personal representative; for discharge, see §§ 15-12-1001 and 15-12-1002.

#### ANNOTATION

**Law reviews.** For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

**malpractice action** after initial appointment terminated. *Boatright v. Derr*, 919 P.2d 221 (Colo. 1996).

**Personal representative had continuing authority to represent estates in pending legal**

**15-12-609. Termination of appointment - death or disability.** The death of a personal representative or the appointment of a conservator for the estate of a personal representative terminates his appointment. Until a duly appointed and qualified successor personal representative or corepresentative has taken possession of the estate possessed and being administered by a deceased or protected personal representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates, has the power to perform acts necessary for protection, and shall account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification, or to any remaining corepresentative.

**Source:** L. 73: R&RE, p. 1582, § 1. C.R.S. 1963: § 153-3-609.

#### ANNOTATION

**Law reviews.** For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

**15-12-610. Termination of appointment - voluntary.** (1) An appointment of a personal representative terminates as provided in section 15-12-1003 one year after the filing of a closing statement.

(2) An order closing an estate as provided in section 15-12-1001 or 15-12-1002 terminates an appointment of a personal representative.

(3) A personal representative may resign his or her position by filing a written statement of resignation with the registrar after he or she has given at least fourteen days' written notice to the persons known to be interested in the estate. If the person resigning is a sole representative and if no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him or her. If the person resigning is a corepresentative, such resignation is effective only upon delivery of the assets in his or her possession to any remaining corepresentatives.

**Source:** L. 73: R&RE, p. 1582, § 1. C.R.S. 1963: § 153-3-610. L. 2012: (3) amended, (SB 12-175), ch. 208, p. 837, § 43, effective July 1.



**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

### ANNOTATION

**Law reviews.** For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

**Personal representative had continuing authority to represent estates in pending legal**

**malpractice action as personal representative after initial appointment terminated.** *Boatright v. Derr*, 919 P.2d 221 (Colo. 1996).

**15-12-611. Termination of appointment by removal - cause - procedure.** (1) The court shall have the power to remove a personal representative for cause at any time. Removal proceedings shall be governed by the provisions of section 15-10-503.

(2) Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or herself or his or her nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

**Source:** L. 73: R&RE, p. 1582, § 1. C.R.S. 1963: § 153-3-611. L. 2008: Entire section amended, p. 482, § 4, effective July 1.

### ANNOTATION

**Law reviews.** For article, "Practical Administrative Problems in Average-Sized Estates", see 27 Dicta 285 (1950). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

**Annotator's note.** Since § 15-12-611 is similar to repealed § 152-10-8, CRS 53, CSA, C. 176, § 90, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**The power to remove an administrator is largely discretionary.** The action of a court should not be interfered with by any other court, unless an abuse of discretion is shown. *Shore v. Wall*, 22 Colo. App. 146, 122 P. 1124 (1912); *Canaday v. Kauffman*, 140 Colo. 165, 342 P.2d 1027 (1959); *In re Estate of Jefferson v. Hough*, 140 Colo. 347, 344 P.2d 179 (1959).

**The court may terminate a personal representative at any time for various reasons including mismanagement of the estate's assets or failure to perform any duty pertaining to the office.** *In re Estate of Sandstead*, 897 P.2d 883 (Colo. App. 1995).

**Dilatoriness of an administrator in filing inventories or making reports is not ground for removal.** *In re Estate of Jefferson v. Hough*, 140 Colo. 347, 344 P.2d 179 (1959).

**The language of this section is sufficiently broad to admit proof of any waste or mismanagement.** *Miller v. Hider*, 9 Colo. App. 50, 47 P. 406 (1896).

**Failure to collect debts is mismanagement.** If an executor or administrator should refuse to collect debts due to the estate from others, he would be justly chargeable with mismanagement; and, surely, his refusal to account to the estate for money owing to it by himself, cannot be characterized by any milder term. *Haines v. Christie*, 17 Colo. App. 272, 68 P. 669 (1902).

**Court, therefore, may commit administration to another in proper situation.** The law is a jealous guardian of the estates of deceased persons, and when the appointment of the executor named in the will of the decedent may endanger the estate, or lead to embarrassment in the administration, it is within the power of the court, and is its clear duty, to commit administration to another. *Deeble v. Alerton*, 58 Colo. 166, 143 P. 1096 (1914).

**Bank was not subject to removal from its position as administrator** where, knowing of its appointment as executor from copy of will, it began probate proceedings in regard to the will even though the original of the will was lost. *In re Estate of Enz*, 33 Colo. App. 24, 515 P.2d 1133 (1973).

**15-12-612. Termination of appointment - change of testacy status.** Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment

of the personal representative although his powers may be reduced as provided in section 15-12-401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within thirty days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be.

**Source:** L. 73: R&RE, p. 1583, § 1. C.R.S. 1963: § 153-3-612.

#### ANNOTATION

**Law reviews.** For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

**15-12-613. Successor personal representative.** Parts 3 and 4 of this article govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process, or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

**Source:** L. 73: R&RE, p. 1583, § 1. C.R.S. 1963: § 153-3-613.

#### ANNOTATION

**Successor fiduciary of an estate is in privity with his predecessor.** In re Estate of Perini, 34 Colo. App. 201, 526 P.2d 313 (1974).

**15-12-614. Special administrator - appointment.** (1) A special administrator may be appointed:

(a) Informally by the registrar on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative, or if a prior appointment has been terminated as provided in section 15-12-609;

(b) In a formal proceeding by order of the court on the petition of any interested person, or by the court on the court's own motion, and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

**Source:** L. 73: R&RE, p. 1584, § 1. C.R.S. 1963: § 153-3-614. L. 2007: (1)(b) amended, p. 127, § 5, effective July 1.



## ANNOTATION

**Law reviews.** For article, "The Use of Special Administrators in Colorado", see 19 Colo. Law. 2433 (1990).

**When there is no prejudice caused by delay nor a lengthy period of inaction by a movant for substitution**, rather than allowing substantial rights to be lost by dismissing the action, the court should either allow a reasonable additional time for the movant to submit an amended motion or, failing that, appoint a proper personal representative such as the public administrator.

Smith v. Bridges, 40 Colo. App. 171, 574 P.2d 511 (1977).

**Where probate court finds under this section that appointment of a special administrator is necessary**, court may appoint any proper person as such under § 15-12-615 notwithstanding the provisions in § 15-12-203 on priority of appointment of a personal representative. In re Estate of Franchs, 722 P.2d 422 (Colo. App. 1986).

**15-12-615. Special administrator - who may be appointed.** (1) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available and qualified.

(2) In other cases, any proper person may be appointed special administrator.

**Source:** L. 73: R&RE, p. 1584, § 1. C.R.S. 1963: § 153-3-615.

## ANNOTATION

**When appointment of special administrator is necessary under § 15-12-614, such appointment is proper** under this section, notwithstanding the provisions in § 15-12-203

governing priority of appointment of a personal representative. In re Estate of Franchs, 722 P.2d 422 (Colo. App. 1986).

**15-12-616. Special administrator - appointed informally - powers and duties.** A special administrator appointed by the registrar in informal proceedings pursuant to section 15-12-614 (1) has the duty to collect and manage the assets of the estate, to preserve them, to account therefor, and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under the code necessary to perform his duties.

**Source:** L. 73: R&RE, p. 1584, § 1. C.R.S. 1963: § 153-3-616.

**15-12-617. Special administrator - formal proceedings - power and duties.** A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts, or on other terms as the court may direct.

**Source:** L. 73: R&RE, p. 1584, § 1. C.R.S. 1963: § 153-3-617.

**15-12-618. Termination of appointment - special administrator.** The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in sections 15-12-608 to 15-12-611.

**Source:** L. 73: R&RE, p. 1584, § 1. C.R.S. 1963: § 153-3-618.

**15-12-619. Public administrator - appointment - oath - bond - deputy.** (1) The district or probate court in each judicial district may appoint a person who shall be known as the public administrator. The appointee shall be a qualified elector over twenty-one years

of age and shall be a resident of or maintain a principal place of business in the judicial district in which the appointee is to act as public administrator. Unless authorized by the appointing court, the appointee shall remain a resident of or maintain a principal place of business in the judicial district in which the appointee has been appointed during the period in which the appointee holds the office of public administrator. The person appointed as the public administrator shall serve at the pleasure of the appointing court until discharged by the court or until such person's resignation is accepted by the appointing court. Any person appointed as a public administrator shall not be considered an employee of either the state of Colorado or of the judicial district or the city or the county in which such person has been appointed public administrator because of his or her appointment as public administrator.

(2) Before taking office, a public administrator shall take and subscribe an oath, before a district or probate judge of the appointing judicial district, in the following form:

I, \_\_\_\_\_, in accepting the position of the public administrator in and for the \_\_\_\_\_ judicial district of the state of Colorado, do solemnly swear (or affirm) that I will support the constitution of the United States and of the state of Colorado, and that I will faithfully perform the duties of the office of public administrator as required by law.

(3) If a public administrator is discharged or resigns from office, the public administrator may, at the court's discretion, be permitted to complete the administration of any estate or trust in which the public administrator has been previously appointed, or is acting as the public administrator, at the time of discharge or resignation.

(4) Every public administrator shall procure and maintain a general bond in the sum of twenty-five thousand dollars covering the public administrator's performance and the performance of the public administrator's employees to the people of the state of Colorado. Such bond shall be conditioned on the faithful discharge of the duties of the office of the public administrator and shall be filed in the office of the secretary of state. If the Colorado attorney general finds reasonable grounds to believe that a public administrator has improperly administered a public administrator's estate, the attorney general may sue upon such bond in the name of the people of the state of Colorado to compensate any party harmed by any neglect or wrongful act by a public administrator or the public administrator's employees. In addition to the above general bond, a public administrator may also be required to give such bonds as are required of other fiduciaries.

(5) The public administrator is authorized to act as provided in this section and sections 15-12-620, 15-12-621, 15-12-622, and 15-12-623 and as directed by the appointing court. A public administrator may also be appointed as a fiduciary in other cases in any judicial district in the state of Colorado or elsewhere as needed.

(6) Subject to the approval and confirmation by the district or probate court in each judicial district, the public administrator may also appoint one or more deputy public administrators. Deputy public administrators shall be qualified electors over the age of twenty-one. Any deputy public administrator shall serve at the pleasure of the appointing court and the public administrator in that judicial district until such time as the deputy public administrator is discharged by the court or the public administrator or until the deputy public administrator resigns. No resignation of a deputy public administrator shall be effective until it is filed with and approved by the appointing court. The deputy public administrator shall act as directed by the public administrator in the deputy public administrator's judicial district.

(7) Any acting public administrator or deputy public administrator who was appointed prior to July 1, 1991, shall be exempt from the appointment criteria required by this section.

**Source:** L. 73: R&RE, p. 1584, § 1. C.R.S. 1963: § 153-3-619. L. 91: Entire section R&RE, p. 1453, § 1, effective July 1. L. 2006: (1) amended, p. 377, § 6, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Administration of Intestate Estates", see 29 Rocky Mt. L. Rev. 571 (1957).

**When there is no prejudice caused by delay nor a lengthy period of inaction by a movant for substitution,** rather than allowing substan-



tial rights to be lost by dismissing the action, the court should either allow a reasonable additional time for the movant to submit an amended motion or, failing that, appoint a proper personal

representative such as the public administrator. *Smith v. Bridges*, 40 Colo. App. 171, 574 P.2d 511 (1977).

**15-12-620. Public administrator - responsibility for protecting decedent's estate - duty of persons holding property.** (1) Upon notification of the death of any person who was either a resident of Colorado, or a nonresident who died owning real or personal property located in Colorado, it shall be the responsibility of the public administrator of the judicial district of the decedent's residence, or, in the case of a nonresident, of the public administrator of the judicial district wherein the decedent's property is located, to take possession of the decedent's property or to take such measures as are reasonably necessary to protect and secure the decedent's property. The public administrator need not act in cases where such property can be protected by a person who is in the vicinity of the property and who is willing and able to provide such protection, if such person is either an heir of the decedent or has apparent authority to act as the personal representative of the decedent's estate as set forth in an original document that reasonably appears to be the last will of the decedent.

(2) In appropriate cases, the public administrator shall act as soon as the public administrator receives notice of the decedent's death. The public administrator shall continue to protect the decedent's property until the administration of the decedent's estate is granted to a person or entity by a court of proper jurisdiction or until the public administrator is presented with a properly executed affidavit pursuant to section 15-12-1201. The ten-day waiting period required in section 15-12-1201 (1) (b) shall not apply to affidavits presented to a public administrator to obtain property being protected by a public administrator pursuant to this section.

(3) Reasonable administration fees and costs including reasonable attorney fees incurred in efforts to protect the decedent's property shall be paid to the public administrator at the time such property is released by the public administrator. Upon the presentation or mailing of an itemized statement of fees and costs to the person assuming responsibility for the case, the public administrator shall be entitled to deduct such fees and costs from any cash assets of the decedent's estate that are in the public administrator's possession. Any fee dispute regarding a public administrator's fees and costs shall be resolved by petition to the district or probate court that has jurisdiction over the estate.

(4) When a person dies leaving property located in any house, residence, or apartment, on the premises of another, or in a nursing home, coroner's office, mortuary, state agency, or public or private hospital, without leaving either a known heir residing in this state or a resident of this state who has been nominated as a personal representative in an original document that reasonably appears to be the last will of the decedent, the person in possession of such house, residence, apartment or premises, or the administrator of such nursing home, coroner's office, mortuary, state agency, or public or private hospital, shall give prompt notice of death, and notice of the existence of the property, to the public administrator of that judicial district. Any person who fails to act in compliance with this section shall be liable for all damages and any loss that may be sustained as a result of the neglect or refusal of such person to report the death or the existence of property to the public administrator. Such damages may be recovered by the decedent's heirs or successors, or by the public administrator. It shall be the responsibility of any law enforcement agency, coroner, or other public agency to give notice to the public administrator of the appropriate jurisdiction at any time they believe that property of a decedent located within their jurisdiction is not properly secured or protected.

**Source:** L. 73: R&RE, p. 1585, § 1. C.R.S. 1963: § 153-3-620. L. 75: (4) added, p. 596, § 27, effective July 1. L. 91: Entire section R&RE, p. 1455, § 2, effective July 1.

## ANNOTATION

**Law reviews.** For article, "The Public Administrator: A User's Guide", see 40 Colo. Law. 81 (January 2011).

**Annotator's note.** Since § 15-12-620 is similar to repealed CSA, C. 176, § 104, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**This section must be construed as superseding earlier statutes** to the extent of its declaration of rights of administration. In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

**This section modifies § 15-12-203** insofar as it defines the right to administer estates in any county having a population of more than 20,000 inhabitants. In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

**Nominee of residuary legatee chosen within 60 days of death preferred as administrator.** In re Bourquin's Estate, 84 Colo. 275, 269 P. 903 (1928); In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

**15-12-621. Public administrator - decedents' estates - areas of responsibility.**

(1) The public administrator of each judicial district shall be responsible for handling the administration of decedents' estates within such judicial district under the following circumstances:

(a) (I) Where the decedent died a resident of that judicial district; or

(II) Where the decedent was a nonresident of the state of Colorado and the decedent has property located within that judicial district; and

(b) Where no individual can be found who is willing and able to administer the estate of the decedent by virtue of being either nominated to act as a personal representative under the last will of the decedent, or is an heir or devisee of the decedent entitled to receive a portion of the decedent's estate.

(2) A public administrator may also administer a decedent's estate within the public administrator's judicial district in cases where the decedent's heirs, devisees, creditors, or nominated personal representative, do not act to evidence their willingness or intention to administer the decedent's estate within sixty days from the date of death, by either:

(a) Assuming responsibility for the administration of the estate by use of an affidavit pursuant to sections 15-12-1201 and 15-12-1202; or

(b) By filing a petition or application to open the estate in a district or probate court in this state.

(3) The grant of authority to a public administrator in this section shall not supersede the normal priority for the appointment of a personal representative as set forth in section 15-12-203; except that a public administrator shall have priority for appointment over creditors of the estate.

(4) In estates where the location or identity of some or all of the decedent's heirs or devisees is unknown, the requirement for the publication of notice to such persons concerning the petition for the appointment of a public administrator as personal representative or special administrator of the estate shall be waived unless the court otherwise directs.

(5) All decedent estates in which the public administrator has been appointed as the personal representative of the estate shall be closed in a formal hearing in accordance with section 15-12-1001.

(6) Small estates, as defined in section 15-12-1201, may be administered by the public administrator using an affidavit as provided in section 15-12-1201, with the same effect as provided in section 15-12-1202. The claims period shall end one year from the date of the decedent's death. At the end of the claims period, the public administrator shall summarily make distribution of estate assets by distribution to allowed claimants pursuant to the priorities set forth in section 15-12-805. The remainder of the estate's funds, if any, shall be distributed to the decedent's heirs or devisees as determined under the Colorado Probate Code. In determining who is entitled to an estate's funds, a public administrator may rely on affidavits by persons who set forth facts to establish their claims, heirship, or the validity of a testamentary document. The public administrator shall not be liable for any improper distributions made in reasonable reliance on information contained in such affidavits. All estates administered by a public administrator pursuant to the small estate procedure shall



be closed by the filing of a public administrator's statement of account with the appointing district or probate court. The statement of account shall set forth all receipts and disbursements made during the administration of the estate including the public administrator's fees and costs, and the fees and costs of the public administrator's staff and investigators. Upon filing of the public administrator's statement of account, the public administrator shall be discharged and released from all further responsibility and all liability with regards to the estate.

(7) In the absence of any interested person willing to make funeral and burial arrangements, a public administrator may make funeral and burial arrangements for the decedent. The public administrator shall make reasonable efforts to see that such arrangements are consistent with the decedent's apparent religious or other preferences regarding such matters. A public administrator may authorize the cremation of the decedent's remains if the decedent left signed written instructions, or other funeral arrangements authorized by the decedent, which indicated the decedent's wish to be cremated. A public administrator shall have the authority to authorize cremation if he believes that public funds will be needed to complete the administration of an estate because the estate lacks the apparent assets to pay fully all necessary administration, funeral, and burial costs and expenses. In cases of doubt the public administrator may decline to authorize cremation.

(8) Whenever a public administrator is administering or investigating a decedent's estate, the public administrator or the public administrator's authorized employee or agent may make an immediate search for the decedent's assets and burial instructions; and in furtherance thereof, a public administrator may prepare a certificate stating that he or she is a public administrator administering or investigating the estate of the decedent, that the decedent died on a stated date, and that such person may have assets or a will or burial instructions which are needed for the proper administration of the decedent's estate. Any entity, person, bank, corporation, or financial institution that receives such a certificate shall promptly release to the public administrator, or to the public administrator's authorized employees or agents, all information that such entity has at its disposal concerning any assets in which the decedent had any interest, whether such assets be jointly or individually owned; and any such entity, person, bank, corporation, or financial institution shall promptly grant access to the public administrator, or to the public administrator's authorized employees or agents, to any safe deposit box which the decedent had the right of entry to search and remove any will or burial instructions concerning the decedent's estate. For this preliminary investigation, the public administrator shall not be required to furnish a death certificate, an affidavit pursuant to section 15-12-1201, or letters. If a will, codicil, or burial instructions concerning the decedent is discovered as a result of this investigation, upon giving a receipt for same, the public administrator, or the public administrator's authorized employee or agent, shall be entitled to receive the original of such document. The public administrator shall lodge the original of any will or codicil so discovered in the district or probate court having proper jurisdiction. A copy of such instrument shall be provided to any heir or devisee of the decedent who requests it. Any costs incurred in the drilling of a safe deposit box or the copying of any estate documents shall be paid by the estate of the decedent. If any burial instructions are found, the public administrator shall promptly deliver such instructions to the person or persons who have the right to dispose of the decedent's remains. Receipt of a certificate of the public administrator as provided by this section shall fully discharge any entity, person, bank, corporation, or other financial institution from all liability for the release of any information concerning the decedent's assets or the granting of access to a safe deposit box, or for any acts or omissions by the public administrator with reference to these items, without the necessity of inquiring into the truth of any facts stated in the certificate. Any entity, person, bank, corporation, or other financial institution who refuses to honor a properly presented certificate as provided in this section shall be liable for all damages and costs, including reasonable attorney fees and costs, suffered by the estate as a result of the failure of such entity to comply with the public administrator's request for information.

(9) A public administrator may act as a special administrator in a decedent's estate when a creditor or claimant requests such an appointment for the purpose of having the public administrator represent the estate in an action to be brought by the creditor or

claimant against the estate. A public administrator requested to act as a special administrator in such cases need act only if the creditor or claimant makes advance arrangements, satisfactory to the public administrator, to pay all reasonable fees and costs likely to be incurred by the public administrator in the public administrator's performance as special administrator regardless of the outcome of the creditor's or claimant's claim or litigation against the estate.

**Source:** L. 73: R&RE, p. 1586, § 1. C.R.S. 1963: § 153-3-621. L. 91: Entire section R&RE, p. 1456, § 3, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Practical Problems of Evidence in Real Estate Titles", see 24 Rocky Mt. L. Rev. 430 (1952). For article, "The

Public Administrator: A User's Guide", see 40 Colo. Law. 81 (January 2011).

**15-12-622. Public administrator - acting as conservator or trustee.** (1) When appointed by a court of appropriate jurisdiction, the public administrator may act as a conservator, temporary conservator, special conservator, trustee, or other fiduciary of any estate that has assets requiring protection. Each county department of social services may refer any resident of that county, or any nonresident located in that county, to that county's public administrator for appropriate protective proceedings if such department determines that such person meets the standards required for court protective action.

(2) Any case referred to the public administrator pursuant to this section by a county department of social services shall be presented to the court of appropriate jurisdiction by a petition which shall state to the court that the public administrator has been requested by the county department of social services to act as a conservator or other fiduciary for the person in need of protection, that the public administrator is the nominee of that department, and that the public administrator is not acting as an attorney for that department. The public administrator may prepare and file such a petition if requested to do so by the county department of social services. The fact that a public administrator has been requested by a county department of social services to act as a conservator or other fiduciary shall not be construed by the court as granting any priority for his appointment, and the court shall make that determination solely upon the best interests of the person in need of protection. If the public administrator is not appointed as conservator or other fiduciary and the court determines that another individual should act as the conservator or fiduciary, the court may award reasonable fees and costs to the public administrator if the court determines that the efforts of the public administrator were beneficial to the estate or contributed to the protection of the protected person's assets. In cases where the court awards fees and costs to the public administrator, to the extent that such funds are available, such fees shall be paid from the protected person's estate. In cases in which the public administrator is not compensated from the protected person's estate, the court may approve the payment of such fees from state funds designated for the payment of court-appointed counsel or fiduciaries. The court may determine the amount of fees to be paid from such state funds as it deems to be just.

(3) In any case in which the public administrator has been nominated to act as conservator or other fiduciary at the request of the county department of social services and such case develops into a contested court proceeding, the department's own attorney shall assume all aspects of the contested court case, and the public administrator shall not be required to be involved in such hearings unless specifically directed to do so by the court.

(4) **Missing persons.** A public administrator has standing to petition a court of appropriate jurisdiction for his or her appointment to act as a conservator, temporary conservator, or special conservator to protect a person's assets and manage the person's estate if:

- (a) The person is missing, detained, or unable to return to the United States; and
- (b) No interested person has initiated protective proceedings to accomplish this purpose.



**Source:** L. 73: R&RE, p. 1586, § 1. **C.R.S. 1963:** § 153-3-622. **L. 91:** Entire section R&RE, p. 1460, § 4, effective July 1. **L. 2007:** (4) added, p. 126, § 4, effective July 1.

ANNOTATION

**Law reviews.** For article, “Practical Problems of Evidence in Real Estate Titles”, see 24 Rocky Mt. L. Rev. 430 (1952). For article, “The Public Administrator: A User’s Guide”, see 40 Colo. Law. 81 (January 2011).

**15-12-623. Public administrator - administration - reports - fees.** (1) The following court docket fees shall be charged:

(a) Public administrator statements of account in small estates, as “small estates” is defined in section 15-12-1201, having gross assets:

	Fee	Tax	Total
(I) Less than \$500.00	fee waived		
(II) \$500.00 or more, but less than \$2,000.00	\$ 9.00	1.00	10.00
(III) \$2,000.00 or more	\$ 89.00	1.00	90.00

(b) The docket fee charged in all other decedent, trust, or conservatorship estates filed by a public administrator shall be the same fee as those charged to the general public filing a similar type of action.

(2) On or before March 1 of each year, each public administrator shall file with the appointing court such reports concerning the administration of public administrator cases during the previous calendar year as the appointing court shall direct.

(3) The office of the public administrator shall only charge fees and costs that are reasonable and proper for similar services in the community. The public administrator shall maintain detailed time records for all charged services. The public administrator shall attempt to minimize fees while providing quality fiduciary, administrative, and legal services to all assigned estates. The public administrator may charge the estates under his or her administration for the services of attorneys, paralegals, bookkeepers, certified public accountants, investigators, tax counsel, or any other professional or nonprofessional who provides necessary services which further the cost-effective administration of the estates. A public administrator who is a member of a law firm may use the legal services of that firm to assist the public administrator in his or her duties as the public administrator or as a fiduciary. All fees of the public administrator or of the public administrator’s agents and employees are subject to review by the court having jurisdiction over the estate in which the fees were incurred. The payment of public administrators’ administrative fees and costs shall have priority over all other claims and exempt property or family allowances. In cases in which the public administrator is appointed to administer an estate and a more suitable person is subsequently located and such person is then appointed to continue the administration of the estate, the public administrator shall be entitled to receive the prompt payment of his fees and costs for the period of his administration of the estate.

(4) Cash assets collected by the public administrator in small decedent estates may be combined into a single public administrator’s trust account which shall be held in a federally insured bank or savings and loan association located in this state. The total amount of the funds in a single public administrator’s trust account shall not exceed the federal deposit insurance limits for such accounts. When an additional account is required, such account shall be opened in a different Colorado bank or savings and loan association which has the required federal deposit insurance protection. Regardless of whether the public administrator is an attorney, all estate funds under the control of a public administrator shall be governed by the rules set forth by the Colorado supreme court in the code of professional responsibility, DR 9-102, dealing with trust accounts, unless otherwise modified by this section. Any public administrator’s trust account may be utilized as the temporary depository for any public administrator funds. When letters are issued in an estate, the funds belonging to such an estate shall be promptly transferred to an account or accounts in the individual estate’s name.

**Source:** **L. 91:** Entire section added, p. 1461, § 5, effective July 1. **L. 95:** (1)(a)(III) amended, p. 741, § 6, effective July 1, 1997.

## ANNOTATION

**Law reviews.** For article, "The Public Administrator: A User's Guide", see 40 Colo. Law. 81 (January 2011).

## PART 7

### DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

**Law reviews:** For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986); for article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990); for article, "Who's on First - The Client in Estate Administration", see 22 Colo. Law. 2393 (1993); for article, "A Personal Representative's Right to Participate in a Will Contest", see 33 Colo. Law. 57 (April 2004).

**15-12-701. Time of accrual of duties and powers.** The duties and powers of a personal representative commence upon his or her appointment. The powers of a personal representative relate back in time to give acts by the person appointed that are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person nominated to serve as personal representative in a will may carry out written instructions of the decedent or of the persons designated to control disposition of the decedent's last remains under section 15-19-106, relating to his or her body, anatomical gifts, funeral, and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

**Source:** **L. 73:** R&RE, p. 1587, § 1. **C.R.S. 1963:** § 153-3-701. **L. 2003:** Entire section amended, p. 1355, § 3, effective August 6.

## ANNOTATION

**Law reviews.** For article, "Practical Administrative Problems in Average-Sized Estates", see 27 Dicta 285 (1950). For article, "Testamentary Disposition of a Decedent's Body", see 18 Colo. Law. 435 (1989).

**Annotator's note.** Since § 15-12-701 is similar to repealed laws antecedent to CSA, C. 176, § 113, relevant cases construing those provisions have been included in the annotations to this section.

**Even before probate of the will, the executor may employ an attorney** to aid in securing moneys pertaining to the estate. In re Macky's Estate, 68 Colo. 556, 191 P. 106 (1920).

**Prior to appointment as personal representative, a suit may not be maintained against executor.** Stratton's Independence, Ltd. v. Dines, 126 F. 968 (D. Colo. 1904).

**Absent an appointment, a designee for personal representative has limited powers and**

**duties.** Such powers and duties extend no further than the limited tasks described in this section. Estate of Rienks v. Rienks, 844 P.2d 1295 (Colo. App. 1992).

**If no personal representative has ever been appointed, the "relation back" authority is insufficient** to authorize a mere designee to accept presentment pursuant to § 15-12-804 (1). Estate of Rienks v. Rienks, 844 P.2d 1295 (Colo. App. 1992).

**Better price available does not negate benefit to estate.** The fact that a better price could have been obtained for the decedent's real property does not, under this section, negate the actual benefit to the estate resulting from decedent's son, prior to his appointment as personal representative, accepting payment from an option holder for purchase of the property. Brown v. Brown, 43 Colo. App. 535, 608 P.2d 840 (1980).

**15-12-702. Priority among different letters.** A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the



representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

**Source:** L. 73: R&RE, p. 1587, § 1. C.R.S. 1963: § 153-3-702.

**15-12-703. General duties - relation and liability to persons interested in estate - duty to search for a designated beneficiary agreement - standing to sue.** (1) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by section 15-16-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

(2) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent.

(3) Repealed.

(3.5) A personal representative shall not be surcharged for distributions made that do not take into consideration the possible birth of a posthumously conceived child unless prior to such distribution:

(a) The personal representative has received notice or has actual knowledge that there is an intention to use an individual's genetic material to create a child or has received written notice that there may be an intention to use an individual's genetic material to create a child; and

(b) The birth of the child could affect the distribution of the decedent's estate.

(4) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

(5) A personal representative shall not be surcharged for distributions made that do not take into consideration a designated beneficiary agreement if:

(a) The personal representative has reviewed the records of the county clerk and recorder's office in every county in Colorado in which the personal representative has actual knowledge that the decedent was domiciled at any time during the three years prior to the decedent's death for a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession; and

(b) The personal representative has not received actual notice nor has actual knowledge of the existence of a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession.

**Source:** L. 73: R&RE, p. 1587, § 1. C.R.S. 1963: § 153-3-703. L. 75: (3) repealed, p. 606, § 62, effective July 1. L. 2010: (3.5) added, (SB 10-199), ch. 374, p. 1751, § 14, effective July 1. L. 2011: (3.5)(a) amended, (SB 11-083), ch. 101, p. 303, § 5, effective August 10. L. 2012: (5) added, (SB 12-131), ch. 114, p. 393, § 1, effective April 13.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act adding subsection (3.5):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For the duty of a personal representative to take possession of decedent's estate, see § 15-12-709.

## COMMENT

This and the next section are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, this section applies to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the Court is created. *See* Section 3-501.

The fundamental responsibility is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the Court. But, the Code also makes it clear that the personal representative, in spite of the source of his authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. *See* Sections 3-107 and 3-704. Subsection (b) is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time". Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate.

*See* Section 3-302 concerning the status of a will probated without notice and Section 3-102 concerning the ineffectiveness of an unprobated will. However, it does *not* follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed. *See* Sections 3-909 and 3-1004. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter section.

Paragraph (c) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of Article IV, are designed to eliminate many of the present reasons for ancillary administrations.

1997 Technical Amendment. By technical amendment effective July 31, 1997, the final sentence of Section 3-703(b) was modified to clarify the originally intended meaning that a personal representative of a decedent's estate does not owe fiduciary duties to a person whose claim has not yet been allowed. This added language is not intended to affect any duty to give notice to prospective claimants under Section 3-801 or *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988).

## ANNOTATION

**Personal representatives vested with broad powers.** In order to facilitate the performance of this statutory duty, personal representatives are vested with broad powers. *Fry & Co. v. District Court*, 653 P.2d 1135 (Colo. 1982).

**Personal representative cannot recover noneconomic damages** such as emotional stress or loss of enjoyment of life. Only the personal representative acting on behalf of an estate and not a beneficiary may represent an estate in the interest of the beneficiaries in a malpractice

action. *Hill v. Boatright*, 890 P.2d 180 (Colo. App. 1994), *aff'd* in part and *rev'd* in part on other grounds *sub nom. Boatright v. Derr*, 919 P.2d 221 (Colo. 1996).

**When beneficiaries are not indispensable parties to partition action.** Estate beneficiaries are not indispensable parties to a partition action commenced by the personal representative, where the personal representative is acting on behalf of all the estate beneficiaries to segregate their collective interests in the real property to



be partitioned, so that he can perform his statutory duty to settle and distribute the estate expeditiously and efficiently. *Fry & Co. v. District Court*, 653 P.2d 1135 (Colo. 1982).

**By law the executor of an estate has no choice but to tender all the assets bequeathed**

**to the various beneficiaries**, for were he not to do so, he would subject himself to suit by the beneficiaries. *Estate of Riggs v. Midwest Steel & Iron Works*, 36 Colo. App. 302, 540 P.2d 361 (1975).

**15-12-704. Personal representative to proceed without court order - exception.** A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration.

**Source: L. 73: R&RE, p. 1587, § 1. C.R.S. 1963: § 153-3-704.**

#### ANNOTATION

**A personal representative has the same standing to sue as the decedent had immediately prior to his or her death**, except for

proceedings that do not survive the decedent's death. *Steiger v. Burroughs*, 878 P.2d 131 (Colo. App. 1994).

**15-12-705. Duty of personal representative - information to heirs and devisees.** (1) Not later than thirty days after appointment, every personal representative, except any special administrator, shall give information of his or her appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information shall:

- (a) Include the name and address of the personal representative;
  - (b) Indicate that it is being sent to persons who have or may have some interest in the estate being administered;
  - (c) Indicate whether bond has been filed;
  - (d) Describe the court where papers relating to the estate are on file;
  - (e) Indicate that the surviving spouse, children under twenty-one years of age, and dependent children may be entitled to exempt property and a family allowance if a request for payment is made in the manner and within the time limits prescribed by statutes;
  - (f) Indicate that the surviving spouse may have a right of election to take a portion of the augmented estate if a petition is filed within the time limits prescribed by statute;
  - (g) Indicate that, because a court will not routinely review or adjudicate matters unless it is specifically requested to do so by a beneficiary, creditor, or other interested person, all interested persons, including beneficiaries and creditors, have the responsibility to protect their own rights and interests in the estate in the manner provided by the provisions of this code by filing an appropriate pleading with the court by which the estate is being administered and serving it on all interested persons pursuant to section 15-10-401;
  - (h) Indicate that all interested parties have the right to obtain information about the estate by filing a demand for notice pursuant to section 15-12-204; and
  - (i) Indicate that any individual who has knowledge that there is or may be an intention to use an individual's genetic material to create a child and that the birth of the child could affect the distribution of the decedent's estate should give written notice of such knowledge to the personal representative of the decedent's estate.
- (2) The personal representative's failure to give the information required by this section is a breach of his or her duty to the persons concerned but does not affect the validity of the

personal representative's appointment, powers, or other duties. A personal representative may inform other persons of his or her appointment by delivery or ordinary first-class mail.

**Source:** L. 73: R&RE, p. 1588, § 1. C.R.S. 1963: § 153-3-705. L. 96: Entire section amended, p. 659, § 11, effective July 1. L. 2008: (1) amended, p. 483, § 5, effective July 1. L. 2010: (1)(g) and (1)(h) amended and (1)(i) added, (SB 10-199), ch. 374, p. 1752, § 15, effective July 1. L. 2011: (1)(i) amended, (SB 11-083), ch. 101, p. 304, § 6, effective August 10.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsections (1)(g) and (1)(h) and adding (1)(i):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

### COMMENT

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. Also, it requires the personal representative to give notice to persons who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed. The communication involved is not to be confused with the notice requirements relating to litigation. The duty applies even though there may have been a prior testacy proceeding after notice, except that persons who have been adjudicated to be without interest in the estate are excluded. The rights, if any, of persons in regard to estates cannot be cut off completely except by the running of the three year statute of limitations provided in Section 3-108, or by a formal judicial proceeding which will include full notice to all interested persons. The interests of some persons may be shifted from rights to specific property of the decedent to the proceeds from

sale thereof, or to rights to values received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in relation to trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may be interested in the estate, under Section 3-401 or, in connection with a formal closing, as provided by Section 3-1001.

No information or notice is required by this section if no personal representative is appointed.

In any circumstance in which a fiduciary accounting is to be prepared, preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account. See ALI-ABA Monograph, Whitman, Brown and Kramer, Fiduciary Accounting Guide (2nd edition 1990).

### ANNOTATION

**Applied** in *Fry & Co. v. District Court*, 653 P.2d 1135 (Colo. 1982).

**15-12-706. Duty of personal representative - inventory and appraisal.**  
(1) Within three months after his appointment, a personal representative who is not a successor to another representative who has previously discharged this duty shall prepare an inventory of property owned by the decedent and subject to disposition by will or intestate succession at the time of his death, listing it with reasonable detail and indicating, as to each listed item, its fair market value as of the date of the decedent's death and the type and amount of any encumbrance that may exist with reference to any item. The inventory shall



include the oath or affirmation of the personal representative that it is complete and accurate so far as he is informed.

(2) The personal representative shall send a copy of the inventory to interested persons who request it, or he may file the original of the inventory with the court.

(3) If it appears that the heirs of an intestate or the devisees of a testator are unknown, or if known and there is no person qualified to receive the distributive share of such heirs or devisees, the personal representative shall also, within said three months, deliver or mail to the attorney general a copy of the inventory.

**Source:** L. 73: R&RE, p. 1588, § 1. C.R.S. 1963: § 153-3-706. L. 75: (1) amended, p. 596, § 28, effective July 1. L. 77: (1) amended, p. 834, § 18, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "The Inventory and Final Report", see 27 Dicta 291 (1950).

**Annotator's note.** Since § 15-12-706 is similar to repealed CSA, C. 176, § 145, relevant cases construing that provision have been included in the annotations to this section.

**The detailed requirements of this section for a valid inventory are mandatory.** Meyer v. Milliken, 111 Colo. 113, 138 P.2d 276 (1943).

**Effect of personal representative's failure to file inventory within statutory time.** Failure

of an executor or administrator to file an inventory of the estate within the time fixed by this section does not automatically extend the time for the filing of a widow's election not to take under the will of her deceased husband, and there is no statutory indication that the time for filing such election depends directly or indirectly upon the filing of the inventory. In re Sheely's Estate, 102 Colo. 194, 78 P.2d 378 (1938).

**15-12-707. Employment of appraisers.** The personal representative may employ qualified and disinterested appraisers to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

**Source:** L. 73: R&RE, p. 1588, § 1. C.R.S. 1963: § 153-3-707.

**15-12-708. Duty of personal representative - supplementary inventory.** If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisal showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed, or furnish copies thereof or information thereof to interested persons who request the inventory.

**Source:** L. 73: R&RE, p. 1588, § 1. C.R.S. 1963: § 153-3-708.

**15-12-709. Duty of personal representative - possession of estate.** Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property; except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for the purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for the purposes of administration. The personal representative shall pay taxes on

and take all steps reasonably necessary for the management, protection, and preservation of the estate in such representative's possession. The personal representative may maintain an action to recover possession of the property or to determine the title thereto. If the personal representative incurs expenses necessary for the protection or disposition of property not subject to such representative's administration, such as those incurred to fix the amount of death taxes thereon, or to compel the contribution contemplated in section 15-11-204 or 15-12-916 (4), the court may fix such liability for the same as it determines to be equitable against any person entitled to or wrongfully withholding the property.

**Source:** L. 73: R&RE, p. 1589, § 1. C.R.S. 1963: § 153-3-709. L. 81: Entire section amended, p. 914, § 7, effective July 1. L. 94: Entire section amended, p. 1037, § 11, effective July 1, 1995. L. 2009: Entire section amended, (HB 09-1241), ch. 169, p. 761, § 17, effective April 22.

## ANNOTATION

**Law reviews.** For article, "Practical Administrative Problems in Average-Sized Estates", see 27 Dicta 285 (1950). For article, "The Awkward Status of Colorado Real Property in a Decedent's Estate", see 41 Den. L. Ctr. J. 129 (1964).

**Annotator's note.** Since § 15-12-709 is similar to repealed § 152-10-13, CRS 53, CSA, C. 176, § 115, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**This section expressly confers the power upon an administrator and makes it his duty to sue for, recover, and preserve the estate, both real and personal.** Grover v. Clover, 69 Colo. 72, 169 P. 578 (1917); De Ford v. New York Life Ins. Co., 75 Colo. 146, 224 P. 1049 (1924); Swartz v. Rosenkrans, 78 Colo. 167, 240 P. 333 (1925); Norris v. Bradshaw, 92 Colo. 34, 18 P.2d 467 (1932); Weaver v. Weaver, 99 Colo. 74, 60 P.2d 227 (1936); Gushurst v. Benham, 151 Colo. 159, 376 P.2d 687 (1962).

**That duty implies the further one to employ counsel for the purpose.** People ex rel. Eaton v. El Paso County Court, 74 Colo. 123, 219 P. 215 (1923).

**Aggrieving administrator.** Any injury to the interests of heirs, beneficiaries, or creditors of the decedent arising through a diminution of the assets of the estate, even though not aggrieving the administrator personally, in legal effect is a grievance affecting him in his fiduciary and representative capacity. Gushurst v. Benham, 151 Colo. 159, 376 P.2d 687 (1962).

**Duty to take appeal necessary to prevent injury to interests.** The administrator represents the creditors and the whole of the estate, and it is his duty to take steps, such as appeal, as are necessary to prevent injury to the interests which he represents resulting from improper orders with respect to the estate of which he is representative. Gushurst v. Benham, 151 Colo. 159, 376 P.2d 687 (1962).

**A personal representative is required to preserve the real estate under this section.** People v. Cooke, 150 Colo. 52, 370 P.2d 896

(1962).

**Prior to closing estate, personal representative collects rents.** Normally in the course of administration of an estate a life tenant or other devisee is not given possession of realty until the estate is closed, meanwhile the representative of the estate collects the rents therefrom. Robinson v. Tubbs, 140 Colo. 471, 344 P.2d 1080 (1959).

**Power to bring actions to set aside colorable inter vivos transfers.** The administrator of the transferor's estate is authorized and also has standing to bring actions to set aside colorable inter vivos transfers. In re Scavello v. Scott, 194 Colo. 64, 570 P.2d 1 (1977).

**He may maintain an action for the cancellation of irrigation district bonds,** regardless of whether he has an interest in the real estate involved or not, it being his duty to receive, take possession of, sue for, recover and preserve the estate. Fowler v. Badger Irrigation Dist., 74 Colo. 109, 219 P. 209 (1923).

**Taxes are a proper administration expense.** The taxes are a proper administration expense, and where their payment has been approved by the state court the taxes are not a claim against the decedent, since they accrued after his death. The payment is therefore necessarily approved as a part of the administration expense. Since the executor must pay them, he must be recouped. Such charges cannot be claims against the estate. He can only be recouped by allowing them as a part of the administration expenses, which they are. Brown v. Comm'r 74 F.2d 281 (10th Cir. 1934).

**The estate is subject to taxation so long as the estate remains unsettled in the hands of the executor.** A testator directed that after the payment of certain specific legacies and the expense of administration, the residue of his estate should be paid to an institution of learning, the properties which are exempt by law from taxation. So long as the estate remained unsettled the funds in the hands of the executors were subject to taxation under this section, and



upon final settlement, the residue, if any, should be delivered to the regents. *Davis v. Regents of the Univ. of Colo.*, 63 Colo. 506, 168 P. 404 (1917).

**The administrator may assume possession of real property pertaining to the estate of the**

**decedent**, and if withheld, may sue for and recover it. *Galligan v. Hayden Realty Co.*, 62 Colo. 477, 163 P. 295 (1917).

**Applied** in *Fry & Co. v. Dist. Court*, 653 P.2d 1135 (Colo. 1982).

**15-12-710. Power to avoid transfers.** The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and, subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.

**Source:** L. 73: R&RE, p. 1589, § 1. C.R.S. 1963: § 153-3-710.

#### ANNOTATION

**Law reviews.** For article, "Decedents' Creditors and Nonprobate Assets," see 15 Colo. Law. 2190 (1986).

**Power to bring actions to set aside colorable inter vivos transfers.** The administrator of

the transferor's estate is authorized and also has standing to bring actions to set aside colorable inter vivos transfers. In *re Scavello v. Scott*, 194 Colo. 64, 570 P.2d 1 (1977).

**15-12-711. Powers of personal representatives - in general.** Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

**Source:** L. 73: R&RE, p. 1589, § 1. C.R.S. 1963: § 153-3-711.

#### ANNOTATION

**Annotator's note.** Cases relevant to § 15-12-711 decided prior to its earliest source, § 153-3-711, C.R.S. 1963, have been included in the annotations to this section.

**The Uniform Probate Code vests a personal representative with broad powers.** *Hill v. Boatright*, 890 P.2d 180 (Colo. App. 1994), *aff'd* in part and *rev'd* in part on other grounds sub nom. *Boatright v. Derr*, 919 P.2d 221 (Colo. 1996).

**An administrator is charged with a trust concerning decedent's interest in real estate.** *Murray v. Stuart*, 79 Colo. 454, 247 P. 187 (1926).

**He is forbidden by law to make a profit out of dealing on behalf of the estate.** In *re Macky's Estate*, 73 Colo. 1, 213 P. 131 (1922);

*Murray v. Stuart*, 79 Colo. 454, 247 P. 187 (1926).

**Power to bring actions to set aside colorable inter vivos transfers.** The administrator of the transferor's estate is authorized and also has standing to bring actions to set aside colorable inter vivos transfers. In *re Scavello v. Scott*, 194 Colo. 64, 570 P.2d 1 (1977).

**The personal representative must act for the benefit of all interested in the estate.** When there is a dispute regarding ownership of interstitial property, the personal representative must bring a separate proceeding to determine ownership. In *re Estate of Masden*, 24 P.3d 634 (Colo. App. 2001).

**Applied** in *Fry & Co. v. Dist. Court*, 653 P.2d 1135 (Colo. 1982).

**15-12-712. Improper exercise of power - breach of fiduciary duty.** If the exercise of power concerning the estate is improper, the personal representative is subject to the provisions of section 15-10-504 and is liable to interested persons for damage or loss resulting from breach of his or her fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in sections 15-12-713 and 15-12-714.

**Source:** L. 73: R&RE, p. 1589, § 1. C.R.S. 1963: § 153-3-712. L. 2008: Entire section amended, p. 483, § 6, effective July 1.

#### ANNOTATION

**Applied** in Fry & Co. v. Dist. Court, 653 P.2d 1135 (Colo. 1982).

**15-12-713. Sale, encumbrance, or transaction involving conflict of interest - voidable - exceptions.** (1) Any sale or encumbrance to the personal representative, his spouse, agent, or attorney, or any corporation or trust in which he has a beneficial interest, or any transaction which is affected by a conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented, unless:

(a) The will or a contract entered into by the decedent expressly authorized the transaction; or

(b) The transaction is approved by the court after notice to interested persons.

(c) Repealed.

(2) Any transaction previously declared by subsection (1) of this section to be void shall be deemed voidable unless a petition has been filed with the court to set aside any such transaction and a lis pendens has been recorded in the county where any affected real property is located, within sixty days after July 16, 1975.

**Source:** L. 73: R&RE, p. 1589, § 1. C.R.S. 1963: § 153-3-713. L. 75: IP(1) amended, (1)(c) repealed, and (2) added, pp. 596, 606, §§ 29, 62, effective July 1.

**15-12-714. Persons dealing with personal representative - protection.** (1) A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in section 15-12-504, no provision in any will or order of court purporting to limit the power of a personal representative is effective, except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

(2) For purposes of this section, any recorded instrument evidencing a transaction with a personal representative on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that such transaction was made for value.

**Source:** L. 73: R&RE, p. 1590, § 1. C.R.S. 1963: § 153-3-714. L. 75: Entire section amended, p. 596, § 30, effective July 1.

**15-12-715. Transactions authorized for personal representatives - exceptions.** (1) Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 15-12-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(a) Exercise any of the powers enumerated in the "Colorado Fiduciaries' Powers Act" at the time of such exercise; and

(b) Satisfy written charitable pledges of the decedent irrespective of whether the



pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances.

**Source:** L. 73: R&RE, p. 1590, § 1. C.R.S. 1963: § 153-3-715.

**Cross references:** For the “Colorado Fiduciaries’ Powers Act”, see part 8 of article 1 of this title.

#### ANNOTATION

**Applied** in Fry & Co. v. Dist. Court, 653 P.2d 1135 (Colo. 1982).

**15-12-716. Powers and duties of successor personal representative.** A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

**Source:** L. 73: R&RE, p. 1590, § 1. C.R.S. 1963: § 153-3-716.

**15-12-717. Corepresentatives - when joint action required.** If two or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any corepresentative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a corepresentative has been delegated to act for the others. Persons dealing with a corepresentative, if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

**Source:** L. 73: R&RE, p. 1590, § 1. C.R.S. 1963: § 153-3-717.

#### ANNOTATION

**Law reviews.** For article, “Representation of and Ethical Issues”, see 34 Colo. Law. 65 (July Multiple Estate Or Trust Fiduciaries: Practical 2005).

**15-12-718. Powers of surviving personal representative.** Unless the terms of the will otherwise provide, every power exercisable by personal corepresentatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of two or more nominated as personal corepresentatives is not appointed, those appointed may exercise all the powers incident to the office.

**Source:** L. 73: R&RE, p. 1591, § 1. C.R.S. 1963: § 153-3-718.

**15-12-719. Compensation of personal representative. (Repealed)**

**Source:** L. 73: R&RE, p. 1591, § 1. C.R.S. 1963: § 153-3-719. L. 2001: Entire section amended, p. 888, § 5, effective June 1. L. 2011: Entire section repealed, (SB 11-083), ch. 101, p. 317, § 27, effective August 10.

**15-12-720. Expenses in estate litigation. (Repealed)**

**Source:** L. 73: R&RE, p. 1591, § 1. C.R.S. 1963: § 153-3-720. L. 2001: Entire section amended, p. 888, § 6, effective June 1. L. 2011: Entire section repealed, (SB 11-083), ch. 101, p. 317, § 27, effective August 10.

**15-12-721. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate. (Repealed)**

**Source:** L. 73: R&RE, p. 1591, § 1. C.R.S. 1963: § 153-3-721. L. 75: (2)(f) repealed, p. 606, § 62, effective July 1. L. 2001: (3) added, p. 889, § 7, effective June 1. L. 2011: Entire section repealed, (SB 11-083), ch. 101, p. 317, § 27, effective August 10.

**15-12-722. Failure to comply with court orders - penalty. (Repealed)**

**Source:** L. 75: Entire section added, p. 597, § 31, effective July 1. L. 2008: Entire section repealed, p. 484, § 7, effective July 1.

**15-12-723. Assets concealed or embezzled.** If any personal representative, heir, legatee, creditor, guardian, or conservator or other person interested in the estate of any deceased person or protected person complains to the court, in writing, that any person is suspected to have concealed, embezzled, carried away, or disposed of any money, goods, or chattels of the deceased or protected person, or that such person has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest, or claim of the decedent or protected person to any real or personal estate, or any claim or demand, or any last will and testament of the deceased, the said district or probate court may cite such suspected person to appear before it and may examine him on oath upon the matter of such complaint. If the person cited refuses to appear and submit to such examination or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the county jail until he complies with the order of the court. All such interrogatories and answers may be in writing and signed by the party examined and filed in the district or probate court.

**Source:** L. 75: Entire section added, p. 597, § 31, effective July 1.

**ANNOTATION**

**Law reviews.** For article, "Proper Application of CRS § 15-12-723 for Recovery of Estate Assets", see 32 Colo. Law. 59 (May 2003).

**PART 8****CREDITORS' CLAIMS**

**Law reviews:** For article, "Creditors' Claims", see 13 Colo. Law. 1399 (1984); for article, "The Colorado Non-Claim Statute", see 21 Colo. Law. 45 (1992); for article, "Claims Against Decedents' Estates", see 27 Colo. Law. 45 (May 1998); for article, "Probate Jurisdiction for Creditors' Claims", see 29 Colo. Law. 57 (May 2000); for article, "Pre-Death Creditors' Claims Under the Colorado Probate Code: Part I", see 30 Colo. Law. 81 (August 2001); for article, "Pre-Death Creditors' Claims Under the Colorado Probate Code: Part II", see 30 Colo. Law. 77 (September 2001); for article, "New Developments in Creditor Claims Provisions of the Colorado Probate Code", see 35 Colo. Law. 67 (December 2006).

**15-12-801. Notice to creditors.** (1) Unless one year or more has elapsed since the death of the decedent, a personal representative shall cause a notice to creditors to be



published in some daily or weekly newspaper published in the county in which the estate is being administered, or if there is no such newspaper, then in some newspaper of general circulation in an adjoining county. Such notice shall be published not less than three times, at least once during each of three successive calendar weeks. The notice shall be substantially as follows:

NOTICE TO CREDITORS

Estate of .....(Deceased)

No. ....

All persons having claims against the above-named estate are required to present them to the undersigned or to the District Court of .....County, Colorado (or Probate Court of the City and County of Denver, Colorado), on or before

(a date not earlier than four months from date of first publication  
or the date one year from date of death, whichever occurs first),

..... 20 ....., or said claims may be forever  
barred.

.....  
Personal Representative

- (2) A personal representative may give written notice by mail or other delivery to any creditor. Written notice shall be the notice described in subsection (1) of this section or a similar notice. Such written notice shall notify the creditor to present his claim within the later of the following time periods or be forever barred:
- (a) Within the time set in the notice to creditors by publication in compliance with subsection (1) of this section; or
- (b) Within sixty days from the mailing or other delivery of such notice, but not later than the date one year from date of death.
- (3) A personal representative shall not be liable to any creditor or to any successor of the decedent for giving or failing to give notice under this section.

**Source:** L. 73: R&RE, p. 1592, § 1. **C.R.S. 1963:** § 153-3-801. **L. 75:** Entire section R&RE, p. 597, § 32, effective July 1. **L. 79:** Entire section amended, p. 649, § 9, effective July 1. **L. 90:** Entire section amended, p. 904, § 1, effective July 1.

ANNOTATION

**Law reviews.** For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Again — How Many Times?", see 21 Dicta 62 (1944). For article, "Decedents' Creditors and Nonprobate Assets," see 15 Colo. Law. 2190 (1986).

**Failure to file claim within four months bars claim.** The failure of a creditor to file a claim on its judgment within the four months required by this section bars it from asserting any claim based on the judgment. *Park State Bank v. McLean*, 660 P.2d 13 (Colo. App. 1982).

**A known or reasonably ascertainable creditor must present claims by the published**

**deadline if the creditor has actual knowledge of the deadline.** In re Estate of Sheridan, 117 P.3d 39 (Colo. App. 2004).

**Ex-wife's right to enforce a judicial lien through foreclosure is not affected by this section** where, as a secured creditor, she could proceed against the property without filing a claim against the estate. *Wright v. Estate of Valley*, 827 P.2d 579 (Colo. App. 1992).

**Applied in** In re Estate of Daigle, 634 P.2d 71 (Colo. 1981); *Barnhill v. Pub. Serv. Co.*, 649 P.2d 716 (Colo. App. 1982), aff'd, 690 P.2d 1248 (Colo. 1984).

**15-12-802. Statutes of limitations.** (1) Unless an estate is insolvent, or would thereby be rendered insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid.

(2) The running of any statute of limitations measured from some event other than death or the giving of notice to creditors for claims against a decedent is suspended during the four months following the decedent's death but resumes thereafter as to claims not barred pursuant to the provisions of this part 8.

(3) For purposes of any statute of limitations other than those time periods specified in sections 15-12-801, 15-12-803, 15-12-804, and 15-12-806, the proper presentation of a claim under section 15-12-804 is equivalent to commencement of a proceeding on the claim.

**Source:** L. 73: R&RE, p. 1592, § 1. C.R.S. 1963: § 153-3-802. L. 75: Entire section amended, p. 598, § 33, effective July 1. L. 90: Entire section amended, p. 905, § 2, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Practical Administrative Problems in Average-Sized Estates", see 27 Dicta 285 (1950).

**Annotator's note.** Since § 15-12-802 is similar to repealed laws antecedent to CSA, C. 176, § 200, relevant cases construing those provisions have been included in the annotations to this section.

**Where a claim was filed and later withdrawn,** it was held that the claim was barred by the statute of limitations as not having been filed within four months after the cause of action

accrued. The filing and withdrawal of the claim did not constitute the commencement of an action to prevent the statute of limitations from running. *Morse v. Clark*, 10 Colo. 216, 14 P. 327 (1887).

**The filing and docketing of a claim stops running of statute.** *Gordon-Tiger Mining & Reduction Co. v. Loomer*, 50 Colo. 409, 115 P. 717 (1911).

**Claim may consist of new judgment based on an original judgment.** *Scholtz v. Hazard*, 68 Colo. 343, 191 P. 123 (1920).

**15-12-803. Limitations on presentation of claims.** (1) (a) All claims against a decedent's estate that arose before the death of the decedent, including claims of the state of Colorado and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statutes of limitations, are barred against the estate, the personal representative, any transferee or other person incurring liability under section 15-15-103, and the heirs and devisees of the decedent, unless presented as follows:

(I) As to creditors barred by publication, within the time set in the published notice to creditors;

(II) As to creditors barred by written notice, within the time set in the written notice;

(III) As to all creditors, within one year after the decedent's death.

(b) In addition to the limitations on presentation of claims in paragraph (a) of this subsection (1), claims barred by the nonclaim statute at the decedent's domicile are also barred in this state.

(2) All claims against a decedent's estate that arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, any transferee or other person incurring liability under section 15-15-103, and the heirs and devisees of the decedent, unless presented as follows:

(a) A claim based on a contract with the personal representative, within four months after performance by the personal representative is due;

(b) Any other claim, within four months after it arises.

(3) Nothing in this section affects or prevents:



(a) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(b) To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

(c) Collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

(4) This section is a nonclaim statute that cannot be waived or tolled, and it shall not be considered a statute of limitations.

(5) Unless section 15-10-106 is determined to apply, and subject to the provisions of subsection (3) of this section, claims that are not presented in accordance with subsections (1) and (2) of this section are barred even if addressing the merits of the claim would not delay the settlement and distribution of the estate.

**Source:** L. 73: R&RE, p. 1592, § 1. C.R.S. 1963: § 153-3-803. L. 75: (3)(c) added, p. 598, § 34, effective July 1. L. 79: (1)(a) amended, p. 650, § 10, effective July 1. L. 90: (1) R&RE, p. 905, § 3, effective July 1. L. 2006: IP(1)(a) and IP (2) amended and (4) and (5) added, p. 373, § 2, effective July 1.

## ANNOTATION

**Law reviews.** For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "The Awkward Status of Colorado Real Property in a Decedent's Estate", see 41 Den. L. Ctr. J. 129 (1964). For article, "Notice and Due Process in Probate Revisited", see 14 Colo. Law. 29 (1985). For article, "Decedents' Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986). For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987).

**Annotator's note.** Since § 15-12-803 is similar to repealed § 153-12-12, C.R.S. 1963, § 152-12-12, CRS 53, CSA, C. 176, § 207, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Subsection (3)(b) constitutional.** The statutory classification of subsection (3)(b) between claims and estates protected by liability insurance and those that are not is reasonable and does not violate equal protection of the laws. In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

**Subsection (1)(a), setting forth one-year period for bringing a claim against an estate, is not so limited as to amount to a denial of justice or due process.** A statute of limitations does not deprive a claimant of its rights to due process unless the time for bringing the claim is so limited as to amount to a denial of justice. The general assembly is the primary judge of what amount of time is reasonable, and has determined that a one-year period is necessary to promote the speedy and efficient settlement of estates. In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000).

**This section represents substantial change in Colorado law,** not merely a codification of

existing law and public policy. In re Estate of Wehling, 37 Colo. App. 276, 547 P.2d 1289 (1976), aff'd sub nom. Kropp v. Farmers Ins. Exch., 193 Colo. 144, 563 P.2d 943 (1977).

**The Colorado probate code cannot be deemed to indicate a legislative intent to eradicate all time limitations.** In re Estate of Wehling, 37 Colo. App. 276, 547 P.2d 1289 (1976), aff'd sub nom. Kropp v. Farmers Ins. Exch., 193 Colo. 144, 563 P.2d 943 (1977).

**Purpose of a nonclaim statute** is to impose a condition precedent, namely, filing notice within the time specified, to the enforcement of the right of action for the benefit of the party against whom the claim is made. It also serves to effectuate the substantive rights of the party against whom the claim is asserted, usually a governmental entity or a court officer. Barnhill v. Pub. Serv. Co., 649 P.2d 716 (Colo. App. 1982), aff'd, 690 P.2d 1248 (Colo. 1984).

**Purpose of subsection (1)(a).** In order to preserve the finality of distributions of the estate, subsection (1)(a) creates a jurisdictional bar to untimely claims. Strong Bros. Enters. v. Estate of Strong, 666 P.2d 1109 (Colo. App. 1983).

**Nonclaim statute intended to expedite settlement of estate.** The nonclaim statute providing for an absolute bar of a claim filed late is intended to expedite the orderly and exact settlement of estates of decedents. In re Estate of Randall v. Colo. State Hosp., 166 Colo. 1, 441 P.2d 153 (1968); In re Estate of Dire, 851 P.2d 271 (Colo. App. 1993) (decided under this section as it existed prior to 1990 amendment); In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000).

**Effect of a nonclaim statute** is to bar substantive claims. Barnhill v. Pub. Serv. Co., 649

P.2d 716 (Colo. App. 1982), *aff'd*, 690 P.2d 1248 (Colo. 1984).

**Nonclaim statute operates to deprive a court of jurisdiction.** In *re Estate of Plank*, 32 Colo. App. 126, 509 P.2d 812 (1973), cert. dismissed, 186 Colo. 64, 527 P.2d 548 (1974); In *re Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000).

**Nonclaim statute does not operate to deprive a court of jurisdiction, but instead bars the enforcement of late-filed claims against an estate.** In *re Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000).

**But the bar created by this section is not an absolute bar.** This section does not necessarily bar an untimely claim if addressing the merits of the claim would not delay settlement of the estate and distribution of assets. *De Avila v. Estate of DeHerrera*, 75 P.3d 1144 (Colo. App. 2003).

**Nonclaim statute not applicable to equitable proceeding to redress breach of contract relating to will.** Since an equitable proceeding to redress a breach of contract relating to a will is not in the nature of a demand which would reduce the size of the estate, such an action involves a dispute as to the ownership of the decedent's property and is not a claim against the estate. Thus, this nonclaims statute does not determine the time within which the action must be started. *Knies v. Gross*, 43 Colo. App. 127, 599 P.2d 976 (1979).

**Disability trust is not subject to claims filing requirements of this section.** Since department of health care policy and financing has a first priority right to all amounts remaining in the trust, the department is not required to file a claim against the estate. *Stell v. Colo. Dept. of Health Care Policy & Fin.*, 78 P.3d 1142 (Colo. App. 2003), *rev'd* on other grounds, 92 P.3d 910 (Colo. 2004).

**Subsection (2) creates jurisdictional bar to claim untimely filed on behalf of minor against a decedent's estate, except to the extent of the liability insurance exemption of subsection (3).** In *re Estate of Daigle*, 634 P.2d 71 (Colo. 1981).

**Nonclaim statute and statute of limitations distinguished.** A nonclaim statute imposes a condition precedent to the enforcement of a right of action; the claim must be presented within the time set in the notice to creditors or be barred. A statute of limitations, on the other hand, does not bar the right of action but only the remedy. Such a statute, unlike a nonclaim statute, may be tolled. Such a statute is a defense which is waived if not affirmatively pleaded. In *re Estate of Randall v. Colo. State Hosp.*, 166 Colo. 1, 441 P.2d 153 (1968); In *re Estate of Plank*, 32 Colo. App. 126, 509 P.2d 812 (1973), cert. dismissed, 186 Colo. 64, 527 P.2d 548 (1974); In *re Estate of Daigle*, 634 P.2d 71 (Colo. 1981); In *re Estate of Hall*, 936 P.2d 592

(Colo. App. 1996), *aff'd*, 948 P.2d 539 (Colo. 1997).

**Nonclaim statute clearly not statute of limitations.** While a nonclaim statute appears to be in the nature of a statute of limitations, it is clearly not such. In *re Estate of Plank*, 32 Colo. App. 126, 509 P.2d 812 (1973), cert. dismissed, 186 Colo. 64, 527 P.2d 548 (1974).

Construing the nonclaim statute as a statute of limitations would frustrate the legislative purpose of promoting the speedy and efficient settlement of estates. In *re Estate of Daigle*, 634 P.2d 71 (Colo. 1981).

**Nonclaim statute not subject to tolling provisions.** The nonclaim statute is jurisdictional in character, and therefore not subject to the tolling provisions otherwise applicable to statutes of limitations. In *re Estate of Daigle*, 634 P.2d 71 (Colo. 1981); In *re Estate of Ongaro*, 973 P.2d 660 (Colo. App. 1998); In *re Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000).

**Unlike a statute of limitations, the deadline for filing claims established by this section generally cannot be waived or tolled,** since the estate's personal representative is a trustee of the estate for the benefit of its creditors and heirs and as such cannot by his or her conduct waive any provision of the statute affecting their substantive rights, nor should the representative interfere with the orderly and exact settlement of the estates of decedents. In *re Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000).

**Purpose of section is to bar untimely claims, and time limitation for presenting claim is jurisdictional.** Claim disallowed where presented more than three years after decedent's death. *Matter of Estate of Musselman*, 784 P.2d 858 (Colo. App. 1989).

**Subsection (1)(a)(I) is not a self-executing statute.** *Russo v. Sunrise Healthcare Corp.*, 994 P.2d 491 (Colo. App. 1999).

**Due process requires personal representative to give actual notice to known or reasonably ascertainable creditors of an estate.** *Russo v. Sunrise Healthcare Corp.*, 994 P.2d 491 (Colo. App. 1999).

**A known or reasonably ascertainable creditor must present claims by the published deadline if the creditor has actual knowledge of the deadline.** In *re Estate of Sheridan*, 117 P.3d 39 (Colo. App. 2004).

**A will contest, or a dispute over the distribution of the estate, is not a claim against the estate as contemplated by this section.** Therefore, this section does not apply. In *re Estate of Haywood*, 43 Colo. App. 127, 599 P.2d 976 (1979) (decided under law in effect prior to the 1990 repeal and reenactment); *Murphy v. Glenn*, 964 P.2d 581 (Colo. App. 1998).

**This section and § 15-12-804, in referring to claims "against the decedent's estate", mean merely "payable out of the estate".** *Heuschel v. Wagner*, 73 Colo. 327, 215 P. 476 (1923).



**Illustrations of contingent claims.** Decedent had signed as a guarantor on a note of which another person was the maker. *State ex rel. Zimmerman v. Estate of Petzoldt*, 126 Colo. 76, 246 P.2d 909 (1952).

A lessor of premises, at the time of the death of his lessee, has a claim against the estate for the rental due under the terms of the lease executed by deceased. *Lieber v. Sherman*, 130 Colo. 216, 274 P.2d 816 (1954).

**Where a claim is not filed within the statutory period, the same is forever barred.** *Lieber v. Sherman*, 130 Colo. 216, 274 P.2d 816 (1954); *Jackson v. Bates*, 133 Colo. 248, 293 P.2d 962 (1956); *Koon v. Bartmettler*, 134 Colo. 221, 301 P.2d 713 (1956); *Willis v. Neilson*, 32 Colo. App. 129, 507 P.2d 1106 (1973).

The failure of a creditor to file a claim on its judgment within the four months required by § 15-12-801 bars it from asserting any claim based on the judgment. *Park State Bank v. McLean*, 660 P.2d 13 (Colo. App. 1982).

The claim of a reinstated corporation is not validated by reinstatement when the corporation was in suspension during the statutory period for filing. This section is a non-claim statute which provides an absolute bar to claims which are not timely filed. *Alperstein v. Sherwood Int'l., Inc.*, 778 P.2d 279 (Colo. App. 1989).

**Failure to file a timely claim constitutes a jurisdictional defect and can be raised for first time on appeal.** Failure to file a claim against an estate prior to the date fixed in the notice of creditors as the last date for filing claims can be raised for the first time on appeal. *In re Estate of Plank*, 32 Colo. App. 126, 509 P.2d 812 (1973), cert. dismissed, 186 Colo. 64, 527 P.2d 548 (1975).

**If claim is filed within four months, the notice of application for allowance may be given after the four months.** Where a claim is filed against a decedent's estate within four months from the granting of letters, it is immaterial that no notice to the executor of an application for its allowance is given, until the lapse of the four months. *Metz v. People ex rel. Reid*, 6 Colo. App. 57, 40 P. 51 (1895); *Loveland's Estate v. Union Nat'l Bank*, 25 Colo. 499, 56 P. 61 (1898); *Altwater v. First Nat'l Bank*, 45 Colo. 528, 103 P. 378 (1909); *Milner Bank & Trust Co. v. Whipple's Estate*, 61 Colo. 252, 156 P. 1098 (1916).

**Claims against estate seeking equitable remedies timely presented.** Where a mutual mistake in the claimants' deeds was not discovered until the estate conveyed adjacent land to a third party and where claimants presented their claim for equitable relief from such mistake within four months from its discovery, the claim asserted by claimants was timely filed. *Matter of Estate of Scott*, 735 P.2d 924 (Colo. App. 1986).

**Only a filing of claim within four months is necessary to arrest statute.** Under the former

act it was held that a claim was not exhibited until notice was given. That rule does not apply to this section in which filing only is necessary within four months to arrest the running of the statute. *Brown's Estate v. Stair*, 25 Colo. App. 140, 136 P. 1003 (1913).

**Generally a personal representative cannot waive either the requirements or limitations of a statute of nonclaim.** This rule is grounded upon the principle that the personal representative is a trustee of the estate for the benefit of its creditors and heirs, and as such cannot by his conduct waive any provision of a statute affecting their substantial rights. *Crowley v. Farmers State Bank*, 109 Colo. 146, 123 P.2d 407 (1942).

The personal representative of an estate can neither waive nor toll a nonclaim statute. *In re Estate of Plank*, 32 Colo. App. 126, 509 P.2d 812 (1973), cert. dismissed, 186 Colo. 64, 527 P.2d 548 (1975).

**But personal representative cannot defeat rights of creditor by failing timely to allow or disallow claims.** *In re Estate of Hall*, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

**Statutes must be read together.** A claimant who has presented a claim pursuant to § 15-12-804(1) rather than commencing a civil proceeding under § 15-12-804(2) has opted for consideration of the claim on its merits by the personal representative. If, thereafter, a claim initially deemed allowed is purportedly disallowed or not paid by the personal representative, the claimant is entitled to petition the court for allowance and payment of the claim under § 15-12-806 or § 15-12-807, even though such petition is brought more than 60 days after the deadline for presenting a claim pursuant to this section. *In re Estate of Hall*, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

**Renewal note by administratrix will not change character of original indebtedness.** Renewal notes given by the administratrix of an estate for a debt existing at the time of the death of the decedent do not change the character of the original indebtedness, a claim not presented within the time prescribed and thus barred by this section. *Haley v. Austin*, 74 Colo. 571, 223 P. 43 (1924).

**If original debt is barred the mortgage securing the renewal note cannot be foreclosed.** This debt, being barred by this section, insofar as the right to satisfaction out of the estate property not included in the chattel mortgage is concerned, it necessarily follows that the claimants were not entitled to a foreclosure of the mortgage securing the renewal notes. The note is the principal thing, the mortgage merely an incident. *Haley v. Austin*, 74 Colo. 571, 223 P. 43 (1924).

**Under prior law, claims of state hospital not barred by limitation or nonclaim statute.** *State ex rel. Zimmerman v. Estate of Petzoldt*,

126 Colo. 76, 246 P.2d 909 (1952); *State v. Estate of Griffith*, 130 Colo. 312, 275 P.2d 945 (1954).

**Likewise under prior law, state claim for income taxes not barred by limitation or non-claim statute.** *Ray v. State*, 123 Colo. 144, 226 P.2d 804 (1950); *State v. Barr*, 159 Colo. 88, 409 P.2d 832 (1966); *In re Estate of Randall v. Colo. State Hosp.*, 166 Colo. 1, 441 P.2d 153 (1968).

**Insofar as claims are for care and maintenance, the weight of authority is that a sovereign or its subdivisions is subject to the same limitations for filing a claim as any other creditor who may make a claim against the estate of a decedent.** *In re Estate of Randall v. Colo. State Hosp.*, 166 Colo. 1, 441 P.2d 153 (1968).

**One who pays inheritance tax becomes creditor.** When one voluntarily pays an inheritance tax, she becomes a creditor of the estate and must file her claim for reimbursement within the four-month period of subsection (2). *Valks v. Krabacher*, 639 P.2d 1086 (Colo. App. 1980).

**Claim arising under workmen's compensation act is within section's purview.** Since a claim arises at the time of the accident for purposes of the workmen's compensation act, it is a claim within the purview of this section notwithstanding the fact that a department of labor referee has not made a determination in a workmen's compensation proceeding concerning the claimant's eligibility for compensation nor an order entered pursuant to § 8-44-107 (3). *First Nat'l Bank v. Long*, 44 Colo. App. 317, 616 P.2d 180 (1980).

**Debt of decedent asserted against estate within section's time limitation is deductible.** Under § 39-23-114 (1)(a)(I) any debt, except as qualified within that subparagraph, for which the decedent was personally liable, and which has been asserted against his estate within the time limitations of this section is deductible. *State Inheritance & Gift Tax Div. v. Bugdanowitz*, 44 Colo. App. 337, 614 P.2d 902 (1980).

**Valid liens are not affected.** This statute which bars the claims of unsecured creditors provides that valid liens of secured creditors are not affected and a secured creditor may disregard the estate and proceed against his security. *In re Estate of Blanpied v. Robinson*, 155 Colo. 133, 393 P.2d 355 (1964); *Willis v. Neilson*, 32 Colo. App. 129, 507 P.2d 1106 (1973); *Alberico v. Health Mgmt. Sys., Inc.*, 5 P.3d 967 (Colo. App. 2000).

As holders of a valid lien, defendants were secured creditors and, thus, were not required to file a claim against plaintiff's mother's estate. Accordingly, non-claim statute does not bar defendants' claims. *Alberico v. Health Mgmt. Sys., Inc.*, 5 P.3d 967 (Colo. App. 2000).

**Although not filed within the four months, claims secured by mortgage or deed of trust**

**may be allowed** when the creditor relies solely upon the property covered by his lien and relinquishes all claim against the general assets of the estate. *Reid v. Sullivan*, 20 Colo. 498, 39 P. 338 (1895); *Sullivan v. Sheets*, 22 Colo. 153, 43 P. 1012 (1896).

**In fact, the holder of an encumbrance upon property of the deceased may follow one of three routes:** (1) He may ignore the estate entirely and look only to his security; (2) he may file a conditional claim so that he may share in any of the assets in the event there is a deficiency; or (3) he may ignore the security and look only to the assets of the estate. The failure to file a claim does not discharge the lien nor render it unenforceable. *In re Estate of Blanpied v. Robinson*, 155 Colo. 133, 393 P.2d 355 (1964).

**Subsection (3)(b) creates an exception to the time limitations of the probate code** where the decedent is "protected by liability insurance". *Vigil v. Lewis Maintenance Serv., Inc.*, 38 Colo. App. 209, 554 P.2d 703 (1976).

**Publication of notice which does not comply with § 15-12-801 is equivalent to no publication at all.** In such a case, the general one-year period in former subsection (1)(b) of this section was held to apply. *In re Estate of Dire*, 851 P.2d 271 (Colo. App. 1993) (decided under this section as it existed prior to 1990 amendment).

**Contingent legal malpractice claim arose when claimant knew or should have known that he might suffer damage due to decedent's conduct.** When claim arose after the death of decedent attorney, contingent claim was barred if not filed within four months, even if still only a contingent claim. *Poleson v. Wills*, 998 P.2d 469 (Colo. App. 2000).

**Failure to present a contingent claim should not bar a subsequent liquidated claim** based on the same instrument when the obligation becomes fixed or ascertainable. *Security Savings & Loan Ass'n v. Estate of Kite*, 857 P.2d 430 (Colo. App. 1992), overruled in *In re Estate of Hall*, 948 P.2d 539 (Colo. 1997).

**Claim of father for reimbursement of funeral expenses against decedent son's estate arose within the meaning of subsection (2) at the time the father paid the funeral expenses in November 1996, even though the funeral expenses were incurred by the decedent's brother in March 1994.** Accordingly, the father's claim was not barred on the grounds that it was untimely filed, and the court properly asserted jurisdiction over the claim. *In re Estate of Boyd*, 972 P.2d 1075 (Colo. App. 1988).

**A loan payment receipt did not present sufficient notice of a claim against the estate** for compliance with this section. *In re Estate of Ongaro*, 973 P.2d 660 (Colo. App. 1998), *aff'd*, 998 P.2d 1097 (Colo. 2000).



**Applied** in *Price v. Sommermeyer*, 41 Colo. App. 147, 584 P.2d 1220 (1978); *Wickham v. Wickham*, 670 P.2d 452 (Colo. App. 1983).

**15-12-804. Manner of presentation of claims.** (1) Before a claim may be presented, the decedent's estate must first have been commenced in a court of appropriate jurisdiction by the filing of an application or petition pursuant to part 3 or 4 of this article. A claimant may thereafter present a claim only by:

(a) Filing a written statement of the claim with the clerk of the court, in the form approved by the supreme court, whether or not a personal representative has been appointed;

(b) Delivering or mailing a written statement of the claim to the court-appointed personal representative; or

(c) In the case of a claimant who has a claim described in section 15-12-803 (1), presenting a claim by commencing a proceeding against the personal representative in the court where the personal representative was appointed to obtain payment of the claim. A claimant having a claim described in section 15-12-803 (2) may present a claim by commencing a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction under the rules of civil procedure or statutes of this state to obtain payment of his or her claim against the estate. In order to constitute a timely presentation of a claim, the commencement of any proceeding under this paragraph (c) must occur within the time limited for presenting the claim. Time limits on proceedings to enforce timely presented claims are determined by section 15-12-806 (1) and not by this paragraph (c).

(2) Unless presentation is made pursuant to paragraph (a) of subsection (1) of this section, a claim against a decedent's estate is not validly presented by delivering or mailing a claim to any person unless that person has been appointed by the court or registrar of the court as the personal representative of the decedent's estate prior to the time the presentation is attempted.

(3) A personal representative's knowledge that a creditor could bring a claim against an estate shall not be treated as a valid substitute for the proper presentation of a written claim authorized by subsection (1) of this section.

(4) Each written statement of a claim shall include:

(a) A request or demand for payment from the decedent or the estate; and

(b) Sufficient information to allow the personal representative to investigate and respond to the claim, including the basis of the claim, the name and address of the claimant, and the amount claimed.

(5) Except in the situation where a special administrator has been formally appointed with specific powers to deal with the specific claim being presented or has been formally appointed to deal with claims generally under this part 8, a special administrator appointed in informal proceedings, or a special administrator who lacks the powers and authority of a general personal representative, is not a personal representative to whom presentation of a claim may properly be made.

(6) A claim shall be deemed presented on the date that the court-appointed personal representative receives the written statement of claim or the date the claim is filed with the court, whichever is earlier. If a claim is not yet due, the claim shall state the date when it will become due. If the claim is contingent or unliquidated, the claim shall state the nature of the uncertainty. If the claim is secured, the claim shall describe the security. Failure to describe correctly the security, the nature of any uncertainty, or the due date of a claim not yet due does not invalidate the presentation made.

(7) The personal representative shall inform any interested person, upon request, as to the existence, amounts, and nature of all claims against the estate that are known to him or her, but the personal representative shall not be required to express any opinion as to the probable outcome of any claim.

(8) If a claim is presented under subsection (1) of this section, a proceeding thereon may not be commenced more than sixty-three days after the personal representative has mailed a notice of disallowance; except that, in the case of a claim that is not presently due

or that is contingent or unliquidated, the personal representative may consent to an extension of the sixty-three-day period, or, to avoid injustice, the court, on petition, may order an extension of the sixty-three-day period, but in no event shall the extension run beyond the applicable statute of limitations.

**Source:** **L. 73:** R&RE, p. 1593, § 1. **C.R.S. 1963:** § 153-3-804. **L. 75:** (2) amended, p. 598, § 35, effective July 1. **L. 96:** Entire section amended, p. 660, § 12, effective July 1. **L. 2006:** Entire section amended, p. 374, § 3, effective July 1. **L. 2012:** (8) amended, (SB 12-175), ch. 208, p. 838, § 44, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (8) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Law reviews.** For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "Evidence in Estate Proceedings", see 24 Rocky Mt. L. Rev. 437 (1952). For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987).

**Annotator's note.** Since § 15-12-804 is similar to repealed § 153-12-5, C.R.S. 1963, CSA, C. 176, § 201, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Section simplifies procedure.** *Pierpoint v. Earl*, 80 Colo. 328, 251 P. 529 (1926).

**The requirements of this statute are mandatory.** *Crowley v. Farmers State Bank*, 109 Colo. 146, 123 P.2d 407 (1942).

**One designated in a will as a personal representative is not always the personal representative for purposes of subsection (1).** Such persons may possess priority for appointment but may not necessarily be deemed qualified and appointed by the court. *Estate of Rienks v. Rienks*, 844 P.2d 1295 (Colo. App. 1992).

**Nevertheless, a claim inartistically drawn is sufficient,** where the administratrix had long known of the claim and, in a general way, of the facts upon which it was based, for she could not have been misled by the manner in which it was presented. *Brown's Estate v. Stair*, 25 Colo. App. 140, 136 P. 1003 (1913).

**Excuse for failure to comply with section.** An executor is the representative of the estate, and he cannot properly accept employment from, or act as agent of, a claimant in presenting a claim against the estate for adjustment; and his failure to comply with the request of a claimant in this regard, is no excuse for the latter's failure to file his claim in accordance with the provisions of this section. In re *Hobson's Estate*, 40 Colo. 332, 91 P. 929 (1907).

**The intent of the law with respect to the filing and hearing of claims against an estate contemplates that the claim should be heard**

**upon its merits.** Where the trial court takes no testimony and the plaintiff has no opportunity to show that laches or the statute of limitations might or might not have been tolled, dismissing the claims on motions improperly raised under the rules of civil procedure agreed by the parties is erroneous. *McPherson v. McPherson*, 145 Colo. 170, 358 P.2d 478 (1960).

**The Colorado probate code cannot be deemed to indicate a legislative intent to eradicate all time limitations.** In re *Estate of Wehling*, 37 Colo. App. 276, 547 P.2d 1289 (1976), *aff'd sub nom. Kropp v. Farmers Ins. Exch.*, 193 Colo. 144, 563 P.2d 943 (1977).

**But personal representative cannot defeat rights of creditor by failing timely to allow or disallow claims.** In re *Estate of Hall*, 936 P.2d 592 (Colo. App. 1996), *aff'd*, 948 P.2d 539 (Colo. 1997).

**Statutes must be read together.** A claimant who has presented a claim pursuant to subsection (1) of this section rather than commencing a civil proceeding under subsection (2) has opted for consideration of the claim on its merits by the personal representative. If, thereafter, a claim initially deemed allowed is purportedly disallowed or not paid by the personal representative, the claimant is entitled to petition the court for allowance and payment of the claim under § 15-12-806 or § 15-12-807, even though such petition is brought more than 60 days after the deadline for presenting a claim pursuant to § 15-12-803. In re *Estate of Hall*, 936 P.2d 592 (Colo. App. 1996), *aff'd*, 948 P.2d 539 (Colo. 1997).

**There are three methods of presenting a claim against an estate.** First, a claimant may mail or deliver a written statement to the estate's personal representative. Second, a claimant may file its written claim with the clerk of the court where the estate is being probated. Third, a claimant may commence litigation against the personal representative to obtain payment of its claim against the estate. In re *Estate of Hall*, 948 P.2d 539 (Colo. 1997); In re *Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000).



A creditor need not strictly comply with each formal requirement for presentation of claims, however, this section does require that a creditor provide a personal representative with reasonable notice that it is making a claim against an estate, which, at a minimum, must contain a request or demand for payment from the estate and sufficient information to allow the personal representative to investigate and respond to the claim. In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000); In re Estate of Kochevar, 94 P.3d 1253 (Colo. App. 2004).

**Individual can claim against self as personal representative.** A person acting in his individual capacity as a claimant can file or accept a filing of such a claim with himself as personal representative. Wickham v. Wickham, 670 P.2d 452 (Colo. App. 1983).

**Notice to the attorney for the personal representative satisfies the requirement of notice to the personal representative.** Strong Bros. Enters. v. Estate of Strong, 666 P.2d 1109 (Colo. App. 1983).

The personal representative's full knowledge of his or her own claims does not satisfy the presentation requirement. Personal representative must satisfy this section like any other claimant. In re Estate of Sheridan, 117 P.3d 39 (Colo. App. 2004).

**None of the items the personal representative represented as a presentation of claim were a written request or demand for payment from estate;** therefore, the personal representatives claims were not properly presented. In re Estate of Sheridan, 117 P.3d 39 (Colo. App. 2004).

**Subsection (1) requires that a claim be mailed or delivered to a personal representative** who has been formally appointed by order of the court, if the claim has not been filed with the clerk of the court. Estate of Rienks v. Rienks, 844 P.2d 1295 (Colo. App. 1992).

**Applied in** In re Estate of Hamilton v. Egan, 633 P.2d 1100 (Colo. App. 1981).

**15-12-805. Classification of claims.** (1) The allowed claims against the estate of a decedent shall be paid by the personal representative in the following order:

(a) Property held by or in the possession of the deceased person as fiduciary or trustee of a trust, which shall include a resulting trust, as long as the reasonable expenses of administering such property and of investigating and determining such claim, as provided by section 15-10-602, but subject to section 15-10-605, shall be paid from such property as determined by the court;

(b) Other costs and expenses of administration;

(c) Reasonable funeral and burial, interment, or cremation expenses;

(d) Debts and taxes with preference under federal law;

(e) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him or her;

(f) Debts and taxes with preference under other laws of this state;

(f.5) The claim of the department of health care policy and financing for the net amount of medical assistance, as defined in section 25.5-4-302 (5), C.R.S., paid to or for the decedent;

(f.7) The claim of a county department of social services or the state department of human services for the excess public assistance paid for which the recipient was ineligible;

(g) All other claims.

(2) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

**Source:** L. 73: R&RE, p. 1593, § 1. C.R.S. 1963: § 153-3-805. L. 79: (1)(a) amended, p. 650, § 11, effective July 1. L. 91, 2nd Ex. Sess.: (1)(f.5) added, p. 91, § 7, effective October 16. L. 94: (1)(f.5) amended, p. 2647, § 113, effective July 1. L. 96: (1)(f.5) amended, p. 824, § 8, effective May 23. L. 2002: (1) amended, p. 653, § 9, effective July 1. L. 2006: (1)(f.5) amended, p. 2002, § 49, effective July 1; (1)(f.7) added, p. 948, § 5, effective August 7. L. 2011: (1)(a) amended, (SB 11-083), ch. 101, p. 304, § 7, effective August 10.

**Cross references:** For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative intent contained in the 2006 act enacting subsection (1)(f.7), see section 8 of chapter 208, Session Laws of Colorado 2006.

## ANNOTATION

- I. General Consideration.
- II. Personal Property Held by Deceased as Trustee.
- III. Costs of Administration.
- IV. Funeral Expenses.
- V. Other Claims.

## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "The Tax Liability of the Executor", see 28 Rocky Mt. L. Rev. 95 (1955). For article, "Some Suggested Changes in the Colorado Statutes Concerning Wills and Estates", see 29 Rocky Mt. L. Rev. 595 (1957).

**Annotator's note.** Since § 15-12-805 is similar to repealed § 153-12-2, C.R.S. 1963, § 152-12-2, CRS 53, CSA, C. 176, § 195, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**The purpose of the provision** allowing certain claims in an estate to be given first priority was to avoid subjecting property not owned by the decedent to disposition by the estate. In re Estate of Gray, 37 Colo. App. 47, 541 P.2d 336 (1975).

**Section should not be extended beyond language used.** A statute giving a preference to one class of claims over all others should not be construed to extend farther than its language clearly demands. McCutchen v. Osborne, 61 Colo. 408, 158 P. 136 (1916).

**The provisions of this section are mandatory.** State ex rel. Zimmerman v. Estate of Petzoldt, 126 Colo. 76, 246 P.2d 909 (1952).

**Section not applicable to claim against estate of incompetent.** This section, setting up classes of claims to be filed in an estate, applies to the estate of a deceased person, and, standing alone, clearly is not applicable to a conservatorship of the estate of a mental incompetent. The general assembly recognized the inapplicability of this section to conservatorships when it enacted § 15-14-428 especially applying to that subject. State ex rel. Zimmerman v. Estate of Petzoldt, 126 Colo. 76, 246 P.2d 909 (1952).

**Section not applicable when determining whether a disability trust qualifies for exemption from the Medicaid calculation.** Stell v. Colo. Dept. of Health Care Policy & Fin., 78 P.3d 1142 (Colo. App. 2003), rev'd on other grounds, 92 P.3d 910 (Colo. 2004).

**Classification of claims within probate jurisdiction of the district court.** Whitlock v. Alliance Coal Co., 73 Colo. 205, 214 P. 546 (1923).

**After the sale a secured creditor shares pro rata with other creditors.** In the case of a secured creditor, after the property mortgaged has been sold and its proceeds applied to his debt, leaving a balance unpaid, as to that balance the creditor is no longer a mortgage creditor, but is entitled only to have the same paid from the fund realized from the general assets of the estate pro rata with other creditors. Erle v. Lane, 22 Colo. 273, 44 P. 591 (1896).

## II. PERSONAL PROPERTY HELD BY DECEASED AS TRUSTEE.

**Fiduciary relationship must exist.** Both parties were attorneys, and aware that specificity of language or conduct is required to prove the essential elements of an express trust. Had they intended a fiduciary relationship, they would have used language which speaks of more than the debtor-creditor relationship evident. Fleming v. Singer, 168 Colo. 195, 450 P.2d 635 (1969).

**The word "trustee" in this section, is to be construed in connection with the other words of the section,** and as importing a technical and special trust, not the bailee of chattels, in a particular instance, charged with the duty to sell and account for the proceeds. McCutchen v. Osborne, 61 Colo. 408, 158 P. 136 (1916).

**This paragraph does not encompass a demand against a decedent's estate founded upon the receipt of certain negotiable paper,** to be sold by decedent, and the proceeds accounted for. The deceased is not regarded as a trustee within this section. McCutchen v. Osborne, 61 Colo. 408, 158 P. 136 (1916).

**Likewise, partial assignment of a chose in action does not in and of itself render an assignor a trustee for the assignee.** It does not, as a matter of law, necessarily create a fiduciary relationship between the partial assignor and the partial assignee. Fleming v. Singer, 168 Colo. 195, 450 P.2d 635 (1969).

**Where the trustee under a trust deed releases the trust deed and wrongfully appropriates the money** received for the release to his own use, he holds the fund in trust, for which a claim against his estate should be allowed under this section. Chavez v. Gallup, 77 Colo. 141, 235 P. 345 (1925).

## III. COSTS OF ADMINISTRATION.

**Expenses incurred in settlement of the estate are claims against the estate** encompassed by subsection (1)(c). Fleming v. Kelly, 18 Colo. App. 23, 69 P. 272 (1902); United States Fid. & Guar. Co. v. People ex rel. Miller, 44 Colo. 557, 98 P. 828 (1908); Proudfit v. Coons, 137 Colo. 353, 325 P.2d 273 (1958).



**Section 15-12-803 does not apply to expenses incurred in the administration and settlement of the estate.** *Gordon-Tiger Mining & Reduction Co. v. Loomer*, 50 Colo. 409, 115 P. 717 (1911).

**The executrix may treat the federal estate taxes and the state inheritance and succession taxes as a part of the cost of administration** and as a claim against the estate under subsection (1)(c). In turn such claims against the estate are satisfied by contributions or abatements from the bequests and devises of the testator's will or by payment from the estate assets if the testator so provides. *Meier v. Denver United States Nat'l Bank*, 164 Colo. 25, 431 P.2d 1019 (1967).

**Purchases to replenish stock of goods.** Generally speaking, an administrator may not continue the business of the decedent, nor use the assets of the estate for business purposes. To this rule, however, there are exceptions. Where the decedent was engaged in the mercantile or manufacturing business, his representative may, under order of court, carry on the business for a sufficient time to close it up. The administrator, if properly authorized, could continue the business for the purpose of disposing of the stock to advantage, and might purchase necessary merchandise to make the property more salable. Such purchases would constitute a proper claim in the settlement of the estate. A person from whom he bought goods could present the claim to the court for allowance, and § 15-12-803 from the very nature of the transaction would not apply. *Gordon-Tiger Mining & Reduction Co. v. Loomer*, 50 Colo. 409, 115 P. 717 (1911).

**Attorney fees for services rendered personal representative of decedent's estate are costs of administration.** *United States Fid. & Guar. Co. v. People ex rel. Miller*, 44 Colo. 557, 98 P. 828 (1908); *In re Curtis Estate*, 103 Colo. 361, 86 P.2d 260 (1938).

**No allowance may be made out of the estate of a deceased person for the services of an attorney not employed by the personal**

**representative** of the estate, where the services are rendered for the sole benefit of an individual or group of individuals interested in the estate, and where the services are rendered in a proceeding purely personal and adversary between the parties. *Proudfit v. Coons*, 137 Colo. 353, 325 P.2d 273 (1958).

**An unauthorized loan is not a claim against the estate.** An order of the court to carry on a mercantile business, and replenish the stock as occasion may require, carries no implied authority to borrow money, and a loan made in such case is not a claim against the estate. *Gordon-Tiger Mining & Reduction Co. v. Loomer*, 50 Colo. 409, 115 P. 717 (1911).

#### IV. FUNERAL EXPENSES.

**Funeral expenses and expenses of last illness** both appear as claims under this section and both items constitute valid claims, and the estate of deceased wife is primarily liable for both to husband who paid same. *In re Kefover's Estate*, 112 Colo. 53, 145 P.2d 879 (1944).

#### V. OTHER CLAIMS.

**Law reviews.** For comment on *Eisenberg v. Reininger*, appearing below, see 9 *Rocky Mt. L. Rev.* 294 (1937).

**Under prior law a widow's allowance, while in nature of cost of administration, was only superior to fifth class claims.** *Eisenberg v. Reininger*, 90 Colo. 511, 10 P.2d 945 (1932).

**State hospital's claim falls within this section.** Although the personal representative has the duty to pay the hospital's claim to the extent of the assets, such payment is to be made in the order of priority provided for in this section. *State v. Estate of Taylor*, 29 Colo. App. 231, 484 P.2d 1262 (1971).

**Since decedent held funds pursuant to an agency coupled with an interest, his rights thereto pass to his personal representative, and the first class claim section of this section does not apply.** *In re Estate of Gray*, 37 Colo. App. 47, 541 P.2d 336 (1975).

**15-12-806. Allowance of claims.** (1) The personal representative may mail a notice to any claimant stating that the claim has been disallowed. If the personal representative fails to mail notice to a claimant of action on his or her claim within sixty-three days after the time for original presentation of the claim has expired, the claim shall be deemed to be allowed. After any claim has been deemed to be allowed or disallowed, the personal representative may change the status of the allowance or disallowance of the claim by notice to the claimant; except that the personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim that is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty-three days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar.

(2) Upon the petition of the personal representative or of a claimant in a proceeding for

the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the clerk of the court in due time and not barred by subsection (1) of this section. Notice in this proceeding shall be given to the claimant, the personal representative, and those other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(3) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

(4) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty-three days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

**Source:** L. 73: R&RE, p. 1594, § 1. C.R.S. 1963: § 153-3-806. L. 79: (1) amended, p. 650, § 12, effective July 1. L. 2006: (1) amended, p. 376, § 4, effective July 1. L. 2012: (1) and (4) amended, (SB 12-175), ch. 208, p. 838, § 45, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1) and (4) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Failure of personal representative to provide notice** of 60-day time limitation did not render the disallowance defective. *Wishbone, Inc., v. Eppinger*, 829 P.2d 434 (Colo. App. 1991), overruled in *In re Estate of Hall*, 948 P.2d 539 (Colo. 1997).

**Failure to provide notice concerning the 60-day time bar** has no effect on the substance or the intended effect of the notice of disallowance, it only relieves the plaintiff of the requirement to file their claim within 60 days. *Wishbone, Inc., v. Eppinger*, 829 P.2d 434 (Colo. App. 1991), overruled in *In re Estate of Hall*, 948 P.2d 539 (Colo. 1997).

**Nor does such failure** remove a claim from the requirements of the probate code or general statutes of limitation. *Wishbone, Inc., v. Eppinger*, 829 P.2d 434 (Colo. App. 1991), overruled in *In re Estate of Hall*, 948 P.2d 539 (Colo. 1997).

**A nonclaim statute is not a statute of limitations** and to employ such a construction would frustrate the statutory goal underlying the distribution of estates. *Wishbone, Inc., v. Eppinger*, 829 P.2d 434 (Colo. App. 1991), overruled in *In re Estate of Hall*, 948 P.2d 539 (Colo. 1997).

**Since this nonclaim statute is self-executing, any lack of prior notice** to plaintiffs of its operation does not constitute a deprivation of due process. *Wishbone, Inc., v. Eppinger*, 829 P.2d 434 (Colo. App. 1991), overruled in *In re Estate of Hall*, 948 P.2d 539 (Colo. 1997).

**The filing of a petition to allow a claim under subsection (1) is not governed by the time limit in § 15-12-804 (2).** *In re Estate of Hall*, 948 P.2d 539 (Colo. 1997).

**Claim allowed by failure to act not barred by failure to act.** A claim against an estate which is allowed by the personal representative's failure to act is not barred by the limitation period of this section. *In re Estate of Hamilton v. Egan*, 633 P.2d 1100 (Colo. App. 1981).

**A personal representative may change a previous allowance of a claim** to a disallowance even if the allowance resulted from the failure of the personal representative to deny the claim within 60 days after the time for original presentation of the claim. Claimant may properly contest such disallowance by petition to the court, and an adjudication of the claim is proper. *Matter of Estate of Roddy*, 784 P.2d 841 (Colo. App. 1989).

**Nonclaim statute requires a claimant to commence an action within the time permitted for presentation of a claim**, even though the personal representative has not yet allowed or disallowed a claim. *Sec. Sav. & Loan Ass'n v. Estate of Kite*, 857 P.2d 430 (Colo. App. 1992), overruled in *In re Estate of Hall*, 948 P.2d 539 (Colo. 1997).

**The court has broad discretion in determining whether a contingent claim should be allowed, the amount of time to give a claimant to secure a judgment on the claim, and the amount of assets to be held in reserve for the contingency.** *Powers Blvd. Assoc. Ltd. v. Estate of Reel*, 839 P.2d 516 (Colo. App. 1992).

**When contingent claims force the court to hold open the administration of an estate**, the court must balance the heirs' interests in the prompt, orderly, and efficient administration of the estate against the protection of contingent claims being pursued against the estate in other



courts. Powers Blvd. Assoc. Ltd. v. Estate of Reel, 839 P.2d 516 (Colo. App. 1992).

**Personal representative cannot defeat rights of creditor by failing timely to allow or disallow claims.** In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

**Statutes must be read together.** A claimant who has presented a claim pursuant to § 15-12-804(1) rather than commencing a civil proceeding under § 15-12-804(2) has opted for consideration of the claim on its merits by the personal representative. If, thereafter, a claim initially deemed allowed is purportedly disallowed or not paid by the personal representative, the claimant is entitled to petition the court for allowance and payment of the claim under this

section or § 15-12-807, even though such petition is brought more than 60 days after the deadline for presenting a claim pursuant to § 15-12-803. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

**Claimant may not assert surprise** where the record shows that her opponent's defense arises from the very evidence on which claimant's case is based. Pierce v. Erzen, 672 P.2d 1023 (Colo. App. 1983).

**The time limit in subsection (2) does not govern the filing of a petition to allow a claim under § 15-12-806 (1).** In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

**Applied in** In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

**15-12-807. Payment of claims.** (1) One year after the decedent's death, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed, after making provision for family and exempt property allowances, for claims already presented which have not yet been allowed or whose allowance has been appealed, and for unbarred claims which may yet be presented, including costs and expenses of administration. By petition to the court in a proceeding for the purpose, or by appropriate motion if the administration is supervised, a claimant whose claim has been allowed but not paid as provided in this subsection (1) may secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for the payment.

(2) The personal representative at any time may pay any just claim which has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by such payment if:

(a) The payment was made before the expiration of the time limit stated in subsection (1) of this section and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or

(b) The payment was made, due to the negligence or willful fault of the personal representative, in such manner as to deprive the injured claimant of his priority.

**Source:** L. 73: R&RE, p. 1594, § 1. C.R.S. 1963: § 153-3-807. L. 90: (1) amended, p. 906, § 4, effective July 1.

## ANNOTATION

**Annotator's note.** Since § 15-12-807 is similar to repealed § 153-12-13, C.R.S. 1963, and § 152-12-11, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

**Personal representative cannot defeat rights of creditor by failing timely to allow or disallow claims.** In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

**Statutes must be read together.** A claimant who has presented a claim pursuant to § 15-12-804(1) rather than commencing a civil proceeding under § 15-12-804(2) has opted for consideration of the claim on its merits by the personal representative. If, thereafter, a claim initially deemed allowed is purportedly disallowed or not paid by the personal representative, the

claimant is entitled to petition the court for allowance and payment of the claim under this section or § 15-12-806, even though such petition is brought more than 60 days after the deadline for presenting a claim pursuant to § 15-12-803. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

**An order directing payment of a claim forthwith does not have the effect of relieving the executor of performing his duties in accordance with law.** Irwin v. Robinson, 143 Colo. 336, 355 P.2d 108 (1960).

**When a surcharge is adjudged against a fiduciary, the amount is required to be paid into the estate forthwith.** It becomes an asset of the estate and subject to the claims against the estate. The claim here was subjected to certain

conditions because of its late filing. The executor, whose improper handling of this claim caused it to be classified as a late filed claim, should not benefit by these conditions by being

reimbursed from these estate assets for expenses thereby prejudicing the right to payment on the claim. In re Estate of Blanpied v. Robinson, 163 Colo. 433, 431 P.2d 481 (1967).

**15-12-808. Individual liability of personal representative.** (1) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(2) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(3) Claims based on contracts entered into by a personal representative in his fiduciary capacity on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(4) Issues of liability as between the estate and the personal representative individually may be determined:

(a) In a proceeding pursuant to section 15-10-504;

(b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal;  
or

(c) In other appropriate proceedings.

(5) A personal representative is not individually liable for making distributions that do not take into consideration the possible birth of a posthumously conceived child if the personal representative made the distribution prior to:

(a) Receiving notice or acquiring actual knowledge of the existence of an intention to use an individual's genetic material to create a child; and

(b) The birth of the child could affect the distribution of the decedent's estate.

(6) If a personal representative has reviewed the records of the county clerk and recorder in every county in Colorado in which the personal representative has actual knowledge that the decedent was domiciled at any time during the three years prior to the decedent's death and the personal representative does not have actual notice or actual knowledge of the existence of a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession, the personal representative shall not be individually liable for distributions made to devisees or heirs at law that do not take into consideration the designated beneficiary agreement.

**Source:** L. 73: R&RE, p. 1595, § 1. C.R.S. 1963: § 153-3-808. L. 2008: (4) amended, p. 484, § 8, effective July 1. L. 2010: (5) added, (SB 10-199), ch. 374, p. 1752, § 16, effective July 1. L. 2011: IP(5) and (5)(a) amended, (SB 11-083), ch. 101, p. 304, § 8, effective August 10. L. 2012: (6) added, (SB 12-131), ch. 114, p. 393, § 2, effective April 13.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act adding subsection (5):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.



## COMMENT

In the absence of statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e.g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the estate only after exhausting

his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

## ANNOTATION

**Bank, acting as personal representative for a particular decedent, may not be held liable in an individual capacity for tortious interference with a contract** which entitled a surviving

partner to purchase partnership interest held by such decedent at the time of death. Colo. Nat. Bank v. Friedman, 846 P.2d 159 (Colo. 1993).

**15-12-809. Secured claims.** (1) Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:

(a) If the creditor exhausts his security before receiving payment, (unless precluded by other law) upon the amount of the claim allowed less the fair value of the security; or

(b) If the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise, or litigation.

(2) A claim for a decedent's proportionate share of liability for a secured debt, made by a third party who is jointly liable with the decedent to the secured creditor, based on the third party's right to contribution from the decedent, shall be reduced by the fair market value, as of the date of death, of the decedent's interest in the property securing the debt, if the property securing the debt is owned by the decedent and not subject to disposition by will or intestate succession at the time of death, and if the decedent's interest passed to the third party on decedent's death.

**Source:** L. 73: R&RE, p. 1595, § 1. C.R.S. 1963: § 153-3-809. L. 91: Entire section amended, p. 1449, § 11, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Decedents' Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986).

**15-12-810. Claims not due and contingent or unliquidated claims.** (1) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(2) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

(a) If the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;

(b) Arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

**Source:** L. 73: R&RE, p. 1595, § 1. C.R.S. 1963: § 153-3-810.

**15-12-811. Counterclaims.** In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate a court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim.

**Source:** L. 73: R&RE, p. 1596, § 1. C.R.S. 1963: § 153-3-811.

**15-12-812. Execution and levies prohibited.** No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges, or liens upon real or personal property in an appropriate proceeding.

**Source:** L. 73: R&RE, p. 1596, § 1. C.R.S. 1963: § 153-3-812.

#### ANNOTATION

A judgment creditor of a deceased person has no right or power to attach property after death by an execution lien. Great W. Exch., Inc. v. Walters, 819 P.2d 1093 (Colo. App. 1991).

**15-12-813. Compromise of claims.** When a claim against the estate has been presented in any manner, the personal representative may, if it appears to be in the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

**Source:** L. 73: R&RE, p. 1596, § 1. C.R.S. 1963: § 153-3-813.

#### ANNOTATION

**Law reviews.** For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987).

**15-12-814. Encumbered assets.** If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance, or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be in the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

**Source:** L. 73: R&RE, p. 1596, § 1. C.R.S. 1963: § 153-3-814. L. 75: Entire section amended, p. 599, § 36, effective July 1.



**15-12-815. Administration in more than one state - duty of personal representative.** (1) All assets of estates being administered in this state are subject to all claims, allowances, and charges existing or established against the personal representative wherever appointed.

(2) If the estate either in this state or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges, and claims, after satisfaction of the exemptions, allowances, and charges, each claimant whose claim has been allowed either in this state or elsewhere in administrations of which the personal representative is aware is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this state, the creditor so benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(3) In case the exempt property and family allowances, prior charges, and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this state is not the state of the decedent's last domicile, the claims allowed in this state shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this state the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this state is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

**Source:** L. 73: R&RE, p. 1596, § 1. C.R.S. 1963: § 153-3-815.

**15-12-816. Final distribution to domiciliary representative.** (1) The estate of a nonresident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless:

(a) By virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this state without reference to the local law of the decedent's domicile;

(b) The personal representative of this state, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or

(c) The court orders otherwise in a proceeding for a closing order under section 15-12-1001 or incident to the closing of a supervised administration.

(2) In other cases distribution of the estate of a decedent shall be made in accordance with the applicable provisions of this article.

**Source:** L. 73: R&RE, p. 1597, § 1. C.R.S. 1963: § 153-3-816.

## PART 9

### SPECIAL PROVISIONS RELATING TO DISTRIBUTION

**15-12-901. Successors' rights if no administration.** (1) (a) As used in this subsection (1), "will probated in this state" means a will that is declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court.

(b) Except as otherwise provided in paragraph (c) of this subsection (1) and in part 13 of this article:

(I) In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a will probated in this state or the laws of intestate succession.

(II) Devisees may establish title by the will probated in this state to devised property.

(c) A duly executed and unrevoked will that is not a will probated in this state may be admitted as evidence of a devise if:

(I) A court proceeding concerning the succession or administration of the estate has not occurred; and

(II) Either the devisee or his or her successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

(2) Persons entitled to property by exemption or intestacy may establish title thereto by proof of the decedent's ownership, his or her death, and their relationship to the decedent.

(3) Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption.

**Source:** L. 73: R&RE, p. 1597, § 1. C.R.S. 1963: § 153-3-901. L. 2011: Entire section amended, (SB 11-083), ch. 101, p. 304, § 9, effective August 10.

**15-12-902. Distribution - order in which assets appropriated - abatement.**

(1) (a) Except as provided in subsection (2) of this section and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

(I) Property not disposed of by the will;

(II) Residuary devisees;

(III) General devisees;

(IV) Specific devisees.

(b) For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(2) If the will expresses an order of abatement, or the express purpose of the devise would be defeated by the order of abatement stated in subsection (1) of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(3) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

**Source:** L. 73: R&RE, p. 1597, § 1. C.R.S. 1963: § 153-3-902.

**ANNOTATION**

**Annotator's note.** Since § 15-12-902 is similar to repealed § 152-14-5, CRS 53, CSA, C. 176, § 226, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**Effect of widow's taking elective share on other devisees.** Upon renunciation by the widow under § 15-11-201, giving her in such case half of the whole estate, the will was not revoked as to a devise to one not an heir at law, but that such a devise abated one half. *Logan v. Logan*, 11 Colo. 44, 17 P. 99 (1887).

**How interest of widow derived.** A will devised to the widow an undivided half of the estate of decedent for life, remainder to a brother and sister and three children and the residue to another. The widow elected to renounce under

the will and take under the statute. A judgment declaring void a part of the bequests held objectionable; the interest of the widow should be derived from the entire estate and the interests of the beneficiaries abated proportionally under this section. *Binkley v. Switzer*, 69 Colo. 176, 192 P. 500 (1920).

**Loss to devisee attributed to this section.** Where the widow's half which she has elected to take might encroach upon a part of the devise to the son because the estate property outside of the devise to the son and outside of the legacy to the daughter is not sufficient to pay the widow's half in full, the loss to the son must then be attributed to this section. The courts have no power to repeal the section. *Hart v. Hart*, 95 Colo. 471, 37 P.2d 754 (1934).



A general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind. *Breymaier v. Davidson*, 149 Colo. 218, 368 P.2d 965 (1962).

While a specific legacy is a gift by will of a specific article, or a particular part of the testator's estate, which is identified and distinguished from all others of the same nature, and which is to be satisfied only by the delivery and receipt of the particular thing given. *Breymaier v. Davidson*, 149 Colo. 218, 368 P.2d 965 (1962).

A demonstrative legacy partakes of the nature of both a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an

intent to relieve the general estate from liability in case the fund fails. *Breymaier v. Davidson*, 149 Colo. 218, 368 P.2d 965 (1962).

Therefore, bequests to daughters of sums of money are general legacies, as distinguished from specific legacies, and are subject to abatement under this section as unamended. *Breymaier v. Davidson*, 149 Colo. 218, 368 P.2d 965 (1962).

Settlement contract confirming legacy does not exempt it from abatement. A gift of \$30,000 to a daughter of the testator to be paid out of the general estate of testator is a general legacy, and a contract made by the parties in settlement of a contest which merely confirmed such legacy cannot be held to exempt it from abatement under this section as unamended. *Breymaier v. Davidson*, 149 Colo. 218, 368 P.2d 965 (1962).

**15-12-903. Right of retainer.** Unless a contrary intent is indicated by the will, the amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

Source: L. 73: R&RE, p. 1598, § 1. C.R.S. 1963: § 153-3-903.

Cross references: For debts to a decedent, see § 15-11-110.

**15-12-904. Interest on general pecuniary devise.** General pecuniary devises bear interest at the legal rate beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

Source: L. 73: R&RE, p. 1598, § 1. C.R.S. 1963: § 153-3-904.

#### ANNOTATION

Law reviews. For article, "Fiduciary Accounting — Are the Ground Rules Clear?", see 11 Colo. Law. 1192 (1982).

**15-12-905. Penalty clause for contest.** A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

Source: L. 73: R&RE, p. 1598, § 1. C.R.S. 1963: § 153-3-905.

#### ANNOTATION

Law reviews. For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "No-Contest Clauses: Issues for Drafting and Litigating", see 29 Colo. Law. 57 (December 2000).

For purposes of this section, offering a later will can constitute a contest of an earlier will and the fact that the later will was a product of

undue influence does not, as a matter of law, preclude the application of the good faith-probable cause exception set forth in this section. In re Estate of Peppler, 971 P.2d 694 (Colo. App. 1998).

**15-12-906. Distribution in kind - valuation - method.** (1) A specific devisee is entitled to distribution of the thing devised to him.

(2) (a) Any exempt property or family allowance or devise payable in money may be satisfied by value in kind, if:

(I) The person entitled to the payment has requested distribution in kind;

(II) The property distributed in kind is valued at fair market value as of the date of its distribution; and

(III) No residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(b) For the purpose of valuation under paragraph (a) of this subsection (2), securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than thirty days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(c) The residuary estate may be distributed in cash or in kind, without requiring a pro rata distribution of specific assets, if there is no objection to the proposed distribution. In other cases, residuary property may be converted into cash for distribution, subject to all applicable fiduciary duties, or may be distributed in cash or in kind, without requiring a pro rata distribution of specific assets, pursuant to a court order.

(3) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within thirty days after mailing or delivery of the proposal.

(4) If, in any instrument which provides for a devise or transfer intended to qualify for a federal estate tax marital deduction, the personal representative or trustee is required, or expressly authorized, by the terms of the instrument, to satisfy such devise or transfer by a distribution of property in kind at values as finally determined for federal estate tax purposes or at values which are the same as the federal income tax bases of such property to the estate or trust, then, unless the instrument expressly requires that such devise or transfer be satisfied with property having an aggregate fair market value at the date, or dates, of distribution amounting to no less than the amount of such devise or transfer as finally determined for federal estate tax purposes, the distributee of such devise or transfer shall be entitled to a distribution of property which will have an aggregate fair market value fairly representative of the distributee's proportionate share of the appreciation or depreciation in the value to the date, or dates, of distribution of all property then available for distribution, and the personal representative or trustee shall satisfy such devise or transfer accordingly.

**Source:** L. 73: R&RE, p. 1598, § 1. C.R.S. 1963: § 153-3-906. L. 81: (2)(c) amended, p. 914, § 8, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Marital Bequest Computations (Pecuniary Bequests)", see 13 Colo. Law. 43 (1984).



**15-12-907. Distribution in kind - evidence.** If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring, or releasing the assets to the distributee as evidence of the distributee's title to the property.

**Source:** L. 73: R&RE, p. 1599, § 1. **C.R.S. 1963:** § 153-3-907.

**15-12-908. Distribution - right or title of distributee.** Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate; except that the personal representative may recover the assets or their value if the distribution was improper.

**Source:** L. 73: R&RE, p. 1599, § 1. **C.R.S. 1963:** § 153-3-908.

**15-12-909. Improper distribution - liability of distributee.** Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable for return of the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable for return of the value as of the date of disposition of the property improperly received and its income and gain received by him.

**Source:** L. 73: R&RE, p. 1599, § 1. **C.R.S. 1963:** § 153-3-909.

**Cross references:** For liability to persons interested in an estate, see § 15-12-703.

**15-12-910. Purchasers from distributees protected.** If property distributed in kind or a security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order and whether or not the authority of the personal representative was terminated prior to execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or his transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated prior to the distribution. For purposes of this section, any recorded instrument evidencing a transfer to a purchaser from or lender to a distributee on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that such transfer was made for value.

**Source:** L. 73: R&RE, p. 1599, § 1. **C.R.S. 1963:** § 153-3-910. **L. 75:** Entire section R&RE, p. 599, § 37, effective July 1.

**15-12-911. Partition for purpose of distribution.** When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the court, prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the court shall partition the property in the same manner as provided by the law for civil actions of partition. The court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

**Source:** L. 73: R&RE, p. 1600, § 1. C.R.S. 1963: § 153-3-911.

**15-12-912. Private agreements among successors to decedent binding on personal representative.** Subject to the rights of creditors, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent or under the laws of intestacy in any way that they provide in a written agreement, whether or not supported by a consideration, executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his or her obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his or her office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing in this section relieves trustees of any duties owed to beneficiaries of trusts.

**Source:** L. 75: Entire section added, p. 599, § 38, effective July 1. L. 99: Entire section amended, p. 467, § 5, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989).

**When attempting to carry out private agreement among successors, the personal representative must act for the benefit of all successors including those who are not parties.** When a stipulated order for property distribution involves competing parties and interests, all parties must be given an opportunity to participate in the proceedings to determine the

ownership interests. In re Estate of Masden, 24 P.3d 634 (Colo. App. 2001).

**Where the will clearly limits participation in the estate to devisees and unambiguously excludes other family members from participation, the omitted heirs have no interest in the estate, are not affected by any agreement entered pursuant to this section, and are not entitled to any notice of such an agreement.** In re Estate of Walter, 97 P.3d 188 (Colo. App. 2003).

**15-12-913. Distributions to trustee.** (1) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in section 15-16-303.

(2) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the court has acted.

(3) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (1) and (2) of this section.

**Source:** L. 73: R&RE, p. 1600, § 1. C.R.S. 1963: § 153-3-913.

**15-12-914. Disposition of unclaimed assets.** (1) If any heirs or devisees of any intestate or testator are unknown, or if known and there is no person qualified to receive devises or distributive shares of such heirs or devisees at the time of making final settlement of the estate, or if such heirs or devisees refuse to receive and receipt for such devises or distributive shares, or in the event there is no taker under the provisions of article 11 of this title, the personal representative shall reduce all such devises or distributive shares to cash and shall be ordered by the court to pay any balances remaining in his hands to the state treasurer; and the state shall be answerable for the same, without interest, anytime within twenty-one years after the same shall have been paid into the treasury, to such person or persons as shall appear to be legally entitled to the same, upon order of the court having administration of the estate.



(2) Except as provided in subsection (1) of this section, any person, corporation, association, or other entity in possession of moneys paid to him or it or in his or its possession in any fiduciary capacity, and the said moneys are unclaimed, or the person to whom the person in possession may lawfully pay the same, or the person who may be entitled thereto is unknown or absent or fails to receive and properly receipt therefor, may pay said moneys to the state treasurer; and the state shall be answerable for the same, without interest, anytime within twenty-one years after the same shall have been paid to the state treasurer; such payment to the state treasurer shall discharge the person making the same from any further liability or responsibility for such moneys.

(3) After the lapse of twenty-one years from the time any such moneys shall be paid into the state treasury, and no claim therefor having been made and established by any person entitled thereto, said moneys shall become the property of the state and shall be transferred to the public school fund thereof, and the state shall not be liable therefor. Prior to said lapse of twenty-one years, such moneys may be invested by the state treasurer, and all interest or increment therefrom shall be credited to the general fund.

(4) At the time any personal representative or other fiduciary pays into the state treasury any moneys, he shall make a written report thereof to the attorney general of the state, giving him such information as he may have, under oath or affirmation, touching the identity and antecedents of the deceased, as well as of any person supposed to be entitled to said moneys, to the end that fictitious claims thereto may be forestalled. The attorney general shall file such reports in his office and keep the index thereof, and no order shall be made by a court for the repayment of any moneys so paid into the state treasury without the attorney general having first been served with written notice thirty days before the time of making application therefor. Upon the serving of such notice, the attorney general shall be classified as an interested person under this code and may appear and take all steps for and on behalf of the state that any person who might be a defendant to such action might take. The reasonable expense of any such action taken by the attorney general shall be initially paid out of the attorney general's contingent fund; but, with the approval, order, and direction of the court having jurisdiction of the estate, any such reasonable expense incurred by the attorney general in conserving the estate and in investigating and litigating the claim of any alleged heir, devisee, distributee, or creditor shall be repaid to said contingent fund out of the moneys in the estate or fund in controversy before final settlement thereof.

(5) No estate or trust shall be permitted to remain open for the reason that an heir or devisee or beneficiary is unknown or cannot be located or refuses to receive and receipt for his share. All property subject to the provisions of subsection (1) of this section shall be paid to the state treasurer no later than three months after the entry of the order of final settlement or no later than six months after such property becomes eligible for distribution, whichever date is the earlier.

**Source:** L. 73: R&RE, p. 1600, § 1. C.R.S. 1963: § 153-3-914. L. 81: (1), (4), and (5) amended, p. 920, § 1, effective June 9. L. 84: (4) amended, p. 1118, § 11, effective June 7.

**15-12-915. Distribution to person under disability.** (1) A personal representative or trustee may discharge his obligation to distribute to any person under legal disability:

- (a) By distributing to his conservator; or
- (b) By distributing to any person authorized by law to give a valid receipt and discharge for the distribution; or
- (c) The court may authorize distribution to a parent or relative of or a person having the custody and being responsible for the care of the person under disability for such person's use or benefit, subject to such terms and conditions as the court shall direct and approve; or
- (d) By distributing in any way authorized by the terms of the will or trust instrument or by the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.; but, in making any such distribution, the personal representative or trustee has a duty to act as a prudent man with due regard to the obligations of a fiduciary.

**Source:** L. 73: R&RE, p. 1601, § 1. C.R.S. 1963: § 153-3-915. L. 81: (1)(d) amended, p. 915, § 9, effective July 1. L. 84: (1)(d) amended, p. 394, § 7, effective July 1.

**15-12-916. Apportionment of estate taxes.** (1) For purposes of this section:

(a) "Estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this state.

(b) "Fiduciary" means personal representative or trustee.

(c) "Person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency.

(d) "Person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, conservator, and trustee.

(e) "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(f) "Tax" means the federal estate tax, the additional inheritance tax imposed by section 26-2-113, C.R.S., the Colorado estate tax imposed by article 23.5 of title 39, C.R.S., and interest and penalties imposed in addition to the tax.

(2) Unless otherwise provided in the will or other dispositive instrument, the tax shall be apportioned among all persons interested in the estate, subject to the exceptions specified in this section. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for tax apportionment purposes. In all instances not involving a spouse unprovided for in a will as provided in section 15-11-301 or an election by a surviving spouse as provided in section 15-11-201, if the decedent's will or other dispositive instrument directs a method of apportionment of tax different from the method described in this code, the method described in the will or other dispositive instrument controls. In instances involving such a spouse unprovided for in a will or election, if the decedent's will or other dispositive instrument directs a method of apportionment of tax different from the method described in this code, the apportionment of tax to the spouse unprovided for in the will or to the surviving spouse shall be in accordance with the method described in this code, and the apportionment of tax to the remaining persons interested in the estate shall be in accordance with the method described in the will or other dispositive instrument.

(3) (a) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose, may determine the apportionment of the tax.

(b) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (2) of this section, because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(c) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge him with the amount of the assessed penalties and interest.

(d) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this code, the determination of the court in respect thereto shall be prima facie correct.

(4) (a) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the



other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this section.

(b) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(5) (a) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate, and for any deductions and credits allowed by the law imposing the tax.

(b) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but, if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(c) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of all persons liable to apportionment.

(d) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

(e) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or devise is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (2) of this section, and to that extent no apportionment is made against the property. The provisions of this paragraph (e) do not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the federal "Internal Revenue Code of 1986", as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

(6) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

(7) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the three months' period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

(8) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state, or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is *prima facie* correct.

(9) If the liabilities of persons interested in the estate as prescribed by this code differ from those which result under the federal estate tax law, the liabilities imposed by the

federal law shall control, and all other provisions of this code shall apply as if the amounts and liabilities prescribed by the federal law had been prescribed by subsection (2) of this section.

**Source:** **L. 73:** R&RE, p. 1602, § 1. **C.R.S. 1963:** § 153-3-916. **L. 75:** (2) amended, p. 600, § 39, effective July 1. **L. 79:** (1)(f) amended, p. 1436, § 18, effective July 3. **L. 81:** (2) amended, p. 915, § 10, effective July 1. **L. 83:** (9) added, p. 660, § 1, effective April 21. **L. 85:** (2) amended, p. 605, § 1, effective April 30. **L. 94:** (2) amended, p. 1038, § 12, effective July 1, 1995. **L. 2000:** (5)(e) amended, p. 1846, § 29, effective August 2. **L. 2002:** (1)(f) amended, p. 1360, § 10, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Estate Tax Apportionment", see 14 Colo. Law. 208 (1985).

**Specific bequest not direction against apportionment.** A testator's bequest of a stated sum of money to a legatee does not constitute a direction against apportionment within the meaning of the apportionment statute. *Barton v. Kelly*, 41 Colo. App. 316, 584 P.2d 640 (1978).

**Without clear expression of testator's intent.** This section is applicable unless the testator expresses a clear and unambiguous intent that legacies and devises be transferred without deduction for taxes, and an intent to shift the burden of the tax will not be inferred from vague and uncertain language, and ambiguous language will be interpreted in favor of apportionment. *Barton v. Kelly*, 41 Colo. App. 316, 584 P.2d 640 (1978).

**Decedent's daughter who received assets from her father's estate pursuant to a settlement agreement** was a "person interested in her father's estate" pursuant to subsections (1)(d), (2), and (4) of this section for purposes of apportioning estate taxes. In *re Estate of Barnard*, 867 P.2d 47 (Colo. App. 1993).

**Decedent's daughter was responsible for payment of estate taxes** on money received

from decedent's business partner for settlement of claim as pretermitted heir where partner transferred estate assets to the daughter by executing a disclaimer. In *re Estate of Barnard*, 867 P.2d 47 (Colo. App. 1993).

**Application of proportionate formula in subsection (2) to the apportionment of federal estate taxes on a trust is improper.** Rather, the calculation required under federal law concerning the difference between the total federal estate tax and the amount payable if the trust had not been included in the gross estate should be used. In *re Estate of Klarner*, 98 P.3d 892 (Colo. App. 2003); *rev'd* on other grounds, 113 P.3d 150 (Colo. 2005).

**This section is a harmonizing statute that renders Colorado law consistent with federal law.** In *re Estate of Klarner*, 113 P.3d 150 (Colo. 2005).

**Section 2207A of the federal Internal Revenue Code of 1986, and not this section, controls the apportionment of both federal and state estate taxes.** In *re Estate of Klarner*, 113 P.3d 150 (Colo. 2005).

**Subsection (2) is not a basis for apportioning administrative expenses.** In *re Estate of Klarner*, 98 P.3d 892 (Colo. App. 2003), *rev'd* on other grounds, 113 P.3d 150 (Colo. 2005).

## PART 10

### CLOSING ESTATES

**15-12-1001. Formal proceedings terminating administration - testate or intestate - order of general protection.** (1) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one year from the appointment of the original personal representative; except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs, and to adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.



(2) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

**Source:** L. 73: R&RE, p. 1604, § 1. C.R.S. 1963: § 153-3-1001.

**Cross references:** For the termination of a conservatorship, see § 15-14-431.

### ANNOTATION

**Law reviews.** For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "Denver Institute", see 24 Dicta 168 (1947). For article, "Testamentary Trusts Should Remain Under County Court Jurisdiction", see 27 Dicta 283 (1950). For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "Commitment Procedures in Colorado", see 29 Dicta 273 (1952). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record?", see 34 Dicta 7 and 335 (1957). For article, "An Aspect of Estate Planning in Colorado: The Revocable Inter Vivos Trust", see 43 Den. J. 296 (1966). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**Annotator's note.** Since § 15-12-1001 is similar to repealed § 153-14-11, C.R.S. 1963, and CSA, C. 176, § 227, relevant cases construing those provisions have been included in the annotations to this section.

**This section provides for the final settlement of an estate.** *Archuleta v. Archuleta*, 160 Colo. 32, 413 P.2d 704 (1966).

**Section operates retroactively.** It is likely that this section, being purely remedial and procedural in character, properly could be given a retroactive operation and no contract obligation or vested right would be violated in so doing. *Dunklee v. County Court*, 106 Colo. 77, 103 P.2d 484 (1940).

**15-12-1002. Formal proceedings terminating testate administration - order construing will without adjudicating testacy.** A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one year, from the appointment of the original personal representative; except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of section 15-12-1001.

**Source:** L. 73: R&RE, p. 1604, § 1. C.R.S. 1963: § 153-3-1002.

**15-12-1003. Closing estates - by sworn statement of personal representative.**  
(1) Unless prohibited by order of the court and except for estates being administered in

supervised administration proceedings, a personal representative may close an estate by filing with the court, no earlier than six months after the date of original appointment of a general personal representative for the estate or one year after the date of death, whichever occurs first, a verified statement stating that he or she, or a prior personal representative whom he or she has succeeded, has or have:

(a) Fully administered the estate of the decedent by making payment, settlement, or other disposition of all lawful claims, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or it shall state in detail other arrangements which have been made to accommodate outstanding liabilities; and

(b) Sent a copy thereof to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected thereby.

(2) If no proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

**Source:** L. 73: R&RE, p. 1605, § 1. C.R.S. 1963: § 153-3-1003. L. 77: IP(1) amended, p. 834, § 19, effective July 1. L. 90: IP(1) and (1)(a) amended, p. 906, § 5, effective July 1. L. 94: IP(1) amended, p. 770, § 3, effective April 20.

#### ANNOTATION

**Personal representative had continuing authority to represent estates in pending legal malpractice action as personal representa-**

**tive after initial appointment terminated.**  
Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

**15-12-1004. Liability of distributees to claimants.** After assets of an estate have been distributed and subject to section 15-12-1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts received as exempt property or family allowances or for amounts in excess of the value of his other distributions as of the time of such distributions. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

**Source:** L. 73: R&RE, p. 1605, § 1. C.R.S. 1963: § 153-3-1004. L. 77: Entire section amended, p. 834, § 20, effective July 1.

#### ANNOTATION

**Applied in** In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

**15-12-1005. Limitations on proceedings against personal representative.** Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within six months after the filing of the closing statement. The



rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

**Source:** L. 73: R&RE, p. 1606, § 1. C.R.S. 1963: § 153-3-1005.

#### ANNOTATION

**Court may revoke order and reopen proceedings irregularly made.** A probate court may revoke its orders and reopen proceedings with respect to the settlement of estates which have been irregularly made or procured by fraud

or mistake. *Lembach v. Lembach*, 622 P.2d 606 (Colo. App. 1980).

**Applied in** *In re Estate of Daigle*, 634 P.2d 71 (Colo. 1981).

**15-12-1006. Limitations on actions and proceedings against distributees.** (1) Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred as follows:

(a) A claim by a creditor of the decedent is forever barred at one year after the decedent's death.

(b) Any other claimant or any heir or devisee is forever barred at the later of the following:

(I) Three years after the decedent's death; or

(II) One year after the time of distribution thereof.

(2) This section does not bar an action to recover property or value received as the result of fraud.

**Source:** L. 73: R&RE, p. 1606, § 1. C.R.S. 1963: § 153-3-1006. L. 90: Entire section amended, p. 907, § 6, effective July 1.

#### ANNOTATION

**This statute (formerly § 15-12-803) is a nonclaim statute and not a statute of limitations** and therefore creates a jurisdictional bar to a claim that is untimely filed. *In re Estate of Daigle*, 634 P.2d 71 (Colo. 1981); *In re Estate of Shuler*, 981 P.2d 1109 (Colo. App. 1999).

**A claim not raised in a testacy proceeding or in a proceeding settling the accounts of a personal representative is not immediately barred by the nonclaim statute.** *In re Estate of Shuler*, 981 P.2d 1109 (Colo. App. 1999).

**Where brokerage account was owned by decedent and husband as joint tenants and passed by operation of law upon decedent's death to husband**, husband's claim to brokerage account did not arise during decedent's lifetime but at or after her death and therefore husband is not a creditor of the decedent and his claim is not subject to the one-year bar in § 15-12-1006 (1)(a). *In re Estate of Shuler*, 981 P.2d 1109 (Colo. App. 1999).

**15-12-1007. Certificate discharging liens securing fiduciary performance.** After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the registrar that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

**Source:** L. 73: R&RE, p. 1606, § 1. C.R.S. 1963: § 153-3-1007.

**15-12-1008. Subsequent administration.** If, after an estate has been settled and the personal representative discharged or after one year after a closing statement has been filed, it is determined that the estate has not been fully administered or fully distributed by reason of subsequently discovered property or for any other reason, the court, upon petition of any interested person, and upon notice as it directs, may appoint the same or a successor personal representative to complete the administration or distribution of the estate. If a new appointment is made, unless the court orders otherwise, the provisions of this code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

**Source:** L. 73: R&RE, p. 1606, § 1. C.R.S. 1963: § 153-3-1008. L. 79: Entire section amended, p. 651, § 13, effective July 1.

#### ANNOTATION

**Trial court sitting in probate may reopen an estate** in furtherance of justice. In re Estate of Hamilton v. Egan, 633 P.2d 1100 (Colo. App. 1981).

**Probate court had authority under this statute to expand personal representative's**

**authority** and scope of administration as necessary during the course of the proceedings. In re Estate of Shuler, 981 P.2d 1109 (Colo. App. 1999).

**15-12-1009. Estates not closed after three years or more.** (1) When records of the court indicate no action has been taken in an estate for a period of three years or more, the court may, on its own motion, and after notice to the attorney of record, if available, or if there is no attorney of record, then to the personal representative, enter an order closing the estate without further accounting. Such closure may likewise be ordered upon the motion of any interested person, as defined in section 15-10-201 (27), or upon motion of the attorney of record. Any order in such case shall provide for the closing of the estate without further accounting, and such order shall not discharge the personal representative or any other person from any liability to the estate, the court, or any other person; except that sureties upon any bond posted in such proceedings shall be released as to any claim arising after closure of the estate under such circumstances.

(2) Unless the court has reason to believe the personal representative's conduct in the administration of the estate has been improper, closure of the estate as provided in this section shall be without further accounting, report, or hearing.

(3) Upon motion of any interested person, an estate closed pursuant to this section shall be reopened by the court.

(4) This section shall be applicable to all decedents' estates, whether instituted before or after the effective date of this code.

**Source:** L. 73: R&RE, p. 1606, § 1. C.R.S. 1963: § 153-3-1009. L. 79: Entire section R&RE, p. 659, § 1, effective February 22; entire section R&RE, p. 657, § 2, effective May 25. L. 87: (1) amended, p. 602, § 3, effective July 1. L. 94: (1) amended, p. 1038, § 13, effective July 1, 1995.

**Cross references:** For effective date of this code, see § 15-17-101.

#### ANNOTATION

**Claim against surety "arising after" closure**, within the meaning of subsection (1), is a claim based on facts which occurred after order of closure was issued. The surety is not released

from a claim based on facts occurring before order of closure merely because the claim was not filed before issuance of order. In re Estate of DeAndrea, 847 P.2d 249 (Colo. App. 1993).



## PART 11

## COMPROMISE OF CONTROVERSIES

**15-12-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.** A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probated will, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

**Source:** L. 73: R&RE, p. 1607, § 1. C.R.S. 1963: § 153-3-1101.

## ANNOTATION

**Law reviews.** For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989).

**Execution of agreement settling will contest under this section was binding on all parties** where all parties agreed to compromise of controversy and agreement was approved in formal proceeding. *Matter of Estate of Barnard*, 867 P.2d 47 (Colo. App. 1993).

**Court may properly approve a settlement agreement even over the objection of one of**

**the petitioner beneficiaries**, provided the court's determination is fair, reasonable, and in the parties' best interests. The principle is similar to that behind a shareholder derivative suit, where the plaintiffs are acting as representatives of the corporation and the court is charged with protecting the interests of the corporation as a whole. *Saunders v. Muratori*, 251 P.3d 550 (Colo. App. 2010).

**15-12-1102. Procedure for securing court approval of compromise.** (1) The procedure for securing court approval of a compromise is as follows:

(a) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(b) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(c) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. A minor child represented only by his parents may be bound only if his parents join with other competent persons in execution of the compromise, and if there is no conflict of interest between parent and child. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

**Source:** L. 73: R&RE, p. 1607, § 1. C.R.S. 1963: § 153-3-1102.

## ANNOTATION

**Law reviews.** For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989).

**Court may properly approve a settlement agreement even over the objection of one of the petitioner beneficiaries,** provided the court's determination is fair, reasonable, and in the parties' best interests. The principle is similar to that behind a shareholder derivative suit,

where the plaintiffs are acting as representatives of the corporation and the court is charged with protecting the interests of the corporation as a whole. *Saunders v. Muratori*, 251 P.3d 550 (Colo. App. 2010).

**Applied** in *Cavanaugh v. State, Dept. of Rev. Inheritance & Gift Tax Div.*, 42 Colo. App. 453, 599 P.2d 965 (1979).

## PART 12

COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY  
ADMINISTRATION PROCEDURE FOR SMALL ESTATES

**15-12-1201. Collection of personal property by affidavit.** (1) At any time ten or more days after the date of death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, chose in action, or stock brand belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock, chose in action, or stock brand to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(a) The fair market value of property owned by the decedent and subject to disposition by will or intestate succession at the time of his or her death, wherever that property is located, less liens and encumbrances, does not exceed sixty thousand dollars;

(b) At least ten days have elapsed since the death of the decedent;

(c) No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(d) Each claiming successor is entitled to payment or delivery of the property in the respective proportion set forth in such affidavit.

(2) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (1) of this section.

(3) The public official having cognizance over the registered title of any personal property of the decedent shall change the registered ownership from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (1) of this section.

**Source:** **L. 73:** R&RE, p. 1607, § 1. **C.R.S. 1963:** § 153-3-1201. **L. 75:** (1)(d) amended, p. 600, § 40, effective July 1. **L. 77:** IP(1) amended and (3) added, p. 835, § 21, effective July 1. **L. 81:** (1)(a) amended, p. 915, § 11, effective July 1. **L. 91:** (1)(a) amended, p. 1449, § 12, effective July 1. **L. 2002:** (1)(a) amended, p. 652, § 7, effective July 1. **L. 2011:** (1)(a) amended, (SB 11-083), ch. 101, p. 306, § 11, effective August 10.

**Editor's note:** The amendments to this section made after July 1, 1974, are not affected by the provisions of § 15-12-1205.

**15-12-1202. Effect of affidavit.** The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of



their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer, or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

**Source:** L. 73: R&RE, p. 1608, § 1. C.R.S. 1963: § 153-3-1202.

**15-12-1203. Small estates - summary administrative procedure.** If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed the value of personal property held by or in the possession of the decedent as fiduciary or trustee, exempt property allowance, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in section 15-12-1204.

**Source:** L. 73: R&RE, p. 1608, § 1. C.R.S. 1963: § 153-3-1203. L. 75: Entire section amended, p. 600, § 41, effective July 1.

**15-12-1204. Small estates - closing by sworn statement of personal representative.** (1) Unless prohibited by order of the court, and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of section 15-12-1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(a) To the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed the value of personal property held by or in the possession of the decedent as fiduciary or trustee, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent;

(b) The personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and

(c) The personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

(2) If no actions or proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

(3) A closing statement filed under this section has the same effect as one filed under section 15-12-1003.

**Source:** L. 73: R&RE, p. 1608, § 1. C.R.S. 1963: § 153-3-1204. L. 75: (1)(a) amended, p. 600, § 42, effective July 1.

**Cross references:** For remedies for fraud or intentional misstatements, see § 15-10-106.

**15-12-1205. Time of taking effect - provisions for transition.** The provisions of sections 15-12-1201 and 15-12-1202 became effective on July 1, 1974, regardless of the date of the death of the decedent.

**Source:** L. 75: Entire section added, p. 601, § 43, effective July 1.

**Editor's note:** This section does not apply to the amendments made to § 15-12-1201 after July 1, 1974.

## PART 13

DETERMINATION OF HEIRS, DEVISEES, AND PROPERTY INTERESTS BY  
SPECIAL PROCEEDING

**Editor's note:** Articles 10 to 17 of this title were repealed and reenacted in 1973, and this part 13 was subsequently repealed and reenacted in 1993, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 13 prior to 1993, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following this article heading. Former C.R.S. section numbers prior to 1993 are shown in editor's notes following those sections that were relocated.

**15-12-1301. Definitions.** As used in this part 13, unless the context otherwise requires:

(1) "Interested person" means an alleged heir or devisee of a decedent or any person claiming an interest derived from an alleged heir or devisee in any property the descent or succession of which is to be determined pursuant to this part 13.

(2) "Owner by inheritance" means a person in whom all or any part of the decedent's interest in the property vests as a result of intestate or testate succession.

(3) "Property" means the property interest owned by the decedent at the time of death without regard to other property interests which may be owned by other persons in the same parcel of real property or item of personal property.

**Source:** L. 93: Entire part R&RE, p. 1241, § 1, effective July 1.

## ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Determination of Heirship

by Special Proceedings and Temporary Conservatorship", see 14 Colo. Law. 1781 (1985).

**15-12-1302. Petition to determine heirship - devisees - interests in property.**

(1) When any person dies leaving an interest in real property in this state, or dies domiciled in this state leaving an interest in personal property wherever located, any interested person may petition the court having jurisdiction over probate matters in and for the county in which the decedent was domiciled or resided at the time of death, or the county in which the property or some portion thereof is situated, to determine the heirs of the decedent and the descent of all or any portion of intestate property, or to determine the devisees of the decedent under a will previously admitted to probate in this or any other state and the succession of testate property.

(2) The petition shall be in writing, signed, and verified and shall include the following:

(a) A statement that one year has passed since the date of death of the decedent;

(b) A statement that administration of the decedent's estate has not been granted in this state, or if administration has been granted in this state the estate has been settled without determination of the descent or succession of all or a portion of the decedent's property;

(c) A statement containing the name, age, and disability of any interested person who is known to the petitioner to be a minor or under legal disability;

(d) A statement of the time and place of death of the decedent;

(e) A statement of the last place of domicile or residence of the decedent;

(f) A statement of whether the decedent died intestate or testate and, if testate, the name of the court which admitted the decedent's will to probate and a certified copy of the will and the order admitting the will to probate;

(g) The names, addresses, and relationship of all interested persons, owners by inheritance, and all the heirs and devisees entitled to any part of the property;

(h) A description of the decedent's interest in the property the descent or succession of which is to be determined through the petition; and

(i) The name and address of the petitioner and a statement of the petitioner's interest in the property.



(3) The petition may include more than one decedent if related by successive interests in the property.

(4) Upon filing of the petition, the court shall set a time and date for hearing the petition.

**Source:** L. 93: Entire part R&RE, p. 1242, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-12-1301 as it existed prior to 1993.

#### ANNOTATION

**Law reviews.** For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

**15-12-1303. Hearing - notice - service.** (1) The petitioner shall prepare a notice of the filing of the petition which notice shall include the name of the decedent, a description of the property set forth in the petition, the name of each interested person, and the name of each owner by inheritance. The notice may be served by personal service or by mailing a copy thereof, postage prepaid, addressed to the person at the address given and shall be directed to the interested persons and owners by inheritance set forth in the petition. The notice shall direct all interested persons and owners by inheritance to appear and answer the petition within twenty-one days after service of the notice if personal service occurs within the state of Colorado or thirty-five days after service if personal service occurs outside the state of Colorado or service is had by mail or by publication. The notice shall further provide that all objections to the petition must be filed in writing with the court and the filing fee paid within the time required for answering the petition and that the hearing shall be limited to the objections timely filed and the parties answering the petition in a timely manner. The notice shall set forth the time and place of the hearing on the petition.

(2) The notice shall be published once a week for three consecutive weeks, as defined in section 15-10-401 (4), in a newspaper of general circulation in the county where the proceeding is filed, or if there is no such newspaper in such county, then in some newspaper of general circulation in an adjoining Colorado county. Service by publication shall be complete on the last day of publication. Prior to the hearing the petitioner shall file with the court the publisher's affidavit of publication stating the dates of publication. The petition itself need not be published.

(3) The notice, in addition to publication, shall be served on each person named in the petition whose address is shown on the petition and who does not join in the petition, or does not consent to the granting of the petition or enter a personal appearance, or does not admit, accept, or waive service. If service is by personal service within the state, service must be completed at least twenty-one days prior to the hearing. If service is by personal service outside the state or by mail within or outside the state or by publication, service must be completed at least thirty-five days prior to the hearing. The petitioner shall file a return of service or shall make and file a certificate of mailing, stating the name of the person to whom the copy was mailed and the address to which mailed, that it was mailed, postage prepaid, and the date of mailing. A copy of the petition shall be served with the notice.

**Source:** L. 93: Entire part R&RE, p. 1243, § 1, effective July 1. L. 2012: (1) and (3) amended, (SB 12-175), ch. 208, p. 838, § 46, effective July 1.

**Editor's note:** (1) This section is similar to former § 15-12-1302 as it existed prior to 1993.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1) and (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**15-12-1304. Appearance.** Any interested person or owner by inheritance may appear and answer such petition and establish any proper defense to the petition or any part thereof,

or assert or protect any interest the person may claim, at any time within the time for filing an answer as set forth in the notice. After the expiration of the time periods allowed for appearance and answer, the court shall proceed with the hearing on the petition. Any person who objects to the relief prayed for in the petition must present all such objections in writing within the time period for filing an answer; except that the court, for good cause, may allow an entry of appearance by any interested person at any time prior to the entry of the court's judgment and decree.

**Source: L. 93:** Entire part R&RE, p. 1243, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-12-1302 as it existed prior to 1993.

**15-12-1305. Judgment.** The court shall determine the standing of the petitioner to bring the action, the heirs and devisees of the decedent, the owners by inheritance of the property, a description of the property, and any other pertinent facts, and shall enter judgment on the petition. If after proper service pursuant to section 15-12-1303 there are no objections or answers filed to the petition, then the court may enter a decree pursuant to this part 13 without a hearing.

**Source: L. 93:** Entire part R&RE, p. 1244, § 1, effective July 1.

**15-12-1306. Decree - conclusive and when - reopening.** A decree entered pursuant to this part 13 shall be conclusive as to the rights of heirs or devisees in the property described in the order from the date of its entry. Any person claiming to be an heir or devisee, or the grantee or successor in interest of an heir or devisee, not served with notice by personal service or by mail, and who did not admit, accept, or waive service, or consent to the granting of the petition or enter a personal appearance, may petition to reopen the proceeding and modify the decree within one year after the entry thereof, but not thereafter; except that no such modification of the decree shall serve to impair the rights of any person who, in reliance upon such decree, in good faith, for value, and without notice, purchased property or acquired a lien upon property.

**Source: L. 93:** Entire part R&RE, p. 1244, § 1, effective July 1.

**15-12-1307. Title of proceedings.** All such proceedings shall be titled substantially in the following form:

“IN THE MATTER OF THE DETERMINATION OF HEIRS OR DEVISEES OR BOTH, AND OF INTERESTS IN PROPERTY, OF \_\_\_\_\_ (Names of decedents) \_\_\_\_\_, Deceased.”.

**Source: L. 93:** Entire part R&RE, p. 1244, § 1, effective July 1.

**15-12-1308. Proceedings under the rules of civil procedure.** Nothing herein shall be construed to prevent determination of the descent or the succession of property pursuant to the Colorado Rules of Civil Procedure or any other provision of the “Colorado Probate Code”.

**Source: L. 93:** Entire part R&RE, p. 1244, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-12-1304 as it existed prior to 1993.

**15-12-1309. Effective date - applicability.** This part 13 shall take effect July 1, 1993, and shall apply to all proceedings commenced on or after said date.

**Source: L. 93:** Entire part R&RE, p. 1244, § 1, effective July 1.



## PART 14

## COLORADO UNIFORM ESTATE TAX APPORTIONMENT ACT

## PREFATORY NOTE

The Internal Revenue Code places the primary responsibility for paying federal estate taxes on the decedent's executor and empowers, but does not direct, the executor to collect from recipients of certain non-probate transfers included in the taxable estate a prorated portion of the estate tax attributable to those types of property. In the absence of specific contrary directions of the decedent, the Code generally provides as to other transfers that taxes are to be borne by the persons who would bear that cost if the taxes were paid by the executor prior to distributing the estate. The determination of who should bear the ultimate burden of the estate taxes is left to state law.

If a state does not have a statutory apportionment law, the burden of the estate taxes generally will fall on residuary beneficiaries of the probate estate. This means that recipients of many types of nonprobate assets (such as beneficiaries of revocable trusts and surviving joint tenants) may be exonerated from paying a portion of the tax. Also, it generates a risk that residual gifts to the spouse or a charity may result in a smaller deduction and a larger tax. A number of states have adopted legislation apportioning the burden of estates taxes among the beneficiaries.

The National Conference of Commissioners on Uniform State Laws' original Uniform Estate Tax Apportionment Act, completed in 1958, was superseded in 1964 by a revision later incorpo-

rated into the Uniform Probate Code as UPC § 3-916, a section that was slightly changed in 1982. The project to replace the 1964 Act and the Uniform Probate Code section with an updated version was announced at the Conference's 1999 annual meeting, but did not get underway until the first meeting of the drafting committee in November of 2000. The current Act was approved and recommended for enactment in all states at the annual meeting of the National Conference of Commissioners on Uniform State Laws in August 2003.

The Act continues to advance the principle of the 1964 Act that the decedent's expressed intentions govern apportionment of an estate tax. Statutory apportionment applies only to the extent there is no clear and effective decedent's tax burden direction to the contrary. Under the statutory scheme, marital and charitable beneficiaries generally are insulated from bearing any of the estate tax, and a decedent's direction that estate tax be paid from a gift to be shared by a spouse or charity with another is construed to locate the tax burden only on the taxable portion of the gift. The Act provides relief for persons forced to pay estate tax on values passing to others whose interests, though contributing to the tax, are unreachable by the fiduciary. The Act also addresses the allocation of the burden incurred because of several federal transfer tax provisions that did not exist when the 1964 Act was adopted.

**15-12-1401. Short title.** This part 14 shall be known and may be cited as the "Colorado Uniform Estate Tax Apportionment Act".

**Source:** L. 2011: Entire part added, (SB 11-165), ch. 184, p. 699, § 1, effective August 10.

**15-12-1402. Definitions.** As used in this part 14, unless the context otherwise requires:

(1) "Apportionable estate" means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned, reduced by:

- (a) Any claim or expense allowable as a deduction for purposes of the estate tax;
- (b) The value of any interest in property that, for purposes of the estate tax, qualifies for a marital or charitable deduction or is otherwise deductible or exempt; and
- (c) Any amount added to the decedent's gross estate because of a gift tax on transfers made before death.

(2) "Apportionment provision" means any provision of a dispositive instrument having the effect of allocating estate tax to certain property or recipients, or exonerating certain property or recipients from liability for estate tax. An apportionment provision may include, but is not equivalent to, a provision affecting rights of recovery or reimbursement under federal estate tax law.

(3) "Estate tax" means a federal, state, or foreign tax imposed because of the death of an individual and interest and penalties associated with the tax. The term does not include

an inheritance tax, income tax, or generation-skipping transfer tax other than a generation-skipping transfer tax incurred on a direct skip taking effect on death.

(4) “Gross estate” means, with respect to an estate tax, all interests in property subject to the estate tax.

(5) “Person” has the same meaning as set forth in section 15-10-201 (38).

(6) “Ratable” means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied. “Ratably” has a corresponding meaning.

(7) “Time-limited interest” means an interest in property that terminates on a lapse of time or on the occurrence or nonoccurrence of an event or that is subject to the exercise of discretion that could transfer a beneficial interest to another person. The term does not include a cotenancy unless the cotenancy itself is a time-limited interest.

(8) “Value” means, with respect to an interest in property, fair market value as finally determined for purposes of the estate tax that is to be apportioned, reduced by any outstanding debt secured by the interest without reduction for taxes paid or required to be paid or for any special valuation adjustment.

**Source:** L. 2011: Entire part added, (SB 11-165), ch. 184, p. 699, § 1, effective August 10.

### OFFICIAL COMMENT

The starting point for calculating the apportionable estate is the value of the gross estate. Since the properties included and deductions allowed for determining different taxes can differ, the apportionable estate figure may not be the same for different taxes.

Property not included in the apportionable estate for an estate tax typically will not bear any of that tax. However, the donee recipients of such property will bear part of an estate tax to the extent that the available assets of the apportionable estate are insufficient to pay the tax. See sections 15-12-1406 (3) and 15-12-1409 (2). Since deductible transfers will not generate any estate tax, it is appropriate to insulate those transfers from the allocation of that tax to the extent that properties of the apportionable estate are sufficient.

A gift tax paid by the decedent on a gift that was made by the decedent or the decedent's spouse within three years of the decedent's death is added back to the decedent's gross estate for federal estate tax purposes by Internal Revenue Code §2035(b). A State or foreign estate tax may have a similar provision or effect. Subsection (1)(c) excludes any such gift tax from the apportionable estate.

The value of the apportionable estate is reduced by claims and expenditures that are allowable estate tax deductions whether or not allowed. For example, administrative expenses that could have been claimed as estate tax deductions, but instead are taken as income tax deductions, will reduce the apportionable estate. When a decedent's estate includes property in more than one State, the apportionable estate for each State's estate tax will be reduced by the expenses and claims that are deductible for purposes of that tax. Where an expenditure cannot

be identified as pertaining to property in the gross estate of only one State tax, the expenditure is to be apportioned ratably among the taxes of the States in which the relevant properties are located, in accordance with the values of those properties.

A spouse's elective share of a decedent's estate is excluded from the apportionable estate to the extent that the spouse's share qualifies for an estate tax deduction. Other statutory claims against a decedent's estate that do not qualify for an estate tax deduction (for example, a pretermitted heir) do not reduce the apportionable estate.

The term “estate tax” is defined in the Act to include all estate taxes and certain generation-skipping taxes arising because of an individual's death. The term estate tax does not include any inheritance taxes, income taxes, gift taxes, or generation-skipping taxes incurred because of a taxable termination, a taxable distribution, or an inter vivos direct skip. A generation-skipping tax that is incurred because of a direct skip that takes place because of the decedent's death is included in the term “estate tax.”

Currently, no United States income tax is imposed on the unrealized appreciation of a decedent's assets at the time of death. While Canada and some other foreign countries impose an income tax at death, those income taxes are not apportioned by the Act.

Some States impose an inheritance tax on recipients of property from a decedent. This Act does not apportion those taxes.

This Act does not provide for the apportionment of the income tax payable on the receipt of Income in Respect of a Decedent (IRD). If a decedent held an installment obligation the payment on which is accelerated by the decedent's



death, the income tax incurred thereby is not apportioned by the Act.

If a donor pays a gift tax during the donor's life, the amount paid will not be part of the donor's assets when the donor dies; and so the gift tax will not be subject to apportionment among the persons interested in the donor's gross estate. This consequence is consistent with the typical donor's wish that the gifts made during life pass to the donee free of any transfer tax. If all or part of a gift tax was not paid at the time of the donor's death and is subsequently paid by the donor's personal representative, the burden of the gift tax should lie with the same persons who would have borne it if the donor had paid it during life, typically, the residuary beneficiaries. A gift tax liability is not apportioned by this Act, but is treated the same as any other debt of the estate. A gift tax deficiency that becomes due after the decedent's death also is treated as a debt of the decedent's estate.

The kinds of death benefits included in a gross estate depend upon the particular estate tax to be apportioned and may not be the same for each tax. For example, some State death taxes will have an exemption for a homestead; some will exclude life insurance proceeds and pensions. In determining the gross estate for such taxes, the property excluded from the tax will also be excluded from the gross estate for that tax. Property that is deductible under an estate tax, such as property that qualifies for a marital or charitable deduction, is nevertheless "subject to" that tax and included in the gross estate. Once the value of the gross estate for an estate tax is determined, the reductions described in subsection (1) are applied to ascertain the apportionable estate.

A "time-limited interest" includes a term of years, a life interest, a life income interest, an annuity interest, an interest that is subject to a power of transfer, a unitrust interest, and similar interests, whether present or future, and whether held alone or in cotenancy. The fact that an interest that otherwise is not a time-limited interest is held in cotenancy does not make it a time-limited interest.

If a debt is secured by more than one interest in property, the value of each such interest is the fair market value of that interest less a ratable portion of the debt that it secures.

If the beneficiary of an interest in property is required by the terms of the transfer to make a payment to a third party or to pay a liability of the transferor, that obligation constitutes an encumbrance on the property, but does not necessarily reduce the value of the apportionable estate. If the obligation is to make a transfer or payment to a third party, other than an obligation to satisfy a debt of the decedent based on money or money worth's consideration, the right of the third person constitutes an interest in the appor-

tionable estate and so is subject to apportionment.

A decedent's direction by will or other dispositive instrument that property controlled by that instrument is to be used to pay a debt secured by an interest in property is an additional bequest to the person who is to receive the interest securing the debt.

Taxes imposed on the transfer or receipt of property, regardless of whether a lien on the property or payable by the recipient of the property, do not reduce the value of the property for purposes of apportioning estate taxes by this Act.

The date on which gross estate property is to be valued for federal estate tax purposes (and for some other estate tax purposes) is either the date of the decedent's death or an alternate valuation date elected by the decedent's personal representative pursuant to the estate tax law. An estate tax value that is determined on the alternate valuation date is not, as such, a "special valuation adjustment." A "special valuation adjustment" refers to a reduction of the valuation of an item included in the gross estate pursuant to a provision of the estate tax law. See the Comment to section 15-12-1407.

If a person has a right by contract or by the decedent's will or other dispositive instrument to purchase gross estate property at a price below its estate tax value, the estate tax value of the property is the amount included in the value of the decedent's gross estate. The difference or discount between the purchase price and the estate tax value of the property can be viewed as an interest which the decedent passed to that person. If the right to purchase is exercised, the amount of the discount is the value of that person's interest in the apportionable estate.

The value of a person's interest in the apportionable estate can depend upon the value of the apportionable estate. So, the value of a residuary interest in a decedent's estate will reflect the amount of allowable deductions which, under this Act, reduce the apportionable estate, but will not be reduced by expenditures that are not allowable deductions for that estate tax. The formula for allocating estate taxes in section 15-12-1404 (1)(a) utilizes a fraction of which the numerator is the value of a person's interest in the apportionable estate rather than the value of the person's interest in the net estate or in the taxable estate. Since the denominator of the fraction is the value of the apportionable estate, the sum of the numerators of all persons having an interest in the apportionable estate will equal the denominator, and so 100% of the estate taxes will be apportioned. Consider the following example.

Ex. D died leaving a gross estate with a value of \$10,150,000 and made no provision for apportionment of taxes. D's will made pecuniary devises totaling \$1,000,000, and gave the resi-

due to A and B equally. There are no claims against the estate and no marital or charitable deductions are allowable. The funeral expenses are \$10,000, and the estate incurred administrative expenses of \$240,000 of which, while all were allowed as administrative expenses by the State probate court, \$100,000 was disallowed by the Service for a federal estate tax deduction on the ground that \$100,000 of the expenses was not necessary for the administration of the estate. See Rev. Rul. 77-461 and TAM 7912006. The personal representative elected to deduct the remaining \$140,000 of administrative expenses as a federal estate tax deduction. For federal estate tax purposes, the apportionable estate is equal to the difference between the gross estate (\$10,150,000) and the allowable deductions of \$150,000 (\$140,000 deductible administrative expenses and \$10,000 deductible funeral expenses); and so the apportionable estate is \$10,000,000. The value of the two resid-

uary beneficiaries' interests in the apportionable estate is equal to the difference between the entire apportionable estate of \$10,000,000 and the \$1,000,000 that was devised to the pecuniary beneficiaries. While the residuary beneficiaries will not receive any part of the \$100,000 of administrative expenses for which no federal estate tax deduction is allowable, that expense does not reduce the gross estate in determining the apportionable estate, and so does not affect the value of their residuary interests for the purpose of apportioning the federal estate tax. So, for purposes of apportioning the federal estate taxes, each residuary beneficiary has an interest in the apportionable estate valued at \$4,500,000, which constitutes 45% of the apportionable estate of \$10,000,000. Forty-five percent of the federal estate taxes is apportioned each to A and B, and 10% of the federal estate taxes is apportioned to the pecuniary beneficiaries.

**15-12-1403. Apportionment by will or other dispositive instrument.** (1) Except as otherwise provided in subsection (3) of this section, the following rules apply:

(a) To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax shall be apportioned accordingly.

(b) Any portion of an estate tax not apportioned pursuant to paragraph (a) of this subsection (1) shall be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor that expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph (b):

(I) A trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(II) The date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

(c) If any portion of an estate tax is not apportioned pursuant to paragraph (a) or (b) of this subsection (1), and a provision in any other dispositive instrument expressly and unambiguously directs that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.

(2) Subject to subsections (3) and (4) of this section, and unless the decedent expressly and unambiguously directs to the contrary, the following rules apply:

(a) If an apportionment provision specifically directs that a person receiving an interest in a property under an instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned the interest:

(I) The tax attributable to the exonerated interest shall be apportioned among other persons receiving interests in the apportionable estate passing under the same instrument; or

(II) The deficiency shall be apportioned ratably among other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax if the values of the other interests are less than the tax attributable to the exonerated interest.

(b) If an apportionment provision directs that an estate tax is to be apportioned to a specific interest in property, recipients of other interests in the apportionable estate are indirectly exonerated from the responsibility to pay such tax; however, such indirect exoneration does not preclude the application of section 15-12-1404 if the value of the interest to which the tax is apportioned is insufficient to pay the tax in full.

(c) If an apportionment provision directs that an estate tax is to be apportioned to a specific interest in property, a portion of which qualifies for a marital or charitable



deduction, the estate tax shall first be apportioned ratably among the holders of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the deductible portion to the extent that the value of the nondeductible portion is insufficient.

(d) Except as otherwise provided for in paragraph (e) of this subsection (2), if an apportionment provision directs that an estate tax be apportioned to property in which one or more time-limited interests exist, other than interests in specified property under section 15-12-1407, the tax shall be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property.

(e) If an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax shall first be apportioned, to the extent feasible, to interests in property that have not been distributed to persons entitled to receive the interests.

(3) A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent has no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this subsection (3), a testamentary power of appointment is a power to transfer the property that is subject to the power.

(4) An apportionment provision expressly directing estate taxes to be paid from the "residue" of the subject probate or trust estate, or using language of similar effect, shall be subject to the following construction:

(a) If the gross estate includes assets not passing under the dispositive instrument and the beneficiaries of those assets and the beneficiaries of the residue are different persons, this part 14 shall apply unless there is an express and unambiguous statement that the estate tax attributable to the assets shall also be paid from the residue.

(b) If the dispositive instrument contains pre-residuary gifts and the residuary estate is insufficient to pay all estate taxes due, the apportionment provision directing payment from the residue shall be effective with respect to the residue as provided for pursuant to paragraph (b) of subsection (2) of this section, and this part 14 shall apply only to specify the source of payment for estate tax that cannot be paid from the residue. In this event, neither section 15-12-902 nor any other statutory or common law rule of abatement shall affect the apportionment of estate tax among the pre-residuary gifts.

(c) When a gift qualifying for an estate tax marital or charitable deduction is made from a portion of the residue, the provisions of paragraph (c) of subsection (2) of this section shall apply, unless there is an express and unambiguous statement in the dispositive instrument of an intent to not fully utilize the available marital or charitable deduction. For this purpose, a direction to pay estate tax from the residue without "apportionment" or "right of contribution", or language of similar effect, does not constitute an express and unambiguous statement sufficient to avoid the application of paragraph (c) of subsection (2) of this section.

(5) An express and unambiguous apportionment of estate tax pursuant to this section does not, by itself, affect rights of recovery that may be available to a fiduciary under federal tax law. An intent to waive a right of recovery provided in sections 2206, 2207, 2207A, and 2207B of the internal revenue code of 1986, as amended, shall be expressly stated in the dispositive instrument in the manner described in such sections.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 700, § 1, effective August 10.

#### OFFICIAL COMMENT

A decedent's direction will not control the apportionment of taxes unless it explicitly refers to the payment of an estate tax and is specific and unambiguous as to the direction it makes for

that payment. For example, a testamentary direction that "all debts and expenses of and claims against me or my estate are to be paid out of the residuary of my probate estate" is not an

express direction for the payment of estate taxes and will not control apportionment. While an estate tax is a claim against the estate, a will's direction for payment of claims that does not explicitly mention estate taxes is likely to be a boiler plate that was written with no intention of controlling tax apportionment. To protect against an inadvertent inclusion of estate tax payment in a general provision of that nature, the Act requires that the direction explicitly mention estate taxes.

On the other hand, a direction in a will that "all taxes arising as a result of my death, whether attributable to assets passing under this will or otherwise, be paid out of the residue of my probate estate" satisfies the Act's requirement for an explicit mention of estate taxes and is specific and unambiguous as to what properties are to bear the payment of those taxes.

Whether other directions of a decedent that explicitly mention estate taxes comply with the Act's requirement that they be specific and unambiguous is a matter for judicial construction. For example, there is a split among judicial decisions as to whether a direction such as "all estate taxes be paid out of the residue of my estate" is ambiguous because it is unclear whether it is intended to apply to taxes attributable to nonprobate assets. To the extent that it is determined that a decedent failed to apportion an estate tax, then the Act will apply to apportion that amount of the tax.

If an amendment is made to a revocable trust instrument, and if the amendment itself contains an express and unambiguous provision apportioning an estate tax, the date of the amendment is the date of the revocable trust instrument. However, if an amendment to a revocable trust instrument does not contain an express and unambiguous provision apportioning an estate tax, the date of the revocable trust instrument is the date on which it was executed or the date of the most recent amendment containing an express and unambiguous provision apportioning an estate tax. An express and unambiguous provision apportioning an estate tax includes a provision directing that payment of an estate tax be made from specified property.

The statutory apportionment rules of the Act are default rules applicable to the extent that the decedent does not make a valid provision as to how estate taxes are to be apportioned. The decedent has the power to determine which recipients of decedent's property will bear the estate taxes and in what proportion. If provisions conflict, it is necessary to determine which prevails. A possible choice would permit the directions in each of decedent's instruments determine the extent to which property controlled by that instrument bears a share of estate taxes, but having the provisions for an allocation scheme scattered among a number of documents would make decedent's personal representative search

multiple instruments to ascertain the decedent's directions. Instead, the Act provides an order of priority for a decedent's provisions for estate tax allocations. To the extent that a decedent makes an express and unambiguous provision by will, that provision will trump any competing provision in another instrument. To the extent that the will does not expressly and unambiguously provide for the allocation of some estate taxes, an express and unambiguous provision in a revocable trust instrument will control. If the decedent executed more than one revocable trust instrument, the express provisions in the instrument that was executed most recently will control. In determining which revocable trust instrument was executed most recently, the date of any amendment containing an express and unambiguous apportionment provision will be taken into account. In the event that the allocation of estate taxes is not fully provided for by the decedent's will or revocable trust instrument, an express and unambiguous provision in other instruments executed by the decedent controls to the extent that the provision applies to the property disposed of in that instrument. An example of a provision in an instrument disposing of property, other than a will or revocable trust instrument, is a provision in a designation of a beneficiary of life insurance proceeds either that the proceeds will or will not be used to pay a portion of estate taxes. A designation of that form will be honored if there is no conflicting valid provision in a will or revocable trust instrument.

A provision in decedent's will, revocable trust, or other instrument will not be honored to the extent that it would contravene subsection (3).

The exclusivity of the provisions of this section apply only to apportionment rules; they do not prevent a dispositive instrument from making additional gifts; nor do they prevent a governing instrument of an entity from rearranging the internal division of the assets of that entity.

Ex. (1). On D's death, her will apportioned \$100,000 of estate taxes to the holders of interests in the D Family Trust, an irrevocable trust created by D during her life. The D Family Trust is divided into two separate shares: the William Share, and the Franklin Share, each of which is for a different child of D. The William Share is for the benefit of William, and the Franklin Share is for the benefit of Franklin. The trust instrument provides that any taxes apportioned to the holders of interests in the trust or to any share of the trust are to be paid from the William Share. The effect of that trust provision is to require that taxes reduce the size of the William Share and do not reduce the Franklin Share. The apportionment provision in D's will established the amount of estate tax that the trust must bear; the amount apportioned to the D Family Trust makes all of the assets of that trust liable for that



amount. Since the decedent's will did not direct how the trust's burden should be allocated between the two shares of the trust, the direction in the trust instrument is not inconsistent with the will provision and so can control the allocation of taxes between properties disposed of in the trust instrument under subsection (3). Even if the direction in the trust instrument were deemed not to be permitted by subsection (3), the direction would be effective as a disposition of trust assets as explained in Example (2).

Ex. (2). The same facts as those stated in Ex. (1) except that D's will apportioned the \$100,000 of estate taxes to the Franklin Share of the D Family Trust. The trust provision placing the burden of the tax on the William Share cannot qualify as an apportionment direction since it is in conflict with the will provision allocating all of the trust's share of the estate tax to the Franklin Share. But the settlor has the power to direct trust assets to whomever the settlor pleases. The direction in the trust instrument that assets of the William Share are to be used to pay any taxes apportioned to the Franklin Share is a gift to Franklin of assets from the William Share. The direction is valid as a provision shifting trust assets from the William Share to the Franklin Share, which is a permissible disposition of a trust instrument.

The federal estate tax laws enable a decedent's personal representative to collect a portion of the decedent's federal estate tax from the recipients of certain nonprobate property that is included in the decedent's gross estate. See e.g., §§2206 to 2207B of the Internal Revenue Code. There is a conflict among the courts as to whether those federal provisions preempt a State law apportionment provision. Choosing the position that there is no federal preemption, the Act apportions taxes without regard to the federal provisions. The federal provisions are not apportionment statutes; rather, they simply empower the personal representative to collect a portion of the estate tax that is attributable to the property included in the decedent's gross estate and do not direct use of the collected amounts by the personal representative. The rights granted to the personal representative by federal law for the collection of assets from nonprobate beneficiaries do not conflict either with the apportionment of taxes by State law or with other rights of collection granted by State law. Since there is no conflict, this Act does not include a direction as to whether federal or State law takes priority.

The Act does not permit anyone other than the decedent to override the allocation provisions of the Act. For example, if X created a QTIP trust for Y, the value of the trust assets will be included in Y's gross estate for federal estate tax purposes on Y's death. See §2044 of the Internal Revenue Code of 1986. If X's QTIP trust provided that the trust is not to bear any of the estate taxes imposed at Y's death, the direction

would be ineffective under the Act because only Y can direct apportionment of taxes on Y's estate. In this regard, it is noteworthy that the right granted to a decedent's estate by §2207A of the Internal Revenue Code to collect a share of the federal estate tax from a QTIP included in the decedent's gross estate can be waived only by direction of the decedent in a will or revocable trust instrument. Y is in the best position to determine the optimum allocation of Y's estate taxes among the various assets that comprise Y's gross estate. If Y fails to make an allocation, the default provisions of the Act are more likely to reflect Y's intentions than would a direction of a third person.

If an instrument transferring property that may be included in the taxable estate of someone other than the transferor directs payment from the transferred property of any part of the estate taxes of the other person, the direction affects the size of the gift, and so is a dispositive rather than an apportionment provision, and is not subject to this Act.

If a decedent makes a valid direction that a person receiving property under a particular disposition is exonerated from payment of an estate tax, the tax that would have been borne by that person will, instead, be borne by other persons receiving interests under the instrument directing the exoneration. Thus, if several assets are disposed of by a governing instrument, which exonerates one or more of those assets from bearing an estate tax, the exoneration will not reduce the amount of estate tax to be allocated to all of the assets disposed of by that instrument, including the exonerated assets. For example, if decedent's will directs that all federal estate taxes attributable to decedent's probate estate be paid from the residuary of his estate, the exoneration of the pre-residuary devisees will not affect the total amount of federal estate tax apportioned to the beneficiaries of the probate estate, all of which tax will be borne by the residuary beneficiaries if the residuary is sufficient. If the value of the other interests is insufficient to pay the estate taxes, the difference will be payable by other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

If a decedent directs that estate taxes be paid from properties, some of which qualify for a marital or charitable deduction, the provision making that direction may designate the extent to which the charitable or marital interests will or will not bear a portion of the tax. If the decedent makes no provision as to whether the marital or charitable interests bear a portion of the tax, the Act provides a default rule that exempts the marital or charitable interests from payment of the tax to the extent that it is feasible to do so. An example of when this circumstance arises is when the decedent's will makes a residuary devise, a portion of which qualifies for a

marital or charitable deduction and a portion of which does not. If the decedent provides that estate taxes are to be paid from the residuary, unless directed otherwise, the default provision of the Act will require the payment to be made first from the nondeductible interests in the residuary. The default rule does not apply to an allocation of tax to a holder of an interest in property in which there is a time-limited interest; the tax allocated to any interest in that property is to be paid from the principal of the property unless the decedent expressly directed otherwise or unless section 15-12-1407 applies to the property.

If a decedent created a trust during life the value of which is included in the decedent's gross estate at death, if immediately after decedent's death, there were one or more time-limited interests in the trust that did not qualify for an estate tax deduction, and if one or more charities held a remainder interest in the trust that otherwise qualified for an estate tax charitable deduction, the charitable deduction for the remainder interests may be lost if the estate taxes generated by the nondeductible time-limited interests are to be paid from assets in the trust. See Rev. Rul. 82-128, Rev. Proc. 90-30 (§§ 4 and 5), and Rev. Proc. 90-31 (§§ 5 and 6). It is possible that if the payment of an estate tax is made from funds that, while directed to be added to the trust's assets, had not been distributed to the trust before payment of the estate tax, the payment will not disqualify the charitable deduction. There are numerous instances in which estate taxes are required to be paid from a charitable remainder trust that was created *inter vivos*. Subsection (2)(e) is an attempt to protect the deduction in such cases by establishing a rule of construction requiring that funds directed to be added to the trust be used to pay any required estate tax before assets already in the trust itself are used. It seems unlikely that a decedent would wish to negate this construction of decedent's direction, but the decedent has the power to do so by including an express statement to that effect in a will or revocable trust instrument.

### COLORADO COMMENT

#### General Comments:

This section addresses a myriad of issues involved in tax apportionment analysis. This section recognizes that a decedent may specify directions for the apportionment of estate taxes in a variety of instruments, including a will, a revocable trust which the decedent established or some "other dispositive instrument" such as a beneficiary designation for non-probate assets.

The section also specifies default rules for the apportionment of estate taxes when a decedent (a) exonerates a beneficiary from the responsi-

If a decedent had made an irrevocable transfer during his life, over which the decedent did not retain a power to make a subsequent transfer, and if that transfer is included in the decedent's gross estate for estate tax purposes, a portion of the estate tax will be apportioned to the transferee unless the decedent effectively provides otherwise in a will, revocable trust or other instrument. While, by an express provision in the appropriate instrument, a decedent can reduce the amount of tax apportioned to such *inter vivos* transfers, the decedent is not permitted to increase the amount of tax apportioned to such a transferee. If a decedent attempts to do so, whether directly by apportioning more estate tax to the *inter vivos* transfer or indirectly by insulating some person interested in the gross estate from all or part of that person's share of the estate tax, the amount of estate tax that is apportioned to the transferee of an irrevocable *inter vivos* transfer will not be greater than the amount that would have been apportioned to that transferee if the decedent had made no provision for apportionment in another instrument.

Subsection (3) does not apply to a decedent's provision that no estate tax be apportioned to the recipient of an interest who would be excluded from apportionment by this Act in the absence of a contrary direction by the decedent. For example, a decedent's provision that no estate tax be apportioned to the recipient of property that qualifies for a marital or charitable deduction is not subject to subsection (3).

If a decedent transferred property to a revocable trust prior to executing a will that directs the apportionment of taxes to that trust, the apportionment direction will be valid even if the decedent subsequently released the power of revocation so that the trust became irrevocable prior to the decedent's death. In such a case, subsection (3) does not invalidate the will's direction.

If, immediately before the decedent's death, the decedent had a power of appointment, whether *inter vivos* or testamentary, the decedent had the power to transfer the property interest within the meaning of this provision.

bility to pay estate taxes; (b) directs that property which qualifies for a marital or charitable deduction is to bear the burden of some or all of the estate taxes; and (c) directs that estate taxes are apportioned to split-interest gifts.

Limits are placed on the effectiveness of tax apportionment clauses that attempt to increase the estate tax borne by persons having interests in property over which the decedent had no power to transfer.

As the Commissioners point out in their comments, only the decedent can override the stat-



utory tax apportionment provisions. C.R.S. § 15-12-916 (2009) does not contain an express statement to this effect.

There are a number of other issues implicitly addressed by this section. These include the distinctions between (a) tax apportionment clauses and property disposition clauses and (b) federal estate tax reimbursement provisions and tax apportionment clauses.

#### Subsection (1):

This section prioritizes, among multiple instruments executed by a decedent, which instrument will govern the apportionment of estate taxes.

In order for any instrument to govern tax apportionment, the ACT requires that the instrument contain an “express and unambiguous” tax apportionment clause. The Commissioners’ comments recognize that determining whether a decedent’s directions on tax apportionment are “express and unambiguous” will be the subject of judicial construction.

The Colorado Committee believes that no substantive difference exists or was intended by the Commissioners when they use the phrase “expressly and unambiguously” in the Act and the phrase “specific and unambiguous” in their comments.

This section provides exclusive rules for determining when statutory apportionment or a tax apportionment clause in a decedent’s will, revocable trust or other dispositive instrument will govern. However, if a purported tax apportionment clause fails to so qualify, the clause may nonetheless create a gift for federal gift tax purposes. As noted in the article authored by Douglas A. Kahn, *The 2003 Revised Uniform Estate Tax Apportionment Act*, 38 Real Property, Probate and Trust Journal 613 (Winter 2004), it is “critical” to differentiate between a tax apportionment clause and a clause disposing of the decedent’s property. As Mr. Kahn writes,

“[t]he shifting of the tax burden from one person to another is one means of affecting the amount of the decedent’s property that passes to those persons. But, while the decedent’s apportionment of taxes may be regarded as a subcategory of property disposition, it is a special category with specific rules and should be isolated when analyzing issues that arise.”

The Commissioners spend considerable space in the comments addressing this distinction by illustrating, in two examples, that a clause in a trust that was presumably intended to serve as a tax apportionment clause, did not so qualify due to a conflict with a will, but was given effect as a dispositive direction, resulting in a gift between trust beneficiaries.

#### Subsection (2):

Subsection (b) of the Model Act (subsection (2) of this section) refers to the apportionment of estate tax to, alternatively, “property,” an “in-

terest in property,” a “person receiving an interest in property,” and a “holder of an interest in property.” As recognized in the Colorado committee’s definition of “apportionment provision” (See section 15-12-1402 (2)), apportionment may be accomplished by the allocation of estate tax to a certain property or recipient, or by exonerating a certain property or recipient from liability. For purposes of this section, no substantive distinction is to be drawn between apportionment to the recipient of property (or an interest therein) and the property being received.

The NCCUSL Comments to subsection (2) also require some further elaboration, because they do not distinguish between property that is specifically exonerated from an estate tax obligation and property that is indirectly exonerated from such an obligation by the allocation of estate tax to another source of payment. Subject to the rules of construction set forth in subsection (4), paragraph (c), property that is specifically exonerated may be used for the payment of estate tax only after all other sources of payment have been exhausted. On the other hand, property that is only indirectly exonerated remains subject to the provisions of section 15-12-1404 (the statutory provisions for apportionment of estate taxes) if the property to which estate tax has been apportioned is insufficient to pay the tax in full; this is set forth in new section 15-12-1403 (2)(b).

By way of further explanation, often a testator will make pecuniary or specific devises (which may or may not have significant value); the scrivener needs to determine the client’s intentions as to whether these devises are exonerated from estate taxes and if so, who will pay the estate taxes on the exonerated devises. If the decedent directs that certain property dispositions are to be exonerated from estate taxes, section 15-12-1403 (2)(a)(I) specifies that the taxes attributable to the exonerated interest must be apportioned among other persons receiving interests *passing under the instrument* (i.e., “inside” apportionment). Notice, however, that section 15-12-1403 (2)(a)(I) does not specify the method of apportionment (i.e., proportionality vs. some other method, however, Section 4 of the Act fills this gap (section 15-12-1404)). As Mr. Pennell suggests in his article at page 17, when addressing “inside” apportionment of estate taxes for dispositions made within a decedent’s single dispositive instrument and when pre-residuary pecuniary or specific devises are made, the “common law abatement and apportionment rules are likely to be directly contrary to the intent of the client in the sense that, if anyone should suffer for insufficient assets in the estate, it should be these takers.”

If the value of the other interests is insufficient to fully pay all of the estate taxes on the exonerated interests, then section 15-12-1403 (2)(a)(II) fills the gap and apportions the tax

ratably among other recipients receiving interests in the *apportionable estate* (i.e., “outside” apportionment not just among the recipients of interests under the instrument). This language requires that the apportionment rules will apply over statutory abatement rules, to the extent the abatement rules might otherwise have been applicable. Note that section 15-12-1403 (2)(a)(II) apportions the tax ratably; if the decedent desired a different apportionment (perhaps based upon marginal rates or some other means), the decedent would need to so direct in the dispositive instrument.

A recipient of an interest in property may be indirectly exonerated from the payment of estate taxes by a provision that apportions estate tax to one or more other recipients of interests in other property. Section 15-12-1403 (2)(c) addresses the determination of the source of payment of estate taxes in this situation where the value of the property received by a recipient to whom estate tax is apportioned is insufficient to pay the estate tax in full. In this situation, the statutory apportionment provisions of section 15-12-1404 will apply (rather than rules of abatement) if the value of the interest in property to which estate tax is apportioned is insufficient to pay the estate tax in full.

#### Subsection (3):

This section specifies that a provision in an instrument which apportions estate tax with respect to property that the decedent did not have any power to transfer immediately before the decedent executed the instrument is ineffective to increase estate taxes apportioned to any person having an interest in such property. The Colorado Committee discussed at least one situation in which subsection (3) would have direct application. For example, assume that wife created a testamentary QTIP trust for the benefit of her surviving husband, granting husband a special power to appoint the QTIP trust property remaining at his death among wife’s children from a prior marriage. In the governing instrument creating the QTIP trust, wife also provided that estate taxes attributable to the inclusion of the QTIP trust in husband’s estate at his later death are to be paid from the QTIP trust unless husband waives that right of reimbursement in the manner provided in Internal Revenue Code §2207A. Under subsection (3), any provision in husband’s governing instrument that would exercise the special power of appointment over the QTIP trust property in a manner that purports to apportion estate taxes imposed with respect to the husband’s personal estate, to the property of the QTIP trust (and thereby attempt to increase the amount of estate taxes borne by the QTIP trust beyond the amount specified in Internal Revenue Code §2207A) would be ineffective.

The second sentence is necessary to avoid unintentionally invalidating an otherwise en-

forceable apportionment clause contained in a decedent’s Will simply because the apportionment clause apportions estate tax to property (or an interest in property) over which the decedent holds a testamentary power of appointment. Hence, this section clarifies that if a decedent has a testamentary power of appointment over property which is validly exercised by the decedent’s Will and the decedent’s Will contains a provision apportioning estate taxes to the appointment property, the apportionment clause will be effective (assuming it is otherwise effective under the provisions of this section) notwithstanding that the decedent had no power to transfer the appointment property immediately prior to executing his or her Will.

#### Subsection (4):

Even though a dispositive instrument may direct payment of estate taxes from a specific source, often the residuary estate, at times the direction cannot be carried out or becomes ambiguous due to circumstances existing at death that the decedent did not contemplate. Subsection (d) (subsection (4) of this section) has been added to the Act to assist in resolving certain of these situations which arise with some frequency by providing rules of construction designed to address common situations when estate taxes are directed to be paid from the residue of the probate or trust estate. This addition reflects the notion that principles of equitable apportionment, and the provisions of the Act, should be superseded only by clearly intentional statements for that purpose a notion that is consistent with Colorado case law. In re Estate of Kelly, 41 Colo. App. 316, 584 P.2d 640 (1978).

Three situations (or a combination of them) often cause ambiguity or impossibility of performance with respect to an estate tax payment direction in a dispositive instrument:

1. When the gross federal estate contains substantial non-probate assets, the dispositive instrument directs payment from the estate residue, and the non-probate beneficiaries and residuary beneficiaries are different persons.
2. When the dispositive instrument contains substantial pre-residuary gifts, the dispositive instrument directs payment from the residue, and the residue is insufficient to discharge the estate tax liability.
3. When a marital or charitable gift is made from the residue and the dispositive instrument directs payment from the residue without recognizing the potential diminution of an available estate tax deduction.

Each of these situations is addressed below.

#### *1. Residuary Estate / Non-Probate Assets Conflict*

In the first situation, when (a) the dispositive instrument directs payment of estate taxes from the residuary estate but substantial non-probate



assets exist, and (b) the residuary and non-probate beneficiaries are different, the NCCUSL comments indicate that the question of whether the direction is "specific and unambiguous" is a matter for judicial construction, because it is unclear whether taxes attributable to property not passing under the dispositive instrument also shall be paid from the estate residue. The Colorado committee has adopted a rule of construction that relieves courts from the need to determine the intent of such a direction, by requiring an express and unambiguous acknowledgment that non-probate assets are covered by the apportionment provision. Examples of such express and unambiguous language might include, but are not limited to, the following:

"All taxes payable by reason of my death, whether attributable to assets passing under this instrument or otherwise, shall be paid out of the residue of my probate estate." (This language is identified by NCCUSL as specific and unambiguous as to the proper source of estate taxes).

"All estate tax shall be paid from the residuary estate, without apportionment to other assets."

"All estate tax shall be paid from the residuary estate, without right of contribution from recipients of other assets."

"All estate tax shall be paid from the residuary estate, without apportionment to other assets or right of contribution from recipients of other assets."

However, even where a dispositive instrument directs apportionment to the residue in an express and unambiguous manner, federal estate tax laws present a complicating factor that the NCCUSL comments do not adequately address. See Comments to subsection (5) below.

## 2. *Pre-Residuary / Residuary Conflict (No Marital or Charitable Gift)*

As noted above, the NCCUSL comments suggest that, under some circumstances, a direction that "all taxes arising as a result of my death, whether attributable to assets passing under this instrument or otherwise, be paid out of the residue of my probate estate" is specific and unambiguous. There may be some question as to whether this is true where estate taxes exceed the assets of the residuary probate estate. Subsection (2), paragraph (a) and the corresponding NCCUSL comments indicate that an apportionment provision such as the one described above effectively "exonerates" the preresiduary interests and forces the residuary beneficiaries to bear all taxes if the residue is sufficient. However, the Colorado committee believes that situations in which the residue is not sufficient to bear all taxes should be addressed more directly in the statutory text.

In such an instance, while the apportionment directive is not fully operative (due to deficient residuary assets), the directive can be followed to the greatest extent possible; and any shortfall

in the tax payment sources is adequately addressed through the default rules of 15-12-1404. The rules of abatement set forth in 15-12-902 and any corresponding distinctions drawn between classes of pre-residuary devises are not to be applied with respect to the apportionment of estate taxes. Thus, the provision described above is "specific and unambiguous" and should be given effect with respect to residuary assets, but the Act should be applied to resolve the uncertainty created by the apportionment provision's failure to contemplate exhaustion of the residue.

## 3. *Apparent Specific Allocation to Marital or Charitable Property*

A more difficult dilemma arises when the dispositive instrument (a) directs that estate tax be paid by all recipients pro rata, including a surviving spouse or a charity; or (b) provides that payment of estate taxes shall be made from the residue "without apportionment or contribution" and a marital or charitable gift is made from the residue. Subsection (2), paragraph (c) and the accompanying NCCUSL comments address these situations by apportioning estate tax ratably among property interests that do not qualify for a marital or charitable deduction, unless there is an "express and unambiguous" direction to the contrary; however, there is no indication as to what constitutes an adequate contrary direction.

The Colorado Committee believes that the Act should apply to shield the surviving spouse or charity from the tax burden in all of the instances described above, unless there is a clear and unambiguous statement in the dispositive instrument of an intent not to benefit from an available marital or charitable deduction. See, e.g., Restatement (Third) of Property, Wills, and Other Donative Transfers § 11.3, subsection (c)(4), which states that "the construction that gives more favorable tax consequences than other plausible constructions" is preferred, as most donors would prefer that their dispositions receive "as favorable a tax treatment as is consistent with their general dispositive plan." *Id.*, Comment k.

In this light, the Colorado committee concludes that, absent unusual circumstances, the Act should insulate a charity or spouse from estate tax liability notwithstanding a direction in the dispositive instrument against apportionment or contribution, or a direction that taxes are to be borne pro rata. An exception to this general rule exists only where the instrument states explicitly that the decedent is aware of the increased tax burden that results if a charity or spouse is burdened with any tax liability, or that a named spouse or charity is to contribute to such liability. Examples of such clear and unambiguous language (as mandated by Sections 3(b) and (d)(3) of the Act (subsections (2) and

(4)(c) of this section) might include, but are not limited to, the following:

**In a Tax Allocation Provision:**

"I specifically recognize that the allocation of estate taxes provided above could result in the apportionment of estate taxes to the gift to [spousal / charitable beneficiary], and that the estate taxes imposed against my estate could thereby be increased" or

"Even if the allocation of estate taxes provided above does not fully utilize the marital or charitable deductions otherwise allowable to my estate, I intend that the gift to [spousal / charitable beneficiary] shall bear a proportionate share of estate taxes payable by reason of my death."

**In a Provision for Disposition of Residue:**

"I intend that the devise of my residuary estate shall be calculated and distributed after the payment of all estate taxes, without regard to whether any such devise would result in a federal estate tax charitable or marital deduction, and despite any increase in estate taxes as a consequence of this intent" or

"Each devise of my net residuary estate provided herein shall bear its proportionate share of estate taxes, even if the federal estate tax marital or charitable deduction allowable by reason of such devise is thereby reduced."

Such language clearly indicates that the fiduciary must reduce the spouse's/charity's share by means of a circular calculation in determining the available deduction.

**Subsection (5):**

Additional uncertainty may arise out of the inconsistencies between the Act and federal estate tax recovery statutes (sometimes referred to as "reimbursement" statutes). This problem is only cursorily addressed in the NCCUSL comments. Subsection (e) (subsection (5) of this section) has been added to ensure that an estate tax apportionment provision is not confused with or viewed as necessarily effecting a waiver of federal tax recovery rights.

Internal Revenue Code §§ 2206 to 2207B authorize a personal representative to collect a portion of the decedent's federal estate tax from the recipients of non-probate property that is included in the decedent's taxable estate. § 2206 covers life insurance proceeds includible under § 2042; § 2207 covers power of appointment property includible under § 2041; § 2207A covers qualified terminable interest property ("QTIP property") includible under § 2044; and § 2207B covers prior transfers in which the decedent retained a life interest as described by § 2036. The right of recovery granted under each of these statutes may be waived by a contrary direction in the decedent's will. Under §§ 2207A and 2207B, a waiver of the recovery rights must specifically express an intent to waive the right. Courts have indicated

that similar specificity may be required to effectively waive the provisions under §§ 2206 and 2207, although those statutes do not, by their terms, require such specificity.

Technically, Code §§ 2206 to 2207B are not apportionment statutes. These statutes do not expressly compel the exercise of available reimbursement rights or any particular application of collected amounts; they simply grant recovery rights to the personal representative. NCCUSL adopted the position that there is no conflict between the Act and the Code's recovery provisions, hence no federal "preemption" of state estate tax apportionment. The uniform Act does not reference the federal statutes; and the NCCUSL comments are non-committal as to the effects of federal recovery rights on state apportionment laws. Thus, the uniform Act leaves open the possibility that a dispositive instrument could require apportionment from the residue of the decedent's probate estate, notwithstanding the personal representative's lingering federal "right to recover" taxes from certain non-probate property. Conversely, a dispositive instrument could effectively waive the personal representative's right of recovery under federal law, but still expressly or under the Act's default provisions provide for the apportionment of taxes against QTIP property. In both situations, the personal representative (or a court) would be left to ascertain how the ultimate burden of tax payments is to be borne.

NCCUSL may be correct as to the theoretical difference between estate tax apportionment and federal recovery rights. However, certain case law and standard practice in estate administration supports the notion that such recovery rights even though they may be couched in discretionary terms — create a "duty" to collect taxes in the manner contemplated by Code §§ 2206 to 2207B. In that light, the federal provisions may be viewed as tantamount to federal estate tax apportionment laws.

Further, courts have blurred the distinction between federal recovery statutes and state tax apportionment laws. In Colorado, for instance, the decision of *In re Estate of Klarner*, 113 P.3d 150 (Colo. 2005) directly holds that Internal Revenue Code § 2207A preempts the state's estate tax apportionment laws. Under *Klarner*, absent a specific waiver of the statute's application, § 2207A requires both federal and state estate taxes to be apportioned against a QTIP trust that is includible in the decedent's taxable estate. The Act and the NCCUSL comments leave continuing room for argument as to (a) whether the holding of *Klarner* would remain intact after the Act's adoption, and (b) how discrepancies between the Act's apportionment principles and federal recovery provisions will be managed in the future.

Beyond the fundamental question as to whether the federal recovery provisions effec-



tively preempt state apportionment laws, there are numerous other issues that arise out of incongruity between the federal scheme and the Act. For example: What kind of specificity is required to deflect recovery rights/apportionment from non-probate property? What kind of instrument can be used to direct the apportionment? (Internal Revenue Code §§ 2206 and 2207 do not permit rights of recovery to be waived in a trust instrument.) How can the incremental allocation of estate taxes to QTIP property under Section 4 of the Act (section 15-12-1404) and Internal Revenue Code § 2207A be altered to create a pro rata burden?

Subsection (5) expressly preserves the distinction between state estate tax apportionment laws and federal statutes granting estate tax recovery rights to personal representatives. However, the Colorado committee suggests that the tensions between these two sources of authority may be significantly minimized through some standardized drafting precautions.

With respect to non-probate assets that are included in a decedent's taxable estate, practitioners must recognize that language which may be sufficient to override the Act's default apportionment rules is not necessarily adequate to waive the personal representative's federal right to collect from the recipients a proportionate share (under Internal Revenue Code §§ 2206, 2207 or 2207B) or an incremental share (under Internal Revenue Code § 2207A) of the taxes attributable to such property. Thus, for instance, if the estate tax burden is intended to be borne by the decedent's residuary probate estate, rather than by QTIP property includible in the decedent's taxable estate, the following direction would be sufficient: "All taxes payable by reason of my death, whether attributable to assets passing under this instrument or otherwise, shall be paid out of the residue of my probate estate without apportionment to or right of con-

tribution from any person; and I waive any right of recovery otherwise available to my personal representative under Internal Revenue Code § 2207A." Practitioners should consider including similar references to other federal estate tax reimbursement statutes providing rights that are intended to be waived in conjunction with tax apportionment even where the statutes or applicable regulations do not require such express acknowledgments.

Similarly, if apportionment to QTIP property is to be obtained on a proportionate basis, instead of an incremental basis, the calculation mechanics provided under the Act and Internal Revenue Code § 2207A should be specifically superseded by a reference to and expressed intent to deviate from the federal statute. Otherwise, the federal recovery scheme could result in a different and preemptive apportionment computation.

The Colorado committee notes that the Act's maintenance of a distinction between estate tax apportionment and federal recovery rights may conflict with the rationale applied by the Colorado Supreme Court in *In re Estate of Klarner*, 113 P.3d 150 (Colo. 2005). However, the committee believes that the distinction is in keeping with federal law and the uniformity sought by NCCUSL.

In this context, federal recovery statutes must also be distinguished from the power of a fiduciary under section 15-12-1409 to collect estate taxes due from recipients of a decedent's property. Such authority, while also sometimes referred to as a right of recovery, arises out of the need to ensure that the responsible fiduciary has the means to pay the taxes due in a timely manner. Thus, this collection power will be exercised in a manner that is consistent with the Act. Federal recovery rights, on the other hand, create burdens on beneficiaries and entitlements in fiduciaries that are independent of state laws of apportionment.

**15-12-1404. Statutory apportionment of estate taxes.** (1) To the extent that apportionment of an estate tax is not controlled by an instrument described in section 15-12-1403, and except as otherwise provided for in sections 15-12-1406 and 15-12-1407, the following rules apply:

(a) Subject to paragraphs (b) to (d) of this subsection (1), the estate tax shall be apportioned ratably to each person that has an interest in the apportionable estate.

(b) A generation-skipping transfer tax incurred on a direct skip taking effect at death shall be charged to the person to which the interest in property is transferred.

(c) If property is included in the decedent's gross estate because of section 2044 of the internal revenue code of 1986, as amended, or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of estate tax for which the decedent's estate would have been liable if the property had not been included in the decedent's gross estate shall be apportioned ratably among the holders of interests in the property. The balance of the tax, if any, shall be apportioned ratably to each other person having an interest in the apportionable estate.

(d) Except as otherwise provided for in section 15-12-1403 (2) (d), and except as to

property to which section 15-12-1407 applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest shall be apportioned, without further apportionment, to the principal of that property.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 703, § 1, effective August 10.

### OFFICIAL COMMENT

The value of an interest in the apportionable estate is determined in accordance with Section 2(7) (section 15-12-1402 (8)) of the Act.

Property values subtracted from the decedent's gross estate in determining the apportionable estate under section 15-12-1402 (1) are excluded from the apportionable estate, and beneficiaries of those properties do not have any estate tax apportioned to them because of their interest in those properties. This treatment is consistent with the Restatement (Third) of Property: Wills and Other Donative Transfers §1.1, comment g (1998). The Act adopts a method of equitable apportionment of estate taxes, but does not follow the Restatement method which allocates taxes apportioned to probate assets first to the residuary beneficiaries and invites preferential treatment for beneficiaries of specific and pecuniary gifts by will over beneficiaries of gifts by various non-probate transfer methods.

A "direct skip" currently is defined in §§ 2612(c) and 2613 of the Internal Revenue Code. Section 2603(b) of the Internal Revenue Code states that, unless directed otherwise in the governing instrument, the tax on a generation-skipping transfer is charged to the property constituting the transfer. Section 2603(a)(3) of the Internal Revenue Code imposes the duty of paying the tax on a direct skip on the transferor of the property. Under subsection (1)(b), the decedent's personal representative will pay the generation-skipping tax on a direct skip out of the transferred property (or the proceeds from a sale of all or some of that property). To the extent that it is not feasible or practical to pay the tax from the transferred property, the transferees are to pay their proportionate share of the shortfall. Subsection (1)(b) is consistent with the treatment provided by federal law.

The property to which subsection (1)(c) applies is sometimes referred to as "QTIP property" since § 2044 of the Internal Revenue Code of 1986 deals with "qualified terminable

interest property." See §§ 2044(b)(1), 2056(b)(7), and 2523(f) of the Internal Revenue Code of 1986. Although the general rule of apportionment in the Act is to apportion estate taxes on the basis of the average rate of tax, the tax apportioned to the holders of interests in QTIP property by the Act is based on the marginal rate of tax. Note that federal estate tax law grants the decedent's fiduciary the power to collect from the holders of the QTIP property the estate tax generated by that property at the marginal estate tax rate of the decedent's estate. The Act tracks the federal law in this respect.

It would be harsh to collect the estate tax from persons holding discretionary or contingent interests in property since they may not obtain possession for many years, if at all. Hence, when the tax is apportioned to persons holding interests in property in which there are time-limited interests, subsection (1)(d) requires the tax to be paid from principal. This provision does not apply to property for which a special elective benefit (as described in section 15-12-1407) has been elected.

An estate tax that is apportioned to an interest in property that cannot be reached because of legal or practical obstacles but is not subject to a time-limited interest is to be collected from the interest holder to the extent feasible. In that circumstance, since there is no time-limited interest, the tax will not be apportioned to a person who may not receive property for many years if at all.

When some of the interests in property qualify for a charitable or marital deduction and some do not, requiring the tax to be paid from the principal of the property may reduce the amount of marital or charitable deduction that is allowable. Although the likely intent of a decedent would be to maximize the marital and charitable deductions available for the estate, subsection (1)(d) provides that the estate tax is to be paid from the principal of the property, a choice that avoids administrative complexity.

**15-12-1405. Credits and deferrals.** (1) Except as otherwise provided for in sections 15-12-1406 and 15-12-1407, the following rules apply to credits and deferrals of estate taxes:

(a) A credit resulting from the payment of gift taxes or from estate taxes paid on property previously taxed inures ratably to the benefit of all persons to which the estate tax is apportioned.

(b) A credit for state or foreign estate taxes inures ratably to the benefit of all persons



to which the estate tax is apportioned, except that the amount of credit for a state or foreign tax paid by a beneficiary of the property on which the state or foreign tax was imposed, directly or by a charge against the property, inures to the benefit of the beneficiary.

(c) If payment of a portion of an estate tax is deferred because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral inures ratably to the persons to whom the estate tax attributable to the interest is apportioned. The burden of any interest charges incurred on a deferral of taxes and the benefit of any tax deduction associated with the accrual or payment of the interest charge is allocated ratably among the persons receiving an interest in the property.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 703, § 1, effective August 10.

### OFFICIAL COMMENT

Section 2013 of the Internal Revenue Code of 1986 allows a credit for federal estate taxes paid on certain properties that were included in the taxable estate of a person who died within a relatively short time of the decedent's death. This credit often is referred to as a credit for property previously taxed.

A beneficiary of property attracting a foreign or State death tax may have paid that tax directly or may have paid it indirectly by virtue of the tax's being paid out of the property passing to that person. If that occurs, while the beneficiary's payment of the foreign or State tax reduces

the amount that the beneficiary will receive, it will not reduce the value of the beneficiary's interest in the apportionable estate according to the definition of "value" in this Act. See section 15-12-1402 (8). The Act mitigates the beneficiary's burden by giving the beneficiary the benefit of any estate tax credit allowed for the foreign or State tax and paid by the beneficiary.

The benefits and burdens described in subsection (1)(c) are to be allocated ratably among persons in accordance with the amount of deferral or extension attributable to their interests in the apportionable estate.

**15-12-1406. Insulated property, advancement of tax - definitions.** (1) As used in this section, unless the context otherwise requires:

(a) "Advanced fraction" means a fraction that has as its numerator the amount of the advanced tax and as its denominator the value of the interests in insulated property to which that tax is attributable.

(b) "Advanced tax" means the aggregate amount of estate tax attributable to interests in insulated property that is required to be advanced by uninsulated holders under subsection (3) of this section.

(c) "Insulated property" means property subject to a time-limited interest that is included in the apportionable estate but is unavailable for payment of an estate tax because of impossibility or impracticability.

(d) "Uninsulated holder" means a person who has an interest in uninsulated property.

(e) "Uninsulated property" means property included in the apportionable estate, other than insulated property.

(2) If estate tax is to be advanced pursuant to subsection (3) of this section by persons holding interests in uninsulated property subject to a time-limited interest other than property to which section 15-12-1407 applies, the estate tax shall be advanced, without further apportionment, from the principal of the uninsulated property.

(3) Subject to sections 15-12-1409 (2) and 15-12-1409 (4), an estate tax attributable to interests in insulated property shall be advanced ratably by uninsulated holders. If the value of an interest in uninsulated property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency shall be advanced ratably by the person holding interests in any property that is excluded from the apportionable estate as defined in section 15-12-1402 (1) (b) as if those interests were in uninsulated property.

(4) A court having jurisdiction to determine the apportionment of an estate tax may require a beneficiary of an interest in insulated property to pay all or part of the estate tax otherwise apportioned to the interest if the court finds that it would be substantially more

equitable for that beneficiary to bear the tax liability personally than for that part of the tax to be advanced by uninsulated holders.

(5) When a distribution of insulated property is made, each uninsulated holder may recover from the distributee a ratable portion of the advanced fraction of the property distributed. To the extent that undistributed insulated property ceases to be insulated, each uninsulated holder may recover from the property a ratable portion of the advanced fraction of the total uninsulated property.

(6) Upon a distribution of insulated property for which the distributee becomes obligated to make a payment to uninsulated holders pursuant to subsection (4) of this section, a court may award an uninsulated holder a recordable lien on the distributee's property to secure the distributee's obligation to that uninsulated holder.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 704, § 1, effective August 10.

### OFFICIAL COMMENT

The term "time-limited interest" is defined in section 15-12-1402 (7).

Subsection (2) applies to property in which at least one person has a time-limited interest and which property can be reached by the personal representative of the decedent. In such cases, an estate tax that is payable as an advanced tax under subsection (3), is charged against the principal of the property, and is not apportioned among the several interests in that property. While there is no express apportionment of the advanced tax to the time-limited interests in the property, the holders of the time-limited interests will bear a share of the tax burden in that the resulting reduction of the value of the principal will reduce the value of the time-limited interests, except that it will not reduce the value of a dollar annuity interest. So, the holder of a dollar annuity interest will be exonerated from sharing in the burden of estate taxes.

Since the estate tax apportioned to the owners of insulated property cannot be collected from the property, the tax is to be paid (as an advancement) by persons having interests in other assets of the estate (uninsulated holders), provided however that the total tax attributed to and advanced by an uninsulated holder cannot exceed the value of that person's interest in the uninsulated property. See section 15-12-1409 (4). If the amount of the aggregate tax apportioned to and to be advanced by an uninsulated holder exceeds the value of that holder's interest in the uninsulated property, then the deficiency shall be apportioned to the holders of interests in properties that otherwise qualify for charitable or marital deductions. In such cases, those charitable and marital properties are reclassified as uninsulated properties, and so the beneficiaries of those properties will be uninsulated holders who will have a right of recovery from the distributees of insulated properties for which they paid a portion of the estate tax.

It would be harsh to make persons holding future interests in insulated property pay tax on

properties that they will not receive until years later and may never receive. If they were required to pay the tax at the time of decedent's death, that could give rise to widespread disclaimers of interests. Also, it would be difficult to value the interests of discretionary beneficiaries. For that reason, with one exception set forth in subsection (4), the tax attributable to insulated properties is reallocated to uninsulated holders who are required to advance the funds to pay the tax.

The tax attributable to the insulated property that is required to be paid by the uninsulated holders is referred to as an "advanced tax." To permit the uninsulated holders who bear the advanced tax to be reimbursed, the Act effectively provides the uninsulated holders with a phantom percentage interest in the property whose transfer is the source of the advanced tax. While the phantom percentage interest of the uninsulated holder remains constant, its value will increase or decrease as the value of the property changes. The phantom percentage interest is determined by dividing the advanced tax by the aggregate value of insulated properties as determined for purposes of the estate tax. When a distribution of insulated property is made, a percentage of that distribution must be paid over to the uninsulated holders; and this is a personal obligation of the distributee. If it were not for this Section, the uninsulated holders would have had a right of reimbursement under section 15-12-1410 for the amount of their outlay from the distributees; but instead, subsection (5) gives them a right to a fraction of the distributed amount rather than to a fixed dollar amount. The amount collected from a distributee is divided among the uninsulated holders according to the percentage of the advanced tax that they paid.

It is important to note that the uninsulated holders do not have an actual interest in the insulated property and have no lien or security interest in that property while it is in the pos-



session of the trust or fund. The uninsulated holders only have a claim against the persons who receive distributions from the trust or fund which holds the insulated property. The only exception is where previously insulated property loses its insulation so that it can be reached by the uninsulated holders without violating any prohibition against alienation of interests. Once insulated property is in the hands of a distributee, subsection (6) permits the uninsulated holders to seek a lien on the distributee's property for the amount owed to them; but there is no lien or other encumbrance on the insulated property while it is in the possession of the trust or fund.

The operation of this Section is illustrated in the following examples.

Ex. (1) X dies having a gross estate and an apportionable estate of \$10M and devises his probate property (with a value of \$8M) to A, B and C, with A and B each receiving 40% of the probate estate, and C receiving 20%. In addition to the probate property, X had an interest in a nonqualified pension plan at his death which interest had a value of \$2M. X's contract with the plan provides that an annuity of \$120,000 per year is to be paid to G for life, and upon G's death the remainder of the corpus is to be paid to L. The only estate tax to which X's estate is subject is the federal estate tax. The federal estate tax on X's \$10M gross estate is \$4M. So, the average rate of the estate tax is 40%. Under section 15-12-1404 (1)(a), the estate tax that is attributable to the \$2M pension fund is \$800,000 — the value of the property interests that G and L hold in the fund (\$2M) is 20% of the \$10M value of the entire apportionable estate, and so 20% of the \$4M estate tax is attributable to the pension fund. Assume that under local law, the assets of the pension fund cannot be reached by creditors or by the personal representative of X's estate in order to use those funds to pay estate taxes. Under subsection (3), the personal representative will collect 40% of the \$800,000 (i.e., \$320,000) from A and a like amount from B; and the personal representative will collect \$160,000 from C.

The advanced fraction for the pension fund is \$800,000 (the amount of the estate tax that was advanced by A, B, and C) divided by the \$2M value of the fund (the insulated property), which division results in a percentage of 40%. Putting it differently, the \$800,000 estate tax attributable to the fund but not paid by those interested in the fund constitutes 40% of the \$2M value of the fund. To compensate A, B and C for paying the advanced tax, they obtain what amounts to a 40% phantom interest in the fund. Their actual interest arises only when distributions are made from the fund or, in the event that the fund loses its insulation from creditors, when that occurs.

In Year One, the fund pays \$120,000 to G pursuant to the terms of the contract. Forty percent of that distribution (\$48,000) must be

paid by G to A, B and C — 40% or \$19,200 payable to A and another \$19,200 payable to B, and 20% or \$9,600 payable to C, since that is the proportion in which they bore the advanced tax. The next year, the fund distributes another \$120,000 to G, and the same payments must be made to A, B and C. In the third year, G dies, and the fund distributes the remaining principal of \$2,400,000 to L; the value of the principal had increased because of an increase in the value of the investments the fund held. A, B, and C are entitled to 40% of that \$2,400,000, and so L must pay them \$960,000, to be divided among them. A and B will each receive \$384,000 (40% of the \$960,000), and C will receive \$192,000 (20% of \$960,000).

Ex. (2) X dies leaving a taxable estate of \$10,000,000 on which a federal estate tax of \$5,000,000 is payable (for convenience of computation, we treat all of X's estate as subject to a tax at a 50% marginal rate). X's estate has no marital or charitable deductions. X left \$4,000,000 of assets in an offshore trust that cannot be reached by X's personal representative and so constitutes insulated property. The federal estate tax attributable to that property is \$2,000,000. X had other nonprobate assets having an aggregate value of \$2,000,000 and a residuary estate of \$4,000,000. The holders of the nonprobate assets will have \$1,000,000 in federal estate taxes apportioned to them, and the holders of the residuary interests will have \$2,000,000 of federal estate taxes attributed to them. But, the personal representative must also pay the \$2,000,000 of federal estate taxes attributable to the offshore assets. If the holders of interests in those assets cannot be reached, and if the Act did not apply, the personal representative would have to pay the \$2,000,000 from the residuary of the estate, thereby wiping it out completely. Under the Act, 1/3 of the \$2,000,000 of federal estate tax attributable to the offshore assets (\$666,667) will be paid by the holders of the other nonprobate assets, and the remaining \$1,333,333 of that tax will be paid by the beneficiaries of the residuary estate. Under the Act, the holders of the other nonprobate assets will have to bear their proportionate share of the tax on the offshore assets. When distributions are made of the offshore assets, the distributees will be personally liable to pay a portion of their distribution to the persons who paid the estate tax on the offshore fund.

If undistributed insulated property loses its insulation from claims, the uninsulated holders can collect the balance of their interest from the property at that time.

In certain circumstances, it would be more equitable to require the beneficiary of an interest in insulated property to bear the tax on that interest than to reapportion it to others. For example, if the beneficiary's interest is one that will become possessory in a short period of

time, so that the beneficiary will soon have possession of assets from the fund or trust, it would be more equitable to place personal liability on that beneficiary; and the court has discretion to do so. In determining whether a beneficiary is likely to obtain possession of all or a significant part of the beneficiary's interest in the insulated property, the court can consider not only distributions that are required to be made to the beneficiary, but also distributions that, based on an examination of the history of the administration of the fund or trust, are likely

to be made in the near future. Subsection (4) provides the court with the discretion to make that determination. While a beneficiary's receipt of a distribution from the trust or fund would make that beneficiary liable to uninsured holders who paid the advanced tax, that places a burden of collection on the uninsured holders; and so, when the distribution is likely to be made to a beneficiary within a short period of time, it would be more equitable to have that beneficiary bear the tax.

**15-12-1407. Apportionment and recapture of special elective benefits.** (1) As used in this section, unless the context otherwise requires:

(a) "Special elective benefit" means a reduction in an estate tax obtained by an election for:

(I) A reduced valuation of specified property that is included in the gross estate;

(II) A deduction from the gross estate, other than a marital or charitable deduction, allowed for specified property; or

(III) An exclusion from the gross estate of specified property.

(b) "Specified property" means property for which an election has been made for a special elective benefit.

(2) If an election is made for one or more special elective benefits, an initial apportionment of a hypothetical estate tax shall be computed as if no election for any of such benefits had been made. The aggregate reduction in estate tax resulting from all elections made shall be allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation, or exclusion attributable to each holder's interest bears to the aggregate amount of deductions, reduced valuations, and exclusions obtained by the decedent's estate from the elections. If the estate tax initially apportioned to the holder of an interest in specified property is reduced to zero, any excess amount of reduction reduces ratably the estate tax apportioned to other persons that receive interests in the apportionable estate.

(3) An additional estate tax imposed to recapture all or part of a special elective benefit shall be charged to any person who is liable for the additional tax pursuant to the law providing for the recapture.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 705, § 1, effective August 10.

#### OFFICIAL COMMENT

The types of special elective benefits at which this provision is aimed are currently set forth in §§ 2031(c), 2032A, and 2057 of the Internal Revenue Code of 1986. Section 2032A provides an election whereby "qualified real property" (real property that is used for a specified purpose and is held by certain parties related to the decedent) will be given a lower valuation for federal estate tax purposes than otherwise would have been true. Under § 2032A(c), if within 10 years after the decedent's death the qualified heir disposes of an interest in the qualified realty or ceases to use it for its required purpose, an additional estate tax will be imposed to recapture some of the estate tax reduction that was obtained through the election. The purpose of this section is to define how the benefit of an estate tax reduction of this or a similar type will

be allocated and how any additional estate tax imposed to recapture some of that tax benefit will be allocated.

Another federal estate tax provision to which this Section applies is § 2057 of the Internal Revenue Code of 1986. That provision grants an election to receive a special estate tax deduction for a "qualified family-owned business interest." Under § 2057(f), if, within 10 years after the decedent's death, one of four listed events occurs, an additional federal estate tax will be imposed in order to recapture some of the tax reduction obtained by electing to take the deduction. This Section defines how the benefits of the election and the burden of an additional tax will be apportioned. The Economic Growth and Tax Relief Reconciliation Act of 2001 repealed § 2057 for the estates of decedent's dying after



the year 2003. However, the 2001 Act retains the 10-year recapture provision, and the sunset provision will reinstate § 2057 in the year 2011 unless the repeal is made permanent.

Section 2031(c) of the Internal Revenue Code of 1986 provides an election whereby a portion of the value of land that is subject to a qualified conservation easement, as defined in § 2031(c)(8), is excluded from the gross estate. The exclusion does not apply to the value of a retained development right; but if, prior to the date for filing the estate tax return, all the persons who have an interest in the land execute an agreement to extinguish some or all of the development rights, an additional estate tax deduction will be allowed by § 2031(c)(5). A failure to implement that agreement within a specified time will cause the imposition of an additional estate tax to recapture that deduction. The allocation of the benefits of the exclusion and of the deduction for making the agreement, and the allocation of any additional estate tax, is determined by this section.

The allocation of the aggregate tax reduction obtained from all special elective benefits is made among the holders of interests in the specified properties in accordance with the reduction of the decedent's taxable estate that is attributable to each holder's interest. Since the determination of the amount of estate tax benefit is made by applying the marginal rate of estate tax to the reduced value of the gross estate, it is necessary to aggregate the tax reduction obtained from all of the special election benefits so that the greater tax reduction obtained from using a marginal rate is not duplicated by applying that rate to several distinct reductions.

Once the amount of estate tax that is apportioned to the holder of an interest in specified property is determined, it will have to be paid. The holders of interests in a specified property

may have difficulty paying that tax. To pay the tax, the holders will have to sell the property, borrow against it, use other funds to pay the tax, or defer the payment of the tax under tax deferral provisions and pay the tax in installments with income produced by the property. If they were to sell the property, the special elective benefit would be lost; so a sale is not a viable option. Accordingly, the requirement of sections 15-12-1403 (2)(d), 15-12-1404 (1)(d), and 15-12-1406 (2) that the estate tax or an advanced tax be paid from the principal of property subject to a time-limited interest does not apply to properties for which an election for a special elective benefit is made. The solution chosen in section 15-12-1406 (3) and (5) of having other persons interested in the apportionable estate pay the tax and then collect reimbursement from distributees of the property is not practical here because there would be difficulty in determining what income was derived from the property itself, and there would be no trustee or other fiduciary to see that the amounts were turned over to the persons who paid the tax. So, that approach was not adopted. Instead, section 15-12-1404 and this section apportion the estate tax to the holders of the interests in the properties who, facing the obligation to pay, can determine the best method for obtaining the funds to make that payment.

If additional estate taxes are imposed to recapture some or all of a special elective benefit, this section follows the allocation of liability imposed by the estate tax law that generated the additional tax. The burden of the additional estate tax will be borne by the persons who hold interests in the specified property at the time that the additional tax payment is made, and those persons may not be the same ones who held the specified property when the special elective benefit was allowed and so derived the benefit of that election.

**15-12-1408. Securing payment of estate tax from property in possession of fiduciary.** (1) A fiduciary may defer a distribution of property until the fiduciary is satisfied that adequate provision for payment of the estate tax has been made.

(2) A fiduciary may withhold from a distributee an amount equal to the amount of estate tax apportioned to an interest of the distributee.

(3) As a condition to a distribution, a fiduciary may require the distributee to provide a bond or other security for the portion of the estate tax apportioned to the distributee.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 706, § 1, effective August 10.

#### OFFICIAL COMMENT

This section grants a fiduciary discretion either to retain funds or to require a distributee to provide security for payment of that distributee's share of the estate tax. The fiduciary's

exercise of that discretion and use of retained properties are subject to the fiduciary's duty to treat the parties fairly.

**15-12-1409. Collection of estate tax by fiduciary.** (1) A fiduciary responsible for payment of an estate tax may collect from any person the tax apportioned to and the tax required to be advanced by that person.

(2) Except as otherwise provided for in section 15-12-1406, any estate tax due from a person that cannot be collected from that person may be collected by the fiduciary from other persons in the following order of priority:

(a) A person having an interest in the apportionable estate that is not exonerated from the tax;

(b) Any other person having an interest in the apportionable estate; and

(c) A person having an interest in the gross estate.

(3) A domiciliary fiduciary may recover from an ancillary personal representative the estate tax apportioned to the property controlled by the ancillary personal representative.

(4) The total tax collected from a person pursuant to this part 14 may not exceed the value of that person's interest.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 706, § 1, effective August 10.

### OFFICIAL COMMENT

If a fiduciary is unable to collect from a person the estate tax apportioned to that person or to be advanced by that person, the fiduciary is authorized to collect the deficiency from any person interested in the apportionable estate whose interest is not exonerated from tax apportionment. The fiduciary is not obliged to collect the deficiency ratably from such persons. At the fiduciary's discretion, the fiduciary is authorized to collect all of the deficiency from one person or from several persons in any proportion that the fiduciary chooses. The reason that the fiduciary is not required to collect a deficiency ratably is that the payment of the estate tax should not be delayed because of difficulties in collecting from a number of persons.

If the amount collected from persons whose interests in the apportionable estate is not exonerated from tax apportionment is insufficient to make up the deficiency, the fiduciary can then collect any remaining deficiency from persons

interested in the apportionable estate whose interests are exonerated from tax apportionment. This class excludes persons holding interests in property that qualified for a marital or charitable deduction since those interests are excluded from the apportionable estate. Again, the fiduciary is not required to collect the remaining deficiency ratably from the persons holding exonerated interests.

Finally, if the amount collected from persons holding exonerated interests is insufficient, the fiduciary can collect the balance from persons holding interests that qualify for a marital or charitable deduction. The fiduciary is not required to make that collection ratably.

Anyone who pays more than his share of an estate tax or an advanced tax has a ratably right of reimbursement from those who did not pay their share. If requested, the fiduciary may assist in collecting that reimbursement.

**15-12-1410. Right of reimbursement.** (1) A person required pursuant to section 15-12-1409 to pay an estate tax greater than the amount due from the person pursuant to sections 15-12-1403 and 15-12-1404 has a right to reimbursement from another person to the extent that the other person has not paid the tax required by sections 15-12-1403 and 15-12-1404 and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected pursuant to section 15-12-1409 (2).

(2) A fiduciary may enforce the right of reimbursement under subsection (1) of this section on behalf of the person that is entitled to the reimbursement and shall take reasonable steps to do so if so requested by the person.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 706, § 1, effective August 10.



**OFFICIAL COMMENT**

The Act does not include a provision for interest on the collection of a reimbursement, and the question of whether interest will be payable is left to the courts to decide.

**15-12-1411. Action to determine or enforce part.** A fiduciary, transferee, or beneficiary of the gross estate may maintain an action for declaratory judgment to have a court determine and enforce this part 14.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 707, § 1, effective August 10.

**15-12-1412. Uniformity of application and construction.** In applying and construing this part 14, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 707, § 1, effective August 10.

**15-12-1413. Severability.** If any provision of this part 14 or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this part 14 that can be given effect without the invalid provision or application, and to this end the provisions of this part 14 are severable.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 707, § 1, effective August 10.

**15-12-1414. Delayed application.** (1) Sections 15-12-1403 to 15-12-1407 shall not apply to the estate of a decedent who dies on or within three years after August 10, 2011, nor to the estate of a decedent who dies more than three years after August 10, 2011, if the decedent continuously lacked testamentary capacity from the expiration of the three-year period after August 10, 2011, until the date of death.

(2) For the estate of a decedent who dies on or after August 10, 2011, to which sections 15-12-1403 to 15-12-1407 do not apply, estate taxes shall be apportioned pursuant to the law in effect immediately before August 10, 2011.

(3) The provisions of this part 14 may be adopted as applicable law in a governing instrument at any time on or after August 10, 2011. The provisions of this part 14 may be incorporated by reference, in whole or in part, into a governing instrument at any time.

**Source: L. 2011:** Entire part added, (SB 11-165), ch. 184, p. 707, § 1, effective August 10.

**OFFICIAL COMMENT**

Testamentary capacity was chosen as the standard for determining whether the preclusion for applying the Act's apportionment rules is extended beyond the statutory period despite the fact that a different standard is employed to determine whether a person has the capacity to

execute non-testamentary instruments. Testamentary capacity is employed in the Act because it has a well established meaning and will provide a uniform standard. See Restatement (Third) of Property: Wills and Other Donative Transfers, Section 8.1 (2003).

**ARTICLE 13****Ancillary Administration**

**Editor's note:** For historical information concerning the repeal and reenactment of articles 10 to 17 of this title, see the editor's note immediately preceding article 10.

## PART 1

15-13-207.

Ancillary and other local administrations - provisions governing.

## DEFINITIONS

15-13-101. Definitions.

## PART 3

## PART 2

## JURISDICTION OVER FOREIGN REPRESENTATIVES

## POWERS OF FOREIGN PERSONAL REPRESENTATIVES

15-13-301.

Jurisdiction by act of foreign personal representative.

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15-13-302.

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15-13-303.

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15-13-202. Payment or delivery discharges.

## PART 4

15-13-203. Resident creditor notice.

## JUDGMENTS AND PERSONAL REPRESENTATIVE

15-13-204. Proof of authority.

15-13-205. Powers.

15-13-401.

Effect of adjudication for or against personal representative.

15-13-206. Power of representatives in transition.

## PART 1

## DEFINITIONS

**15-13-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Local administration" means administration by a personal representative appointed in this state pursuant to appointment proceedings described in article 12 of this title.

(2) "Local personal representative" includes any personal representative appointed in this state pursuant to appointment proceedings described in article 12 of this title and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to section 15-13-205.

(3) "Resident creditor" means a person domiciled in, or doing business in, this state, who is, or could be, a claimant against an estate of a nonresident decedent.

**Source:** L. 73: R&RE, p. 1609, § 1. C.R.S. 1963: § 153-4-101.

## PART 2

## POWERS OF FOREIGN PERSONAL REPRESENTATIVES

**15-13-201. Payment of debt and delivery of property to domiciliary foreign personal representative without local administration.** (1) At any time after the expiration of sixty days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock, or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock, or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of the representative's appointment, and an affidavit made by or on behalf of the representative stating:

- (a) The date of the death of the nonresident decedent;
- (b) That no local administration, or application or petition therefor, is pending in this state;
- (c) That the domiciliary foreign personal representative is entitled to payment or delivery.



**Source:** L. 73: R&RE, p. 1609, § 1. C.R.S. 1963: § 153-4-201. L. 2002: IP(1) amended, p. 1360, § 11, effective July 1.

**15-13-202. Payment or delivery discharges.** Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative.

**Source:** L. 73: R&RE, p. 1610, § 1. C.R.S. 1963: § 153-4-202.

**15-13-203. Resident creditor notice.** Payment or delivery under section 15-13-201 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

**Source:** L. 73: R&RE, p. 1610, § 1. C.R.S. 1963: § 153-4-203.

**15-13-204. Proof of authority.** If no local administration or application or petition therefor is pending in this state, a domiciliary foreign personal representative may file with a court in this state, in a county in which property belonging to the decedent is located, authenticated copies of the appointment documents.

**Source:** L. 73: R&RE, p. 1610, § 1. C.R.S. 1963: § 153-4-204. L. 87: Entire section amended, p. 602, § 4, effective July 1. L. 2006: Entire section amended, p. 392, § 25, effective July 1.

**15-13-205. Powers.** A domiciliary foreign personal representative who has complied with section 15-13-204 may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally.

**Source:** L. 73: R&RE, p. 1610, § 1. C.R.S. 1963: § 153-4-205.

## ANNOTATION

**Annotator's note.** Since § 15-13-205 is similar to repealed CSA, C. 176, § 141, relevant cases construing that provision have been included in the annotations to this section.

**Inspection of corporation books not allowed until provisions of section complied with.** Officers of a local corporation will not be compelled to allow an inspection of the corporation books by an administrator in another state, upon the estate of the owner of stock in such corporation, without having complied with the provisions of this section. *Clark v. Tindolph*, 67 Colo. 67, 185 P. 648 (1919).

**Foreign personal representative who complies with § 15-13-204 may prosecute action without taking out appointment here.** Executor to whom appointment has issued from the proper court of another state may, upon complying with § 15-13-204, prosecute an action in the courts of the state without taking out appointment here. *Berkey v. Bd. of Comm'rs*, 48 Colo. 104, 110 P. 197 (1910).

**Foreign personal representative may amend petition to incorporate copies of appointment and bond.** On the question of executor's legal capacity to sue, where the record shows that duly authenticated copies of his official bond and appointment issued out of the probate court of another state were filed with the clerk of the court in this state, in compliance with the preceding section, the proper practice is to incorporate copies of these documents in the body of the petition itself, and an executor should be allowed to so amend. *Berkey v. Bd. of Comm'rs*, 48 Colo. 104, 110 P. 197 (1910).

**Substantial compliance is sufficient and defect may be cured at any time before hearing.** *Cordingly v. Kennedy*, 239 F. 645 (8th Cir. 1917).

**Foreign personal representative must file the appointment and a bond.** The substance of this and the preceding section is that upon filing his appointment a foreign personal representative may prosecute or defend an action but the

court shall not grant him authority to do so until he has filed the appointment and a bond. Where the question, therefore, is of plaintiff's "legal capacity to sue", this objection, if it appears on

the face of the complaint should be taken by answer, and where the objection is not taken by answer, it is waived. *Funk v. Funk*, 76 Colo. 45, 230 P. 611 (1924).

**15-13-206. Power of representatives in transition.** The power of a domiciliary foreign personal representative under section 15-13-201 or 15-13-205 shall be exercised only if there is no administration or application therefor pending in this state. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under section 15-13-205, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this state.

**Source:** L. 73: R&RE, p. 1610, § 1. C.R.S. 1963: § 153-4-206.

**15-13-207. Ancillary and other local administrations - provisions governing.**  
 (1) In respect to a nonresident decedent, the provisions of article 12 of this title govern:  
 (a) Proceedings, if any, in a court of this state for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and  
 (b) The status, powers, duties, and liabilities of any local personal representative and the rights of claimants, purchasers, distributees, and others in regard to a local administration.

**Source:** L. 73: R&RE, p. 1610, § 1. C.R.S. 1963: § 153-4-207.

### PART 3

## JURISDICTION OVER FOREIGN REPRESENTATIVES

**15-13-301. Jurisdiction by act of foreign personal representative.** (1) A foreign personal representative submits personally to the jurisdiction of the courts of this state in any proceeding relating to the estate by:

- (a) Filing authenticated copies of his appointment as provided in section 15-13-204;
- (b) Receiving payment of money or taking delivery of personal property under section 15-13-201; or
- (c) Doing any act as a personal representative in this state which would have given the state jurisdiction over him as an individual.

(2) Jurisdiction conferred by this section shall not include jurisdiction over the personal representative for matters unrelated to the estate for which he was acting when he submitted himself to the jurisdiction of the courts of this state by performing any of the acts enumerated in this section and, under paragraph (b) of subsection (1) of this section, is limited to the money or value of personal property collected.

**Source:** L. 73: R&RE, p. 1611, § 1. C.R.S. 1963: § 153-4-301. L. 75: IP(1) amended, p. 601, § 44, effective July 1.

**15-13-302. Jurisdiction by act of decedent.** In addition to jurisdiction conferred by section 15-13-301, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death.



**Source:** L. 73: R&RE, p. 1611, § 1. C.R.S. 1963: § 153-4-302.

**15-13-303. Service on foreign personal representative.** (1) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting and receiving a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

(2) If service is made upon a foreign personal representative as provided in subsection (1) of this section, he or she shall be allowed at least thirty-five days within which to appear or respond.

**Source:** L. 73: R&RE, p. 1611, § 1. C.R.S. 1963: § 153-4-303. L. 2012: (2) amended, (SB 12-175), ch. 208, p. 839, § 47, effective July 1.

**Editor’s note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

PART 4

JUDGMENTS AND PERSONAL REPRESENTATIVE

**15-13-401. Effect of adjudication for or against personal representative.** An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication.

**Source:** L. 73: R&RE, p. 1611, § 1. C.R.S. 1963: § 153-4-401.

ARTICLE 14

Persons Under Disability - Protection

**Editor’s note:** (1) Articles 10 to 17 of this title were repealed and reenacted in 1973, and parts 1 to 4 of this article were subsequently repealed and reenacted in 2000, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to parts 1 to 4 of this article prior to 2000, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor’s note immediately preceding article 10 of this title. Former C.R.S. section numbers prior to 2000 are shown in editor’s notes following those sections that were relocated.

(2) Section 15-17-103, as enacted by House Bill 01-1377, modified the applicability of parts 1 to 4. (See L. 2001, p. 889.)

PART 1		15-14-108.	Venue.
GENERAL PROVISIONS		15-14-109.	Practice in court - consolidation of proceedings.
15-14-101.	Short title.	15-14-110.	Letters of office.
15-14-102.	Definitions.	15-14-111.	Effect of acceptance of appointment.
15-14-103.	(Reserved)	15-14-112.	Termination of or change in guardian’s or conservator’s appointment.
15-14-104.	Facility of transfer.	15-14-113.	Notice.
15-14-105.	Delegation of power by parent or guardian.	15-14-114.	Waiver of notice.
15-14-106.	Subject-matter jurisdiction.	15-14-115.	Guardian ad litem.
15-14-107.	Transfer of jurisdiction.		

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|------------|--|--------------|---|
| 15-14-116. | Request for notice - interested persons.                                 |              | ties - prohibition of dual roles.                               |
| 15-14-117. | Multiple appointments or nominations.                                    | 15-14-311.   | Findings - order of appointment.                                |
| 15-14-118. | Small estate - person under disability - no personal representative.     | 15-14-312.   | Emergency guardian.   |
|            |  | 15-14-313.   | Temporary substitute guardian.                                  |
|            |  | 15-14-314.   | Duties of guardian.   |
| 15-14-119. | Notice to public institutions on appointment of guardian or conservator. | 15-14-315.   | Powers of guardian.   |
|            |  | 15-14-315.5. | Dissolution of marriage and legal separation.                   |
| 15-14-120. | Uniform veterans' guardianship act not affected.                         | 15-14-316.   | Rights and immunities of guardian - limitations.                |
| 15-14-121. | Uniformity of application and construction.                              | 15-14-317.   | Reports - monitoring of guardianship - court access to records. |
| 15-14-122. | Severability clause.   |              |   |

## PART 2

## GUARDIANSHIP OF MINOR

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| 15-14-201. | Appointment and status of guardian.  |
| 15-14-202. | Testamentary appointment of guardian - appointment by written instrument.  |
| 15-14-203. | Objection of others to parental appointment - consent by minor of twelve years of age or older to appointment of guardian. |
| 15-14-204. | Judicial appointment of guardian - conditions for appointment.   |
| 15-14-205. | Judicial appointment of guardian - procedure.  |
| 15-14-206. | Judicial appointment of guardian - priority of minor's nominee - limited guardianship.                                     |
| 15-14-207. | Duties of guardian.  |
| 15-14-208. | Powers of guardian.  |
| 15-14-209. | Rights and immunities of a guardian.   |
| 15-14-210. | Termination of guardianship - other proceedings after appointment.   |

## PART 3

## GUARDIANSHIP OF INCAPACITATED PERSON

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|------------|--|
| 15-14-301. | Appointment and status of guardian.          |
| 15-14-302. | (Reserved)                                   |
| 15-14-303. | (Reserved)                                   |
| 15-14-304. | Judicial appointment of guardian - petition. |
| 15-14-305. | Preliminaries to hearing.                    |
| 15-14-306. | Professional evaluation.                     |
| 15-14-307. | (Reserved)                                   |
| 15-14-308. | Presence and rights at hearing.              |
| 15-14-309. | Notice.                                      |
| 15-14-310. | Who may be guardian - priori-                |

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|              | ties - prohibition of dual roles.   |
| 15-14-311.   | Findings - order of appointment.  |
| 15-14-312.   | Emergency guardian.   |
| 15-14-313.   | Temporary substitute guardian.  |
| 15-14-314.   | Duties of guardian.   |
| 15-14-315.   | Powers of guardian.   |
| 15-14-315.5. | Dissolution of marriage and legal separation.                                     |
| 15-14-316.   | Rights and immunities of guardian - limitations.                                  |
| 15-14-317.   | Reports - monitoring of guardianship - court access to records.                   |
| 15-14-318.   | Termination or modification of guardianship - resignation or removal of guardian. |

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## PROTECTION OF PROPERTY OF PROTECTED PERSON

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| 15-14-402.   | Jurisdiction over business affairs of protected person.   |
| 15-14-403.   | Original petition for appointment or protective order.  |
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| 15-14-408.   | Original petition - procedure at hearing.   |
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| 15-14-410.   | Powers of court.  |
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| 15-14-412.8. | Disability trusts - limitations.  |
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| 15-14-413.   | Who may be conservator - priorities - prohibition of dual roles.  |
| 15-14-414.   | Petition for order subsequent to appointment.   |
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- 15-14-416. Terms and requirements of bond.
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- 15-14-418. General duties of conservator - financial plan.
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- 15-14-420. Reports - appointment of monitor - monitoring - records - court access to records.
- 15-14-421. Title by appointment.
- 15-14-422. Protected person's interest inalienable.
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- 15-14-426. Delegation.
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- 15-14-428. Death of protected person.
- 15-14-429. Presentation and allowance of claims.
- 15-14-430. Personal liability of conservator.
- 15-14-431. Termination of proceedings.
- 15-14-432. Payment of debt and delivery of property to foreign conservator without local proceeding.
- 15-14-433. Foreign conservator - proof of authority - bond - powers.

## PART 5

## POWERS OF ATTORNEY

- 15-14-500.3. Legislative declaration.
- 15-14-500.5. Definitions - excluded powers.
- 15-14-501. When power of attorney not affected by disability.
- 15-14-502. Other powers of attorney not revoked until notice of death or disability.
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## PART 6

## POWER OF ATTORNEY

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- 15-14-606. Duty - standard of care - record-keeping - exoneration.
- 15-14-607. Reliance on an agency instrument.
- 15-14-608. Preservation of estate plan and trusts. (Repealed)
- 15-14-609. Agency - court relationship. (Repealed)
- 15-14-610. Statutory form agent's affidavit regarding power of attorney. (Repealed)
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## PART 7

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- 15-14-704. Power of attorney is durable.
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- 15-14-706. Validity of power of attorney.
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- 15-14-708. Nomination of conservator or guardian - relation of agent to court- appointed fiduciary.
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PART 1

GENERAL PROVISIONS

**Editor’s note:** Section 10 of chapter 249, Session Laws of Colorado 2001, modified the applicability of parts 1 to 4. (See L. 2001, p. 889.)

**Law reviews:** For article, “Adult Guardianships and Conservatorships: Protection of Constitutional Rights”, see 15 Colo. Law. 820 (1986); for article, “Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency”, see 19 Colo. Law. 1813 (1990); for article, “Protecting a Disabled Client in a Dissolution of Marriage Action”, see 24 Colo. Law. 795 (1995); for article, “Highlights of Colorado’s New Guardianship and Conservatorship Laws”, see 30 Colo. Law. 5 (January 2001); for article, “Personal Injury and Workers’ Compensation Settlements for Incapacitated Persons: Part I”, see 30 Colo. Law. 43 (January 2001); for article, “Personal Injury and Workers’ Compensation Settlements for Incapacitated Persons: Part II”, see 30 Colo. Law. 56 (February 2001); for article, “Examination of Selected Provisions of Colorado’s Uniform Guardianship and Protective Proceedings Act”, see 31 Colo. Law. 71 (September 2002); for article, “Crisis Intervention to Prevent Elder Abuse: Emergency Guardianships and Other Legal Procedures” see 33 Colo. Law. 91 (July 2004); for article, “The Basics on Juveniles in Probate Court for Protective Proceedings”, see 36 Colo. Law. 15 (February 2007).

**15-14-101. Short title.** Parts 1 to 4 of this article may be cited as the “Colorado Uniform Guardianship and Protective Proceedings Act”.

**Source:** L. 2000: Entire part R&RE, p. 1778, § 1, effective January 1, 2001 (see § 15-17-103).

ANNOTATION

**The trial court has a broad discretion in all matters relating to protected persons,** which is exclusive. *Sweeney v. Summers*, 194 Colo. 149, 571 P.2d 1067 (1977) (decided prior to 2000 repeal and reenactment).

**This section does not create an exception for a “protected person” within the definition of “incapacitated person”.** A person who is an “incapacitated person” under this section, and thus ineligible to elect to receive a lump sum



damage award payment under § 13-64-205 (1)(f) of the Health Care Availability Act, is not entitled to such election merely because the incapacitated person also is a "protected person". Rather, this section and the sections that follow, when read as a whole, provide that pro-

ected persons are necessarily incapacitated for purposes of § 13-64-205 (1)(f). *Rodriguez ex rel. Rodriguez v. Healthone*, 24 P.3d 9 (Colo. App. 2000), rev'd on other grounds, 50 P.3d 879 (Colo. 2002).

**15-14-102. Definitions.** In parts 1 to 4 of this article:

(1) "Claim", with respect to a protected person, includes a claim against an individual, whether arising in contract, tort, or otherwise, and a claim against an estate which arises at or after the appointment of a conservator, including expenses of administration.

(2) "Conservator" means a person at least twenty-one years of age, resident or non-resident, who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator.

(3) "Court" means the court or division thereof having jurisdiction in matters relating to the affairs of decedents and protected persons. This court is the district court, except in the city and county of Denver where it is the probate court.

(4) "Guardian" means an individual at least twenty-one years of age, resident or non-resident, who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.

(5) "Incapacitated person" means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.

(6) "Legal representative" includes a representative payee, a guardian or conservator acting for a respondent in this state or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, or an agent designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal.

(7) "Letters" includes letters of guardianship or letters of conservatorship.

(8) "Minor" means an unemancipated individual who has not attained eighteen years of age.

(9) "Parent" means a parent whose parental rights have not been terminated.

(10) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(11) "Protected person" means a minor or other individual for whom a conservator has been appointed or other protective order has been made.

(12) "Respondent" means an individual for whom the appointment of a guardian or conservator or other protective order is sought.

(13) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(14) "Tribe" means an Indian tribe or band, or Alaskan Native village, which is recognized by federal law or formally acknowledged by a state.

(15) "Ward" means an individual for whom a guardian has been appointed.

**Source:** L. 2000: Entire part R&RE, p. 1778, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-101 as it existed prior to 2001.

## ANNOTATION

**Law reviews.** For article, "Legal Guidelines and Methods for Evaluating Capacity", see 32 Colo. Law. 65 (June 2003).

**Government entity may serve as a guardian.** Although subsection (4) provides that

"guardian" means "an individual", the guardianship provisions as a whole lead to the conclusion that the probate court as a government entity may serve as a guardian. In re J.C.T., 176 P.3d 726 (Colo. 2007).

**15-14-103. Reserved.**

**15-14-104. Facility of transfer.** (1) Unless a person required to transfer money or personal property to a minor knows that a conservator has been appointed or that a proceeding for appointment of a conservator of the estate of the minor is pending, the person may do so, as to an amount or value not exceeding ten thousand dollars a year or the then current annual gift tax exclusion as stated in the internal revenue code, whichever is greater, by transferring it to:

(a) A person who has the care and custody of the minor and with whom the minor resides;

(b) A guardian of the minor;

(c) A custodian under the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S., or a custodial trustee under the "Colorado Uniform Custodial Trust Act", article 1.5 of this title; or

(d) A financial institution as a deposit in an interest-bearing account or certificate in the sole name of the minor and giving notice of the deposit to the minor.

(2) A person who transfers money or property in compliance with this section is not responsible for its proper application.

(3) A guardian or other person who receives money or property for a minor under paragraph (a) of subsection (1) of this section or subsection (2) of this section may only apply it to the support, care, education, health, and welfare of the minor, and may not derive a personal financial benefit except for reimbursement for necessary expenses. Any excess must be preserved for the future support, care, education, health, and welfare of the minor, and any balance must be transferred to the minor upon emancipation or attaining majority with an accounting of all income and disbursements.

**Source: L. 2000:** Entire part R&RE, p. 1780, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-103 as it existed prior to 2001.

**15-14-105. Delegation of power by parent or guardian.** A parent or guardian of a minor or incapacitated person, by a power of attorney, may delegate to another person, for a period not exceeding twelve months, any power regarding care, custody, or property of the minor or ward, except the power to consent to marriage or adoption.

**Source: L. 2000:** Entire part R&RE, p. 1780, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-104 as it existed prior to 2001.

## ANNOTATION

**Law reviews.** For article, "Legal Protection of Children in Nontraditional Families", see 29 Colo. Law. 79 (November 2000).



**15-14-106. Subject-matter jurisdiction.** (1) Except as provided in subsection (2) of this section, parts 1 to 4 of this article apply to, and the court has jurisdiction over, guardianship and related proceedings for individuals domiciled or present in this state, protective proceedings for individuals domiciled in or having property located in this state, and property coming into the control of a guardian or conservator who is subject to the laws of this state. Such jurisdiction is subject to the provisions of section 19-1-104 (4) and (5), C.R.S., with respect to guardianships for children under the "Colorado Children's Code".

(2) In matters concerning adults, article 14.5 of this title shall apply and shall supersede the terms of subsection (1) of this section.

**Source:** L. 2000: Entire part R&RE, p. 1780, § 1, effective January 1, 2001 (see § 15-17-103). L. 2008: Entire section amended, p. 797, § 2, effective May 14.

**Editor's note:** This section is similar to former § 15-14-102 as it existed prior to 2001.

**15-14-107. Transfer of jurisdiction.** (1) After the appointment of a guardian or conservator or entry of another protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another county in this state or to another state if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

(2) (a) Except as provided in paragraph (b) of this subsection (2), if a guardianship or protective proceeding is pending in another state or a foreign country and a petition for guardianship or protective proceeding is filed in a court in this state, the court in this state shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

(b) In matters concerning adults, the provisions of article 14.5 of this title shall apply.

(3) (a) Except as provided in paragraph (b) of this subsection (3), a guardian, conservator, or like fiduciary appointed in another state may petition the court for appointment as a guardian or conservator in this state if venue in this state is or will be established. The appointment may be made upon proof of appointment in the other state and presentation of a certified copy of the portion of the court record in the other state specified by the court in this state. Notice of hearing on the petition, together with a copy of the petition, must be given to the ward or protected person, if the ward or protected person has attained twelve years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under parts 1 to 4 of this article were applicable. The court shall make the appointment in this state unless it concludes that the appointment would not be in the best interest of the ward or protected person. Upon the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Within ten days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained twelve years of age, and to all persons given notice of the hearing on the petition.

(b) In matters concerning adults, the provisions of article 14.5 of this title shall apply.

**Source:** L. 2000: Entire part R&RE, p. 1781, § 1, effective January 1, 2001 (see § 15-17-103). L. 2008: (2) and (3) amended, p. 797, § 3, effective May 14.

**15-14-108. Venue.** (1) Venue for a guardianship proceeding for a minor is in the county of this state in which the minor resides or is present at the time the proceeding is commenced.

(2) Venue for a guardianship proceeding for an incapacitated person is in the county of this state in which the respondent resides and, if the respondent has been admitted to an institution by order of a court of competent jurisdiction, in the county in which the court is located. Venue for the appointment of an emergency or a temporary substitute guardian of an incapacitated person is also in the county in which the respondent is present.

(3) Venue for a protective proceeding is in the county of this state in which the respondent resides, whether or not a guardian has been appointed in another place or, if the respondent does not reside in this state, in any county of this state in which property of the respondent is located.

(4) If a proceeding under parts 1 to 4 of this article is brought in more than one county in this state, the court of the county in which the proceeding is first brought has the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred.

**Source: L. 2000:** Entire part R&RE, p. 1781, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-109. Practice in court - consolidation of proceedings.** (1) Except as otherwise provided in parts 1 to 4 of this article, the rules of civil procedure and the Colorado rules of probate procedure, including the rules concerning appellate review, govern proceedings under parts 1 to 4 of this article.

(2) If guardianship and protective proceedings as to the same individual are commenced or pending in the same court, the proceedings may be consolidated.

**Source: L. 2000:** Entire part R&RE, p. 1782, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-110. Letters of office.** (1) A nominee for guardian, emergency guardian, conservator, or special conservator shall file an acceptance of office with the court. The acceptance of office shall be signed by the nominee and, except as otherwise provided in this section, shall include a statement by the nominee informing the court of the following:

(a) Whether the nominee has been convicted of, pled nolo contendere to, or received a deferred sentence for a felony or misdemeanor, and, if so, the name of the state and court issuing the order;

(b) Whether a temporary civil protection or restraining order or a permanent civil protection or restraining order has been issued against the nominee in the state of Colorado or another state at any time;

(c) Whether a civil judgment has been entered against the nominee, and, if so, the name of the state and court granting the judgment;

(d) Whether the nominee has been relieved of any court-appointed responsibilities, and, if so, the name of the court relieving the nominee; and

(e) That the nominee acknowledges and understands that if the nominee fails to file required reports with the court or fails to respond to an order of the court to show cause why the nominee should not be held in contempt of court, Colorado law authorizes the court to access data and records of state agencies in order to obtain contact information, as defined in sections 15-14-317 (4) (c) and 15-14-420 (6) (c).

(2) (a) In support of the statement set forth in the acceptance of office pursuant to subsection (1) of this section, the nominee for guardian, conservator, emergency guardian, or special conservator shall:

(I) Obtain and attach to the acceptance of office a name-based criminal history record check through the Colorado bureau of investigation. The nominee shall be responsible for the cost of the name-based criminal history record checks.

(II) Obtain and attach to the acceptance of office a current credit report of the nominee paid for by the nominee; and

(III) Verify the acceptance of office under penalty of perjury, stating that, to the best of his or her knowledge or belief, the statements in the acceptance of office and attached documentation are accurate and complete.

(b) The court may, in its discretion, waive any or all of the requirements of paragraph (a) of this subsection (2) for good cause shown when making an emergency appointment of a guardian pursuant to section 15-14-204 or 15-14-312, or when making an appointment of a special conservator pursuant to sections 15-14-405, 15-14-406, and 15-14-412.



(3) After a hearing, the court shall issue appropriate letters of guardianship or emergency guardianship if it finds, upon review of the acceptance of office, that the nominee is appropriate for the office. Letters of guardianship shall indicate whether the guardian was appointed by the court or a parent. After a hearing and the filing of any required bond, the court shall issue appropriate letters of conservatorship or special conservatorship if it finds, upon review of the acceptance of office, that the nominee is appropriate for the office. Any limitation on the powers of a guardian, emergency guardian, conservator, or special conservator or of the assets subject to a conservatorship shall be endorsed on the guardian's or conservator's letters.

(4) The specifications required pursuant to paragraphs (a) to (d) of subsection (1) of this section and the requirements of subsection (2) of this section shall not apply to the following nominees:

- (a) A public administrator nominated as a guardian or conservator;
- (b) A trust company nominated as a guardian or conservator;
- (c) A bank nominated as a guardian or conservator;
- (d) A credit union, savings and loan, or other financial institution nominated as a guardian or conservator pursuant to state law;
- (e) A state or county agency nominated as a guardian or conservator pursuant to state law;
- (f) A parent residing with his or her child who is nominated as a guardian or conservator of his or her child; and
- (g) Any other person or entity for whom the court, for good cause shown, determines that the requirements shall not apply.

(5) Nothing in this section shall be construed to prohibit the court from requiring a nominee to obtain additional background information as the court deems necessary to assist the court in determining the fitness of the nominee for the appointment sought by the nominee, including requiring a nominee to obtain fingerprint-based criminal history record checks through the Colorado bureau of investigation and the federal bureau of investigation. If the court requires a nominee to submit fingerprint-based criminal history record checks, the nominee shall be responsible for providing a complete set of fingerprints to the Colorado bureau of investigation and for obtaining the fingerprint-based criminal history record checks and presenting them with the acceptance of office. The nominee shall also be responsible for the cost of the fingerprint-based criminal history record checks.

**Source:** L. 2000: Entire part R&RE, p. 1782, § 1, effective January 1, 2001 (see § 15-17-103). L. 2005: Entire section amended, p. 1046, § 1, effective June 3. L. 2012: (1) amended, (HB 12-1074), ch. 46, p. 169, § 3, effective March 22.

#### ANNOTATION

**Court lacked statutory authority to appoint an unwilling guardian.** When a person, including a state agency, objects to being appointed as guardian of an incapacitated person, a court has no authority to order the person to

become a guardian over the person's objection. There is no indication the general assembly intended to empower courts to order state agencies to serve as guardians. In re Estate of Morgan, 160 P.3d 356 (Colo. App. 2007).

**15-14-111. Effect of acceptance of appointment.** By accepting appointment, a guardian or conservator submits personally to the jurisdiction of the court in any proceeding relating to the guardianship or conservatorship.

**Source:** L. 2000: Entire part R&RE, p. 1782, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-112. Termination of or change in guardian's or conservator's appointment.** (1) The appointment of a guardian or conservator terminates upon the death, resignation, or removal of the guardian or conservator or upon termination of the guardianship or conservatorship. A resignation of a guardian or conservator is effective when approved by

the court. A parental appointment as guardian under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination of the appointment of a guardian or conservator without a decree of discharge does not affect the liability of either for previous acts or the obligation to account for money and other assets of the ward or protected person.

(2) A guardian or conservator may petition for permission to resign. A petition for removal of a guardian or conservator shall be governed by the provisions of section 15-10-503. A petition for removal or permission to resign may include a request for appointment of a successor guardian or conservator.

(3) The court may appoint an additional guardian or conservator at any time, to serve immediately or upon some other designated event, and may appoint a successor guardian or conservator in the event of a vacancy or make the appointment in contemplation of a vacancy, to serve if a vacancy occurs. An additional or successor guardian or conservator may file an acceptance of appointment at any time after the appointment, but not later than thirty days after the occurrence of the vacancy or other designated event. The additional or successor guardian or conservator becomes eligible to act on the occurrence of the vacancy or designated event, or the filing of the acceptance of appointment, whichever occurs last. A successor guardian or conservator succeeds to the predecessor's powers, and a successor conservator succeeds to the predecessor's title to the protected person's assets.

**Source:** L. 2000: Entire part R&RE, p. 1782, § 1, effective January 1, 2001 (see § 15-17-103). L. 2008: (2) amended, p. 484, § 9, effective July 1.

**15-14-113. Notice.** (1) Except as otherwise ordered by the court for good cause, if notice of a hearing on a petition is required, other than a notice for which specific requirements are otherwise provided, the petitioner shall give notice of the time and place of the hearing to the person to be notified. Notice must be given in compliance with Colorado rules of probate procedure, at least fourteen days before the hearing.

(2) Proof of notice must be made before or at the hearing and filed in the proceeding.

(3) A notice under parts 1 to 4 of this article must be given in plain language.

**Source:** L. 2000: Entire part R&RE, p. 1783, § 1, effective January 1, 2001 (see § 15-17-103). L. 2012: (1) amended, (SB 12-175), ch. 208, p. 839, § 48, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**15-14-114. Waiver of notice.** A person may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding in accordance with Colorado rules of probate procedure. However, a respondent, ward, or protected person may not waive notice.

**Source:** L. 2000: Entire part R&RE, p. 1783, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-115. Guardian ad litem.** At any stage of a proceeding, a court may appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.

**Source:** L. 2000: Entire part R&RE, p. 1783, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-116. Request for notice - interested persons.** An interested person not otherwise entitled to notice who desires to be notified before any order is made in a guardianship



proceeding, including a proceeding after the appointment of a guardian, or in a protective proceeding, may file a request for notice with the clerk of the court in which the proceeding is pending in accordance with Colorado rules of probate procedure. The clerk shall send or deliver a copy of the request to the guardian and to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the address of that person or a lawyer to whom notice is to be given. The request is effective only as to proceedings conducted after its filing. A governmental agency paying or planning to pay benefits to the respondent or protected person is an interested person in a protective proceeding.

**Source:** L. 2000: Entire part R&RE, p. 1783, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-117. Multiple appointments or nominations.** If a respondent or other person makes more than one written appointment or nomination of a guardian or a conservator, the most recent controls.

**Source:** L. 2000: Entire part R&RE, p. 1784, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-118. Small estate - person under disability - no personal representative.** (1) Any interested person may file a verified petition for the distribution without administration of the estate of a person under disability under the provisions of this section.

(2) Such petition shall state so far as known to petitioner:

(a) The name, date of birth, county, and state of residence of the person under disability;  
(b) If the person under disability is a nonresident of the state, that he or she has a chose in action or other personal property within the county which must be conserved and has no guardian or conservator determined to be appointed by any court;

(c) The date upon which and the court by which the person under disability was adjudged as having a mental illness, being mentally deficient, or being disabled;

(d) The description and value of each chose in action or other personal property owned by the person under disability and subject to administration as a part of his or her estate;

(e) The name, address, relationship, and date of birth, if a minor, of each person who would inherit the estate of the person under disability if the person under disability were then deceased;

(f) The name and address of each person who would have a claim against the estate if the estate were to be administered and the amount of any such claim;

(g) The name and address of any person or institution having the care and custody of the person under disability and the post-office address of the person under disability.

(3) The court may hear such petition without notice or upon such notice as the court may direct.

(4) If the court finds that the total personal estate of the person under disability subject to administration is ten thousand dollars, or less, that no conservator for the estate has been appointed, and that no useful purpose would be served by the appointment of a conservator, the court may order the personal estate be distributed without the appointment of a conservator as provided in this section.

(5) The court shall direct the distribution of said personal estate as the court finds the estate would be distributed in case of administration, the claimants being first paid in the order of the class of their claims. The court may order the distribution of any surplus to the person under disability, to the guardian or conservator of person under disability, if the court has appointed a guardian or conservator or to the next friend appointed by the court, or as otherwise provided by law for the distribution of property to persons under legal disability. If distribution to a next friend is ordered, the court, in its order, may attach such conditions regarding bond, reports to the court, and otherwise as it may deem proper.

(6) The order of court shall constitute sufficient legal authority to any person owing any money, having custody of any property, or acting as a registrar or transfer agent of any

evidence of interest, indebtedness, property, or right belonging to the estate, and to persons purchasing or otherwise dealing with the estate, for payment or transfer to the persons described in the order as entitled to receive the estate without administration.

(7) Anytime within thirty-five days after the making of an order pursuant to this section, any person interested in the estate may file a petition to revoke the same, alleging that other personal property was not included in the petition or that the property described in the petition was improperly valued, and that if said property were added, included, or properly valued as the case may be, the total value of the personal property would exceed ten thousand dollars, or that the order ordered money paid or property distributed to a person not entitled thereto. Upon proof of any such grounds, the court shall revoke the order and enter a more appropriate order, but the revocation or modification of such order shall not impose any liability upon any person who, in reliance upon such order, in good faith, for value, and without notice, paid money or delivered property, or impair the rights of any person who, in reliance on such order, in good faith, for value, and without notice, purchased property or acquired a lien on property.

(8) If a next friend shall be named to enter into the settlement of a claim of a person under disability against another person for personal injury to the person under disability or for injury to his or her property and the entire net value of the personal estate of the person under disability, including the proposed settlement, after providing for expenses of settlement, is ten thousand dollars or less, such proceeding for approval of the settlement by the court may be had in connection with the petition for the disposition of the estate of the person under disability, including the proceeds of the settlement, under this section, and the court may proceed with the settlement as though a legal guardian or conservator had been appointed and may distribute the net proceeds of the settlement under the provisions of this section. The next friend named may execute releases with the same effect as though they had been executed by a duly appointed legal guardian or conservator.

(9) For purposes of this section, "person under disability" means a person for whom a protective proceeding could be instituted.

**Source:** **L. 2000:** Entire part R&RE, p. 1784, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** (2)(c) amended, p. 1397, § 40, effective August 7. **L. 2012:** (7) amended, (SB 12-175), ch. 208, p. 839, § 49, effective July 1.

**Editor's note:** (1) This section is similar to former § 15-14-107 as it existed prior to 2001.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (7) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Law reviews.** For article, "Colorado Small Estate Law", see 23 Dicta 223 (1946). For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "Administration of Testate Estates", see 29 Rocky Mt. L. Rev. 557 (1957). For note, "Settling the Personal Injury Claim of a Minor", see 38 U. Colo. L. Rev. 377 (1966).

**Distribution under this statute is authorized only in those cases where** "no useful purpose would be served by the appointment of a personal representative". This statute does not

provide an alternative procedure which may be substituted for the appointment of a personal representative for a decedent who at the time of his death is engaged in litigation which should be continued. *Duke v. Pickett*, 30 Colo. App. 438, 494 P.2d 120 (1972) (decided under repealed 153-7-4, C.R.S. 1963).

**Son may bring action on behalf of his incompetent father by proceeding as his next friend although son had not been appointed guardian.** *Delsas ex rel. Delsas v. Centex Home Equity*, 186 P.3d 141 (Colo. App. 2008).

**15-14-119. Notice to public institutions on appointment of guardian or conservator.** When any court shall appoint a conservator of the estate of a protected person or a guardian of an incapacitated person committed to or residing in any public institution of this state, the court shall notify the superintendent or chief administrative officer of said public



institution or, if unknown, the executive director of the department of human services in writing of the fact of such appointment, giving the name and address of the conservator or guardian.

**Source: L. 2000:** Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-106 as it existed prior to 2001.

**15-14-120. Uniform veterans' guardianship act not affected.** If any of the provisions of parts 1 to 4 of this article are inconsistent with the provisions of part 2 of article 5 of title 28, C.R.S., known as the "Uniform Veterans' Guardianship Act", the provisions of that act shall prevail with respect to funds or proceedings subject thereto.

**Source: L. 2000:** Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-105 as it existed prior to 2001.

**15-14-121. Uniformity of application and construction.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source: L. 2000:** Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-122. Severability clause.** If any provision of parts 1 to 4 of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of parts 1 to 4 of this article which can be given effect without the invalid provision or application, and to this end the provisions of parts 1 to 4 of this article are severable.

**Source: L. 2000:** Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103).

## PART 2

### GUARDIANSHIP OF MINOR

**Editor's note:** Section 10 of chapter 249, Session Laws of Colorado 2001, modified the applicability of parts 1 to 4. (See L. 2001, p. 889.)

**Law reviews:** For article, "Age Requirements in Colorado: A Guide for Estate Planners", see 34 Colo. Law. 87 (August 2005); for article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (February 2007).

**15-14-201. Appointment and status of guardian.** A person becomes a guardian of a minor by appointment by a parent or guardian by will or written instrument or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or minor ward.

**Source: L. 2000:** Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103); entire section amended, p. 290, § 8, effective January 1, 2001.

**Editor's note:** This section is similar to former § 15-14-201 as it existed prior to 2001.

**15-14-202. Testamentary appointment of guardian - appointment by written instrument.** (1) A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future. A guardian may also be appointed by will or other signed writing by a guardian of a minor child. The appointment may specify the desired limitations on the powers to be given to the guardian. A guardian may not appoint a surviving parent who has no parental rights to be a successor guardian. The appointing parent or guardian may revoke or amend the appointment before confirmation by the court.

(2) Upon petition of an appointing parent or guardian and a finding that the appointing parent or guardian will likely become unable to care for the child within two years, and after notice as provided in section 15-14-205 (1), the court, before the appointment becomes effective, may confirm the selection of a guardian by a parent or guardian and terminate the rights of others to object. If the minor has attained twelve years of age, the minor must consent to the appointment of a guardian pursuant to section 15-14-203 (2).

(3) Subject to section 15-14-203, the appointment of a guardian becomes effective upon the death of the appointing parent or guardian, an adjudication that the parent or guardian is an incapacitated person, or a written determination by a physician who has examined the parent or guardian that the parent or guardian is no longer able to care for the child, whichever occurs first.

(4) The guardian becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within thirty days after the guardian's appointment becomes effective. The guardian shall:

(a) File the acceptance of appointment and a copy of the will with the court of the county in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the court of the county in which the minor resides or is present; and

(b) Give written notice of the acceptance of appointment to the appointing parent or guardian, if living, the minor, if the minor has attained twelve years of age, and a person other than the parent or guardian having care and custody of the minor.

(5) Unless the appointment was previously confirmed by the court, the notice given under paragraph (b) of subsection (4) of this section must include a statement of the right of those notified to terminate the appointment by filing a written objection in the court as provided in section 15-14-203 (1) and of the right of a minor who has attained twelve years of age to refuse to consent to the appointment of the guardian as provided in section 15-14-203 (2).

(6) Unless the appointment was previously confirmed by the court, within thirty days after filing the notice and the appointing instrument, a guardian shall petition the court for confirmation of the appointment, giving notice in the manner provided in section 15-14-205 (1).

(7) The appointment of a guardian by a parent does not supersede the parental rights of either parent. If both parents are dead or have been adjudged incapacitated persons, an appointment by the last parent who died or was adjudged incapacitated has priority. If a guardian survives the death or adjudication of incapacity of both parents, an appointment by the last parent or guardian who died or was adjudged incapacitated has priority. An appointment by a parent or guardian which is effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this state.

(8) The powers of a guardian who complies timely with the requirements of subsections (4) and (6) of this section relate back to give acts by the guardian which are of benefit to the minor and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of the appointment.

(9) The authority of a guardian appointed under this section terminates upon the first to occur of the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to section 15-14-203 (1) or of the refusal of a minor child who has attained the age of twelve years to consent pursuant to section 15-14-203 (2).



§ 15-17-103); entire section amended, p. 291, § 9, effective January 1, 2001. **L. 2009:** (1) amended, (HB 09-1241), ch. 169, p. 762, § 18, effective April 22.

**Editor's note:** This section is similar to former § 15-14-202 as it existed prior to 2001.

### ANNOTATION

**Law reviews.** For note, "Appointment of a Guardian by Will", see 34 Rocky Mt. L. Rev. 200 (1962). For article, "Legal Protection of Children in Nontraditional Families", see 29

Colo. Law. 79 (November 2000). For article, "Issues for the Elderly and Disabled Client—Part II: Estate and Health Care Planning", see 30 Colo. Law. 5 (March 2001).

**15-14-203. Objection of others to parental appointment - consent by minor of twelve years of age or older to appointment of guardian.** (1) Until the court has confirmed an appointee under section 15-14-202, the other parent, or a person other than a parent or guardian having care or custody of the minor may prevent or terminate the appointment at any time by filing a written objection in the court in which the appointing instrument is filed and giving notice of the objection to the guardian and any other persons entitled to notice of the acceptance of the appointment. An objection may be withdrawn, and if withdrawn is of no effect. The objection does not preclude judicial appointment of the person selected by the parent or guardian. The court may treat the filing of an objection or the refusal of the minor to consent as a petition for the appointment of an emergency or a temporary guardian under section 15-14-204, and proceed accordingly.

(2) Until the court has confirmed an appointee under section 15-14-202, a minor who is the subject of an appointment by a parent or guardian and who has attained twelve years of age has the right to consent or refuse to consent to an appointment of a guardian. If the minor consents to the appointment of the guardian, the minor shall file with the court in which the will is probated or the written instrument is filed a written consent to the appointment before it is accepted or within thirty-five days after notice of its acceptance. If the minor does not consent to the appointment of a guardian, then the court shall appoint a guardian pursuant to section 15-14-204.

**Source:** **L. 2000:** Entire part R&RE, p. 1787, § 1, effective January 1, 2001 (see § 15-17-103); entire section amended, p. 292, § 10, effective January 1, 2001. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 840, § 50, effective July 1.

**Editor's note:** (1) This section is similar to former § 15-14-203 as it existed prior to 2001.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

### ANNOTATION

**Objection to a parental appointment under subsection (1) terminates and may prevent the appointment and triggers a judicial appointment by the trial court.** However, the trial court's involvement in the appointment process upon objection by another party does not prevent the court from reappointing the testamentary appointee. In re R.M.S., 128 P.3d 783 (Colo. 2006).

**Best interest of the child standard applies** when a court must appoint a guardian for a

minor when a person with the care or custody of the child objects to a testamentary appointment. The testamentary nomination, while one of many factors to consider, shall not be considered binding where the trial court determines that a party with the care or custody of the minor is better suited to act as permanent guardian. In re R.M.S., 128 P.3d 783 (Colo. 2006).

**15-14-204. Judicial appointment of guardian - conditions for appointment.** (1) A minor or a person interested in the welfare of a minor may petition for appointment of a guardian.

(2) The court may appoint a guardian for a minor if the court finds the appointment is in the minor's best interest, and:

- (a) The parents consent;
- (b) All parental rights have been terminated;
- (c) The parents are unwilling or unable to exercise their parental rights; or
- (d) Guardianship of a child has previously been granted to a third party and the third party has subsequently died or become incapacitated and the guardian has not made an appointment of a guardian either by will or written instrument; however, the court shall not presume it is in the best interests of a child to be in the care of a parent in circumstances where a court has previously granted custody of a child to a third party.

(3) If a guardian is appointed by a parent or guardian pursuant to section 15-14-202 and the appointment has not been prevented or terminated under section 15-14-203 (1) or the minor has consented to the appointment pursuant to section 15-14-203 (2), that appointee has priority for appointment. However, the court may proceed with another appointment upon a finding that the appointee under section 15-14-202 has failed to accept the appointment within thirty days after notice of the guardianship proceeding.

(4) If necessary and on petition or motion and whether or not the conditions of subsection (2) have been established, the court may appoint a temporary guardian for a minor upon a showing that an immediate need exists and that the appointment would be in the best interest of the minor. Notice in the manner provided in section 15-14-113 must be given to the parents and to a minor who has attained twelve years of age. Except as otherwise ordered by the court, the temporary guardian has the authority of an unlimited guardian, but the duration of the temporary guardianship may not exceed six months. Within five days after the appointment, the temporary guardian shall send or deliver a copy of the order to all individuals who would be entitled to notice of hearing under section 15-14-205.

(5) If the court finds that following the procedures of this part 2 will likely result in substantial harm to a minor's health or safety and that no other person appears to have authority to act in the circumstances, the court, on appropriate petition, may appoint an emergency guardian for the minor. The duration of the emergency guardian's authority may not exceed sixty days and the emergency guardian may exercise only the powers specified in the order. Reasonable notice of the time and place of a hearing on the petition for appointment of an emergency guardian must be given to the minor, if the minor has attained twelve years of age, to each living parent of the minor, and a person having care or custody of the minor, if other than a parent. The court may dispense with the notice if it finds from affidavit or testimony that the minor will be substantially harmed before a hearing can be held on the petition. If the emergency guardian is appointed without notice, notice of the appointment must be given within forty-eight hours after the appointment and a hearing on the appropriateness of the appointment held within five days after the appointment.

**Source:** L. 2000: Entire part R&RE, p. 1788, § 1, effective January 1, 2001 (see § 15-17-103); entire section amended, p. 293, § 11, effective January 1, 2001. L. 2003: (5) amended, p. 2110, § 4, effective May 22.

**Editor's note:** This section is similar to former § 15-14-204 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Legal Protection of Children in Nontraditional Families", see 29 Colo. Law. 79 (November 2000).

**Best interest of the child standard applies** when a court must appoint a guardian for a minor when a person with the care or custody of the child objects to a testamentary appointment. The testamentary nomination, while one of many factors to consider, shall not be considered binding where the trial court determines that a

party with the care or custody of the minor is better suited to act as permanent guardian. In re R.M.S., 128 P.3d 783 (Colo. 2006).

**There would be a chilling effect on parental willingness to give consent to a guardianship under subsection (2)(a) if fit parents' interests are not appropriately recognized and protected when they seek to terminate the consensual guardianship.** Just as the fit parents' decision to consent to a guardianship is pre-



sumed to be in the best interests of the child, so too their decision to seek termination of guardianship and regain care, custody, and control of the child is presumed to be in the best interests of the child, unless the guardianship order contains an express provision limiting the parents from asserting the presumption. In the absence

of such a limitation in the guardianship order, when fit parents seek to terminate the guardianship, guardians bear the burden of demonstrating by a preponderance of the evidence that termination of the guardianship is not in the best interests of the child. In re D.I.S., 249 P.3d 775 (Colo. 2011).

**15-14-205. Judicial appointment of guardian - procedure.** (1) After a petition for appointment of a guardian is filed, the court shall schedule a hearing, and the petitioner shall give notice of the time and place of the hearing, together with a copy of the petition, to:

- (a) The minor, if the minor has attained twelve years of age and is not the petitioner;
- (b) Any person alleged to have had the primary care and custody of the minor during the sixty days before the filing of the petition;
- (c) Each living parent of the minor or, if there is none, the adult nearest in kinship that can be found;

(d) Any person nominated as guardian by the minor if the minor has attained twelve years of age;

(e) Any appointee of a parent or guardian whose appointment has not been prevented or terminated under section 15-14-203 (1) or whose appointment was consented to under section 15-14-203 (2); and

(f) Any guardian or conservator currently acting for the minor in this state or elsewhere.

(2) The court, upon hearing, shall make the appointment if it finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the conditions of section 15-14-204 (2) have been met, and the best interest of the minor will be served by the appointment. In other cases, the court may dismiss the proceeding or make any other disposition of the matter that will serve the best interest of the minor.

(3) If the court determines at any stage of the proceeding, before or after appointment, that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained twelve years of age.

**Source:** L. 2000: Entire part R&RE, p. 1789, § 1, effective January 1, 2001 (see § 15-17-103); (1) amended, p. 294, § 12, effective January 1, 2001.

**Editor's note:** This section is similar to former § 15-14-207 as it existed prior to 2001.

## ANNOTATION

**Law reviews.** For article, "Securing the Non-parent's Place in a Child's Life Through Adoption and Adoption Alternatives", see 37 Colo. Law. 27 (October 2008).

**Subsection (3) authorizes the appointment of a temporary guardian and does not incor-**

**porate the requirement of abandonment** or such other requirements of § 15-14-204 for the appointment of a permanent guardian. O.R.L. v. Smith, 996 P.2d 788 (Colo. App. 2000).

**15-14-206. Judicial appointment of guardian - priority of minor's nominee - limited guardianship.** (1) The court shall appoint a guardian whose appointment will be in the best interest of the minor. The court shall appoint a guardian nominated by the minor, if the minor has attained twelve years of age, unless the court finds the appointment will be contrary to the best interest of the minor.

(2) In the interest of developing self-reliance of a ward or for other good cause, the court, at the time of appointment or later, on its own motion or on motion of the minor ward or other interested person, may limit the powers of a guardian otherwise granted by this part 2 and thereby create a limited guardianship. Following the same procedure, the court may grant additional powers or withdraw powers previously granted.

**Source:** L. 2000: Entire part R&RE, p. 1789, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-206 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Legal Protection of Children in Nontraditional Families", see 29 Colo. Law. 79 (November 2000).

**In the initial selection of a conservator the wishes of the ward should be given consideration,** premised upon the mental ability of the ward to exercise a "sensible opinion" on the matter. The instant record demonstrates that the

ward is unable to exercise such a sensible opinion as to who should serve as the conservator of his estate. No authority requires the probate court to substitute conservators because the ward prefers a different conservator. In re Estate of Alencoy v. Wysowatky, 170 Colo. 385, 461 P.2d 210 (1969) (decided under repealed § 153-9-1, C.R.S. 1963).

**15-14-207. Duties of guardian.** (1) Except as otherwise limited by the court, a guardian of a minor ward has the duties and responsibilities of a parent regarding the ward's support, care, education, health, and welfare. A guardian shall act at all times in the ward's best interest and exercise reasonable care, diligence, and prudence.

(2) A guardian shall:

(a) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(b) Take reasonable care of the ward's personal effects and bring a protective proceeding if necessary to protect other property of the ward;

(c) Expend money of the ward which has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;

(d) Conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money at least quarterly to the conservator to be conserved for the ward's future needs;

(e) Report the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control, as ordered by the court on application of any person interested in the ward's welfare or as required by court rule; and

(f) Inform the court of any change in the ward's custodial dwelling or address.

**Source:** L. 2000: Entire part R&RE, p. 1790, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-209 as it existed prior to 2001.

#### ANNOTATION

**Annotator's note.** Since § 15-14-207 is similar to repealed and reenacted § 153-5-209, C.R.S. 1963, and repealed laws antecedent to CSA, C. 76, § 4, relevant cases construing those provisions have been included in the annotations to this section.

**In disposing of the custody of a child, the paramount consideration is the child's welfare,** to which even the paternal right must yield. *People ex rel. Flannery v. Bolton*, 27 Colo. App. 39, 146 P. 489 (1915).

**Courts recognize expressed or presumed wishes of parents as to custody of child.** The right of the disposition of the custody, tuition, and nurture of a minor, and the duty of the

enforcement of such right by the courts, has been recognized to the extent that in the absence of testamentary disposition the expressed or presumed wishes of the parents in this respect, including religious training of the minor, have been enforced with great uniformity. *People v. Bolton*, 27 Colo. App. 39, 146 P. 489 (1915).

**Generally, a guardian is entitled to legal custody of a minor ward.** *Clark v. Kendrick*, 670 P.2d 32 (Colo. App. 1983).

**Conduct of parents toward child, financial ability, etc., are considered in awarding custody of infant.** *Breene v. Breene*, 51 Colo. 342, 117 P. 1000 (1911).



**15-14-208. Powers of guardian.** (1) Except as otherwise limited by the court, a guardian of a minor ward has the powers of a parent regarding the ward's support, care, education, health, and welfare.

(2) A guardian may:

(a) Apply for and receive money for the support of the ward otherwise payable to the ward's parent, guardian, or custodian under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(b) If otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's custodial dwelling outside the state upon express authorization of the court;

(c) If a conservator for the estate of a ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(d) Consent to medical or other care, treatment, or service for the ward;

(e) Consent to the marriage of the ward; and

(f) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(3) The court may specifically authorize the guardian to consent to the adoption of the ward.

**Source:** L. 2000: Entire part R&RE, p. 1790, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-209 as it existed prior to 2001.

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**Annotator's note.** Since § 15-14-208 is similar to repealed and reenacted § 153-5-209, C.R.S. 1963, and repealed laws antecedent to CSA, C. 76, § 4, relevant cases construing those provisions have been included in the annotations to this section.

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**Conduct of parents toward child, financial ability, etc., are considered in awarding custody of infant.** *Breene v. Breene*, 51 Colo. 342, 117 P. 1000 (1911).

**15-14-209. Rights and immunities of a guardian.** (1) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room and board provided by the guardian or one who is affiliated with the guardian, but only as approved by the court. If a conservator, other than the guardian or a person who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(2) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the guardianship. A guardian is not liable for injury to the ward resulting from the negligence or act of a third person providing medical or other care, treatment, or service for the ward except to the extent that a parent would be liable under the circumstances.

**Source:** L. 2000: Entire part R&RE, p. 1791, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-209 as it existed prior to 2001.

**15-14-210. Termination of guardianship - other proceedings after appointment.**

(1) A guardianship of a minor terminates upon the minor's death, adoption, emancipation, or attainment of majority or as ordered by the court.

(2) A ward or a person interested in the welfare of a ward may petition for any order that is in the best interest of the ward. The petitioner shall give notice of the hearing on the petition to the ward, if the ward has attained twelve years of age and is not the petitioner, the guardian, and any other person as ordered by the court.

(3) Issues of liability as between an estate and the estate's guardian individually may be determined:

- (a) In a proceeding pursuant to section 15-10-504;
  - (b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal;
- or
- (c) In other appropriate proceedings.

**Source:** L. 2000: Entire part R&RE, p. 1791, § 1, effective January 1, 2001 (see § 15-17-103). L. 2008: (3) added, p. 484, § 10, effective July 1.

**Editor's note:** This section is similar to former § 15-14-210 as it existed prior to 2001.

#### ANNOTATION

Where a parent's role as day-to-day caregiver of a minor is relinquished through contested or uncontested judicial proceedings and with no indication by the court that the relinquishment was intended to be temporary, the parent has enjoyed and exercised his or her fundamental rights. In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

Subsequent application of the statutory standards for terminating guardianships or modifying allocations of parental responsibility, which standards certainly allow a court to

consider the relationship between the biological parent and the child, does not violate the parent's constitutional rights. In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

To hold otherwise would effectively afford a parent who relinquishes his or her day-to-day parenting responsibilities through judicial processes a substantial, if not automatic, right to terminate a guardianship or modify an allocation of parental rights with no regard for the perhaps significant impact on his or her children. In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

#### PART 3

#### GUARDIANSHIP OF INCAPACITATED PERSON

**Editor's note:** Section 10 of chapter 249, Session Laws of Colorado 2001, modified the applicability of parts 1 to 4. (See L. 2001, p. 889.)

**Law reviews:** For article, "Ethical Obligations of Petitioners' Counsel in Guardianship and Conservator Cases", see 24 Colo. Law. 2565; for article, "Highlights of Colorado's New Guardianship and Conservatorship Laws", see 30 Colo. Law. 5 (January 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part I", see 30 Colo. Law. 43 (January 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part II", see 30 Colo. Law. 56 (February 2001); for article, "Placement on a Secure Unit by Surrogate Decision-Makers", see 34 Colo. Law. 49 (October 2005); for article, "Colorado Medicaid Home and Community-Based Services and Least-Restrictive Environment", see 39 Colo. Law. 35 (May 2010).

**15-14-301. Appointment and status of guardian.** A person becomes a guardian of an incapacitated person upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward.



**Source:** L. 2000: Entire part R&RE, p. 1792, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-302. Reserved.**

**15-14-303. Reserved.**

**15-14-304. Judicial appointment of guardian - petition.** (1) An individual or a person interested in the individual's welfare may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or unlimited guardian for the individual.

(2) The petition must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(a) The respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made;

(b) (I) The name and address of the respondent's:

(A) Spouse, or if the respondent has none, an adult with whom the respondent has resided for more than six months within one year before the filing of the petition; and

(B) Adult children and parents; or

(II) If the respondent has neither spouse, adult child, nor parent, at least one of the adults nearest in kinship to the respondent who can be found with reasonable efforts;

(c) The name and address of each person responsible for care or custody of the respondent, including the respondent's treating physician;

(d) The name and address of each legal representative of the respondent;

(e) The name and address of each person nominated as guardian by the respondent;

(f) The name and address of each proposed guardian and the reason why the proposed guardian should be selected;

(g) The reason why guardianship is necessary, including a brief description of the nature and extent of the respondent's alleged incapacity;

(h) If an unlimited guardianship is requested, the reason why limited guardianship is inappropriate and, if a limited guardianship is requested, the powers to be granted to the limited guardian; and

(i) A general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

**Source:** L. 2000: Entire part R&RE, p. 1792, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-303 as it existed prior to 2001.

## ANNOTATION

**Law reviews.** For note, "Settling the Personal Injury Claim of a Minor", see 38 U. Colo. L. Rev. 377 (1966). For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Colorado Guardianship and Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article, "Interrogating Medical Witnesses As to Mental Capacity", see 23 Colo. Law. 2753 (1994). For

article, "The Self-Interested Fiduciary: Implications in Guardianship and Conservatorship Law", see 24 Colo. Law. 2181 (1995). For article, "The Court Friends Program of the Denver Probate Court", see 25 Colo. Law. 49 (March 1996). For article, "Defects, Due Process, and Protective Proceedings", see 27 Colo. Law. 39 (April 1998).

**Annotator's note.** Since § 15-14-304 is similar to repealed and reenacted § 15-14-303 and

repealed § 152-9-2, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

**The use of the term adjudicating in article 10 of title 27 indicates that a jury verdict is not an essential requisite of adjudication within the meaning of this section.** *Young v. Brofman*, 139 Colo. 296, 338 P.2d 286 (1959).

**Allegations of complaint insufficient to confer jurisdiction to appoint guardian.** *Nelson v. Nelson*, 31 Colo. App. 63, 497 P.2d 1284 (1972).

**Proof by clear and convincing evidence is required in guardianship proceedings** because of the possibility of being deprived of basic liberties. *Sabrosky v. Denver Dept. of Soc. Servs.*, 781 P.2d 106 (Colo. App. 1989).

**An evidentiary hearing is necessary to consider the factual circumstances to determine whether a petitioner is a person interested in the welfare of the incapacitated person.** In re *Estate of Edwards*, 794 P.2d 1092 (Colo. App. 1990).

**No authority existed to interview allegedly incapacitated person in her home ex parte**, even though the probate judge was motivated by her concern for the allegedly incapacitated person's welfare, by her deteriorated physical and mental condition, and by the court's desire to evaluate her without the undue influence of third parties. *Estate of Milstein v. Ayers*, 955 P.2d 78 (Colo. App. 1998).

**This section unambiguously entitled the allegedly incapacitated person to attend her competency hearing.** Anything less would implicate constitutional concerns because a potential deprivation of fundamental rights and liberties is involved. *Estate of Milstein v. Ayers*, 955 P.2d 78 (Colo. App. 1998).

**A necessary inference from the express right to be present by counsel is the right to**

**retain counsel.** *Estate of Milstein v. Ayers*, 955 P.2d 78 (Colo. App. 1998).

**No authority existed to deny the allegedly incapacitated person counsel on the grounds that she was incompetent to engage counsel.** *Estate of Milstein v. Ayers*, 955 P.2d 78 (Colo. App. 1998).

**Because a guardian ad litem and counsel represent different interests, appointment of a guardian ad litem for the allegedly incapacitated person did not substitute for counsel.** *Estate of Milstein v. Ayers*, 955 P.2d 78 (Colo. App. 1998).

**It is within the court's discretion to appoint legal counsel in addition to a guardian ad litem for an incapacitated person** where the guardian ad litem does not undertake to represent the incapacitated person's legal interests in a proceeding to gain permission to withhold life-sustaining treatment. *Dept. of Insts. v. Carothers*, 821 P.2d 891 (Colo. App. 1991).

**Although subsection (6) does not unambiguously grant the court power to assess attorney fees against another branch of government**, it was within the court's discretion to assess attorney fees against the department of institutions. *Dept. of Insts. v. Carothers*, 821 P.2d 891 (Colo. App. 1991).

**Defendant, department of institutions, waived its right to appeal issue that attorney fees may not be assessed against it on grounds that this section does not contain express authorization for the assessment of such fees against state agencies** where argument was not presented at trial and there was no indication that the court of appeals ruled on the issue. *Carothers v. Dept. of Insts.*, 845 P.2d 1179 (Colo. 1993).

**Applied in** *Romberg v. Slemon*, 778 P.2d 315 (Colo. App. 1989).

**15-14-305. Preliminaries to hearing.** (1) Upon receipt of a petition to establish a guardianship, the court shall set a date and time for hearing the petition and appoint a visitor. The duties and reporting requirements of the visitor are limited to the relief requested in the petition. The visitor must be a person who has such training as the court deems appropriate.

(2) The court shall appoint a lawyer to represent the respondent in the proceeding if:

(a) Requested by the respondent;

(b) Recommended by the visitor; or

(c) The court determines that the respondent needs representation.

(3) The visitor shall interview the respondent in person and, to the extent that the respondent is able to understand:

(a) Explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;

(b) Determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;

(c) Inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and

(d) Inform the respondent that all costs and expenses of the proceeding, including



respondent's attorney fees, will be paid from the respondent's estate unless the court directs otherwise.

(4) In addition to the duties imposed by subsection (3) of this section, the visitor shall:

- (a) Interview the petitioner and the proposed guardian;
  - (b) Visit the respondent's present dwelling and any dwelling in which the respondent will live, if known, if the appointment is made;
  - (c) Obtain information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and
  - (d) Make any other investigation the court directs.
- (5) The visitor shall promptly file a report in writing with the court, which must include:
- (a) A recommendation as to whether a lawyer should be appointed to represent the respondent and whether a guardian ad litem should be appointed to represent the respondent's best interest;
  - (b) A summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;
  - (c) Recommendations regarding the appropriateness of guardianship, including whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;
  - (d) A statement of the qualifications of the proposed guardian, together with a statement as to whether the respondent approves or disapproves of:
    - (I) The proposed guardian;
    - (II) The powers and duties proposed; and
    - (III) The scope of the guardianship;
  - (e) A statement as to whether the proposed dwelling meets the respondent's individual needs;
  - (f) A recommendation as to whether a professional evaluation or further evaluation is necessary; and
  - (g) Any other matters the court directs.

**Source: L. 2000:** Entire part R&RE, p. 1793, § 1, effective January 1, 2001 (see § 15-17-103).

#### ANNOTATION

**Law reviews.** For article, "Adult of Constitutional Rights", see 15 Colo. Law. Guardianships and Conservatorships: Protection 820 (1986).

**15-14-306. Professional evaluation.** (1) At or before a hearing under this part 3, the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands. If the court orders the evaluation, the respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment. The examiner shall promptly file a written report with the court. Unless otherwise directed by the court, the report must contain:

- (a) A description of the nature, type, and extent of the respondent's specific cognitive and functional limitations, if any;
- (b) An evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;
- (c) A prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and
- (d) The date of any assessment or examination upon which the report is based.

**Source: L. 2000:** Entire part R&RE, p. 1794, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-307. Reserved.**

**15-14-308. Presence and rights at hearing.** (1) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The respondent shall attend the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents; examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the visitor; and otherwise participate in the hearing. The hearing may be held in a manner that reasonably accommodates the respondent and may be closed upon the request of the respondent or upon a showing of good cause, except that the hearing may not be closed over the objection of the respondent.

(2) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

(3) The petitioner shall make every reasonable effort to secure the respondent's attendance at the hearing.

**Source:** L. 2000: Entire part R&RE, p. 1795, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-309. Notice.** (1) A copy of a petition for guardianship and notice of the hearing on the petition must be served personally on the respondent. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection (1) is jurisdictional and thus precludes the court from granting the petition.

(2) In a proceeding to establish a guardianship, a copy of the petition for guardianship and notice of the hearing meeting the requirements of subsection (1) of this section must be given to the persons listed in the petition. Failure to give notice under this subsection (2) is not jurisdictional and thus does not preclude the appointment of a guardian or the making of a protective order.

(3) Notice of the hearing on a petition for an order after appointment of a guardian, together with a copy of the petition, must be given to the ward, the guardian, and any other person the court directs.

(4) A guardian shall give notice of the filing of the guardian's report, together with a copy of the report, to the ward and any other person the court directs. The notice must be delivered or sent within ten days after the filing of the report.

**Source:** L. 2000: Entire part R&RE, p. 1795, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-309 as it existed prior to 2001.

**15-14-310. Who may be guardian - priorities - prohibition of dual roles.** (1) Subject to subsection (4) of this section, the court in appointing a guardian shall consider persons otherwise qualified in the following order of priority:

(a) A guardian, other than a temporary or emergency guardian, currently acting for the respondent in this state or elsewhere;

(b) A person nominated as guardian by the respondent, including the respondent's specific nomination of a guardian made in a durable power of attorney or given priority to be a guardian in a designated beneficiary agreement made pursuant to article 22 of this title;

(c) An agent appointed by the respondent under a medical durable power of attorney pursuant to section 15-14-506;

(d) An agent appointed by the respondent under a general durable power of attorney;

(e) The spouse of the respondent or a person nominated by will or other signed writing of a deceased spouse;

(f) An adult child of the respondent;



(g) A parent of the respondent or an individual nominated by will or other signed writing of a deceased parent; and

(h) An adult with whom the respondent has resided for more than six months immediately before the filing of the petition.

(2) A respondent's nomination or appointment of a guardian shall create priority for the nominee or appointee only if, at the time of nomination or appointment, the respondent had sufficient capacity to express a preference.

(3) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, for good cause shown, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(4) An owner, operator, or employee of a long-term-care provider from which the respondent is receiving care may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption.

(5) (a) Unless the court makes specific findings for good cause shown or the person is a family caregiver as defined in section 27-10.5-102 (15.5), C.R.S., or the person is a caregiver to an eligible person pursuant to section 25.5-6-1101 (4), C.R.S., the same professional may not act as an incapacitated person's or a protected person's:

(I) Guardian and conservator; or

(II) Guardian and direct service provider; or

(III) Conservator and direct service provider.

(b) In addition, a guardian or conservator may not employ the same person to act as both care manager and direct service provider for the incapacitated person or protected person unless the person is a family caregiver as defined in section 27-10.5-102 (15.5), C.R.S.

**Source:** **L. 2000:** Entire part R&RE, p. 1796, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 445, § 11, effective July 1. **L. 2010:** (1)(b) amended, (SB 10-199), ch. 374, p. 1753, § 18, effective July 1. **L. 2011:** (5) amended, (SB 11-083), ch. 101, p. 305, § 10, effective August 10. **L. 2012:** (5)(a) amended, (SB 12-074), ch. 110, p. 386, § 1, effective April 13.

**Editor's note:** (1) This section is similar to former § 15-14-311 as it existed prior to 2001.

(2) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (1)(b):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

This section gives top priority for appointment as guardian to existing guardians appointed elsewhere, to the respondent's nominee for the position, and to the respondent's agent, in that order. Existing guardians are granted a first priority for two reasons. First, many of these cases will involve transfers of a guardianship from another state. To assure a smooth transition, the currently appointed guardian, whether appointed in this state or another, should have the right to the appointment at the new location. Second, other cases will involve

situations where a guardianship appointment is sought despite the appointment in another place. Granting the existing guardian priority will deter such forum shopping. If the existing guardian is inappropriate for some reason, subsection (b) permits the Court to pass over the existing guardian and appoint another with or without priority. While an existing guardian is generally granted a first priority for appointment, a temporary substitute and an emergency guardian are excluded from priority because of the short-term nature of their involvement.

A guardian or individual nominated by the respondent or the agent named in the respondent's health care power of attorney has priority for appointment over the respondent's relatives. The nomination may include anyone nominated orally at the hearing, if the respondent has sufficient capacity at the time to express a preference. The nomination may also be made by a separate document. While it is generally good practice for an individual to nominate as the guardian the agent named in a durable power of attorney, the section grants such an agent a preference even in the absence of a specific nomination. The agent is granted a preference on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a guardianship to thwart the authority of the agent. To assure that the agent will be in a position to assert this priority, Sections 5-304(b)(4) and 5-309(b) require that the agent receive notice of the proceeding. Also, until the Court has acted to approve the revocation of that authority, Section 5-316(c) provides that the authority of an agent for health-care decisions takes precedence over that of the guardian.

Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent. Note that there is no requirement that the respondent had resided with the adult for more than six months *immediately prior* to the filing of the petition, just that the requisite residency have occurred at some point in time before the petition is filed. Courts should use a reasonableness standard in applying this subsection so that priority is given to someone with whom the respondent has had a close, enduring relationship. For factors to consider in making this determination, see the comment to Section 5-304, which discusses the interpretation of the phrase "an adult with whom the

respondent has resided for more than six months before the filing of the petition" within the context of the persons required to be listed in the petition for appointment. Note that although the phrase can be interpreted quite broadly, it is intended to be descriptive of those individuals who have had an enduring relationship with the respondent for at least a six month period and who, because of this relationship, should be given a priority for consideration as guardian.

Subsection (c) prohibits anyone affiliated with a long-term care institution at which the respondent is receiving care from being appointed as guardian absent a blood, marital or adoptive relationship. Strict application of this subsection is crucial to avoid a conflict of interest and to protect the ward. Each state enacting Parts 1-4 of this article needs to insert the particular term or terms used in the state for those facilities considered to be long-term care institutions.

A professional guardian, including a public agency or nonprofit corporation, was specifically not given priority for appointment as guardian because those given priority are limited to individuals with whom the ward has a close relationship. The committee which drafted the 1997 revision of the Uniform Guardianship and Protective Proceedings Act (Parts 1-4 of this article) recognized the valuable service that a professional guardian, a public agency or nonprofit corporation provides. A professional guardian can still be appointed guardian if no one else with priority is available and willing to serve or if the Court, acting in the respondent's best interest, declines to appoint a person having priority. A public agency or nonprofit corporation is eligible to be appointed guardian as long as it can provide an active and suitable guardianship program and is not otherwise providing substantial services or assistance to the respondent, but is not entitled to statutory priority in appointment as guardian.

This section is based on UGPPA (1982) Section 2-205 (UPC Section 5-305 (1982)).

## ANNOTATION

**Law reviews.** For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53

(February 2000). For article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (February 2007).

### 15-14-311. Findings - order of appointment. (1) The court may:

(a) Appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that:

(I) The respondent is an incapacitated person; and

(II) The respondent's identified needs cannot be met by less restrictive means, including use of appropriate and reasonably available technological assistance; or

(b) With appropriate findings, treat the petition as one for a protective order under section 15-14-401, enter any other appropriate order, or dismiss the proceeding.

(2) The court, whenever feasible, shall grant to a guardian only those powers neces-



sitated by the ward's limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.

(3) Within thirty days after an appointment, a guardian shall send or deliver to the ward and to all other persons given notice of the hearing on the petition a copy of the order of appointment, together with a notice of the right to request termination or modification.

**Source:** L. 2000: Entire part R&RE, p. 1797, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-304 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Interrogating Medical Witnesses as to Mental Capacity", see 23 Colo. Law. 2753 (1994). For article, "Legal Guidelines and Methods for Evaluating Capacity", see 32 Colo. Law. 65 (June 2003).

**Because there was no declaration of mental incapacity at a formal hearing prior to plain-**

**tiff's execution of a warranty deed**, the good faith purchasers had no constructive notice of plaintiff's alleged mental state. Therefore, the good faith purchasers have a valid interest in the property even if it is later established that plaintiff was mentally incapacitated when he executed the deed. *Delsas ex rel. Delsas v. Centex Home Equity*, 186 P.3d 141 (Colo. App. 2008).

**15-14-312. Emergency guardian.** (1) If the court finds that compliance with the procedures of this part 3 will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian whose authority may not exceed sixty days and who may exercise only the powers specified in the order. Immediately upon appointment of an emergency guardian, the court shall appoint a lawyer to represent the respondent throughout the emergency guardianship. Except as otherwise provided in subsection (2) of this section, reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other persons as the court directs.

(2) An emergency guardian may be appointed without notice to the respondent and the respondent's lawyer only if the court finds from testimony that the respondent will be substantially harmed if the appointment is delayed. If not present at the hearing, the respondent must be given notice of the appointment within forty-eight hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within fourteen days after the court's receipt of such a request.

(3) Appointment of an emergency guardian, with or without notice, is not a determination of the respondent's incapacity.

(4) The court may remove an emergency guardian or modify the powers granted at any time. An emergency guardian shall make any report the court requires. In other respects, the provisions of parts 1 to 4 of this article concerning guardians apply to an emergency guardian.

**Source:** L. 2000: Entire part R&RE, p. 1797, § 1, effective January 1, 2001 (see § 15-17-103). L. 2012: (2) amended, (SB 12-175), ch. 208, p. 840, § 51, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Law reviews.** For article, "Protecting Clients From Abuse and Identity Theft", see 34 Colo. Law. 43 (October 2005).

**15-14-313. Temporary substitute guardian.** (1) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward, the affected guardian, and other interested persons, the temporary substitute guardian, within five days after the appointment, shall inform them of the appointment.

(2) The court may remove a temporary substitute guardian or modify the powers granted at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of parts 1 to 4 of this article concerning guardians apply to a temporary substitute guardian.

**Source:** L. 2000: Entire part R&RE, p. 1798, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-310 as it existed prior to 2001.

**15-14-314. Duties of guardian.** (1) Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian, at all times, shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.

(2) A guardian shall:

(a) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(b) Take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;

(c) Expend money of the ward that has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;

(d) Conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money to the conservator, at least quarterly, to be conserved for the ward's future needs;

(e) Immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed;

(f) Inform the court of any change in the ward's custodial dwelling or address; and

(g) Immediately notify the court in writing of the ward's death.

**Source:** L. 2000: Entire part R&RE, p. 1798, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-312 as it existed prior to 2001.



## ANNOTATION

**Law reviews.** For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Colorado Guardianship and Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988).

**This section confers upon the guardian no greater right to the custody of his ward than had the parent** at common law. People ex rel.

Flannery v. Bolton, 27 Colo. App. 39, 146 P. 489 (1915) (decided under repealed CSA, C. 176, § 140).

**The trial court did not abuse its discretion** in admitting evidence of the respondent's prognosis or the ethics of performing cardiopulmonary resuscitation as concerns the best interest standard of subsection (1). People ex rel. Yeager, 93 P.3d 589 (Colo. App. 2004).

**Applied** in In re A.W., 637 P.2d 366 (Colo. 1981).

**15-14-315. Powers of guardian.** (1) Subject to the limitations set forth in section 15-14-316 and except as otherwise limited by the court, a guardian may:

(a) Apply for and receive money payable to the ward or the ward's guardian or custodian for the support of the ward under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(b) If otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's place of dwelling outside this state upon express authorization of the court;

(c) If a conservator for the estate of the ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(d) Consent to medical or other care, treatment, or service for the ward; and

(e) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(2) The court may specifically authorize or direct the guardian to consent to the adoption or marriage of the ward.

**Source:** L. 2000: Entire part R&RE, p. 1799, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-312 as it existed prior to 2001.

## ANNOTATION

**Law reviews.** For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Colorado Guardianship and Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988).

**This section confers upon the guardian no greater right to the custody of his ward than had the parent** at common law. People ex rel. Flannery v. Bolton, 27 Colo. App. 39, 146 P. 489

(1915) (decided under repealed CSA, C. 176, § 140).

**A nonlawyer conservator or guardian in this state is a statutory legal representative only** and is therefore prohibited from practicing law and serving as legal counsel in court. The powers granted to conservators under § 15-14-425 and to guardians under this section and § 15-14-315.5 do not establish an exception to § 12-5-101 regarding the practice of law. In re Kanefsky, 260 P.3d 327 (Colo. App. 2010).

**Applied** in In re A.W., 637 P.2d 366 (Colo. 1981).

**15-14-315.5. Dissolution of marriage and legal separation.** (1) The guardian may petition the court for authority to commence and maintain an action for dissolution of marriage or legal separation on behalf of the ward. The court may grant such authority only if satisfied, after notice and hearing, that:

(a) It is in the best interest of the ward based on evidence of abandonment, abuse, exploitation, or other compelling circumstances, and the ward either is incapable of consenting; or

(b) The ward has consented to the proposed dissolution of marriage or legal separation.

(2) Nothing in this section shall be construed as modifying the statutory grounds for dissolution of marriage and legal separation as set forth in section 14-10-106, C.R.S.

**Source: L. 2000:** Entire part R&RE, p. 1800, § 1, effective January 1, 2001 (see § 15-17-103).

#### ANNOTATION

**A nonlawyer conservator or guardian in this state is a statutory legal representative only** and is therefore prohibited from practicing law and serving as legal counsel in court. The powers granted to conservators under § 15-14-

425 and to guardians under § 15-14-315 and this section do not establish an exception to § 12-5-101 regarding the practice of law. In re Kanefsky, 260 P.3d 327 (Colo. App. 2010).

**15-14-316. Rights and immunities of guardian - limitations.** (1) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room and board provided by the guardian or one who is affiliated with the guardian, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(2) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the relationship. A guardian who exercises reasonable care in choosing a third person providing medical or other care, treatment, or service for the ward is not liable for injury to the ward resulting from the negligent or wrongful conduct of the third party.

(3) A guardian, without authorization of the court, may not revoke a medical durable power of attorney made pursuant to section 15-14-506 of which the ward is the principal. If a medical durable power of attorney made pursuant to section 15-14-506 is in effect, absent an order of the court to the contrary, a health-care decision of the agent takes precedence over that of a guardian.

(4) A guardian may not initiate the commitment of a ward to a mental health-care institution or facility except in accordance with the state's procedure for involuntary civil commitment. To obtain hospital or institutional care and treatment for mental illness of a ward, a guardian shall proceed as provided under article 65 of title 27, C.R.S. To obtain care and treatment from an approved service agency as defined in section 27-10.5-102, C.R.S., for a ward with developmental disabilities, a guardian shall proceed under article 10.5 of title 27, C.R.S. To obtain care and treatment for alcoholism or substance abuse, a guardian shall proceed as provided under article 80 of title 27, C.R.S. No guardian shall have the authority to consent to any such care or treatment against the will of the ward.

**Source: L. 2000:** Entire part R&RE, p. 1800, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2010:** (4) amended, (SB 10-175), ch. 188, p. 782, § 19, effective April 29.

**15-14-317. Reports - monitoring of guardianship - court access to records.**

(1) Within sixty days after appointment or as otherwise directed by the court, a guardian shall report to the court in writing on the condition of the ward, the guardian's personal care plan for the ward, and account for money and other assets in the guardian's possession or subject to the guardian's control. A guardian shall report at least annually thereafter and whenever ordered by the court. The annual report must state or contain:

(a) The current mental, physical, and social condition of the ward;



- (b) The living arrangements for all addresses of the ward during the reporting period;
  - (c) The medical, educational, vocational, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;
  - (d) A summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making;
  - (e) Whether the guardian considers the current plan for care, treatment, or habilitation to be in the ward's best interest;
  - (f) Plans for future care; and
  - (g) A recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.
- (2) The court may appoint a visitor or other suitable person to review a report, interview the ward or guardian, and make any other investigation the court directs.
- (3) The court shall establish a system for monitoring guardianships, including the filing and review of annual reports.
- (4) (a) Whenever a guardian fails to file a report or fails to respond to an order of the court to show cause why the guardian should not be held in contempt of court, the clerk of the court or his or her designee may research the whereabouts and contact information of the guardian and the ward. To facilitate this research, the clerk of the court or his or her designee shall have access to data maintained by other state agencies, including but not limited to vital statistics information maintained by the department of public health and environment, wage and employment data maintained by the department of labor and employment, lists of licensed drivers and income tax data maintained by the department of revenue and provided pursuant to section 13-71-107, C.R.S., and voter registration information obtained annually by the state court administrator pursuant to section 13-71-107, C.R.S. The court may access the data only to obtain contact information for the guardian or the ward. Notwithstanding any provision of law to the contrary, the judicial department and the other state agencies listed in this paragraph (a) may enter into agreements for the sharing of this data. The judicial department and the courts shall not access data maintained pursuant to the "Address Confidentiality Program Act", part 21 of article 30 of title 24, C.R.S.
- (b) The court shall preserve the confidentiality of the data obtained from other state agencies and use the data only for the purposes set forth in this subsection (4). Notwithstanding the provisions of article 72 of title 24, C.R.S., documents and information obtained by the court pursuant to this subsection (4) are not public records and shall be open to public inspection only upon an order of the court based on a finding of good cause, except to the extent they would otherwise be open to inspection from the providing state agency.
- (c) For purposes of this subsection (4), "contact information" means name, residential address, business address, date of birth, date of death, phone number, e-mail address, or other identifying information as directed by the court.

**Source:** L. 2000: Entire part R&RE, p. 1801, § 1, effective January 1, 2001 (see § 15-17-103). L. 2012: Entire section amended, (HB 12-1074), ch. 46, p. 166, § 1, effective March 22.

**15-14-318. Termination or modification of guardianship - resignation or removal of guardian.** (1) A guardianship terminates upon the death of the ward or upon order of the court.

(2) On petition of a ward, a guardian, or another person interested in the ward's welfare, the court shall terminate a guardianship if the ward no longer meets the standard for establishing the guardianship. The court may modify the type of appointment or powers granted to the guardian if the extent of protection or assistance previously granted is currently excessive or insufficient or the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action.

(3) Except as otherwise ordered by the court for good cause, the court, before terminating a guardianship, shall follow the same procedures to safeguard the rights of the ward as apply to a petition for guardianship.

(3.5) The following provisions apply in a termination proceeding that is initiated by the ward:

(a) The guardian may file a written report to the court regarding any matter relevant to the termination proceeding, and the guardian may file a motion for instructions regarding any relevant matter including, but not limited to, the following:

- (I) Whether an attorney, guardian ad litem, or visitor should be appointed for the ward;
- (II) Whether any further investigation or professional evaluation of the ward should be conducted, the scope of the investigation or professional evaluation, and when the investigation or professional evaluation should be completed; and
- (III) Whether the guardian is to be involved in the termination proceedings and, if so, to what extent.

(b) If the guardian elects to file a written report or a motion for instructions, the guardian shall file such initial pleadings within twenty-one days after the petition to terminate has been filed. Any interested person shall then have fourteen days to file a response. If a response is filed, the guardian shall have seven days to file a reply. If a motion for instructions is filed by the guardian as his or her initial pleading, the court shall rule on the motion before the petition for termination of the guardianship is set for hearing. Unless a hearing on the motion for instructions is requested by the court, the court may rule on the pleadings without a hearing after the time period for the filing of the last responsive pleading has expired. After the filing of the guardian's initial motion for instructions, the guardian may file subsequent motions for instruction as appropriate.

(c) Except for the actions authorized in paragraphs (a), (b), and (e) of this subsection (3.5), or as otherwise ordered by the court, the guardian may not take any action to oppose or interfere in the termination proceeding. The filing of the initial or subsequent motion for instructions by the guardian shall not, in and of itself, be deemed opposition or interference.

(d) Unless ordered by the court, the guardian shall have no duty to participate in the termination proceeding, and the guardian shall incur no liability for filing the report or motion for instruction or for failing to participate in the proceeding.

(e) Nothing in this subsection (3.5) shall prevent:

(I) The court, on its own motion and regardless of whether the guardian has filed a report or request for instructions, from ordering the guardian to take any action that the court deems appropriate or from appointing an attorney, guardian ad litem, visitor, or professional evaluator;

(II) The court from ordering the guardian to appear at the termination proceeding and give testimony; or

(III) Any interested person from calling the guardian as a witness in the termination proceeding.

(f) Any individual who has been appointed as a guardian, and is an interested person in his or her individual capacity, and wants to participate in the termination proceeding in his or her individual capacity and not in his or her fiduciary capacity may do so without restriction or limitation. The payment of any fees and costs to that individual, related to his or her decision to participate in the termination proceeding, shall be governed by section 15-10-602 (7) and not by section 15-10-602 (1).

(4) The court may remove a guardian pursuant to section 15-10-503 or permit the guardian to resign as set forth in section 15-14-112.

(5) Issues of liability as between an estate and the estate's guardian individually may be determined:

- (a) In a proceeding pursuant to section 15-10-504;
- (b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal;
- or
- (c) In other appropriate proceedings.

(6) When a ward dies, all fees, costs, and expenses of the administration of the guardianship, including any unpaid guardian fees and costs and those of his or her counsel, may be submitted to the court for court approval in conjunction with the termination of the guardianship. Thereafter, all court-approved fees, costs, and expenses of administration arising from the guardianship shall be paid as court-approved claims for costs and expenses of administration in the decedent's estate. In the event that there are insufficient moneys to



pay all claims in the decedent's estate in full, the fees, costs, and expenses of administration arising from the guardianship shall retain their classification as "costs and expenses of administration" in the decedent's estate and shall be paid pursuant to section 15-12-805.

**Source:** **L. 2000:** Entire part R&RE, p. 1801, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2008:** (4) amended and (5) added, p. 484, § 11, effective July 1. **L. 2011:** (3.5) and (6) added, (SB 11-083), ch. 101, p. 307, § 15, effective August 10. **L. 2012:** (3.5)(b) amended, (SB 12-175), ch. 208, p. 840, § 52, effective July 1.

**Editor's note:** (1) This section is similar to former § 15-14-306 as it existed prior to 2001.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3.5)(b) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## ANNOTATION

**Under this section the guardian's discharge terminates the guardianship**, as to the guardian, and the final account, when approved by the court, is a judgment conclusive upon the guardian and the sureties on his bond, unless

impeached for fraud, or such other cause as would invalidate any other judgment. *Am. Bonding Co. v. People ex rel. Kennedy*, 46 Colo. 394, 104 P. 81 (1909) (decided under repealed CSA, C. 176, § 92).

## PART 4

### PROTECTION OF PROPERTY OF PROTECTED PERSON

**Editor's note:** Section 10 of chapter 249, Session Laws of Colorado 2001, modified the applicability of parts 1 to 4. (See L. 2001, p. 889.)

**Law reviews:** For article, "Statutory Custodianship Trusts", see 13 Colo. Law. 786 (1984); for article, "The Revocable Living Trust Revisited", see 18 Colo. Law. 225 (1989); for article, "Trust Protection of Personal Injury Recoveries from Public Creditors", see 19 Colo. Law. 2187 (1990); for article, "Personal Injury Settlements With Minors", see 21 Colo. Law. 1167 (1992); for article, "Avoiding Living Probate", see 27 Colo. Law. 5 (March 1998); for article, "Highlights of Colorado's New Guardianship and Conservatorship Laws", see 30 Colo. Law. 5 (January 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part I", see 30 Colo. Law. 43 (January 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part II", see 30 Colo. Law. 56 (February 2001); for article, "Estate Planning Considerations when Distributing Assets from a Conservatorship Estate", see 32 Colo. Law. 55 (August 2003); for article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (February 2007).

**15-14-401. Protective proceeding.** (1) Upon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this part 4 in relation to the estate and affairs of:

(a) A minor, if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be put at risk or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money; or

(b) Any individual, including a minor, if the court determines that, for reasons other than age:

(I) By clear and convincing evidence, the individual is unable to manage property and business affairs because the individual is unable to effectively receive or evaluate information or both or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance, or because the individual is missing, detained, or unable to return to the United States; and

(II) By a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care,

education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.

**Source:** L. 2000: Entire part R&RE, p. 1802, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-401 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969). For article, "Determination of Heirship by Special Proceedings and Temporary Conservatorship", see 14 Colo. Law. 1781 (1985). For article, "Adult Guardianships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Ethical Obligations of Petitioners' Counsel in Guardianship and Conservator Cases", see 24 Colo. Law. 2565 (1995). For article, "Legal Guidelines and Methods for Evaluating Capacity", see 32 Colo. Law. 65 (June 2003).

**Annotator's note.** Since § 15-14-401 is similar to § 15-14-401 as it existed prior to the 2000 repeal and reenactment of this part 4,

relevant cases construing that provision have been included in the annotation to this section.

**The trial court has a broad discretion in all matters relating to protected persons,** which is exclusive. *Sweeney v. Summers*, 194 Colo. 149, 571 P.2d 1067 (1977).

**A conservator may be appointed for a person other than a minor** only if court makes specific factual finding that the ability to manage property is impaired. In re Estate of *Hickle v. Carney*, 748 P.2d 360 (Colo. App. 1987).

**The appointment of a conservator under this section does not include a finding of "incapacity."** In re Estate of *Gallavan*, 89 P.3d 521 (Colo. App. 2004).

**Applied** in *Jenkins v. Mesa County Dist. Court*, 620 P.2d 721 (Colo. 1980).

**15-14-402. Jurisdiction over business affairs of protected person.** (1) After the service of notice in a proceeding seeking a conservatorship or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(a) Exclusive jurisdiction to determine the need for a conservatorship or other protective order;

(b) Exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state must be managed, expended, or distributed to or for the use of the protected person, individuals who are in fact dependent upon the protected person, or other claimants; and

(c) Concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and questions of title concerning assets of the estate.

**Source:** L. 2000: Entire part R&RE, p. 1802, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-402 as it existed prior to 2001.

#### ANNOTATION

**Applied** in *Jenkins v. Mesa County Dist. Court*, 620 P.2d 721 (Colo. 1980) (decided prior to 2000 repeal and reenactment).

**15-14-403. Original petition for appointment or protective order.** (1) The following may petition for the appointment of a conservator or for any other appropriate protective order:

(a) The person to be protected;



(b) An individual interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, or custodian; or

(c) A person who would be adversely affected by lack of effective management of the property and business affairs of the person to be protected.

(2) A petition under subsection (1) of this section must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment or other protective order, and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(a) The respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the respondent will reside if the appointment is made;

(b) If the petition alleges impairment in the respondent's ability to effectively receive and evaluate information, a brief description of the nature and extent of the respondent's alleged impairment;

(c) If the petition alleges that the respondent is missing, detained, or unable to return to the United States, a statement of the relevant circumstances, including the time and nature of the disappearance or detention and a description of any search or inquiry concerning the respondent's whereabouts;

(d) (I) The name and address of the respondent's:

(A) Spouse or, if the respondent has none, an adult with whom the respondent has resided for more than six months within one year before the filing of the petition; and

(B) Adult children and parents; or

(II) If the respondent has neither spouse, adult child, nor parent, at least one of the adults nearest in kinship to the respondent who can be found with reasonable efforts;

(e) The name and address of each person responsible for care or custody of the respondent, including the respondent's treating physician;

(f) The name and address of each legal representative of the respondent;

(g) A general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of other anticipated income or receipts; and

(h) The reason why a conservatorship or other protective order is in the best interest of the respondent.

(3) If a conservatorship is requested, the petition must also set forth to the extent known:

(a) The name and address of each proposed conservator and the reason why the proposed conservator should be selected;

(b) The name and address of each person nominated as conservator by the respondent if the respondent has attained twelve years of age; and

(c) The type of conservatorship requested and, if an unlimited conservatorship, the reason why limited conservatorship is inappropriate or, if a limited conservatorship, the property to be placed under the conservator's control and any limitation on the conservator's powers and duties.

**Source:** L. 2000: Entire part R&RE, p. 1803, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-404 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Effect of Appointment of Conservator on Joint Tenancy Title", see 12 Colo. Law. 1237 (1983). For article, "The Self-Interested Fiduciary: Implications in Guardianship and Conservatorship Law", see 24 Colo. Law. 2181 (1995).

**Section 13-90-102 is inapplicable to a voluntary estate proceeding** under this section. *Patterson v. Pitoniak*, 173 Colo. 454, 480 P.2d 579 (1971)(case decided prior to the earliest source this section).

**15-14-404. Notice.** (1) A copy of the petition and the notice of hearing on a petition for conservatorship or other protective order must be served personally on the respondent, if the respondent has attained twelve years of age, but if the respondent's whereabouts are unknown or personal service cannot be made, service on the respondent must be made by substituted service or publication. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and, if the appointment of a conservator is requested, include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection (1) is jurisdictional and thus precludes the court from granting the petition.

(2) In a proceeding to establish a conservatorship or for another protective order, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this subsection (2) does not preclude the appointment of a conservator or the making of another protective order.

(3) Notice of the hearing on a petition for an order after appointment of a conservator or making of another protective order, together with a copy of the petition, must be given to the protected person, if the protected person has attained twelve years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court.

(4) A conservator shall give notice of the filing of the conservator's inventory, report, or plan of conservatorship, together with a copy of the inventory, report, or plan of conservatorship to the protected person and any other person the court directs. The notice must be delivered or sent within ten days after the filing of the inventory, report, or plan of conservatorship.

**Source:** L. 2000: Entire part R&RE, p. 1804, § 1, effective January 1, 2001 (see § 15-17-103). L. 2001: (1) amended, p. 889, § 8, effective June 1.

**Editor's note:** This section is similar to former § 15-14-405 as it existed prior to 2001.

**15-14-405. Original petition - minors - preliminaries to hearing.** (1) Upon the filing of a petition to establish a conservatorship or for another protective order for the reason that the respondent is a minor, the court shall set a date for hearing. If the court determines at any stage of the proceeding that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained twelve years of age.

(2) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may make orders to preserve and apply the property of the minor as may be required for the support of the minor or individuals who are in fact dependent upon the minor. The court may appoint a special conservator to assist in that task.

**Source:** L. 2000: Entire part R&RE, p. 1805, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-406. Original petition - persons under disability - preliminaries to hearing.** (1) Upon the filing of a petition for a conservatorship or other protective order for a respondent for reasons other than being a minor, the court shall set a date for hearing. The court shall appoint a visitor unless the petition does not request the appointment of a conservator and the respondent is represented by a lawyer. The duties and reporting requirements of the visitor are limited to the relief requested in the petition. The visitor must be a person who has such training or experience as the court deems appropriate.

(2) The court shall appoint a lawyer to represent the respondent in the proceeding if:

- (a) Requested by the respondent;
- (b) Recommended by the visitor; or

(c) The court determines that the respondent needs representation.



(3) The visitor shall interview the respondent in person and, to the extent that the respondent is able to understand:

(a) Explain to the respondent the substance of the petition and the nature, purpose, and effect of the proceeding;

(b) If the appointment of a conservator is requested, inform the respondent of the general powers and duties of a conservator and determine the respondent's views regarding the proposed conservator, the proposed conservator's powers and duties, and the scope and duration of the proposed conservatorship;

(c) Inform the respondent of the respondent's rights, including the right to employ and consult with a lawyer at the respondent's own expense, and the right to request a court-appointed lawyer; and

(d) Inform the respondent that all costs and expenses of the proceeding, including respondent's attorney fees, will be paid from the respondent's estate unless the court directs otherwise.

(4) In addition to the duties imposed by subsection (3) of this section, the visitor shall:

(a) Interview the petitioner and the proposed conservator, if any; and

(b) Make any other investigation the court directs.

(5) The visitor shall promptly file a report with the court, which must include:

(a) A recommendation as to whether a lawyer should be appointed to represent the respondent and whether a guardian ad litem should be appointed to represent the respondent's best interest;

(b) Recommendations regarding the appropriateness of a conservatorship, including whether less restrictive means of intervention are available, the type of conservatorship, and, if a limited conservatorship, the powers and duties to be granted the limited conservator, and the assets over which the conservator should be granted authority;

(c) A statement of the qualifications of the proposed conservator, together with a statement as to whether the respondent approves or disapproves of:

(I) The proposed conservator;

(II) The powers and duties proposed; and

(III) The scope of the conservatorship;

(d) A recommendation as to whether a professional evaluation or further evaluation is necessary; and

(e) Any other matters the court directs.

(6) The court may also appoint a physician, psychologist, or other individual qualified to evaluate the alleged impairment to conduct an examination of the respondent.

(7) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may issue orders to preserve and apply the property of the respondent as may be required for the support of the respondent or individuals who are in fact dependent upon the respondent. The court may appoint a special conservator to assist in that task.

**Source:** L. 2000: Entire part R&RE, p. 1805, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-407. Reserved.**

**15-14-408. Original petition - procedure at hearing.** (1) Unless excused by the court for good cause, a proposed conservator shall attend the hearing. The respondent shall attend the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents, examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the visitor, and otherwise participate in the hearing. The hearing may be held in a manner that reasonably accommodates the respondent and may be closed upon request of the respondent, or upon a showing of good cause; except that the hearing may not be closed over the objection of the respondent.

(2) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

(3) The petitioner shall make every reasonable effort to secure the respondent's attendance at the hearing.

**Source:** L. 2000: Entire part R&RE, p. 1807, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-407 as it existed prior to 2001.

**15-14-409. Original petition - orders.** (1) If a proceeding is brought for the reason that the respondent is a minor, after a hearing on the petition, upon finding that the appointment of a conservator or other protective order is in the best interest of the minor, the court shall make an appointment or other appropriate protective order.

(2) If a proceeding is brought for reasons other than that the respondent is a minor, after a hearing on the petition, upon finding that a basis exists for a conservatorship or other protective order, the court shall make the least restrictive order consistent with its findings. The court shall make orders necessitated by the protected person's limitations and demonstrated needs, including appointive and other orders that will encourage the development of maximum self-reliance and independence of the protected person.

(3) Within thirty days after an appointment, the conservator shall deliver or send a copy of the order of appointment, together with a statement of the right to seek termination or modification, to the protected person, if the protected person has attained twelve years of age and is not missing, detained, or unable to return to the United States, and to all other persons given notice of the petition.

(4) The appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person.

**Source:** L. 2000: Entire part R&RE, p. 1807, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-407 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Effect of Appointment of Conservator on Joint Tenancy Title", see 12 Colo. Law. 1237 (1983). For article, "Determination of Heirship by Special Proceedings and Temporary Conservatorship", see 14 Colo. Law. 1781 (1985). For article, "Appointment of Temporary Conservators: Their Ethical and Legal Imperatives", see 25 Colo. Law. 53 (December 1996).

**Findings that warrant appointment of a conservator under this section do not equate to a determination of testamentary incapacity.** In re Estate of Gallavan, 89 P.3d 521 (Colo. App. 2004); In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

**15-14-410. Powers of court.** (1) After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator:

(a) With respect to a minor for reasons of age, all the powers over the estate and business affairs of the minor that may be necessary for the best interest of the minor and members of the minor's immediate family; and

(b) With respect to an adult, or to a minor for reasons other than age, for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, all the powers over the estate and business affairs of the protected person that the person could exercise if the person were an adult, present, and not under conservatorship or other protective order.



(2) Subject to section 15-14-110 requiring endorsement of limitations on the letters of office, the court may limit at any time the powers of a conservator otherwise conferred and may remove or modify any limitation.

**Source: L. 2000:** Entire part R&RE, p. 1808, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-408 as it existed prior to 2001.

**15-14-411. Required court approval.** (1) After notice to interested persons and upon express authorization of the court, a conservator may:

- (a) Make gifts, except as otherwise provided in section 15-14-427 (2);
- (b) Convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties;
- (c) Exercise or release a power of appointment;
- (d) Create a revocable or irrevocable trust of property of the estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the protected person;
- (e) Exercise rights to elect options and change beneficiaries under retirement plans, insurance policies, and annuities or surrender the plans, policies, and annuities for their cash value;
- (f) Exercise any right to an elective share in the estate of the protected person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos; and
- (g) Make, amend, or revoke the protected person's will.

(2) A conservator, in making, amending, or revoking the protected person's will, shall comply with section 15-11-502 or 15-11-507.

(3) The court, in exercising or in approving a conservator's exercise of the powers listed in subsection (1) of this section, shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained. To the extent the decision cannot be ascertained, the court shall consider the best interest of the protected person. The court shall also consider:

- (a) The financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors;
- (b) Possible reduction of income, estate, inheritance, or other tax liabilities;
- (c) Eligibility for governmental assistance;
- (d) The protected person's previous pattern of giving or level of support;
- (e) The existing estate plan;
- (f) The protected person's life expectancy and the probability that the conservatorship will terminate before the protected person's death; and
- (g) Any other factors the court considers relevant, including the best interest of the protected person.

**Source: L. 2000:** Entire part R&RE, p. 1808, § 1, effective January 1, 2001 (see § 15-17-103).

#### ANNOTATION

**Law reviews.** For article, "Will Preparation for Individuals Lacking Testamentary Capacity", see 33 Colo. Law. 93 (August 2004).

**15-14-412. Protective arrangements and single transactions.** (1) If a basis is established for a protective order with respect to an individual, the court, without appointing a conservator, may:

(a) Authorize, direct, or ratify any transaction necessary or desirable to achieve any arrangement for security, service, or care meeting the foreseeable needs of the protected person, including:

- (I) Payment, delivery, deposit, or retention of funds or property;
- (II) Sale, mortgage, lease, or other transfer of property;
- (III) Purchase of an annuity;
- (IV) Making a contract for life care, deposit contract, or contract for training and education; or
- (V) Addition to or establishment of a suitable trust, including a trust created under the "Colorado Uniform Custodial Trust Act", article 1.5 of this title; and

(b) Authorize, direct, or ratify any other contract, trust, will, or transaction relating to the protected person's property and business affairs, including a settlement of, and distribution of settlement of, a claim, upon determining that it is in the best interest of the protected person.

(2) In deciding whether to approve a protective arrangement or other transaction under this section, the court shall consider the factors described in section 15-14-411 (3).

(3) The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section. The special conservator has the authority conferred by the order and shall serve until discharged by order after report to the court.

**Source:** L. 2000: Entire part R&RE, p. 1809, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-409 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Determination of Heirship by Special Proceedings and Temporary Conservatorship", see 14 Colo. Law. 1781 (1985). For article, "Colorado Guardianship and

Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article, "Trust Protection of Personal Injury Recoveries from Public Creditors", see 19 Colo. Law. 2187 (1990).

**15-14-412.5. Limited court-approved arrangements authorized for persons seeking medical assistance for nursing home care - applicable to trusts established before a certain date.** (1) The general assembly hereby finds, determines, and declares that:

(a) The state makes significant expenditures for nursing home care under the "Colorado Medical Assistance Act";

(b) A large number of persons do not have enough income to afford nursing home care, but have too much income to qualify for state medical assistance, a situation popularly referred to as the "Utah gap";

(c) Some persons in the Utah gap, through innovative court-approved trust arrangements, have become qualified for state medical assistance, thereby increasing state medical assistance expenditures;

(d) It is therefore appropriate to enact state laws that limit such court-approved trusts in a manner that is consistent with Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396 et seq., as amended, and that provide that persons who qualify for assistance as a result of the creation of such trusts shall be treated the same as any other recipient of medical assistance for nursing home care;

(e) In enacting this section, the general assembly intends only to limit certain court-approved trusts and court-approved transfers of property. It is not the general assembly's intent to approve or disapprove of privately created trusts or private transfers of property made under the same or similar circumstances.

(2) The court shall not authorize, direct, or ratify any trust that either has the effect of qualifying or purports to qualify the trust beneficiary for medical assistance for nursing home care pursuant to the provisions of title 25.5, C.R.S., unless the circumstances surrounding the creation of the trust and the trust provisions meet the criteria set forth in



section 25.5-6-102 (3), C.R.S. This section shall apply to any court-approved trust that is funded with property owned by the beneficiary at the time the trust is created but shall not apply to any trust that is established and directly funded by a defendant or insurance company in settlement of an action or claim for personal injury brought by or on behalf of the trust beneficiary.

(3) Except as otherwise permitted by Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p, as amended, the court shall not authorize, direct, or ratify the transfer of any property owned by a protected person if the transfer either has the effect of qualifying or purports to qualify the protected person for medical assistance for nursing home care pursuant to the provisions of title 25.5, C.R.S., unless the property is transferred into a trust established in accordance with subsection (2) of this section.

(4) This section shall take effect January 1, 1992, and shall apply to any court-approved trust established for or court-approved transfer of property made by or for a protected person applying for or receiving medical assistance for nursing home care pursuant to the provisions of title 25.5, C.R.S., on or after said date; except that such a trust created before said date that does not comply with this section shall be modified to comply with this section no later than July 1, 1992, before which time a court-approved trust or a court-approved transfer of property to a court-approved trust shall not render the protected person ineligible for medical assistance.

(5) The provisions of this section shall not apply if federal funds are not available for persons who would qualify for medical assistance as a result of a court-approved trust that meets the criteria set forth in section 25.5-6-102, C.R.S.

(6) This section applies to trusts established or transfers of property made prior to July 1, 1994. The provisions set forth in sections 15-14-412.6 to 15-14-412.9 and any rule adopted by the medical services board pursuant to section 25.5-6-103, C.R.S., apply to trusts established or property transferred on or after July 1, 1994.

**Source:** **L. 2000:** Entire part R&RE, p. 1810, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** (2), (5), and (6) amended, p. 2002, § 50, effective July 1. **L. 2007:** (2), (3), and (4) amended, p. 2027, § 30, effective June 1.

**Editor's note:** This section is similar to former § 15-14-409.5 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Before the Miller Trust: Long-Term Care and HCBS Considerations", see 24 Colo. Law. 2721 (1995).

**15-14-412.6. Trust established by an individual - eligibility for certain public assistance programs - general provisions.** (1) For purposes of this section and sections 15-14-412.7 to 15-14-412.9, unless the context otherwise requires the following definitions apply:

(a) "Asset" has the same meaning as set forth in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (e), as amended.

(b) "Income" has the same meaning as set forth in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (e), as amended.

(c) "Public assistance" means public assistance as provided by article 2 of title 26, C.R.S., and medical assistance as provided by articles 4, 5, and 6 of title 25.5, C.R.S.

(d) "Resources" has the same meaning as set forth in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (e), as amended.

(e) "Trust established by an individual" has the same meaning as set forth in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (d) (2), as amended.

(2) Notwithstanding any statutory provision to the contrary, a court shall not authorize, direct, or ratify any trust established by an individual that has the effect of qualifying or purports to qualify the trust beneficiary for public assistance unless the trust meets the

criteria set forth in this section, sections 15-14-412.7 to 15-14-412.9, and any rule adopted by the medical services board pursuant to section 25.5-6-103, C.R.S.

(3) The court shall not authorize, direct, or ratify the transfer of any assets owned by a protected person if the transfer has the effect of qualifying or purports to qualify the protected person for public assistance unless the assets are transferred to a trust that meets the criteria set forth in this section, sections 15-14-412.7 to 15-14-412.9, and any rule adopted by the medical services board pursuant to section 25.5-6-103, C.R.S.

**Source:** L. 2000: Entire part R&RE, p. 1811, § 1, effective January 1, 2001 (see § 15-17-103). L. 2006: (1)(c), (2), and (3) amended, p. 2002, § 51, effective July 1.

**Editor's note:** This section is similar to former § 15-14-409.6 as it existed prior to 2001.

### ANNOTATION

**The court erred in attempting to shield the assets of the trust for the purpose of determining Medicaid eligibility because** subsection (2) prohibits any trust that has been "established by an individual that has the effect of qualifying or purports to qualify the trust bene-

ficiary for public assistance," and this section does not except from this prohibition elective-share trusts created pursuant to § 15-11-206. In re Estate of Faller, 66 P.3d 114 (Colo. App. 2002).

**15-14-412.7. Income trusts - limitations.** (1) An income trust within the meaning of this section is a trust established for the benefit of an individual that consists only of pension income, social security, and other monthly income to the individual and accumulated income in the trust and that is established for the purpose or with the effect of establishing or maintaining income eligibility for certain medical assistance.

(2) An income trust shall not be effective for establishing or maintaining income eligibility for any category of public assistance other than nursing home care or home- and community-based services.

(3) In order to establish or maintain income eligibility, an income trust shall meet all of the following criteria:

(a) The assets used to fund the trust are limited to any monthly unearned income received by the applicant, including any pension payment;

(b) The sole lifetime beneficiaries of the trust are the person for whom the trust is established and the state medical assistance program. After the death of the person for whom the trust is created or after the trust is terminated during the beneficiary's lifetime, whichever occurs sooner, no person is entitled to payment from the remainder of the trust until the state medical assistance agency has been fully reimbursed for the assistance rendered to the person for whom the trust was created.

(c) The entire corpus of the trust, or as much of the corpus as may be distributed each month without violating federal requirements for federal financial participation, is distributed each month for expenses related to nursing home care or home- and community-based services for the beneficiary that are approved under the state medical assistance program; except that an amount reasonably necessary to maintain the existence of the trust and to comply with federal requirements may be retained in the trust;

(d) The trust provides that deductions may be made from the monthly trust distribution to the same extent that deductions from the income of a nursing home resident or home- and community-based services client are allowed under the state medical assistance program, articles 4, 5, and 6 of title 25.5, C.R.S., for nursing home residents and home- and community-based services clients who are not trust beneficiaries. Allowable deductions include the following:

(I) A monthly personal needs allowance;

(II) With respect to nursing home residents only, payments to the beneficiary's community spouse or dependent family members as provided and in accordance with Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396r-5, as amended, and section 25.5-6-101, C.R.S.;



(III) Specified health insurance costs and special medical services provided under Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396a (r), as amended;

(IV) Any other deduction provided by rules of the medical services board, including rules concerning posteligibility treatment of income for home- and community-based services clients;

(e) The trust provides that, upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, the state agency administering the state medical assistance program receives all amounts remaining in the trust up to the total medical assistance paid on behalf of the individual;

(f) The applicant's monthly gross income from all sources, without reference to the trust, exceeds the income eligibility standard for medical assistance then in effect but is less than the average private pay rate for nursing home care for the geographic region in which the applicant lives.

**Source:** L. 2000: Entire part R&RE, p. 1812, § 1, effective January 1, 2001 (see § 15-17-103). L. 2006: IP(3)(d) and (3)(d)(II) amended, p. 2003, § 52, effective July 1.

**Editor's note:** This section is similar to former § 15-14-409.7 as it existed prior to 2001.

**15-14-412.8. Disability trusts - limitations.** (1) A disability trust within the meaning of this section is a trust that is established for an individual under sixty-five years of age who is disabled, as such term is defined in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1382c (a) (3), as amended, consists of assets of the individual, and is established for the purpose or with the effect of establishing or maintaining the individual's resource eligibility for medical assistance.

(2) A disability trust is not valid for the purpose of establishing or maintaining a person's resource eligibility for medical assistance unless the trust meets all of the following criteria:

(a) The trust is funded by assets of an individual under age sixty-five who is disabled as defined in 42 U.S.C. sec. 1382c (a) (3), as amended, and which is established for the benefit of such individual by the individual's parent, grandparent, guardian, or by the court.

(b) The trust provides that, upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, the department of health care policy and financing receives any amount remaining in the trust up to the total medical assistance paid on behalf of the individual.

(c) The sole lifetime beneficiaries of the trust are the individual for whom the trust is established and the state medical assistance program. After the death of the person for whom the trust is created or after the trust is terminated during the beneficiary's lifetime, whichever occurs sooner, no person is entitled to payment from the remainder of the trust until the state medical assistance agency has been fully reimbursed for the assistance rendered to the person for whom the trust was created.

(3) A disability trust is not valid for the purpose of establishing or maintaining eligibility for any category of public assistance other than medical assistance.

(4) No disability trust shall be valid unless the department of health care policy and financing, or its designee, has reviewed the trust and determined that the trust conforms to the requirements of this section and any rules adopted by the medical services board pursuant to section 25.5-6-103, C.R.S.

**Source:** L. 2000: Entire part R&RE, p. 1813, § 1, effective January 1, 2001 (see § 15-17-103). L. 2006: (4) amended, p. 2003, § 53, effective July 1.

**Editor's note:** This section is similar to former § 15-14-409.8 as it existed prior to 2001.

## ANNOTATION

**Law reviews.** For article, "Preserving the Disabled Plaintiff's Access to Public Benefits with the Special Needs Trust," see 25 Colo. Law. 49 (May 1996).

**This section does not violate the equal protection clause of the U.S. or Colorado Constitutions.** Allowing specified funds to be used to fund a disability trust while other funds cannot be so used does not result in dissimilar treatment of similarly situated people. Because there is no dissimilar classification of individuals, no equal protection issue is presented. Colo. Dept. of Health Care Policy & Fin. v. Estate of Roberts, 18 P.3d 813 (Colo. App. 2000).

**Federal law permits** a state, for the purposes of determining medicaid eligibility, to permit applicants to exclude their income from eligibility by establishing a trust. However, federal law

does not prohibit the state from adopting additional trust requirements, as in this section, for these purposes. Colo. Dept. of Health Care Policy & Fin. v. Estate of Roberts, 18 P.3d 813 (Colo. App. 2000).

Upon termination, a trustee may pay federal and state taxes due from the corpus of the trust before reimbursing the state for medical assistance it rendered to the beneficiary. Stell v. Boulder County Dept. of Soc. Servs., 92 P.3d 910 (Colo. 2004).

**The qualification of the trust for exemption from the Medicaid calculation, as opposed to its eventual distribution, is determined by the criteria set forth in this section, not § 15-12-805.** Stell v. Colo. Dept. of Health Care Policy & Fin., 78 P.3d 1142 (Colo. App. 2003), rev'd on other grounds, 92 P.3d 910 (Colo. 2004).

**15-14-412.9. Pooled trusts - limitations.** (1) A pooled trust within the meaning of this section is a trust consisting of individual accounts established for individuals who are disabled and is established for the purpose or with the effect of establishing or maintaining a person's resource eligibility for medical assistance.

(2) A pooled trust is not valid for the purposes of establishing or maintaining eligibility for medical assistance unless the trust meets the following criteria:

(a) The trust is established and managed by a nonprofit association that is approved by the United States internal revenue service.

(b) A separate account is maintained for each beneficiary of the trust; except that the accounts are pooled for purposes of investment and management of funds.

(c) The sole lifetime beneficiaries of the trust are the individual for whom the trust is established and the state medical assistance program. After the death of the person for whom the trust is created or after the trust is terminated during the beneficiary's lifetime, whichever occurs sooner, no person is entitled to payment from the remainder of the trust until the state medical assistance agency has been fully reimbursed for the assistance rendered to the person for whom the trust was created.

(d) Accounts in the trust are established solely for the benefit of individuals who are disabled as defined in 42 U.S.C. sec. 1382c (a) (3), as amended, and are established by the parent, grandparent, or legal guardian of such individual, by such individual, or by a court.

(e) The trust provides that, upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, to the extent that amounts remaining in the beneficiary's trust account are not retained by the trust, the state medical assistance program receives any amount remaining in that individual's trust account up to the total medical assistance paid on behalf of the individual.

(3) A pooled trust is not valid for the purpose of establishing or maintaining a person's eligibility for any category of public assistance other than medical assistance.

(4) No pooled trust shall be valid unless the department of health care policy and financing, or its designee, has reviewed the trust and determined that the trust conforms to the requirements of this section and any rules adopted by the medical services board pursuant to section 25.5-6-103, C.R.S.

**Source:** L. 2000: Entire part R&RE, p. 1814, § 1, effective January 1, 2001 (see § 15-17-103). L. 2006: (4) amended, p. 2003, § 54, effective July 1.

**Editor's note:** This section is similar to former § 15-14-409.9 as it existed prior to 2001.

**15-14-413. Who may be conservator - priorities - prohibition of dual roles.** (1) Except as otherwise provided in subsection (4) of this section, the court, in appointing



a conservator, shall consider persons otherwise qualified in the following order of priority:

(a) A conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;

(b) A person nominated as conservator by the respondent, including the respondent's specific nomination of a conservator made in a durable power of attorney or given priority to be a conservator in a designated beneficiary agreement made pursuant to article 22 of this title, if the respondent has attained twelve years of age;

(c) An agent appointed by the respondent to manage the respondent's property under a durable power of attorney;

(d) The spouse of the respondent;

(e) An adult child of the respondent;

(f) A parent of the respondent; and

(g) An adult with whom the respondent has resided for more than six months immediately before the filing of the petition.

(2) A respondent's nomination or appointment of a conservator shall create priority for the nominee or appointee only if, at the time of nomination or appointment, the respondent had sufficient capacity to express a preference.

(3) A person having priority under paragraph (a), (d), (e), or (f) of subsection (1) of this section may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.

(4) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, for good cause, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(5) An owner, operator, or employee of a long-term care provider from which the respondent is receiving care may not be appointed as conservator unless related to the respondent by blood, marriage, or adoption.

(6) (a) Unless the court makes specific findings for good cause shown or the person is a family caregiver as defined in section 27-10.5-102 (15.5), C.R.S., the same professional may not act as an incapacitated person's or a protected person's:

(I) Guardian and conservator; or

(II) Guardian and direct service provider; or

(III) Conservator and direct service provider.

(b) In addition, a guardian or conservator may not employ the same person to act as both care manager and direct service provider for the incapacitated person or protected person unless the person is a family caregiver as defined in section 27-10.5-102 (15.5), C.R.S.

**Source:** **L. 2000:** Entire part R&RE, p. 1815, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 445, § 12, effective July 1. **L. 2010:** (1)(b) amended, (SB 10-199), ch. 374, p. 1753, § 19, effective July 1. **L. 2011:** (6) amended, (SB 11-083), ch. 101, p. 308, § 16, effective August 10.

**Editor's note:** (1) This section is similar to former § 15-14-410 as it existed prior to 2001.

(2) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (1)(b):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

## COMMENT

This section gives top priority for appointment to existing conservators appointed elsewhere, to the respondent's nominee for the position, and to the respondent's agent, in that order. Existing conservators are granted a first priority for two reasons. First, many of these cases will involve transfers of a conservatorship from another state. To assure a smooth transition, the currently appointed conservator appointed in this state or another should have the right to the appointment at the new location. Second, many cases may involve situations where a conservatorship appointment is sought despite the appointment in another place. Granting the existing conservator priority will deter such forum shopping. Should the existing conservator be inappropriate for some reason, subsection (c) permits the court to skip over the existing conservator and appoint someone with lower priority or even no priority.

A conservator or individual nominated by the respondent or the agent named in the respondent's durable power of attorney has priority for appointment over the respondent's relatives. The nomination may include anyone nominated orally at the hearing, if the respondent has sufficient capacity at the time to express a preference. The nomination may also be made by separate document. While it is generally good practice for an individual to nominate as conservator the agent named in a durable power of attorney, the section grants such an agent a preference in the absence of a specific nomination. The agent is granted preference on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a conservatorship to thwart the agent's authority. To assure that the agent will be in a position to assert his priority, Section 5-404(b) requires that the agent receive notice of the proceeding. Also, until the court has acted to approve the revocation of that authority, Section 5-411(d) provides that the authority of an agent takes precedence over that of the conservator.

Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent. Note there is no require-

ment that the respondent have resided with the other person for more than six months *immediately prior* to the filing of the petition, just that the requisite residency have occurred at some point in time before the petition is filed. Courts should use a reasonableness standard in applying this subsection so that priority is given to someone with whom the respondent has had a close, enduring relationship. For factors to consider in making this determination, *see* the detailed comment to Section 5-304.

While this section substantially overlaps with Section 5-310, the comparable provision on selection of guardians, there are some differences. For example, Section 5-310 denies a priority to an emergency or temporary guardian, but this section does not expressly deny a priority for appointment to an emergency or temporary conservator appointed in another state. But the failure in subsection (a)(1) to expressly exclude these categories of conservator does not mean that they enjoy a priority for appointment. Unlike the case with guardians, emergency or temporary conservators are not included within the definition of "conservator" found in Section 5-102(1).

Subsection (d) prohibits anyone affiliated with a long-term care facility at which the respondent is receiving care from being appointed as conservator absent a blood, marital or adoptive arrangement. Strict application of this subsection is crucial to avoid a conflict of interest and to protect the protected person from potential financial exploitation. Each state enacting Parts 1-4 of this article needs to insert the particular term or terms used in the state for facilities considered to be long-term care institutions.

*National Probate Court Standards*, Standard 3.4.11 "Qualifications and Appointments of Conservators" (1993), recognizes that the court should appoint as conservator one who is both willing and suitable to manage the respondent's finances and property, based on the nature of the respondent's estate and the respondent's incapacity. The standard provides a preference in appointment to one known by, related to, or requested by the respondent.

This section is based on UGPPA (1982) Section 2-309 (UPC Section 5-409 (1982)).

## ANNOTATION

**Law reviews.** For article, "Determination of Heirship by Special Proceedings and Temporary Conservatorship", *see* 14 Colo. Law. 1781 (1985). For article, "Divorce Considerations Relevant to an Estate Planning Practice", *see* 29 Colo. Law. 53 (February 2000).

**In the initial selection of a conservator the wishes of the ward should be given consideration**, premised upon the mental ability of the ward to exercise a "sensible opinion" on the matter. The instant record demonstrates that the ward is unable to exercise such a sensible opin-



ion as to who should serve as the conservator of his estate. No authority requires the probate court to substitute conservators because the ward prefers a different conservator. In re Estate

of Alencoy v. Wysowatcky, 170 Colo. 385, 461 P.2d 210 (1969) (decided under repealed § 153-9-1, C.R.S. 1963).

**15-14-414. Petition for order subsequent to appointment.** (1) A protected person or a person interested in the welfare of a protected person may file a petition in the appointing court for an order:

- (a) Requiring bond or collateral or additional bond or collateral, or reducing bond or collateral;
- (b) Requiring an accounting for the administration of the protected person's estate;
- (c) Directing distribution;
- (d) Removing the conservator pursuant to section 15-10-503 and appointing a special or successor conservator;
- (e) Modifying the type of appointment or powers granted to the conservator if the extent of protection or management previously granted is currently excessive or insufficient or the protected person's ability to manage the estate and business affairs has so changed as to warrant the action; or
- (f) Granting other appropriate relief.

(2) A conservator may petition the appointing court for instructions concerning fiduciary responsibility.

(3) Upon notice and hearing the petition, the court may give appropriate instructions and make any appropriate order.

(4) At the conclusion of the hearings authorized by this section, the court may review the motions and petitions filed by a party under this section to determine if they were substantially warranted and brought in good faith. If, after the hearing, the court determines that the motions and petitions filed under this section were not substantially warranted or were brought in bad faith, the court may award fees and costs against the movant or petitioner including, but not limited to, the attorney fees and costs incurred by the conservatorship, or the affected parties, in responding to the motions and petitions.

**Source:** L. 2000: Entire part R&RE, p. 1816, § 1, effective January 1, 2001 (see § 15-17-103). L. 2008: (1)(d) amended, p. 485, § 12, effective July 1.

**Editor's note:** This section is similar to former § 15-14-416 as it existed prior to 2001.

#### ANNOTATION

**An evidentiary hearing** is necessary to consider the factual circumstances to determine whether a petitioner is a person interested in the welfare of the incapacitated person. In re Estate of Edwards, 794 P.2d 1092 (Colo. App. 1990) (decided prior to 2000 repeal and reenactment).

**Award of attorney fees under subsection (4) upheld.** "Bad faith" involves conduct that is

arbitrary, vexatious, abusive, stubbornly litigious, aimed at unwarranted delay, or disrespectful of trust and accuracy. Similarly, a motion or petition is "not substantially warranted" if it is not supported by any rational argument or credible evidence. In re Estate of Becker, 68 P.3d 567 (Colo. App. 2003).

**15-14-415. Bond.** Unless the court makes specific findings as to the reasons a bond is not required in the present case, the court shall require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservatorship according to law, with sureties as it may specify. In the alternative, the court may impose restrictions upon the conservator's access to, or transfer of, the assets of the conservatorship estate. Unless otherwise directed by the court, the cost of the bond shall be charged to the protected person's estate and the bond must be in the amount of the aggregate capital value of the property of the estate in the conservator's control, plus one year's estimated income, and minus the value of assets deposited under arrangements requiring an order of the court for their removal and the value of any real property that the fiduciary, by express limitation,

lacks power to sell or convey without court authorization. The court, in place of sureties on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

**Source:** L. 2000: Entire part R&RE, p. 1817, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-411 as it existed prior to 2001.

**15-14-416. Terms and requirements of bond.** (1) The following rules apply to any bond required:

(a) Except as otherwise provided by the terms of the bond, sureties and the conservator are jointly and severally liable.

(b) By executing the bond of a conservator, a surety submits to the jurisdiction of the court that issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator in which the surety is named as a party. Notice of any proceeding must be sent or delivered to the surety at the address shown in the court records at the place where the bond is filed and to any other address then known to the petitioner.

(c) On petition of a successor conservator or any interested person, a proceeding may be brought against a surety for breach of the obligation of the bond of the conservator.

(d) The bond of the conservator may be proceeded against until liability under the bond is exhausted.

(e) Unless otherwise directed by the court, the cost of the bond shall be paid from the protected person's estate.

(2) A proceeding may not be brought against a surety on any matter as to which an action or proceeding against the primary obligor is barred.

(3) If there is a request for the waiver or reduction of a surety upon a bond, the court may require the conservator to supply the court with a credit report, a statement of the conservator's assets, liabilities, income, and expenses, and a statement about any interests the conservator may have in or liability to the conservatorship estate, or any other information the court may wish to consider.

**Source:** L. 2000: Entire part R&RE, p. 1817, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-412 as it existed prior to 2001.

**15-14-417. Compensation, fees, costs, and expenses of administration - expenses. (Repealed)**

**Source:** L. 2000: Entire part R&RE, p. 1818, § 1, effective January 1, 2001 (see § 15-17-103). L. 2001: (1) amended, p. 889, § 9, effective June 1. L. 2011: Entire section repealed, (SB 11-083), ch. 101, p. 317, § 27, effective August 10.

**Editor's note:** This section was similar to former § 15-14-414 as it existed prior to 2001.

#### ANNOTATION

Because this section does not specify the amount of compensation to be granted a conservator, the determination of such amount is within the sound discretion of the probate court. Such determination will not be overturned except upon a showing of abuse of discretion. *Estate of Binford v. Gibson*, 839 P.2d 508 (Colo. App. 1992) (decided prior to 2000 repeal and reenactment).

Section impliedly supports a "reasonably and in good faith" standard that conforms to the common law. A conservator can reasonably and in good faith oppose a protected person's motion to terminate the conservatorship. In re Estate of Keenan, 252 P.3d 539 (Colo. App. 2011) (decided prior to 2011 repeal).

Section implicitly authorizes actions that trigger payment by specifying when payment



to the conservator from the protected person's estate is appropriate. In re Estate of Keenan, 252 P.3d 539 (Colo. App. 2011) (decided prior to 2011 repeal).

**15-14-418. General duties of conservator - financial plan.** (1) A conservator, in relation to powers conferred by this part 4 or implicit in the title acquired by virtue of the proceeding, is a fiduciary and shall observe the standards of care applicable to a trustee.

(2) A conservator shall take into account the limitations of the protected person, and to the extent possible, as directed by the order of appointment or the financial plan, encourage the person to participate in decisions, act in the person's own behalf, and develop or regain the ability to manage the person's estate and business affairs.

(3) Within a time set by the court, but no later than ninety days after appointment, a conservator shall file for approval with the appointing court a financial plan for protecting, managing, expending, and distributing the income and assets of the protected person's estate. The financial plan shall be based upon a comparison of the projected income and expenses of the protected person and shall set forth a plan to address the needs of the person and how the assets and income of the protected person shall be managed to meet those needs. The financial plan must be based on the actual needs of the person and take into consideration the best interest of the person. The conservator shall include in the financial plan steps to the extent possible to develop or restore the person's ability to manage the person's property, an estimate of the duration of the conservatorship, and projections of expenses and resources.

(4) In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the person known to the conservator. The conservator may examine the will and any other donative, nominative, or other appointive instrument of the person.

(5) A conservator shall file an amended financial plan whenever there is a change in circumstances that requires a substantial deviation from the existing financial plan.

**Source:** L. 2000: Entire part R&RE, p. 1819, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-417 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Effect of Appointment of Conservator on Joint Tenancy Title", see 12 Colo. Law. 1237 (1983). For article, "Suggested Modifications to the Durable Power of Attorney Form", see 17 Colo. Law. 2135 (1988).

**15-14-419. Inventory.** (1) Within a time set by the court, but no later than ninety days after appointment, a conservator shall prepare and file with the appointing court a detailed inventory of the estate subject to the conservatorship, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(2) If any property not included in the original inventory comes to the knowledge of a conservator or if the conservator learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he or she shall prepare an amended inventory and file it with the court and provide copies to interested parties as directed by prior court orders.

**Source:** L. 2000: Entire part R&RE, p. 1820, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-418 as it existed prior to 2001.

**15-14-420. Reports - appointment of monitor - monitoring - records - court access to records.** (1) A conservator shall report to the court about the administration of the

estate annually unless the court otherwise directs. Upon filing a petition or motion and after notice, a conservator shall be entitled to a hearing to settle all matters covered in an intermediate or final report. An order, after notice and hearing, allowing an intermediate report of a conservator adjudicates all of the conservator's, his or her other counsel's, and his or her other agent's liabilities concerning all matters adequately disclosed in the report. An order, after notice and hearing, allowing a final report adjudicates all previously unsettled liabilities of the conservator, his or her counsel, and that of his or her agents relating to the conservatorship, the protected person, or the protected person's successors.

(2) Unless the court orders otherwise, a report must:

(a) Contain a list of the assets of the estate under the conservator's control and a list of the receipts, disbursements, and distributions during the period for which the report is made;

(b) Reflect the services provided to the protected person; and

(c) State any recommended changes in the plan for the conservatorship as well as a recommendation as to the continued need for conservatorship and any recommended changes in the scope of the conservatorship.

(3) The court may appoint a visitor or other suitable person to review a report or plan, interview the protected person or conservator, and make any other investigation the court directs. In connection with a report, the court may order a conservator to submit the assets of the estate to an appropriate examination to be made in a manner the court directs.

(4) The court shall establish a system for monitoring conservatorships, including the filing and review of conservators' reports and plans.

(5) A conservator shall keep records of the administration of the estate and make them available for examination on reasonable request of an interested person within thirty days unless the court otherwise directs.

(6) (a) Whenever a conservator fails to file a report or fails to respond to an order of the court to show cause why the conservator should not be held in contempt of court, the clerk of the court or his or her designee may research the whereabouts and contact information of the conservator and the protected person. To facilitate this research, the clerk of the court or his or her designee shall have access to data maintained by other state agencies, including but not limited to vital statistics information maintained by the department of public health and environment, wage and employment data maintained by the department of labor and employment, lists of licensed drivers and income tax data maintained by the department of revenue and provided pursuant to section 13-71-107, C.R.S., and voter registration information obtained annually by the state court administrator pursuant to section 13-71-107, C.R.S. The court may access the data only to obtain contact information for the conservator or the ward. Notwithstanding any provision of law to the contrary, the judicial department and the other state agencies listed in this paragraph (a) may enter into agreements for the sharing of this data. The judicial department and the courts shall not access data maintained pursuant to the "Address Confidentiality Program Act", part 21 of article 30 of title 24, C.R.S.

(b) The court shall preserve the confidentiality of the data obtained from the other state agencies and use the data only for the purposes set forth in this subsection (6). Notwithstanding the provisions of article 72 of title 24, C.R.S., documents and information obtained by the court pursuant to this subsection (6) are not public records and shall be open to public inspection only upon an order of the court based on a finding of good cause, except to the extent they would otherwise be open to inspection from the providing state agency.

(c) For purposes of this subsection (6), "contact information" means name, residential address, business address, date of birth, date of death, phone number, e-mail address, or other identifying information as directed by the court.

**Source:** L. 2000: Entire part R&RE, p. 1820, § 1, effective January 1, 2001 (see § 15-17-103). L. 2011: IP(2) and (5) amended, (SB 11-083), ch. 101, pp. 309, 306, §§ 17, 12, effective August 10. L. 2012: Entire section amended, (HB 12-1074), ch. 46, p. 167, § 2, effective March 22.



## ANNOTATION

**Legitimate expenses of conservator.** Where the conservator attends to his ward's property in good faith and preserves it, expenses for that purpose are legitimate and constitute a proper

accounting for such of ward's money as came into the conservator's hands. *Hunt v. Hunt*, 83 Colo. 282, 264 P. 662 (1928)(case decided prior to the earliest source of this section).

**15-14-421. Title by appointment.** (1) Except as limited in the appointing order, the appointment of a conservator vests title in the conservator as trustee to all property of the protected person, or to the part thereof specified in the order, held at the time of appointment or thereafter acquired, including title to any property held for the protected person by custodians or attorneys-in-fact. An order vesting title in the conservator to only a part of the property of the protected person creates a conservatorship limited to assets specified in the order. Notwithstanding the language vesting title in the conservator in this section, this vesting of title shall not be construed to sever any joint tenancies.

(2) Letters of conservatorship are evidence of vesting title of the protected person's assets in the conservator. An order terminating a conservatorship transfers title to assets remaining subject to the conservatorship, including any described in the order, to the formerly protected person or the person's successors.

(3) Subject to the requirements of other statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give notice of title as between the conservator and the protected person.

(4) Neither the appointment of a conservator nor the establishment of a trust in accordance with sections 15-14-412.5 to 15-14-412.9 is a transfer or an alienation within the meaning of the general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument imposing restrictions upon or penalties for the transfer or alienation by the protected person of his or her rights or interest, but this section does not restrict the ability of a person to make specific provisions by contract or dispositive instrument relating to a conservator.

(5) Except as limited in the appointing order, a conservator has the authority to continue, modify, or revoke any financial power of attorney previously created by the protected person.

(6) (a) Upon notice of the appointment of a conservator, all agents acting under a previously created power of attorney by the protected person:

(I) Shall take no further actions without the direct written authorization of the conservator;

(II) Shall promptly report to the conservator as to any action taken under the power of attorney; and

(III) Shall promptly account to the conservator for all actions taken under the power of attorney.

(b) Nothing in this section shall be construed to affect previously created medical decision-making authority. Any agent violating this section shall be liable to the protected person's estate for all costs incurred in attempting to obtain compliance, including but not limited to reasonable conservator and attorney fees and costs.

**Source:** L. 2000: Entire part R&RE, p. 1821, § 1, effective January 1, 2001 (see § 15-17-103). L. 2009: IP(6)(a) and (6)(a)(I) amended, (SB 09-292), ch. 369, p. 1947, § 26, effective August 5.

**Editor's note:** This section is similar to former § 15-14-420 as it existed prior to 2001.

## ANNOTATION

**Law reviews.** For article, "Effect of Appointment of Conservator on Joint Tenancy Title", see 12 Colo. Law. 1237 (1983).

**Even if appointment of a conservator prevents a protected person from creating an inter vivos trust, it does not prevent a pro-**

**tected person who has testamentary capacity from creating a testamentary trust.** In re Estate of Gallavan, 89 P.3d 521 (Colo. App. 2004).

**15-14-422. Protected person's interest inalienable.** (1) Except as otherwise provided in subsections (3) and (4) of this section, the interest of a protected person in property vested in a conservator is not transferable or assignable by the protected person. An attempted transfer or assignment by the protected person, although ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages that, subject to presentation and allowance, may be satisfied as provided in section 15-14-429.

(2) Property vested in a conservator by appointment and the interest of the protected person in that property are not subject to levy, garnishment, or similar process for claims against the protected person unless allowed under section 15-14-429.

(3) A person without knowledge of the conservatorship who in good faith and for security or substantially equivalent value receives delivery from a protected person of tangible personal property of a type normally transferred by delivery of possession, is protected as if the protected person or transferee had valid title.

(4) A third party who deals with the protected person with respect to property vested in a conservator is entitled to any protection provided in other law.

**Source: L. 2000:** Entire part R&RE, p. 1822, § 1, effective January 1, 2001 (see § 15-17-103).

#### ANNOTATION

**Even if appointment of a conservator prevents a protected person from creating an inter vivos trust, it does not prevent a pro-**

**tected person who has testamentary capacity from creating a testamentary trust.** In re Estate of Gallavan, 89 P.3d 521 (Colo. App. 2004).

**15-14-423. Sale, encumbrance, or other transaction involving conflict of interest.** Any transaction involving the conservatorship estate that is affected by a substantial conflict between the conservator's fiduciary and personal interests is voidable unless the transaction is expressly authorized by the court after notice to interested persons. A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, the spouse, descendant, agent, or lawyer of a conservator, or a corporation or other enterprise in which the conservator has a substantial beneficial interest.

**Source: L. 2000:** Entire part R&RE, p. 1823, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-422 as it existed prior to 2001.

**15-14-424. Protection of person dealing with conservator.** (1) A person who assists or deals with a conservator in good faith and for value in any transaction other than one requiring a court order under section 15-14-410 or 15-14-411 is protected as though the conservator properly exercised the power. That a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, but restrictions on powers of conservators that are endorsed on letters as provided in section 15-14-110 are effective as to third persons. A person who pays or delivers assets to a conservator is not responsible for their proper application.

(2) Protection provided by this section extends to any procedural irregularity or jurisdictional defect that occurred in proceedings leading to the issuance of letters and is not a substitute for protection provided to persons assisting or dealing with a conservator by comparable provisions in other law relating to commercial transactions or to simplifying transfers of securities by fiduciaries.



(3) Any recorded instrument evidencing a transaction described in this section on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that such transaction was made for value.

**Source:** L. 2000: Entire part R&RE, p. 1824, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-423 as it existed prior to 2001.

#### ANNOTATION

**Third parties knowingly dealing with a conservator** are not required to make inquiry into the existence or propriety of the conservator's power, except that restrictions on powers of conservators which are endorsed on letters

provided in this section are effective as to third persons. In re Conservatorship of Roth, 804 P.2d 265 (Colo. App. 1990) (decided prior to 2000 repeal and reenactment).

**15-14-425. Powers of conservator in administration.** (1) Except as otherwise qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator has all of the powers granted in this section and any additional powers granted by law to a trustee in this state.

(2) A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may:

(a) Collect, hold, and retain assets of the estate, including assets in which the conservator has a personal interest and real property in another state, until the conservator considers that disposition of an asset should be made;

(b) Receive additions to the estate;

(c) Continue or participate in the operation of any business or other enterprise;

(d) Acquire an undivided interest in an asset of the estate in which the conservator, in any fiduciary capacity, holds an undivided interest;

(e) Invest assets of the estate as though the conservator were a trustee;

(f) Deposit money of the estate in a financial institution, including one operated by the conservator;

(g) Acquire or dispose of an asset of the estate, including real property in another state, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon an asset of the estate;

(h) Make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, and raze existing or erect new party walls or buildings;

(i) Subdivide, develop, or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation or exchange or partition by giving or receiving considerations, and dedicate easements to public use without consideration;

(j) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the conservatorship;

(k) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(l) Grant an option involving disposition of an asset of the estate and take an option for the acquisition of any asset;

(m) Vote a security, in person or by general or limited proxy;

(n) Pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(o) Sell or exercise stock subscription or conversion rights;

(p) Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(q) Hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;

(r) Insure the assets of the estate against damage or loss and the conservator against liability with respect to a third person;

(s) Borrow money, with or without security, to be repaid from the estate or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made;

(t) Pay or contest any claim, settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise, and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible;

(u) Pay taxes, assessments, compensation of the conservator and any guardian, and other expenses incurred in the collection, care, administration, and protection of the estate;

(v) Allocate items of income or expense to income or principal of the estate, as provided by other law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion of minerals or other natural resources;

(w) Pay any sum distributable to a protected person or individual who is in fact dependent on the protected person by paying the sum to the distributee or by paying the sum for the use of the distributee:

(I) To the guardian of the distributee;

(II) To a distributee's custodian under the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S., or custodial trustee under the "Colorado Uniform Custodial Trust Act", article 1.5 of this title; or

(III) If there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;

(x) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of assets of the estate and of the conservator in the performance of fiduciary duties; and

(y) Execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.

(3) Except as otherwise qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator may exercise any of the powers enumerated in the "Colorado Fiduciaries' Powers Act", part 8 of article 1 of this title.

(4) The court may confer on a conservator at the time of appointment or later, in addition to the powers conferred by sections 15-14-425, 15-14-426, and 15-14-427, any power that the court itself could exercise under section 15-14-410. The court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by sections 15-14-425, 15-14-426, and 15-14-427, or previously conferred by the court, and may at any time relieve the conservator of any limitation. If the court limits any power conferred on the conservator by section 15-14-425, 15-14-426, or 15-14-427 or specifies, as provided in section 15-14-421 (1) that title to some but not all assets of the protected person vest in the conservator, the limitation shall be endorsed upon the conservator's letters of appointment.

(5) In investing the estate, and in selecting assets of the estate for distribution under section 15-14-427, in utilizing powers of revocation or withdrawal available for the support of the protected person and exercisable by the conservator or the court, and in exercising any other powers vested in them, the conservator and the court should take into account any known estate plan of the protected person, including his or her will, any revocable trust of which he or she is settlor, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his or her death to another or others which he or she may have originated. The conservator may examine the will of the protected person.

**Source:** L. 2000: Entire part R&RE, p. 1823, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-424 as it existed prior to 2001.



## ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**One of the prime purposes of an action for annulment is the protection of the property of the ward.** *Cox v. Armstrong*, 122 Colo. 227, 221 P.2d 371 (1950); *Young v. Brofman*, 139 Colo. 296, 338 P.2d 286 (1959).

**An annulment suit may be instituted by a conservator on behalf of a ward.** *Young v. Brofman*, 139 Colo. 296, 338 P.2d 286 (1959).

**A nonlawyer conservator or guardian in this state is a statutory legal representative only** and is therefore prohibited from practicing law and serving as legal counsel in court. The powers granted to conservators under this section and to guardians under §§ 15-14-315 and 15-14-315.5 do not establish an exception to § 12-5-101 regarding the practice of law. In re *Kanefsky*, 260 P.3d 327 (Colo. App. 2010).

**Applied** in *Vallentine v. Taylor Inv. Co.*, 305 F. Supp. 1104 (D. Colo. 1969).

### 15-14-425.5. Authority to petition for dissolution of marriage or legal separation.

(1) The conservator may petition the court for authority to commence and maintain an action for dissolution of marriage or legal separation on behalf of the protected person. The court may grant such authority only if satisfied, after notice and hearing, that:

(a) It is in the best interests of the protected person based on evidence of abandonment, abuse, exploitation, or other compelling circumstances, and the protected person either is incapable of consenting; or

(b) The protected person has consented to the proposed dissolution of marriage or legal separation.

(2) Nothing in this section shall be construed as modifying the statutory grounds for dissolution of marriage and legal separation as set forth in section 14-10-106, C.R.S.

**Source: L. 2000:** Entire part R&RE, p. 1826, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-425.5 as it existed prior to 2001.

## ANNOTATION

**A nonlawyer conservator or guardian in Colorado is a statutory legal representative only** and is therefore prohibited from practicing law and serving as legal counsel in court. The powers granted to conservators under § 15-14-

425 and to guardians under §§ 15-14-315 and 15-14-315.5 do not establish an exception to § 12-5-101 regarding the practice of law. In re *Kanefsky*, 260 P.3d 327 (Colo. App. 2010).

**15-14-426. Delegation.** (1) A conservator may not delegate to an agent or another conservator the entire administration of the estate, but a conservator may otherwise delegate the performance of functions that a prudent trustee of comparable skills may delegate under similar circumstances.

(2) The conservator shall exercise reasonable care, skill, and caution in:

(a) Selecting an agent;

(b) Establishing the scope and terms of a delegation, consistent with the purposes and terms of the conservatorship;

(c) Periodically reviewing an agent's overall performance and compliance with the terms of the delegation; and

(d) Redressing an action or decision of an agent that would constitute a breach of trust if performed by the conservator.

(3) A conservator who complies with subsections (1) and (2) of this section is not liable to the protected person or to the estate or to the protected person's successors for the decisions or actions of the agent to whom a function was delegated.

(4) In performing a delegated function, an agent shall exercise reasonable care to comply with the terms of the delegation.

(5) By accepting a delegation from a conservator subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state.

**Source:** L. 2000: Entire part R&RE, p. 1827, § 1, effective January 1, 2001 (see § 15-17-103).

**15-14-427. Principles of distribution by conservator.** (1) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment or contrary to the financial plan filed pursuant to section 15-14-418, a conservator may expend or distribute income or principal of the estate of the protected person without further court authorization or confirmation for the support, care, education, health, and welfare of the protected person and individuals who are in fact dependent on the protected person, including the payment of child support or spousal maintenance, in accordance with the following rules:

(a) A conservator shall consider recommendations relating to the appropriate standard of support, care, education, health, and welfare for the protected person or an individual who is in fact dependent on the protected person made by a guardian, if any, and, if the protected person is a minor, the conservator shall consider recommendations made by a parent.

(b) A conservator may not be surcharged for money paid to persons furnishing support, care, education, or benefit to a protected person, or an individual who is in fact dependent on the protected person, in accordance with the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian derives personal financial benefit therefrom, including relief from any personal duty of support, or the recommendations are not in the best interest of the protected person.

(c) In making distributions under this paragraph (c), the conservator shall consider:

(I) The size of the estate, the estimated duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully self-sufficient and able to manage his or her business affairs and the estate;

(II) The accustomed standard of living of the protected person and individuals who are in fact dependent on the protected person; and

(III) Other money or sources used for the support of the protected person.

(d) Money expended under this paragraph (d) may be paid by the conservator to any person, including the protected person, as reimbursement for expenditures that the conservator might have made, or in advance for services to be rendered to the protected person if it is reasonable to expect the services will be performed and advance payments are customary or reasonably necessary under the circumstances.

(2) If an estate is ample to provide for the distributions authorized by subsection (1) of this section, a conservator for a protected person other than a minor may make gifts that the protected person might have been expected to make, in amounts that do not exceed in the aggregate for any calendar year twenty percent of the income of the estate in that year.

**Source:** L. 2000: Entire part R&RE, p. 1827, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-425 as it existed prior to 2001.

#### ANNOTATION

**Law reviews.** For article, "Colorado Guardianship and Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article,

"Suggested Modifications to the Durable Power of Attorney Form", see 17 Colo. Law. 2135 (1988).

**15-14-428. Death of protected person.** (1) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the protected person that is in the conservator's possession or control, inform the personal representative or devisees named in the will of the delivery, and retain the estate for delivery to the personal representative of the decedent or to another person entitled to it.

(2) After the death of the protected person, the conservator shall make no expenditures of conservatorship funds except with court authorization other than necessary to preserve



the assets of the estate. However, the conservator may release funds for the funeral, cremation, or burial of the deceased protected person if necessary to do so under the circumstances.

(3) When a protected person dies, all fees, costs, and expenses of administration of the conservatorship, including any unpaid conservator fees and costs and those of his or her counsel, may be submitted to the court for approval in conjunction with the termination of the conservatorship. Thereafter, all court-approved fees, costs, and expenses of administration arising from the conservatorship shall be paid as court-approved claims for costs and expenses of administration in the decedent's estate. In the event that there are insufficient moneys to pay all claims in the decedent's estate in full, the fees, costs, and expenses of administration arising from the conservatorship shall retain their classification as "costs and expenses of administration" in the decedent's estate and shall be paid pursuant to section 15-12-805.

**Source:** L. 2000: Entire part R&RE, p. 1828, § 1, effective January 1, 2001 (see § 15-17-103). L. 2011: (3) added, (SB 11-083), ch. 101, p. 309, § 18, effective August 10.

**15-14-429. Presentation and allowance of claims.** (1) A conservator may pay, or secure by encumbering assets of the estate, claims against the estate or against the protected person arising before or during the conservatorship upon their presentation and allowance in accordance with the priorities stated in subsection (4) of this section. A claimant may present a claim by:

(a) Delivering or mailing to the court-appointed conservator a written statement of the claim, indicating its basis, the name and address of the claimant, and the amount claimed; or

(b) Filing a written statement of the claim with the clerk of the court, in the form approved by the supreme court, and delivering or mailing a copy of the statement to the conservator.

(2) A claim is deemed presented on receipt of the written statement of claim by the conservator or the filing of the claim with the court, whichever first occurs. A presented claim is deemed allowed if it is not disallowed by written statement sent or delivered by the conservator to the claimant within sixty-three days after its presentation. The conservator before payment may change an allowance or deemed allowance to a disallowance in whole or in part, but not after allowance under a court order or judgment or an order directing payment of the claim. The presentation of a claim tolls the running of any statute of limitations relating to the claim until thirty-five days after its disallowance. If a claim is not yet due, the claim shall state the date when it will become due. If a claim is contingent or unliquidated, the claim shall state the nature of the uncertainty or the anticipated due date of the claim.

(3) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by a statute of limitations and, upon due proof, procure an order for its allowance, payment, or security by encumbering assets of the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party shall give to the conservator notice of any proceeding that could result in creating a claim against the estate.

(4) If it appears that the estate is likely to be exhausted before all existing claims are paid, the conservator shall distribute the estate in money or in kind in payment of claims in the following order:

- (a) Costs and expenses of administration;
- (b) Claims of the federal or state government having priority under other law;
- (c) Claims incurred by the conservator for support, care, education, health, and welfare previously provided to the protected person or individuals who are in fact dependent on the protected person;
- (d) Claims arising before the conservatorship; and
- (e) All other claims.

(5) Allowed claims within the same class shall be paid pro rata. Preference may not be given in the payment of a claim over any other claim of the same class, and a claim due and payable may not be preferred over a claim not due.

(6) If assets of the conservatorship are adequate to meet all existing claims, the court, acting in the best interest of the protected person, may order the conservator to grant a security interest in the conservatorship estate for the payment of any or all claims at a future date.

(7) Nothing in this section affects or prevents:

(a) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or

(b) To the limits of the insurance protection only, any proceeding to establish liability of the protected person for which he or she is protected by liability insurance.

(8) Unless otherwise provided in any judgment in another court entered against the protected person or the protected person's estate, an allowed claim bears interest at the legal rate for the period commencing sixty-three days after the time the claim was originally filed with the court or delivered to the conservator, unless based on a contract making a provision for interest, in which case, such claim bears interest in accordance with that contract's provisions.

(9) Each written statement of a claim shall include:

(a) A request or demand for payment from the protected person or the conservatorship estate; and

(b) Sufficient information to allow the conservator to investigate and respond to the claim, including its basis, the name and address of the claimant, and the amount claimed.

**Source:** L. 2000: Entire part R&RE, p. 1829, § 1, effective January 1, 2001 (see § 15-17-103). L. 2006: (1) and (2) amended and (9) added, p. 376, § 5, effective July 1. L. 2012: (2) and (8) amended, (SB 12-175), ch. 208, p. 840, § 53, effective July 1.

**Editor's note:** (1) This section is similar to former § 15-14-428 as it existed prior to 2001.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (2) and (8) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**15-14-430. Personal liability of conservator.** (1) Except as otherwise provided in the contract, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal in the contract the representative capacity and identify the estate.

(2) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate only if personally at fault.

(3) Claims based on contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(4) A question of liability between the estate and the conservator personally may be determined:

(a) In a proceeding pursuant to section 15-10-504;

(b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal; or

(c) In another appropriate proceeding or action.

(5) A conservator is not personally liable for any environmental condition on or injury resulting from any environmental condition on land solely by reason of an acquisition of title under section 15-14-421.



**Source:** L. 2000: Entire part R&RE, p. 1830, § 1, effective January 1, 2001 (see § 15-17-103). L. 2008: (4) amended, p. 485, § 13, effective July 1.

**Editor's note:** This section is similar to former § 15-14-429 as it existed prior to 2001.

**15-14-431. Termination of proceedings.** (1) A conservatorship terminates upon the death of the protected person or upon order of the court determining that a conservatorship is no longer necessary or needed to protect the assets of the protected person. Unless created for reasons other than that the protected person is a minor, a conservatorship created for a minor also terminates when the protected person attains the age of twenty-one years. Upon learning of the protected person's death, the conservator shall promptly give notice of death to the court and all other persons designated to receive notice of subsequent actions in the order appointing the conservator.

(2) Upon receiving an order terminating the conservatorship or upon receiving notice of the death of a protected person, the conservator shall conclude the administration of the estate by filing a final report and a petition for discharge within sixty-three days after distribution unless otherwise directed by the court.

(3) On petition of a protected person, a conservator, or another person interested in a protected person's welfare, the court may terminate the conservatorship if the protected person no longer meets the statutory requirements for the creation of a conservatorship. Termination of the conservatorship without a decree of discharge does not affect a conservator's liability for previous acts or the obligation to account for funds and assets of the protected person.

(4) Except as otherwise ordered by the court for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the protected person that apply to a petition for conservatorship. The court shall order termination unless it is proved by clear and convincing evidence that continuation of the conservatorship is still statutorily warranted and is still in the best interest of the protected person.

(4.5) The following provisions apply in a termination proceeding that is initiated by the protected person:

(a) The conservator may file a written report to the court regarding any matter relevant to the termination proceeding, and the conservator may file a motion for instructions concerning any relevant matter including, but not limited to, the following:

(I) Whether an attorney, guardian ad litem, or visitor should be appointed for the protected person;

(II) Whether any further investigation or professional evaluation of the protected person should be conducted, the scope of the investigation or professional evaluation, and when the investigation or professional evaluation should be completed; and

(III) Whether the conservator is to be involved in the termination proceedings, and if so, to what extent.

(b) If the conservator elects to file a written report or a motion for instructions, the conservator shall file such initial pleadings within twenty-one days after the petition to terminate has been filed. Any interested person shall then have fourteen days to file a response. If a response is filed, the conservator shall have seven days to file a reply. If a motion for instructions is filed by the conservator as his or her initial pleading, the court shall rule on that motion before the petition for termination of the conservatorship is set for hearing. Unless a hearing on the motion for instructions is requested by the court, the court may rule on the pleadings without a hearing after the time period for the filing of the last responsive pleading has expired. After the filing of the conservator's initial motion for instructions, the conservator may file subsequent motions for instruction as appropriate.

(c) Except for the actions authorized in paragraphs (a), (b), and (e) of this subsection (4.5) or as otherwise ordered by the court, the conservator may not take any action to oppose or interfere in the termination proceeding. The filing of the initial or subsequent motion for instructions by the conservator shall not, in and of itself, be deemed opposition or interference.

(d) Unless ordered by the court, the conservator shall have no duty to participate in the termination proceeding, and the conservator shall incur no liability for filing the report or motion for instruction or for failing to participate in the proceeding.

(e) Nothing in this subsection (4.5) shall prevent:

(I) The court, on its own motion and regardless of whether the conservator has filed a report or request for instructions, from ordering the conservator to take any action that the court deems appropriate, or from appointing an attorney, guardian ad litem, visitor, or professional evaluator;

(II) The court from ordering the conservator to appear at the termination proceeding and give testimony; or

(III) Any interested person from calling the conservator as a witness in the termination proceeding.

(f) Any individual who has been appointed as a conservator, is an interested person in his or her individual capacity, and wants to participate in the termination proceeding in his or her individual capacity and not in his or her fiduciary capacity may do so without restriction or limitation. The payment of any fees and costs to the individual that are related to his or her decision to participate in the termination proceeding shall be governed by section 15-10-602 (7) and not section 15-10-602 (1).

(5) Upon termination of a conservatorship and whether or not formally distributed by the conservator, title to assets of the estate passes to the formerly protected person, the former protected person's successors, or as ordered by the court. The order of termination must provide for the payment of all fees, costs, and expenses of administration and direct the conservator to file appropriate instruments to evidence the transfer of title or confirm the ordered distribution pursuant to the schedule of distribution prior to receiving the decree of discharge.

(6) The court shall enter a decree of discharge upon being fully satisfied that the conservator has met all conditions required by the court for the conservator's discharge.

**Source:** L. 2000: Entire part R&RE, p. 1831, § 1, effective January 1, 2001 (see § 15-17-103). L. 2011: (4.5) added, (SB 11-083), ch. 101, p. 309, § 19, effective August 10. L. 2012: (2) and (4.5)(b) amended, (SB 12-175), ch. 208, p. 841, § 54, effective July 1.

**Editor's note:** (1) This section is similar to former § 15-14-430 as it existed prior to 2001.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (2) and (4.5)(b) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**15-14-432. Payment of debt and delivery of property to foreign conservator without local proceeding.** (1) A person who is indebted to or has the possession of tangible or intangible property of a protected person may pay the debt or deliver the property to a foreign conservator, guardian of the estate, or other court-appointed fiduciary of the state of residence of the protected person. Payment or delivery may be made only upon proof of appointment and presentation of an affidavit made by or on behalf of the fiduciary stating that a protective proceeding relating to the protected person is not pending in this state and the foreign fiduciary is entitled to payment or to receive delivery.

(2) Payment or delivery in accordance with subsection (1) of this section discharges the debtor or possessor, absent knowledge of any protective proceeding pending in this state.

**Source:** L. 2000: Entire part R&RE, p. 1832, § 1, effective January 1, 2001 (see § 15-17-103).

**Editor's note:** This section is similar to former § 15-14-431 as it existed prior to 2001.

**15-14-433. Foreign conservator - proof of authority - bond - powers.** If a conservator has not been appointed in this state and a petition in a protective proceeding is not



pending in this state, a conservator appointed in the state in which the protected person resides may file in a district or probate court of this state, in a county in which property belonging to the protected person is located, authenticated copies of the conservator's appointment documents and of any bond. Thereafter, the conservator may exercise all powers of a conservator appointed in this state as to property in this state and may maintain actions and proceedings in this state subject to any conditions otherwise imposed upon nonresident parties.

**Source:** L. 2000: Entire part R&RE, p. 1832, § 1, effective January 1, 2001 (see § 15-17-103). L. 2006: Entire section amended, p. 392, § 26, effective July 1.

**Editor's note:** This section is similar to former § 15-14-432 as it existed prior to 2001.

## PART 5

### POWERS OF ATTORNEY

**Cross references:** For provisions relating to anatomical gifts and their effect on advance health-care directives, see part 1 of article 34 of title 12; for provisions relating to a medical durable power of attorney, see § 15-14-506; for provisions relating to declarations concerning medical treatment, see article 18 of this title; for provisions relating to proxy decision-makers for medical treatment decisions, see article 18.5 of this title; for provisions relating to cardiopulmonary resuscitation directives, see article 18.6 of this title.

**15-14-500.3. Legislative declaration.** (1) The general assembly hereby recognizes that each adult individual has the right as a principal to appoint an agent to deal with property or make personal decisions for the individual, but that this right cannot be fully effective unless the principal may empower the agent to act throughout the principal's lifetime, including during periods of disability, and be sure that any third party will honor the agent's authority at all times.

(2) The general assembly hereby finds, determines, and declares that:

(a) In light of modern financial needs, the statutory recognition of the right of delegation in Colorado must be restated, among other things, to expand its application and the permissible scope of the agent's authority, to clarify the power of the individual to authorize an agent to make financial decisions for the individual, and to better protect any third party who relies in good faith on the agent so that reliance will be assured.

(b) The public interest requires a standard form for certification of agency that any third party may use to assure that an agent's authority under an agency has not been altered or terminated.

(3) The general assembly hereby finds, determines, and declares that nothing in this part 5 or part 6 or 7 of this article shall be deemed to authorize or encourage any course of action that violates the criminal laws of this state or the United States. Similarly, nothing in this part 5 or part 6 or 7 of this article shall be deemed to authorize or encourage any violation of any civil right expressed in the constitution, statutes, case law, or administrative rulings of this state or the United States or any course of action that violates the public policy expressed in the constitution, statutes, case law, or administrative rulings of this state or the United States.

(4) The general assembly hereby recognizes each adult's constitutional right to accept or reject medical treatment, artificial nourishment, and hydration and the right to create advanced medical directives and to appoint an agent to make health care decisions under a medical durable power of attorney. The "Colorado Patient Autonomy Act", sections 15-14-503 to 15-14-509, is intended to assist the exercise of such rights.

(5) In the event of a conflict between the provisions of part 7 of this article and the "Colorado Patient Autonomy Act" or between the provisions of powers of attorney prepared pursuant to part 7 of this article and the "Colorado Patient Autonomy Act", the provisions of the "Colorado Patient Autonomy Act" or provisions of powers of attorney prepared pursuant to the "Colorado Patient Autonomy Act" shall prevail.

(6) Parts 6 and 7 of this article do not abridge the right of any person to enter into a verbal principal and agent relationship. A brokerage relationship between a real estate broker and a seller, landlord, buyer, or tenant in a real estate transaction established pursuant to part 8 of article 61 of title 12, C.R.S., shall be governed by the provisions of part 8 of article 61 of title 12, C.R.S., and not by parts 6 and 7 of this article.

(7) Parts 6 and 7 of this article do not create any power or right in an agent that the agent's principal does not hold or possess and does not abridge contracts existing between principals and third parties.

**Source: L. 2009:** Entire section added with relocations, (HB 09-1198), ch. 106, p. 420, § 5, effective January 1, 2010.

**Editor's note:** This section is similar to former § 15-14-601 as it existed prior to 2010.

**15-14-500.5. Definitions - excluded powers.** (1) (a) For purposes of sections 15-14-501 and 15-14-502, "power of attorney" means a power to make health care decisions granted by an individual.

(b) For purposes of section 15-14-502, "power of attorney" also includes a power or delegation that is:

- (I) Excluded from the application of part 7 of this article pursuant to section 15-14-703;
- (II) Not a power to make health care decisions; and
- (III) Not effective without application of section 15-14-502.

(c) For purposes of this part 5 and part 6 of this article, "medical durable power of attorney" and "medical power of attorney" means a power to make health care decisions.

(2) A power and delegation that is excluded from the application of part 7 of this article by section 15-14-703, other than a power to make health care decisions, may be exercised during the incapacity of the principal to the extent provided in the power or delegation or by applicable principles of law and equity.

**Source: L. 2009:** Entire section added, (HB 09-1198), ch. 106, p. 421, § 6, effective January 1, 2010.

**15-14-501. When power of attorney not affected by disability.** (1) Whenever a principal designates another his attorney-in-fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal." or "This power of attorney shall become effective upon the disability of the principal." or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. The authority of the attorney-in-fact or agent to act on behalf of the principal shall be set forth in the power and may relate to any act, power, duty, right, or obligation which the principal has or after acquires relating to the principal or any matter, transaction, or property, real or personal, tangible or intangible. The authority of the agent with regard to medical treatment decisions on behalf of a principal is set forth in sections 15-14-503 to 15-14-509. The attorney-in-fact or agent, however, is subject to the same limitations imposed upon court-appointed guardians contained in section 15-14-312 (1) (a). Additionally, the principal may expressly empower his attorney-in-fact or agent to renounce and disclaim interests and powers, to make gifts, in trust or otherwise, and to release and exercise powers of appointment. All acts done by the attorney-in-fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled. If a guardian or conservator thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall consult with the guardian on matters concerning the



principal's personal care or account to the conservator on matters concerning the principal's financial affairs. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency as it relates to financial matters. Subject to any limitation or restriction of the guardian's powers or duties set forth in the order of appointment and endorsed on the letters of guardianship, a guardian has the same power to revoke, suspend, or terminate all or any part of the power of attorney or agency as it relates to matters concerning the principal's personal care that the principal would have had if the principal were not disabled or incompetent, except with respect to medical treatment decisions made by an agent pursuant to sections 15-14-506 to 15-14-509; however, such exception shall not preclude a court from removing an agent in the event an agent becomes incapacitated, or is unwilling or unable to serve as an agent.

(2) An affidavit, executed by the attorney-in-fact or agent, stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the termination of the power of attorney by death is, in the absence of fraud, conclusive proof of the nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

**Source:** L. 73: R&RE, p. 1633, § 1. C.R.S. 1963: § 153-5-501. L. 77: Entire section amended, p. 836, § 25, effective July 1. L. 83: (1) amended, p. 661, § 1, effective April 26. L. 91: (1) amended, p. 1451, § 17, effective May 31. L. 92: (1) amended, p. 1978, § 1, effective June 4.

#### ANNOTATION

**Law reviews.** For article, "Estate Planning for Young Lawyers", see 14 Colo. Law. 53 (1985). For article, "The Use of Durable Powers of Attorney", see 14 Colo. Law. 548 (1985). For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988). For article, "Suggested Modifications to the Durable Power of Attorney Form", see 17 Colo. Law. 2135 (1988). For article, "Dissolution of Marriage and Estate

Planning Issues", see 18 Colo. Law. 439 (1989). For article, "Standby Trusts: Spare Tires For Late-Life Trips", see 19 Colo. Law. 851 (1990). For article, "Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency", see 19 Colo. Law. 1813 (1990).

**Power of attorney does not survive principal's disability if it does not contain language specified in this section.** Visser ex rel. Eder v. Mahan, 111 P.3d 575 (Colo. App. 2005).

#### **15-14-502. Other powers of attorney not revoked until notice of death or disability.**

(1) The death, disability, or incompetence of any principal who has executed a power of attorney in writing, other than a power as described by section 15-14-501, does not revoke or terminate the agency as to the attorney-in-fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(2) An affidavit, executed by the attorney-in-fact or agent, stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability, or incompetence is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(3) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

(4) All powers of attorney executed for real estate and other purposes, pursuant to law, shall be deemed valid until revoked as provided in the terms of the power of attorney or as provided by law.

**Source:** L. 73: R&RE, p. 1634, § 1. **C.R.S. 1963:** § 153-5-502. L. 75: (1) and (2) amended, p. 603, § 52, effective July 1. L. 85: (4) added, p. 566, § 13, effective July 1.

**15-14-503. Short title.** Sections 15-14-503 to 15-14-509 shall be known and may be cited as the “Colorado Patient Autonomy Act”.

**Source:** L. 92: Entire section added, p. 1979, § 2, effective June 4.

#### ANNOTATION

**Law reviews.** For article, “The Colorado Patient Autonomy Act: Opportunities and Challenges”, see 21 Colo. Law. 1901 (1992). For article, “Surrogate Medical Decision-Making Under the Best Interests Standard”, see 24 Colo. Law. 291 (1995). For article, “The Attorney’s

Role in Assisting Clients To Prepare Advance Directives”, see 24 Colo. Law. 567 (1995). For article, “Rights to and Disclosure of Medical Information: HIPAA and Colorado Law”, see 33 Colo. Law. 101 (October 2004).

**15-14-504. Legislative declaration - construction of statute.** (1) The general assembly hereby finds, determines, and declares that:

(a) Colorado law recognizes the right of an adult to accept or reject medical treatment and artificial nourishment and hydration;

(b) Each adult has the right to establish, in advance of the need for medical treatment, any directives and instructions for the administration of medical treatment in the event the person lacks the decisional capacity to provide informed consent to or refusal of medical treatment; and

(c) The enactment of a “Colorado Patient Autonomy Act” is appropriate to affirm a patient’s autonomy in accepting or rejecting medical treatment, which right includes the making of medical treatment decisions through an appointed agent under a medical durable power of attorney.

(2) The general assembly does not intend to encourage or discourage any particular medical treatment or to interfere with or affect any method of religious or spiritual healing otherwise permitted by law.

(3) The general assembly does not intend that this part 5 be construed to restrict any other manner in which a person may make advance medical directives.

(4) Nothing in this part 5 shall be construed as condoning, authorizing, or approving euthanasia or mercy killing. In addition, the general assembly does not intend that this part 5 be construed as permitting any affirmative or deliberate act to end a person’s life, except to permit natural death as provided by this part 5.

**Source:** L. 92: Entire section added, p. 1979, § 2, effective June 4.

#### ANNOTATION

**Law reviews.** For article, “Placement on a Secure Unit by Surrogate Decision-Makers”, see 34 Colo. Law. 49 (October 2005). For arti-

cle, “Respecting and Responding to End-of-Life Choices”, see 34 Colo. Law. 57 (October 2005).

**15-14-505. Definitions.** As used in sections 15-14-503 to 15-14-509, unless the context otherwise requires:

(1) “Adult” means any person eighteen years of age or older.

(2) “Advance medical directive” means any written instructions concerning the making of medical treatment decisions on behalf of the person who has provided the instructions. An advance medical directive includes a medical durable power of attorney executed pursuant to section 15-14-506, a declaration executed pursuant to the “Colorado Medical Treatment Decision Act”, article 18 of this title, a power of attorney granting medical treatment authority executed prior to July 1, 1992, pursuant to section 15-14-501, and a declaration executed pursuant to article 18.6 of this title.



(3) “Artificial nourishment and hydration” means any medical procedure whereby nourishment or hydration is supplied through a tube inserted into a person’s nose, mouth, stomach, or intestines or nutrients or fluids are injected intravenously into a person’s bloodstream.

(4) “Decisional capacity” means the ability to provide informed consent to or refusal of medical treatment or the ability to make an informed health care benefit decision.

(4.7) “Health care benefit decision” means any decision or action related to the application, enrollment, disenrollment, appeal, or other function necessary for private or public health care benefits that does not conflict with any known preference of the individual.

(5) “Health care facility” means any hospital, hospice, nursing facility, care center, dialysis treatment facility, assisted living facility, any entity that provides home and community-based services, home health care agency, or any other facility administering or contracting to administer medical treatment, and which is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment.

(6) “Health care provider” means any physician or any other individual who administers medical treatment to persons and who is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment or who is employed by or acting for such authorized person. Health care provider includes a health maintenance organization licensed and conducting business in this state.

(7) “Medical treatment” means the provision, withholding, or withdrawal of any health care, medical procedure, including artificially provided nourishment and hydration, surgery, cardiopulmonary resuscitation, or service to maintain, diagnose, treat, or provide for a patient’s physical or mental health or personal care.

(8) “Physician or designee” means the treating physician or a health care professional under the supervision of the treating physician.

**Source:** L. 92: Entire section added, p. 1979, § 2, effective June 4. L. 2006: (4) amended and (4.7) and (8) added, p. 841, § 2, effective May 4.

#### ANNOTATION

**Decision to agree to arbitrate is not a “medical treatment decision”** and as such not within the authority of a health care proxy. There exists a distinction between an agreement to provide medical services, including an agree-

ment to admit a patient to a health care facility, and an agreement to arbitrate a health care dispute. *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970 (Colo. App. 2009).

**15-14-506. Medical durable power of attorney.** (1) The authority of an agent to act on behalf of the principal in consenting to or refusing medical treatment, including artificial nourishment and hydration, may be set forth in a medical durable power of attorney. A medical durable power of attorney may include any directive, condition, or limitation of an agent’s authority.

(2) The agent shall act in accordance with the terms, directives, conditions, or limitations stated in the medical durable power of attorney, and in conformance with the principal’s wishes that are known to the agent. If the medical durable power of attorney contains no directives, conditions, or limitations relating to the principal’s medical condition, or if the principal’s wishes are not otherwise known to the agent, the agent shall act in accordance with the best interests of the principal as determined by the agent.

(3) An agent appointed in a medical durable power of attorney may provide informed consent to or refusal of medical treatment on behalf of a principal who lacks decisional capacity and shall have the same power to make medical treatment decisions the principal would have if the principal did not lack such decisional capacity. An agent appointed in a medical durable power of attorney shall be considered a designated representative of the patient and shall have the same rights of access to the principal’s medical records as the principal. In making medical treatment decisions on behalf of the principal, and subject to

the terms of the medical durable power of attorney, the agent shall confer with the principal's attending physician concerning the principal's medical condition.

(3.5) Any medical durable power of attorney executed under sections 15-14-503 to 15-14-509 may also have a document with a written statement as provided in section 12-34-105 (b), C.R.S., or a statement in substantially similar form, indicating a decision regarding organ and tissue donation. Such a document shall be executed in accordance with the provisions of the "Revised Uniform Anatomical Gift Act", part 1 of article 34 of title 12, C.R.S. Such a written statement may be in the following form:

I hereby make an anatomical gift, to be effective upon my death, of:

A.\_\_\_\_ Any needed organs/tissues

B.\_\_\_\_ The following organs/tissues:

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Donor signature: \_\_\_\_\_

(4) (a) Nothing in this section or in a medical durable power of attorney shall be construed to abrogate or limit any rights of the principal, including the right to revoke an agent's authority or the right to consent to or refuse any proposed medical treatment, and no agent may consent to or refuse medical treatment for a principal over the principal's objection.

(b) Nothing in this article shall be construed to supersede any provision of article 1 of title 25, C.R.S., or article 10.5 or article 65 of title 27, C.R.S.

(5) (a) Nothing in this part 5 shall have the effect of modifying or changing the standards of the practice of medicine or medical ethics or protocols.

(b) Nothing in this part 5 or in a medical durable power of attorney shall be construed to compel or authorize a health care provider or health care facility to administer medical treatment that is otherwise illegal, medically inappropriate, or contrary to any federal or state law.

(c) Unless otherwise expressly provided in the medical durable power of attorney under which the principal appointed the principal's spouse as the agent, a subsequent divorce, dissolution of marriage, annulment of marriage, or legal separation between the principal and spouse appointed as agent automatically revokes such appointment. However, nothing in this paragraph (c) shall be construed to revoke any remaining provisions of the medical durable power of attorney.

(d) Unless otherwise specified in the medical durable power of attorney, if a principal revokes the appointment of an agent or the agent is unable or unwilling to serve, the appointment of the agent shall be revoked. However, nothing in this paragraph (d) shall be construed to revoke any remaining provisions of the medical durable power of attorney.

(6) (a) This part 5 shall apply to any medical durable power of attorney executed on or after July 1, 1992. Nothing in this part 5 shall be construed to modify or affect the terms of any durable power of attorney executed before such date and which grants medical treatment authority. Any such previously executed durable power of attorney may be amended to conform to the provisions of this part 5. In the event of a conflict between a medical durable power of attorney executed pursuant to this part 5 and a previously executed durable power of attorney, the provisions of the medical durable power of attorney executed pursuant to this part 5 shall prevail.

(b) Unless otherwise specified in a medical durable power of attorney, nothing in this part 5 shall be construed to modify or affect the terms of a declaration executed in accordance with the "Colorado Medical Treatment Decision Act", article 18 of this title.

**Source: L. 92:** Entire section added, p. 1979, § 2, effective June 4. **L. 98:** (3.5) added, p. 1171, § 5, effective June 1. **L. 2007:** (3.5) amended, p. 796, § 3, effective July 1. **L. 2010:** (4)(b) amended, (SB 10-175), ch. 188, p. 783, § 20, effective April 29.



## ANNOTATION

**Law reviews.** For article, "Surrogate Medical Decision-Making Under the Best Interests Standard", see 24 Colo. Law. 291 (1995).

**15-14-507. Transfer of principal.** (1) A health care provider or health care facility shall provide notice to a principal and an agent of any policies based on moral convictions or religious beliefs of the health care provider or health care facility relative to the withholding or withdrawal of medical treatment. Notice shall be provided, when reasonably possible, prior to the provision of medical treatment or prior to or upon the admission of the principal to the health care facility, or as soon as possible thereafter.

(2) A health care provider or health care facility shall provide for the prompt transfer of the principal to another health care provider or health care facility if such health care provider or health care facility wishes not to comply with an agent's medical treatment decision on the basis of policies based on moral convictions or religious beliefs.

(3) An agent may transfer the principal to the care of another health care provider or health care facility if an attending physician or health care facility does not wish to comply with an agent's decision for any reason other than those described in subsection (1) of this section.

(4) The transfer of a principal to another health care provider or health care facility in accordance with the provisions of this section shall not constitute a violation of Title XIX of the federal "Social Security Act", 42 U.S.C., sec. 1395dd, regarding the transfer of patients.

(5) Nothing in this section shall relieve or exonerate an attending physician or health care facility from the duty to provide for the care and comfort of the principal pending transfer pursuant to this section.

**Source:** L. 92: Entire section added, p. 1979, § 2, effective June 4.

**15-14-508. Immunities.** (1) An agent or proxy-decision maker, as established in article 18.5 of this title, who acts in good faith in making medical treatment decisions on behalf of a principal pursuant to the terms of a medical durable power of attorney shall not be subject to civil or criminal liability therefor.

(2) Each health care provider and health care facility shall, in good faith, comply, in respective order, with the wishes of the principal, the terms of an advance medical directive, or the decision of an agent acting pursuant to an advance medical directive. A health care provider or health care facility which, in good faith, complies with the medical treatment decision of an agent acting in accordance with an advance medical directive shall not be subject to civil or criminal liability or regulatory sanction therefor.

(3) Good faith actions by any health care provider or health care facility in complying with a medical durable power of attorney or at the direction of a health care agent of the principal which result in the death of the principal following trauma caused by a criminal act or criminal conduct, shall not affect the criminal prosecution of any person charged with the commission of a criminal act or conduct.

(4) Neither a medical durable power of attorney nor the failure of a person to execute one shall affect, impair, or modify any contract of life or health insurance or annuity or be the basis for any delay in issuing or refusing to issue an annuity or policy of life or health insurance or any increase of a premium therefor.

**Source:** L. 92: Entire section added, p. 1979, § 2, effective June 4.

**15-14-509. Interstate effect of medical durable power of attorney.** (1) Unless otherwise stated in a medical durable power of attorney, it shall be presumed that the principal intends to have a medical durable power of attorney executed pursuant to this part 5 recognized to the fullest extent possible by the courts of any other state.

(2) Unless otherwise provided therein, any medical durable power of attorney or similar instrument executed in another state shall be presumed to comply with the provisions of this part 5 and may, in good faith, be relied upon by a health care provider or health care facility in this state.

**Source: L. 92:** Entire section added, p. 1979, § 2, effective June 4.

## PART 6

### POWER OF ATTORNEY

**Cross references:** For provisions for a power of attorney granted by an individual, see the “Uniform Power of Attorney Act”, part 7 of this article.

#### **15-14-601. Legislative declaration. (Repealed)**

**Source: L. 94:** Entire part added, p. 1068, § 1, effective January 1, 1995. **L. 2009:** Entire section repealed, (HB 09-1198), ch. 106, p. 427, § 19, effective January 1, 2010.

**Editor’s note:** The provisions of this section were relocated to § 15-14-500.3.

#### **15-14-602. Definitions.** As used in this part 6:

- (1) “Agency” means the relationship between the principal and the principal’s agent.
- (2) “Agency instrument” means the written power of attorney or other written instrument of agency governing the relationship between the principal and agent. An agency is subject to the provisions of this part 6 to the extent the agency relationship is established in writing and may be controlled by the principal, excluding agencies and powers for the benefit of the agent. This definition shall not apply to medical powers of attorney drafted pursuant to the “Colorado Patient Autonomy Act”, sections 15-14-503 to 15-14-509, a power of attorney subject to the “Uniform Power of Attorney Act”, part 7 of this article, or to any other power of attorney or instrument of agency granted by an individual.
- (3) “Agent” means the attorney-in-fact or other person, including successors, who is authorized by the agency instrument to act for the principal.
- (4) “Principal” means a corporation, trust, partnership, limited liability company, or other entity, including, but not limited to, an entity acting as trustee, personal representative, or other fiduciary, who signs a power of attorney or other instrument of agency granting powers to an agent.
- (5) “Third party” means any person who is requested by an agent under an agency instrument to recognize the agent’s authority to deal with the principal’s property or who acts in good-faith reliance on a copy of the agency instrument. “Third party” includes an individual, corporation, trust, partnership, limited liability company, or other entity, as may be appropriate.

**Source: L. 94:** Entire part added, p. 1069, § 1, effective January 1, 1995. **L. 2009:** (2) and (4) amended, (HB 09-1198), ch. 106, p. 421, § 7, effective January 1, 2010.

### ANNOTATION

**Law reviews.** For article, “Protecting Clients From Abuse and Identity Theft”, see 34 Colo. Law. 43 (October 2005). For article, “Placement on a Secure Unit by Surrogate Decision-Makers”, see 34 Colo. Law. 49 (October 2005).

**15-14-603. Applicability.** (1) (a) The principal may specify in the agency instrument:

- (I) The event upon which or time when the agency begins and terminates;
- (II) The mode of revocation or amendment of the agency instrument; and



(III) The rights, powers, duties, limitations, immunities, and other terms applicable to the agent and to all third parties dealing with the agent.

(b) The provisions of the agency instrument control in the case of a conflict between the provisions of the agency instrument and the provisions of this part 6. In the agency instrument, the principal may authorize the agent to appoint a successor agent.

(2) (a) Except as otherwise provided in this part 6, on or after January 1, 1995:

(I) The provisions of this part 6 govern every agency instrument, whenever and wherever executed, and all acts of the agent, to the extent the provisions of this part 6 are not inconsistent with the agency instrument; and

(II) The provisions of this part 6 apply to all agency instruments exercised in Colorado and to all other agency instruments if the principal is a resident of Colorado at the time the agency instrument is signed or at the time of exercise or if the agency instrument indicates that Colorado law is to apply.

(b) Repealed.

(3) (a) The authority of an attorney-in-fact or an agent to act on behalf of the principal may include, but is not limited to, the powers specified in sections 15-14-501 to 15-14-506.

(b) Repealed.

(4) Repealed.

**Source:** L. 94: Entire part added, p. 1070, § 1, effective January 1, 1995. L. 98: (3) amended, p. 1171, § 6, effective June 1. L. 2007: (3)(b) amended, p. 797, § 4, effective July 1. L. 2009: (2)(b), (3)(b), and (4) repealed, (HB 09-1198), ch. 106, p. 422, § 8, effective January 1, 2010.

#### **15-14-604. Duration of agency - amendment and revocation - resignation of agent.**

(1) (Deleted by amendment, L. 2009, (HB 09-1198), ch. 106, p. 422, § 9, effective January 1, 2010.)

(2) Any agency created by an agency instrument continues until the principal ceased to exist, regardless of the length of time that elapses, unless the agency instrument states an earlier termination date. The principal may amend or revoke the agency instrument at any time and in any manner that is communicated to the agent or to any other person who is related to the subject matter of the agency. Any agent who acts in good faith on behalf of the principal within the scope of an agency instrument is not liable for any acts that are no longer authorized by reason of an amendment or revocation of the agency instrument until the agent receives actual notice of the amendment or revocation. An agency may be temporarily continued under the conditions specified in section 15-14-607.

(3) (Deleted by amendment, L. 2009, (HB 09-1198), ch. 106, p. 422, § 9, effective January 1, 2010.)

(4) Any agent acting on behalf of a principal under an agency instrument has the right to resign under the terms and conditions stated in the agency instrument. If the agency instrument does not specify the terms and conditions of resignation, an agent may resign by notifying the principal, or the principal's receiver, custodian, trustee in bankruptcy, liquidating trustee, or similar representative if one has been appointed, in writing of the agent's resignation. The agent shall also notify in writing the successor agent, if any, and all reasonably ascertainable third parties who are affected by the resignation. In all cases, any party who receives notice of the resignation of an agent is bound by such notice.

**Source:** L. 94: Entire part added, p. 1071, § 1, effective January 1, 1995. L. 2009: Entire section amended, (HB 09-1198), ch. 106, p. 422, § 9, effective January 1, 2010.

#### **15-14-605. Dissolution of marriage. (Repealed)**

**Source:** L. 94: Entire part added, p. 1072, § 1, effective January 1, 1995. L. 2009: Entire section repealed, (HB 09-1198), ch. 106, p. 424, § 14, effective January 1, 2010.

**15-14-606. Duty - standard of care - record-keeping - exoneration.** Unless otherwise agreed by the principal and agent in the agency instrument, an agent is under no duty to exercise the powers granted by the agency or to assume control of or responsibility for any of the principal's property or affairs. Whenever the agent exercises the powers granted by the agency, the agent shall use due care to act in the best interests of the principal in accordance with the terms of the agency. Any agent who acts under an agency instrument shall be liable for any breach of legal duty owed by the agent to the principal under Colorado law. The agent shall keep a record of all receipts, disbursements, and significant actions taken under the agency. The agent shall not be liable for any loss due to the act or default of any other person.

**Source:** L. 94: Entire part added, p. 1072, § 1, effective January 1, 1995. L. 2000: Entire section amended, p. 1834, § 9, effective January 1, 2001. L. 2009: Entire section amended, (HB 09-1198), ch. 106, p. 423, § 10, effective January 1, 2010.

**15-14-607. Reliance on an agency instrument.** (1) (a) Any third party who acts in good-faith reliance on an agency instrument that is duly notarized shall be fully protected and released to the same extent as if such third party dealt directly with the principal as a fully competent person. Upon demand of any third party, the agent shall furnish an affidavit that states that the agency instrument relied upon is a true copy of the agency instrument and that, to the best of the agent's knowledge, the principal is alive and the relevant powers of the agent have not been altered or terminated; however, any third party who acts in good-faith reliance on an agency instrument shall be protected regardless of whether such third party demands or receives an affidavit.

(b) (I) Any third party who deals with an agent may presume, in the absence of actual knowledge to the contrary, that:

(A) The agency instrument naming the agent was validly executed;

(B) The principal had authority to act at the time of execution; and

(C) At the time of reliance, the principal exists, the agency instrument and the relevant powers of the agent have not terminated or been amended, and the acts of the agent conform to the standards of this part 6.

(II) Any third party who relies on an agency instrument shall not be responsible for the proper application of any property delivered to or controlled by the agent or for questioning the authority of the agent.

(2) Any person to whom the agent, operating under a duly notarized agency instrument, communicates a direction that is in accordance with the terms of the agency instrument shall comply with such direction. Any person who arbitrarily or without reasonable cause fails to comply with such direction shall be subject to the costs, expenses, and reasonable attorney fees required to appoint a conservator for the principal, to obtain a declaratory judgment, or to obtain an order pursuant to section 15-14-412. This subsection (2) shall not apply to the sale, transfer, encumbrance, or conveyance of real property.

(3) Any third party that has reasonable cause to question the authenticity, validity, or authority of an agency instrument or agency may make prompt and reasonable inquiry of the agent, the principal, or other persons involved for additional information and may submit an interpleader action to the district court or the probate court of the county in which the principal resides by depositing any funds or other assets that may be affected by the agency instrument with the appropriate court. In such an interpleader action, if the court finds that the third party had reasonable cause to commence the action, the third party shall be entitled to all reasonable expenses and costs incurred by the third party in bringing the interpleader action.

(4) Any third party may require an agent to present, as proof of the agency, either the original agency instrument naming such agent or a facsimile thereof certified by a notary. The third party has discretion to determine whether the agent shall provide the original agency instrument or a certified facsimile.



**Source:** L. 94: Entire part added, p. 1072, § 1, effective January 1, 1995. L. 95: (2) and (4) amended, p. 362, § 17, effective July 1. L. 2000: (2) amended, p. 1834, § 10, effective January 1, 2001. L. 2009: (1)(b)(I) amended, (HB 09-1198), ch. 106, p. 423, § 11, effective January 1, 2010.

#### **15-14-608. Preservation of estate plan and trusts. (Repealed)**

**Source:** L. 94: Entire part added, p. 1073, § 1, effective January 1, 1995. L. 2009: Entire section repealed, (HB 09-1198), ch. 106, p. 424, § 15, effective January 1, 2010.

#### **15-14-609. Agency - court relationship. (Repealed)**

**Source:** L. 94: Entire part added, p. 1074, § 1, effective January 1, 1995. L. 2009: Entire section repealed, (HB 09-1198), ch. 106, p. 425, § 16, effective January 1, 2010.

#### **15-14-610. Statutory form agent's affidavit regarding power of attorney. (Repealed)**

**Source:** L. 94: Entire part added, p. 1075, § 1, effective January 1, 1995. L. 2009: Entire section repealed, (HB 09-1198), ch. 106, p. 426, § 17, effective January 1, 2010.

**15-14-611. Applicability of part.** This part 6 does not in any way invalidate any agency or power of attorney executed or any act of any agent, guardian, or conservator done or affect any claim, right, or remedy that accrued prior to January 1, 1995.

**Source:** L. 94: Entire part added, p. 1076, § 1, effective January 1, 1995.

### **PART 7**

## **UNIFORM POWER OF ATTORNEY ACT**

**Cross references:** For provisions for a power of attorney executed by an entity, see part 6 of this article.

### **PREFATORY NOTE**

The catalyst for the Uniform Power of Attorney Act (the "Act") was a national review of state power of attorney legislation. The review revealed growing divergence among states' statutory treatment of powers of attorney. The original Uniform Durable Power of Attorney Act ("Original Act"), last amended in 1987, was at one time followed by all but a few jurisdictions. Despite initial uniformity, the review found that a majority of states had enacted non-uniform provisions to deal with specific matters upon which the Original Act is silent. The topics about which there was increasing divergence included: 1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal's marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability. Other topics about which states had legislated, although not necessarily in a diver-

gent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on authority that has the potential to dissipate a principal's property or alter a principal's estate plan.

A national survey was then conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) to ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model. The survey was distributed to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to special interest list serves of the ABA Commission on Law and Aging. Forty- four jurisdictions were represented in the 371 surveys returned.

The survey responses demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should:

- (1) provide for confirmation that contingent powers are activated;
- (2) revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;
- (3) include a portability provision;
- (4) require gift making authority to be expressly stated in the grant of authority;
- (5) provide a default standard for fiduciary duties;
- (6) permit the principal to alter the default fiduciary standard;
- (7) require notice by an agent when the agent is no longer willing or able to act;
- (8) include safeguards against abuse by the agent;
- (9) include remedies and sanctions for abuse by the agent;
- (10) protect the reliance of other persons on a power of attorney; and
- (11) include remedies and sanctions for refusal of other persons to honor a power of attorney.

Informed by the review and the survey results, the Conference's drafting process also incorporated input from the American College of Trust and Estate Counsel, the ABA Section of Real Property, Probate and Trust Law, the ABA Commission on Law and Aging, the Joint Editorial Board for Uniform Trust and Estate Acts, the National Conference of Lawyers and Corporate Fiduciaries, the American Bankers Association, AARP, other professional groups, as well as numerous individual lawyers and corporate counsel. As a result of this process, the Act codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent's authority and the need to prevent and redress financial abuse.

While the Act contains safeguards for the protection of an incapacitated principal, the Act is primarily a set of default rules that preserve a principal's freedom to choose both the extent of an agent's authority and the principles to govern the agent's conduct. Among the Act's features that enhance drafting flexibility are the statutory definitions of powers in Subpart 2, which can be incorporated by reference in an individually drafted power of attorney or selected for inclusion on the optional statutory form provided in Subpart 3. The statutory definitions of enumerated powers are an updated version of those in the Uniform Statutory Form Power of Attorney Act (1988), which the Act supersedes. The national review found that eighteen jurisdictions had adopted some type of statutory form power of attorney. The decision to include a statutory form power of attorney in the Act was based on

this trend and the proliferation of power of attorney forms currently available to the public.

Sections 15-14-719 and 15-14-720 of the Act address the problem of persons refusing to accept an agent's authority. Section 15-14-719 provides protection from liability for persons that in good faith accept an acknowledged power of attorney. Section 15-14-720 sanctions refusal to accept an acknowledged power of attorney unless the refusal meets limited statutory exceptions. An alternate Section 15-14-720 is provided for states that may wish to limit sanctions to refusal of an acknowledged statutory form power of attorney.

In exchange for mandated acceptance of an agent's authority, the Act does not require persons that deal with an agent to investigate the agent or the agent's actions. Instead, safeguards against abuse are provided through heightened requirements for granting authority that could dissipate the principal's property or alter the principal's estate plan (Section 15-14-724(1)), provisions that set out the agent's duties and liabilities (Sections 15-14-714 and 15-14-717) and by specification of the categories of persons that have standing to request judicial review of the agent's conduct (Section 15-14-716). The following provides a brief overview of the entire Act.

## Overview of the Uniform Power of Attorney Act

The Act consists of 4 Subparts. The basic substance of the Act is located in subparts 1 and 2. Subpart 3 contains the optional statutory form and Subpart 4 consists of miscellaneous provisions dealing with general application of the Act and repeal of certain prior acts.

**Subpart 1 — General Provisions and Definitions** — Section 15-14-702 lists definitions which are useful in interpretation of the Act. Of particular note is the definition of "incapacity" which replaces the term "disability" used in the Original Act. The definition of "incapacity" is consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997. Another significant change in terminology from the Original Act is the use of "agent" in place of the term "attorney in fact." The term "agent" was also used in the Uniform Statutory Form Power of Attorney Act and is intended to clarify confusion in the lay public about the meaning of "attorney in fact." Section 15-14-703 provides that the Act is to apply broadly to all powers of attorney, but excepts from the Act powers of attorney for health care and certain specialized powers such as those coupled with an interest or dealing with proxy voting.

Another innovation is the default rule in Section 15-14-704 that a power of attorney is durable unless it contains express language indi-



cating otherwise. This change from the Original Act reflects the view that most principals prefer their powers of attorney to be durable as a hedge against the need for guardianship. While the Original Act was silent on execution requirements for a power of attorney, Section 15-14-705 requires the principal's signature and provides that an acknowledged signature is presumed genuine. Section 15-14-706 recognizes military powers of attorney and powers of attorney properly executed in other states or countries, or which were properly executed in the state of enactment prior to the Act's effective date. Section 15-14-707 states a choice of law rule for determining the law that governs the meaning and effect of a power of attorney.

Section 15-14-708 addresses the relationship of the agent to a later court-appointed fiduciary. The Original Act conferred upon a conservator or other later-appointed fiduciary the same power to revoke or amend the power of attorney as the principal would have had prior to incapacity. In contrast, the Act reserves this power to the court and states that the agent's authority continues until limited, suspended, or terminated by the court. This approach reflects greater deference for the previously expressed preferences of the principal and is consistent with the state legislative trend that has departed from the Original Act.

The default rule for when a power of attorney becomes effective is stated in Section 15-14-709. Unless the principal specifies that it is to become effective upon a future date, event, or contingency, the authority of an agent under a power of attorney becomes effective when the power is executed. Section 15-14-709 permits the principal to designate who may determine when contingent powers are triggered. If the trigger for contingent powers is the principal's incapacity, Section 15-14-709 provides that the person designated to make that determination has the authority to act as the principal's personal representative under the Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing the principal's health-care information and communicating with the principal's health-care provider. This provision does not, however, confer on the designated person the authority to make health-care decisions for the principal. If the trigger for contingent powers is incapacity but the principal has not designated anyone to make the determination, or the person authorized is unable or unwilling to make the determination, the determination may be made by a physician or licensed psychologist, who must find that the principal's ability to manage property or business affairs is impaired, or by an attorney at law, judge, or appropriate governmental official, who must find that the principal is missing, detained, or unable to return to the United States.

The bases for termination of a power of attorney are covered in Section 15-14-710. In response to concerns expressed in the JEB survey, the Act provides as the default rule that authority granted to a principal's spouse is revoked upon the commencement of proceedings for legal separation, marital dissolution or annulment.

Sections 15-14-711 through 15-14-718 address matters related to the agent, including default rules for coagents and successor agents (Section 15-14-711), reimbursement and compensation (Section 15-14-712), an agent's acceptance of appointment (Section 15-14-713), and the agent's duties (Section 15-14-714). Section 15-14-715 provides that a principal may lower the standard of liability for agent conduct subject to a minimum level of accountability for actions taken dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. Section 15-14-716 sets out a comprehensive list of persons that may petition the court to review the agent's conduct and Section 15-14-717 addresses agent liability. An agent may resign by following the notice procedures described in Section 15-14-718.

Sections 15-14-719 and 15-14-720 are included in the Act to address the frequently reported problem of persons refusing to accept a power of attorney. Section 15-14-719 protects persons that in good faith accept an acknowledged power of attorney without actual knowledge that the power of attorney is revoked, terminated, or invalid or that the agent is exceeding or improperly exercising the agent's powers. Subject to statutory exceptions, alternative Sections 15-14-720 impose liability for refusal to accept a power of attorney. Alternative A sanctions refusal of an acknowledged power of attorney and Alternative B sanctions only refusal of an acknowledged statutory form power of attorney.

Sections 15-14-721 through 15-14-723 address the relationship of the Act to other law. Section 15-14-721 clarifies that the Act is supplemented by the principles of common law and equity to the extent those principles are not displaced by a specific provision of the Act, and Section 15-14-722 further clarifies that the Act is not intended to supersede any law applicable to financial institutions or other entities. With respect to remedies, Section 15-14-723 provides that the remedies under the Act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

**Subpart 2 — Authority** — The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. Like the Uniform Statutory Form Power of Attorney Act, Sections 15-14-727 through 15-14-740 of the

Act set forth detailed descriptions of authority relating to subjects such as “real property,” “retirement plans,” and “taxes,” which a principal, pursuant to Section 15-14-702, may incorporate in full into the power of attorney either by a reference to the short descriptive term for the subject used in the Act or to the section number. Section 15-14-702 further states that a principal may modify in a power of attorney any authority incorporated by reference. The definitions in Subpart 2 also provide meaning for authority with respect to subjects enumerated on the optional statutory form in Subpart 3. Section 15-14-726 applies to all incorporated authority and grants of general authority, providing further detail on how the authority is to be construed.

Subpart 2 also addresses concerns about authority that might be used to dissipate the principal’s property or alter the principal’s estate plan. Section 15-14-721(1) lists specific categories of authority that cannot be implied from a grant of general authority, but which may be granted only through express language in the power of attorney. Section 15-14-724(2) contains a default rule prohibiting an agent that is not an ancestor, spouse, or descendant of the principal from creating in the agent or in a person to whom the agent owes a legal obligation of support an interest in the principal’s property, whether by gift, right of survivorship,

beneficiary designation, disclaimer, or otherwise.

**Subpart 3 — Statutory Forms** — The optional form in Subpart 3 is designed for use by lawyers as well as lay persons. It contains, in plain language, instructions to the principal and agent. Step-by-step prompts are given for designation of the agent and successor agents, and grant of general and specific authority. In the section of the form addressing general authority, the principal must initial the subjects over which the principal wishes to delegate general authority to the agent. In the section of the form addressing specific authority, the Section 15-14-724(1) categories of specific authority are listed, preceded by a warning to the principal about the potential consequences of granting such authority to an agent. The principal is instructed to initial only the specific categories of actions that the principal intends to authorize. Subpart 3 also contains a sample agent certification form.

**Subpart 4 — Miscellaneous Provisions** — The miscellaneous provisions in Article 4 clarify the relationship of the Act to other law and pre-existing powers of attorney. Enacting jurisdictions should repeal their existing power of attorney statutes, including, if applicable, the Uniform Durable Power of Attorney Act, The Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code.

## OFFICIAL GENERAL COMMENT

The Uniform Power of Attorney Act replaces the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code. The primary purpose of the Uniform Durable Power of Attorney Act was to provide individuals with an inexpensive, non-judicial method of surrogate property management in the event of later incapacity. Two key concepts were introduced by the Uniform Durable Power of Attorney Act: 1) creation of a durable agency one that survives, or is triggered by, the principal’s incapacity, and 2) validation of post-mortem exercise of powers by an agent who acts in good faith and without actual knowledge of the principal’s death. The success of the Uniform Durable Power of Attorney Act is evidenced by the widespread use of durable powers in every jurisdiction, not only for incapacity planning, but also for convenience while the principal retains capacity. However, the limitations of the Uniform Durable Power of Attorney Act are evidenced by the number of states that have supplemented and revised their statutes to address myriad issues upon which the Uniform Durable Power of Attorney Act is silent. These issues include parameters for the creation and use of powers of attorney as well as guidelines for the principal, the agent, and the person who

is asked to accept the agent’s authority. The general provisions and definitions of Article 1 in the Uniform Power of Attorney Act address those issues.

In addition to providing greater detail than the Uniform Durable Power of Attorney Act, this Act changes two presumptions in the earlier act: 1) that a power of attorney is not durable unless it contains language to make it durable; and 2) that a later court-appointed fiduciary for the principal has the power to revoke or amend a previously executed power of attorney. Section 15-14-704 of this Subpart 1 reverses the non-durability presumption by stating that a power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal. Section 15-14-708 gives deference to the principal’s choice of agent by providing that if a court appoints a fiduciary to manage some or all of the principal’s property, the agent’s authority continues unless limited, suspended, or terminated by the court.

Although the Act is primarily a default statute, Subpart 1 also contains rules that govern all powers of attorney subject to the Act. Examples of these rules include imposition of certain minimum fiduciary duties on an agent who has accepted appointment (Section 15-14-714(1)), recognition of persons who have standing to



request judicial construction of the power of attorney or review of the agent's conduct (Section 15-14-716), and protections for persons who accept an acknowledged power of attorney without actual knowledge that the power of attorney or the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the power (Section 15-14-719). In contrast with the rules of general application in Subpart 1, the default provisions are clearly indicated by signals such as "unless the power of attorney otherwise provides," or

"except as otherwise provided in the power of attorney." These signals alert the draftsman to options for enlarging or limiting the Act's default terms. For example, default provisions in Article 1 state that, unless the power of attorney otherwise provides, the power of attorney is effective immediately (Section 15-14-709), coagents may exercise their authority independently (Section 15-14-711), and an agent is entitled to reimbursement of expenses reasonably incurred and to reasonable compensation (Section 15-14-712).

## SUBPART 1

### GENERAL PROVISIONS

**15-14-701. Short title.** This part 7 may be cited as the "Uniform Power of Attorney Act".

**Source:** L. 2009: Entire part added, (HB 09-1198), ch.106, p. 384, § 1, effective April 9.

### OFFICIAL COMMENT

This Act, which replaces the Uniform Durable Power of Attorney Act, does not contain the word "durable" in the title. Pursuant to Section 15-14-704, a power of attorney created under

the Act is durable unless the power of attorney provides that it is terminated by the incapacity of the principal.

**15-14-702. Definitions.** Except as otherwise provided under this part 7, and except as the context may otherwise require, in this part 7:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

(2) "Durable", with respect to a power of attorney, means not terminated by the principal's incapacity.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because the individual:

(a) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(b) Is:

(I) Missing;

(II) Detained, including incarcerated in a penal system; or

(III) Outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(8) "Presently exercisable general power of appointment", with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate,

the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(9) "Principal" means an individual who grants authority to an agent in a power of attorney.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Sign" means, with present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach to or logically associate with the record an electronic sound, symbol, or process.

(13) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(14) "Stocks and bonds" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 384, § 1, effective April 9. **L. 2011:** IP amended, (SB 11-083), ch. 101, p. 310, § 20, effective August 10.

#### OFFICIAL COMMENT

Although most of the definitions in Section 15-14-702 are self-explanatory, a few of the terms warrant further comment.

"Agent" replaces the term "attorney in fact" used in the Uniform Durable Power of Attorney Act to avoid confusion in the lay public about the meaning of the term and the difference between an attorney in fact and an attorney at law. Agent was also used in the Uniform Statutory Form Power of Attorney Act which this Act supersedes.

"Incapacity" replaces the term "disability" used in the Uniform Durable Power of Attorney Act in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of incapacity stresses the operative consequences of the individual's impairment inability to manage property and business affairs rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997.

The definition of "power of attorney" clarifies that the term applies to any grant of authority in a writing or other record from a principal to an agent which appears from the grant to be a power of attorney, without regard to whether the words "power of attorney" are actually used in the grant.

"Presently exercisable general power of appointment" is defined to clarify that where the phrase appears in the Act it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will. *Cf.* Restatement (Third) of Property (Wills and Don. Trans.) § 19.8 cmt. d (Tentative Draft No. 5, approved 2006) (noting that unless the donor of a presently exercisable power of attorney has manifested a contrary intent, it is assumed that the donor intends that the donee's agent be permitted to exercise the power for the benefit of the donee). Including in a power of attorney the authority to exercise a presently exercisable general power of appointment held by the principal is consistent with the objective of giving an agent comprehensive management authority over the principal's property and financial affairs. The term appears in Section 15-14-734 (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal (see Section 15-14-734(2)(c)), and in Section 15-14-740 (Gifts) in the context of authority to exercise for the benefit of someone else a presently exercisable general power of appointment held by the principal (see Section 15-14-740(b)(1)). The term is also incorporated by reference when using the statutory form in Section 15-14-741 to grant authority with respect to



“Estates, Trusts, and Other Beneficial Interests” or authority with respect to “Gifts.” If a principal wishes to delegate authority to exercise a power that the principal holds in a fiduciary capacity, Section 15-14-724(1)(g) requires that the power of attorney contain an express grant

of such authority. Furthermore, delegation of a power held in a fiduciary capacity is possible only if the principal has authority to delegate the power, and the agent’s authority is necessarily limited by whatever terms govern the principal’s ability to exercise the power.

**15-14-703. Applicability.** (1) This part 7 applies to all powers of attorney except:

(a) A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(b) A power to make health care decisions;

(c) A proxy or other delegation to exercise voting rights or management rights with respect to an entity; and

(d) A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 386, § 1, effective April 9.

### OFFICIAL COMMENT

The Uniform Power of Attorney Act is intended to be comprehensive with respect to delegation of surrogate decision making authority over an individual’s property and property interests, whether for the purpose of incapacity planning or mere convenience. Given that an agent will likely exercise authority at times when the principal cannot monitor the agent’s conduct, the Act specifies minimum agent duties and protections for the principal’s benefit. These provisions, however, may not be appropriate for all delegations of authority that might otherwise be included within the definition of a power of attorney. Section 15-14-703 lists delegations of authority that are excluded from the Act because the subject matter of the delegation, the objective of the delegation, the agent’s role with respect to the delegation, or a combination of the foregoing, would make application of the Act’s provisions inappropriate.

Paragraph (1)(a) excludes a power to the extent that it is coupled with an interest in the subject of the power. This exclusion addresses situations where, due to the agent’s interest in the subject matter of the power, the agent is not intended to act as the principal’s fiduciary. See Restatement (Third) of Agency § 3.12 (2006) and M.T. Brunner, Annotation, *What Constitutes Power Coupled with Interest within Rule as to Termination of Agency*, 28 A.L.R.2d 1243 (1953). Common examples of powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral. While the example of “a power given to or for the benefit of a creditor in connection with a credit transaction” is highlighted in paragraph (1)(a), it is not meant to exclude application of paragraph (1) to other contexts in which a power may be coupled with

an interest, such as a power held by an insurer to settle or confess judgment on behalf of an insured. See, e.g., *Hayes v. Gessner*, 52 N.E.2d 968 (Mass. 1944).

Paragraph (1)(b) excludes from the Act delegations of authority to make health-care decisions for the principal. Such delegations are covered under other law of the jurisdiction. The Act recognizes, however, that matters of financial management and health-care decision making are often interdependent. The Act consequently provides in Section 15-14-714(2)(e) a default rule that an agent under the Act must cooperate with the principal’s health-care decision maker.

Likewise, paragraph (1)(c) excludes from the Act a proxy or other delegation to exercise voting rights or management rights with respect to an entity. The rules with respect to those rights are typically controlled by entity-specific statutes within a jurisdiction. See, e.g., Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996). Notwithstanding the exclusion of such delegations from the operation of this Act, Section 209 contemplates that a power granted to an agent with respect to operation of an entity or business includes the authority to “exercise in person or by proxy . . . a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds . . .” (see paragraph (1)(e) of Section 15-14-732). Thus, while a person that holds only a proxy pursuant to an entity voting statute will not be subject to the provisions of this Act, an agent that is granted Section 15-14-732 authority is subject to the Act because the principal has given the agent authority that is greater than that of a mere voting proxy. In fact, typical entity

statutes contemplate that a principal's agent or "attorney in fact" may appoint a proxy on behalf of the principal. *See, e.g.,* Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996).

Paragraph (1)(d) excludes from the Act any power created on a governmental form for a governmental purpose. Like the excluded powers in paragraphs (1)(b) and (1)(c), the authority for a power created on a governmental form emanates from other law and is generally for a limited purpose. Notwithstanding this exclusion, the Act specifically provides in paragraph (1)(g) of Section 15-14-726 that a grant of authority to

an agent includes, with respect to that subject matter, authority to "prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or governmental regulation." Section 15-14-726, paragraph (1)(h), further clarifies that the agent has the authority to "communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal." The intent of these provisions is to minimize the need for a special power on a governmental form with respect to any subject matter over which an agent is granted authority under the Act.

**15-14-704. Power of attorney is durable.** (1) A power of attorney created on and after January 1, 2010, is durable unless it expressly provides that it is terminated by the incapacity of the principal.

(2) A power of attorney existing on December 31, 2009, is durable only if on that day the power of attorney is durable under section 15-14-501 or 15-14-745 (2).

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 386, § 1, effective April 9.

#### OFFICIAL COMMENT

Section 15-14-704 establishes that a power of attorney created under the Act is durable unless it expressly states otherwise. This default rule is the reverse of the approach under the Uniform Durable Power of Attorney Act and based on the assumption that most principals prefer durability

as a hedge against the need for guardianship. *See also* Section 15-14-707 Comment (noting that the default rules of the jurisdiction's law under which a power of attorney is created, including the default rule for durability, govern the meaning and effect of a power of attorney).

**15-14-705. Execution of power of attorney.** A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 386, § 1, effective April 9.

#### OFFICIAL COMMENT

While notarization of the principal's signature is not required to create a valid power of attorney, this section strongly encourages the practice by according acknowledged signatures a statutory presumption of genuineness. Furthermore, because Section 15-14-719 (Acceptance of and Reliance Upon Acknowledged Power of Attorney) and alternative Sections 15-14-720 (Alternative A Liability for Refusal to Accept Acknowledged Power of Attorney, and Alternative B Liability for Refusal to Accept Acknowledged Statutory Form Power of Attorney) do not apply to unacknowledged powers, persons who are presented with an unacknowledged power of attorney may be reluctant to accept it.

As a practical matter, an acknowledged signature is required if the power of attorney will be recorded by the agent in conjunction with the execution of real estate documents on behalf of the principal. *See R.P.D., Annotation, Recording Laws as Applied to Power of Attorney under which Deed or Mortgage is Executed*, 114 A.L.R. 660 (1938).

This section, at a minimum, requires that the power of attorney be signed by the principal or by another individual who the principal has directed to sign the principal's name. If another individual is directed to sign the principal's name, the signing must occur in the principal's "conscious presence." The 1990 amendments to



the Uniform Probate Code codified the “conscious presence” test for the execution of wills (Section 2-502(a)(2)), which generally requires that the signing is sufficient if it takes place within the range of the senses usually sight or hearing of the individual who directed that another sign the individual’s name. *See* Unif. Pro-

bate Code § 2-502 cmt. (2003). For a discussion of acknowledgment of a signature by an individual whose name is signed by another, see R.L.M., Annotation, *Formal Acknowledgment of Instrument by One Whose Name is Signed thereto by Another as an Adoption of the Signature*, 57 A.L.R. 525 (1928).

**15-14-706. Validity of power of attorney.** (1) A power of attorney executed in this state on or after January 1, 2010, is valid if its execution complies with section 15-14-705.

(2) A power of attorney executed in this state before January 1, 2010, is valid if its execution complied with the law of this state as it existed at the time of execution.

(2.5) It shall not be inferred from the portion of the definition of “incapacity” in section 15-14-702 (5) (b) that an individual who is either incarcerated in a penal system or otherwise detained or outside of the United States and unable to return lacks the capacity to execute a power of attorney as a consequence of such detention or inability to return.

(3) A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(a) The law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to section 15-14-707; or

(b) The requirements for a military power of attorney pursuant to 10 U.S.C. sec. 1044b, as amended.

(4) Except as otherwise provided by statute other than this part 7, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original. Nothing in this subsection (4) shall preclude a third party relying upon a power of attorney from requesting the original document.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 386, § 1, effective April 9.

### OFFICIAL COMMENT

One of the purposes of the Uniform Power of Attorney Act is promotion of the portability and use of powers of attorney. Section 15-14-706 makes clear that the Act does not affect the validity of pre-existing powers of attorney executed under prior law in the enacting jurisdiction, powers of attorney validly created under the law of another jurisdiction, and military powers of attorney. While the effect of this section is to recognize the validity of powers of attorney created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

This section also provides that unless another law in the jurisdiction requires presentation of the original power of attorney, a photocopy or electronically transmitted copy has the same effect as the original. An example of another law that might require presentation of the original power of attorney is the jurisdiction’s recording act. *See, e.g.,* Restatement (Third) of Property (Wills & Don. Trans.) § 6.3 cmt. e (2003) (noting that in order to record a deed, “some states require that the document of transfer be signed, sealed, attested, and acknowledged”).

**15-14-707. Meaning and effect of power of attorney.** The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 387, § 1, effective April 9.

## OFFICIAL COMMENT

This section recognizes that a foreign power of attorney, or one executed before the effective date of the Uniform Power of Attorney Act, may have been created under different default rules than those in this Act. Section 15-14-707 provides that the meaning and effect of a power of attorney is to be determined by the law under which it was created. For example, the law in another jurisdiction may provide for different default rules with respect to durability of a power of attorney (see Section 15-14-704), the authority of coagents (see Section 15-14-711) or the scope of specific authority such as the authority to make gifts (see Section 15-14-740). Section 15-14-707 clarifies that the principal's intended grant of authority will be neither enlarged nor narrowed by virtue of the agent using the power in a different jurisdiction. For a discussion of the issues that can arise with interjurisdictional use of powers of attorney, see Linda S. Whitton, *Crossing State Lines with Durable Powers*, Prob. & Prop., Sept./Oct. 2003, at 28.

This section also establishes an objective means for determining what jurisdiction's law the principal intended to govern the meaning and effect of a power of attorney. The phrase, "the law of the jurisdiction indicated in the power of attorney," is intentionally broad, and

includes any statement or reference in a power of attorney that indicates the principal's choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction's power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 15-14-707 provides that the law of the jurisdiction in which the power of attorney was executed controls. The distinction between "the law of the jurisdiction indicated in the power of attorney" and "the law of the jurisdiction in which the power of attorney was executed" is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction's law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney. See, e.g., Section 15-14-741 (providing for the name of the jurisdiction to appear in the title of the statutory form power of attorney).

**15-14-708. Nomination of conservator or guardian - relation of agent to court-appointed fiduciary.** (1) In a power of attorney, a principal may nominate a conservator of the principal's estate or guardian of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.

(2) If, after a principal executes a power of attorney, a court appoints a conservator of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 387, § 1, effective April 9.

## OFFICIAL COMMENT

Section 15-14-708(2) is a departure from the Uniform Durable Power of Attorney Act which gave a court-appointed fiduciary the same power to revoke or amend a power of attorney as the principal would have if not incapacitated. See Unif. Durable Power of Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the principal's choice of agent by providing that the agent's authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent's au-

thority. This approach assumes that the later-appointed fiduciary's authority should supplement, not truncate, the agent's authority. If, however, a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary. Section 15-14-708(2) is consistent with the state legislative trend that has



departed from the Uniform Durable Power of Attorney Act. *See, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M. Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75- 5-501 (Supp. 2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 15-14-708(2) is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which provides that a guardian may not revoke the ward's advance health-care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997), which provides that a guardian or conservator may not revoke the ward's or protected person's power of attorney for health-care or financial management without first obtaining express authority of the court. *See* Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), § 411(d) (protective proceedings).

Deference for the principal's autonomous choice is evident both in the presumption that an

agent's authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal's most recent nomination (*see* subsection (1)). Typically, a principal will nominate as conservator or guardian the same individual named as agent under the power of attorney. Favoring the principal's choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (*see* Unif. Guardianship & Protective Proc. Act § 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose of thwarting the agent's authority to gain control over a vulnerable principal. *See* Unif. Guardianship & Protective Proc. Act § 310 cmt. (1997). *See also* Linda S. Ershow-Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy*, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged incapacitated person's constitutionally protected rights of privacy and association).

**15-14-709. When power of attorney effective.** (1) A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

(2) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(3) If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(a) A physician or licensed psychologist that the principal is incapacitated within the meaning of section 15-14-702 (5) (a); or

(b) An attorney-at-law, a judge, or an appropriate governmental official that the principal is incapacitated within the meaning of section 15-14-702 (5) (b).

(4) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the federal "Health Insurance Portability and Accountability Act", sections 1171 to 1179 of the federal "Social Security Act", 42 U.S.C. sec. 1320d, as amended, and applicable regulations, to obtain access to the principal's health care information and communicate with the principal's health care provider.

**Source:** L. 2009: Entire part added, (HB '09-1198), ch. 106, p. 388, § 1, effective April 9.

## OFFICIAL COMMENT

This section establishes a default rule that a power of attorney is effective when executed. If the principal chooses to create what is commonly known as a "springing" or contingent power of attorney one that becomes effective at a future date or upon a future event or contin-

gency the principal may authorize the agent or someone else to provide written verification that the event or contingency has occurred (subsection (2)). Because the person authorized to verify the principal's incapacitation will likely need access to the principal's health information, sub-

section (4) qualifies that person to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA). *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 15-14-709 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 15-14-703 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The default rule reflects a "best practices" philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker. *See* Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws, 6-7 (2002), <http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm> (reporting that 23% of lawyer respondents found their clients preferred springing powers, 61% reported a preference for immediate powers, and 16% saw no

trend; however, 89% stated that a power of attorney statute should authorize springing powers).

If the principal's incapacity is the trigger for a springing power of attorney and the principal has not authorized anyone to make that determination, or the authorized person is unable or unwilling to make the determination, this section provides a default mechanism to trigger the power. Incapacity based on the principal's impairment may be verified by a physician or licensed psychologist (subsection (3)(a)), and incapacity based on the principal's unavailability (*i.e.*, the principal is missing, detained, or unable to return to the United States) may be verified by an attorney at law, judge, or an appropriate governmental official (subsection (3)(b)). Examples of appropriate governmental officials who may be in a position to determine that the principal is incapacitated within the meaning of Section 15-14-702(5)(b) include an officer acting under authority of the United States Department of State or uniformed services of the United States or a sworn federal or state law enforcement officer. The default mechanism for triggering a power of attorney is available only when no incapacity determination has been made. It is not available to challenge the determination made by the principal's authorized designee.

**15-14-710. Termination of power of attorney or agent's authority.** (1) A power of attorney terminates when:

- (a) The principal dies;
- (b) The principal becomes incapacitated, if the power of attorney is not durable;
- (c) The principal revokes the power of attorney;
- (d) The power of attorney provides that it terminates;
- (e) The express purpose of the power of attorney is accomplished; or
- (f) The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(1.5) In the case of a power of attorney in existence on December 31, 2009, "incapacitated" shall mean an individual with an incapacity as specified in section 15-14-702 (5) (a) and not as specified in section 15-14-702 (5) (b) unless, on that date, this part 7 applies to the power of attorney as provided in section 15-14-745 (2).

- (2) An agent's authority terminates when:
  - (a) The principal revokes the authority;
  - (b) The agent dies, becomes incapacitated, or resigns;
  - (c) An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or
  - (d) The power of attorney terminates.
- (3) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under subsection (2) of this section, notwithstanding a lapse of time since the execution of the power of attorney.

(4) Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(5) Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual



knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(6) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 388, § 1, effective April 9.

## OFFICIAL COMMENT

This section addresses termination of a power of attorney or an agent's authority under a power of attorney. It first lists termination events (*see* subsections (1) and (2)), and then lists circumstances that, in contrast, either do not invalidate the power of attorney (*see* subsections (3) and (6)) or the actions taken pursuant to the power of attorney (*see* subsections (4) and (5)).

Subsection (3) provides that a power of attorney under the Act does not become "stale." Unless a power of attorney provides for termination upon a certain date or after the passage of a period of time, lapse of time since execution is irrelevant to validity, a concept carried over from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power of Atty. Act § 1 (as amended in 1987). Similarly, subsection (6) clarifies that a subsequently executed power of attorney will not revoke a prior power of attorney by virtue of inconsistency alone. To effect a revocation, a subsequently executed power of attorney must expressly revoke a previously executed power of attorney or state that all other powers of attorney are revoked. The requirement of express revocation prevents inadvertent revocation when the principal intends for one agent to have limited authority that overlaps with broader authority held by another agent. For example, the principal who has given one agent a very broad power of attorney, including general authority with respect to real property, may later wish to give another agent limited authority to execute closing documents with respect to out-of-town real estate.

Subsections (4) and (5) emphasize that even a termination event is not effective as to the agent or person who, without actual knowledge of the termination event, acts in good faith under the power of attorney. For example, the principal's

death terminates a power of attorney (*see* subsection (1)(a)), but an agent who acts in good faith under a power of attorney without actual knowledge of the principal's death will bind the principal's successors in interest with that action (*see* subsection (4)). The same result is true if the agent knows of the principal's death, but the person who accepts the agent's apparent authority has no actual knowledge of the principal's death. *See* Restatement (Third) of Agency § 3.11 (2006) (stating that "termination of actual authority does not by itself end any apparent authority held by an agent"). *See also* Section 15-14-719(3) (stating that "[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is . . . terminated . . . may rely upon the power of attorney as if the power of attorney were . . . still in effect . . ."). These concepts are also carried forward from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power Atty. Act § 4 (1987).

Of special note in the list of termination events is subsection (2)(c) which provides that a spouse-agent's authority is revoked when an action is filed for the dissolution or annulment of the agent's marriage to the principal, or their legal separation. Although the filing of an action for dissolution or annulment might render a principal particularly vulnerable to self-interested actions by a spouse-agent, subsection (2)(c) is not mandatory and may be overridden in the power of attorney. There may be special circumstances precipitating the dissolution, such as catastrophic illness and the need for public benefits, that would prompt the principal to specify that the agent's authority continues notwithstanding dissolution, annulment or legal separation.

**15-14-711. Coagents and successor agents.** (1) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.

(2) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:

- (a) Has the same authority as that granted to the original agent; and
  - (b) May not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.
- (3) Except as otherwise provided in the power of attorney and subsection (4) of this section, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.
- (4) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection (4) is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 389, § 1, effective April 9.

#### OFFICIAL COMMENT

This section provides several default rules that merit careful consideration by the principal. Subsection (1) states that if a principal names coagents, each coagent may exercise its authority independently unless otherwise directed in the power of attorney. The Act adopts this default position to discourage the practice of executing separate, co-extensive powers of attorney in favor of different agents, and to facilitate transactions with persons who are reluctant to accept a power of attorney from only one of two or more named agents. This default rule should not, however, be interpreted as encouraging the practice of naming coagents. For a principal who can still monitor the activities of an agent, naming coagents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions will be taken with the principal's property. For the incapacitated principal, the risk is even greater that coagents will use the power of attorney to vie for control of the principal and the principal's property. Although the principal can override the default rule by requiring coagents to act by majority or unanimous consensus, such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity. A more prudent practice is generally to name one original agent and one or more successor agents. If desirable, a principal may give the original agent authority to delegate the agent's authority during periods when the agent is temporarily unavailable to serve (*see* Section 15-14-724(1)(e)).

Subsection (2) states that unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. While this default provision ensures that the scope of authority granted to the original agent can be carried forward by successors, a principal may want to consider whether a successor agent is an appropriate person to exercise all of the authority given to the original agent. For example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations (*see* Section 15-14-724(1)) may be appropriate for a spouse- agent, but not for an adult child who is named as the successor agent.

Subsection (3) provides a default rule that an agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of fiduciary duty committed by that other agent. Consequently, absent specification to the contrary in the power of attorney, an agent has no duty to monitor another agent's conduct. However, subsection (4) does require that an agent that has actual knowledge of a breach or imminent breach of fiduciary duty must notify the principal, and if the principal is incapacitated, take reasonably appropriate action to safeguard the principal's best interest. Subsection (4) provides that if an agent fails to notify the principal or to take action to safeguard the principal's best interest, that agent is only liable for the reasonably foreseeable damages that could have been avoided had the agent provided the required notification.

**15-14-712. Reimbursement and compensation of agent.** Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.



**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 390, § 1, effective April 9.

### OFFICIAL COMMENT

This section provides a default rule that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to reasonable compensation. While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal's circumstances may warrant including limitations in the power of attorney as to the categories of expenses the agent may incur; likewise,

the principal may choose to specify the terms of compensation rather than leave that determination to a reasonableness standard. Although many family-member agents serve without compensation, payment of compensation to the agent may be advantageous to the principal in circumstances where the principal needs to spend down income or resources to meet qualifications for public benefits.

**15-14-713. Agent's acceptance.** Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 390, § 1, effective April 9.

### OFFICIAL COMMENT

This section establishes a default rule for agent acceptance of appointment under a power of attorney. Unless a different method is provided in the power of attorney, an agent's acceptance occurs upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance. Acceptance is the critical reference point for commencement of the agency relationship and the imposition of fiduciary duties (*see* Section 15-14-714(1)). Because a person may be unaware that the principal has designated the person as an agent in a power of attorney, clear demarcation of when an

agency relationship commences is necessary to protect both the principal and the agent. *See* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 41 (2001) (noting that "fiduciary duties should be imposed only to the extent the attorney-in-fact knows of the role, is able to accept responsibility, and affirmatively accepts"). The Act also provides a default method for agent resignation (*see* Section 15-14-718), which terminates the agency relationship (*see* Section 15-14-710(2)(b)).

**15-14-714. Agent's duties.** (1) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

- (a) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
  - (b) Act in good faith; and
  - (c) Act only within the scope of authority granted in the power of attorney.
- (2) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:
- (a) Act loyally for the principal's benefit;
  - (b) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
  - (c) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
  - (d) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
  - (e) Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
  - (f) Attempt to preserve the principal's estate plan, to the extent actually known by the

agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

- (I) The value and nature of the principal's property;
  - (II) The principal's foreseeable obligations and need for maintenance;
  - (III) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
  - (IV) Eligibility for a benefit, a program, or assistance under a statute or regulation.
- (3) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.
- (4) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.
- (5) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.
- (6) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.
- (7) An agent that exercises authority provided in the power of attorney to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.
- (8) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within thirty days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty days.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 390, § 1, effective April 9.

#### OFFICIAL COMMENT

Although well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney statutes about what that means. *See generally* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1 (2001); Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574 (1996). Among states that address agent duties, the standard of care varies widely and ranges from a due care standard (*see, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-6-2 (West 1994)) to a trustee-type standard (*see, e.g.*, Fla. Stat. Ann. § 709.08(8) (West 2000 & Supp. 2006); Mo. Ann. Stat. § 404.714 (West 2001)). Section 15-14-714 clarifies agent duties by articulating minimum mandatory duties (subsection (1)) as well as default duties that can be modified or omitted by the principal (subsection (2)).

The mandatory duties acting in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest; acting in good faith; and acting only within the scope of authority granted may not be altered in the power of attorney. Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for "substituted judgment" over "best interest" as the surrogate decision-making standard that better protects an incapacitated person's self-determination interests. *See* Wingspan The Second National Guardianship Conference, *Recommendations*, 31 Stetson L. Rev. 595, 603 (2002). *See also* Unif. Guardianship & Protective Proc. Act § 314(a) (1997).

The Act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney. In fact, one of the advantages of a power of attor-



ney over a trust or guardianship is the flexibility and informality with which an agent may exercise authority and respond to changing circumstances. However, when a principal's subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expectations in a written and admissible form as a precaution against later challenges to the agent's conduct (see Section 15-14-716).

If a principal's expectations potentially conflict with a default duty under the Act, then stating the expectations in the power of attorney, or altering the default rule to accommodate the expectations, or both, is advisable. For example, a principal may want to invest in a business owned by a family member who is also the agent in order to improve the economic position of the agent and the agent's family. Without the principal's clear expression of this objective, investment by the agent of the principal's property in the agent's business may be viewed as breaching the default duty to act loyally for the principal's benefit (subsection (2)(a)) or the default duty to avoid conflicts of interest that impair the agent's ability to act impartially for the principal's best interest (subsection (2)(b)).

Two default duties in this section protect the principal's previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal (subsection (2)(e)) and the duty to preserve the principal's estate plan (subsection (2)(f)). However, an agent has a duty to preserve the principal's estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal's best interest. Factors relevant to determining whether preservation of the estate plan is in the principal's best interest include the value of the principal's property, the principal's need for maintenance, minimization of taxes, and eligibility for public benefits. The Act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (3)).

Subsection (4) provides that an agent acting with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has a conflict of interest. This position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the principal. See Restatement (Second) of Agency § 387 (1958); see also Unif. Trust Code § 802(a) (2003) (requiring a trustee to administer a trust "solely in the interests" of the beneficiary). Subsection (4) is modeled after state statutes which provide that loyalty to the principal can be compatible with an incidental benefit to the agent. See Cal. Prob. Code § 4232(b) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code

Ann. § 30-5-9-2 (West 1994 & Supp. 2005). The Restatement (Third) of Agency § 8.01 (2006) also contemplates that loyal service to the principal may be concurrently beneficial to the agent (see Reporter's note a). See also John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 943 (2005) (arguing that the sole interest test for loyalty should be replaced by the best interest test). The public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.

Subsection (5) provides additional protection for a principal who has selected an agent with special skills or expertise by requiring that such skills or expertise be considered when evaluating the agent's conduct. If a principal chooses to appoint a family member or close friend to serve as an agent, but does not intend that agent to serve under a higher standard because of special skills or expertise, the principal should consider including an exoneration provision within the power of attorney (see comment to Section 15-14-715).

Subsections (6) and (7) state protections for an agent that are similar in scope to those applicable to a trustee. Subsection (6) holds an agent harmless for decline in the value of the principal's property absent a breach of fiduciary duty (cf. Unif. Trust Code § 1003(b) (2003)). Subsection (7) holds an agent harmless for the conduct of a person to whom the agent has delegated authority, or who has been engaged by the agent on the principal's behalf, provided the agent has exercised care, competence, and diligence in selecting and monitoring the person (cf. Unif. Trust Code § 807(c) (2003)).

Subsection (8) codifies the agent's common law duty to account to a principal (see Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (8) states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (2)(d) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should

control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal's fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. *See* 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (West

2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). *See generally* Donna J. Rabiner, David Brown & Janet O'Keeffe, *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective countermeasure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent's conduct. *See* Section 15-14-716 and Comment.

**15-14-715. Exoneration of agent.** (1) Provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

(a) Relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(b) Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 392, § 1, effective April 9.

#### OFFICIAL COMMENT

This section permits a principal to exonerate an agent from liability for breach of fiduciary duty, but prohibits exoneration for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. The mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees. A trustee's failure to adhere to that standard cannot be excused by language in the trust instrument. *See* Unif. Trust Code § 1008 cmt. (2003) (noting that "a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries"). *See also* Section 15-14-702(4) (defining good faith for purposes

of the Act as "honesty in fact"). Section 15-14-715 provides, as an additional measure of protection for the principal, that an exoneration provision is not binding if it was inserted as the result of abuse of a confidential or fiduciary relationship with the principal. While as a matter of good practice an exoneration provision should be the exception rather than the rule, its inclusion in a power of attorney may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent's conduct in order to gain control of the principal's assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.

**15-14-716. Judicial relief.** (1) The following persons may petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief:

- (a) The principal or the agent;
- (b) A guardian, conservator, or other fiduciary acting for the principal;
- (c) A person authorized to make health care decisions for the principal;
- (d) The principal's spouse, parent, or descendant;
- (e) An individual who would qualify as a presumptive heir of the principal;
- (f) A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
- (g) A governmental agency having authority to protect the welfare of the principal;
- (h) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
- (i) A person asked to accept the power of attorney.



(2) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 392, § 1, effective April 9. **L. 2011:** (1)(g) amended, (SB 11-083), ch. 101, p. 311, § 21, effective August 10.

### OFFICIAL COMMENT

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (1) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (1)(h)). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions. *See* Cal. Prob. Code § 4540 (West Supp. 2006); Colo. Rev. Stat. Ann. § 15-14-609 (West 2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-5 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West 2001). *But cf.* 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, 3510(b) (2002 & 2006-3 Vt. Adv.

Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (2) states that the court must dismiss a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney. Contrasted with the breadth of Section 15-14-716 is Section 15-14-714(8) which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial privacy. *See* Section 15-14-714 Comment. Section 15-14-716 operates as a check-and-balance on the narrow scope of Section 15-14-714(8) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

**15-14-717. Agent's liability.** (1) An agent that violates this part 7 is liable to the principal or the principal's successors in interest for the amount required to:

(a) Restore the value of the principal's property to what it would have been had the violation not occurred; and

(b) Reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 393, § 1, effective April 9.

### OFFICIAL COMMENT

This section provides that an agent's liability for violating the Act includes not only the amount necessary to restore the principal's property to what it would have been had the violation not occurred, but also any amounts for attorney's fees and costs advanced from the principal's property on the agent's behalf. This section does not, however, limit the agent's liability exposure to these amounts. Pursuant to

Section 15-14-723, remedies under the Act are not exclusive. If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, see Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 McGeorge L. Rev. 267 (2003).

**15-14-718. Agent's resignation - notice.** (1) Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the

principal and, if the principal is incapacitated:

- (a) To the conservator or guardian, if one has been appointed for the principal, and a coagent or successor agent; or
- (b) If there is no person described in paragraph (a) of this subsection (1), to:
  - (I) The principal's caregiver;
  - (II) Another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or
  - (III) A governmental agency having authority to protect the welfare of the principal.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 393, § 1, effective April 9.

#### OFFICIAL COMMENT

Section 15-14-718 provides a default procedure for an agent's resignation. An agent who no longer wishes to serve should formally resign in order to establish a clear demarcation of the end of the agent's authority and to minimize gaps in fiduciary responsibility before a successor accepts the office. If the principal still has capacity when the agent wishes to resign, this section requires only that the agent give notice to the principal. If, however, the principal is incapacitated, the agent must, in addition to giving notice to the principal, give notice as set forth in paragraphs (1)(a) or (1)(b).

Paragraph (1)(a) provides that notice must be given to a fiduciary, if one has been appointed, and to a coagent or successor agent, if any. If the principal does not have an appointed fiduciary

and no coagent or successor agent is named in the power of attorney, then the agent may choose among the notice options in paragraph (1)(b). Paragraph (1)(b) permits the resigning agent to give notice to the principal's caregiver, a person reasonably believed to have sufficient interest in the principal's welfare, or a governmental agency having authority to protect the welfare of the principal. The choice among these options is intentionally left to the agent's discretion and is governed by the same standards as apply to other agent conduct. *See* Section 15-14-714(1) (requiring the agent to act in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest).

#### **15-14-719. Acceptance of and reliance upon acknowledged power of attorney.**

(1) For purposes of this section and section 15-14-720, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgements.

(2) A person that in good faith accepts a purportedly acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under section 15-14-705 that the signature is genuine.

(3) A person that in good faith accepts a purportedly acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid, and still in effect, the agent's authority were genuine, valid, and still in effect, and the agent had not exceeded and had properly exercised the authority.

(4) A person that is asked to accept an acknowledged power of attorney may request and rely upon, without further investigation, one or more of the following:

(a) An agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;

(b) An English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; or

(c) An opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

(5) An English translation, an agent's certification, or an opinion of counsel requested under this section must be provided at the principal's expense.

(6) For purposes of this section and section 15-14-720, a person that conducts activities



through employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 393, § 1, effective April 9.

### OFFICIAL COMMENT

This section protects persons who in good faith accept an acknowledged power of attorney. Section 15-14-719 does not apply to unacknowledged powers of attorney. *See* Section 15-14-705 (providing that the signature on a power of attorney is presumed genuine if acknowledged). Subsection (1) states that for purposes of this section and Section 15-14-720 “acknowledged” means “purportedly” verified before an individual authorized to take acknowledgments. The purpose of this definition is to protect a person that in good faith accepts an acknowledged power of attorney without knowledge that it contains a forged signature or a latent defect in the acknowledgment. *See, e.g.,* Cal. Prob. Code § 4303(a)(2) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-8 (Supp. 2006); Ind. Code Ann. § 30-5-8-2 (West 1994); N.C. Gen. Stat. § 32A-40 (2005). The Act places the risk that a power of attorney is invalid upon the principal rather than the person that accepts the power of attorney. This approach promotes acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship. The national survey conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (*see* Prefatory Note) found that a majority of respondents had difficulty obtaining acceptance of powers of attorney. Sixty-three percent re-

ported occasional difficulty and seventeen percent reported frequent difficulty. Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws 12-13 (2002), available at <http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm>.

Section 15-14-719 permits a person to rely in good faith on the validity of the power of attorney, the validity of the agent’s authority, and the propriety of the agent’s exercise of authority, unless the person has actual knowledge to the contrary (subsection (3)). Although a person is not required to investigate whether a power of attorney is valid or the agent’s exercise of authority proper, subsection (4) permits a person to request an agent’s certification of any factual matter (*see* Section 15-14-742 for a sample certification form) and an opinion of counsel as to any matter of law. If the power of attorney contains, in whole or part, language other than English, an English translation may also be requested. Further protection is provided in subsection (6) for persons that conduct activities through employees. Subsection (6) states that for purposes of Sections 15-14-719 and 15-14-720, a person is without actual knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.

#### **15-14-720. Liability for refusal to accept acknowledged power of attorney.**

(1) Except as otherwise provided in subsection (2) of this section:

(a) A person shall either accept an acknowledged power of attorney or request a certification, a translation, or an opinion of counsel under section 15-14-719 (4) no later than seven business days after presentation of the power of attorney for acceptance.

(b) If a person requests a certification, a translation, or an opinion of counsel under section 15-14-719 (4), the person shall accept the power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel.

(c) A person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(2) A person is not required to accept an acknowledged power of attorney if:

(a) The person is not otherwise required to engage in a transaction with the principal in the same circumstances, including, without limitation, the circumstances set forth in paragraphs (a.3) and (a.5) of this subsection (2);

(a.3) The agent seeks to establish a customer relationship under the power of attorney and the principal is not currently a customer;

(a.5) The agent seeks services under the power of attorney that the person does not offer;

(b) Engaging in a transaction with the agent or the principal in the same circumstances

or acceptance of the power of attorney in the same circumstances would be inconsistent with any federal or state law, rule, or regulation other than as set forth in this part 7;

(c) The person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(d) A request for a certification, a translation, or an opinion of counsel under section 15-14-719 (4) is refused;

(e) The person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under section 15-14-719 (4) has been requested or provided;

(f) The person makes, or has actual knowledge that another person has made, a report to a governmental agency having authority to protect the welfare of the principal stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent; or

(f.5) The person has an apprehension, formed in good faith, that the agent or person acting for or with the agent has acted or is acting, in any capacity, either unlawfully or not in good faith in dealing with the person and the person is investigating in good faith to determine whether the person may, based on the results of the investigation, form a good faith belief that the principal may be subject to financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(3) A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:

(a) A court order mandating acceptance of the power of attorney; and

(b) Liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 394, § 1, effective April 9. **L. 2011:** (2)(f) amended, (SB 11-083), ch. 101, p. 311, § 22, effective August 10.

#### OFFICIAL COMMENT TO ALTERNATIVE A

As a complement to Section 15-14-719, Section 15-14-720 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 15-14-719, Section 15-14-720 does not apply to unacknowledged powers of attorney. Enacting jurisdictions are provided a choice between alternative Sections 15-14-720. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.

Subsection (2) of Alternative A provides the bases upon which an acknowledged power of attorney may be refused without liability. The last paragraph of subsection (2) permits refusal of an otherwise valid acknowledged power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (2)(f)). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. *See* 20 Pa. Cons. Stat. Ann. § 5608(a) (West 2005).

Unless a basis exists in subsection (2) for refusing an acknowledged power of attorney, subsection (1) requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 15-14-719. If a request under Section 15-14-719 is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (1)(b)). Provided no basis exists for refusing the power of attorney, subsection (1)(c) prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (3) of Alternative A provides that a person that refuses an acknowledged power of attorney in violation of Section 15-14-720 is subject to a court order mandating acceptance and to reasonable attorney's fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for unreasonable refusal of a power of attorney is based on a growing state legislative trend. *See, e.g.,* Alaska Stat.



§ 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005);

Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

**15-14-721. Principles of law and equity.** Unless displaced by a provision of this part 7, the principles of law and equity supplement this part 7.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 395, § 1, effective April 9.

#### OFFICIAL COMMENT

The Act is supplemented by common law, including the common law of agency, where provisions of the Act do not displace relevant common law principles. The common law of agency is articulated in the Restatement of Agency and includes contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. The common law also includes the traditional and broad equitable jurisdiction of the court, which this Act in no way restricts.

The statutory text of the Uniform Power of Attorney Act is also supplemented by these comments, which, like the comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2B Norman Singer, *Southerland Statutory Construction* § 52.5 (6th ed. 2000).

**15-14-722. Laws applicable to financial institutions and entities.** This part 7 does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this part 7.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 395, § 1, effective April 9.

#### OFFICIAL COMMENT

This section addresses concerns of representatives from the banking and insurance industries that there may be regulations which govern those entities that conflict with provisions of this Act. Although no specific conflicts were identified during the drafting process, Section 15-14-722 provides that in the event a law applicable to a financial institution or other entity is inconsistent with this Act, the other law will supersede this Act to the extent of the inconsistency.

This concern about inconsistency with the requirements of other law is already substantially addressed in Section 15-14-720, which provides, in pertinent part, that a person is not required to accept a power of attorney if, “the person is not otherwise required to engage in a transaction with the principal in the same circumstances,” or “engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law.”

**15-14-723. Remedies under other law.** The remedies under this part 7 are not exclusive and do not abrogate any right or remedy under the law of this state other than this part 7.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 396, § 1, effective April 9.

#### OFFICIAL COMMENT

The remedies under the Act are not intended to be exclusive with respect to causes of action

that may accrue in relation to a power of attorney. The Act applies to many persons, individual

and entity (*see* Section 15-14-702(6) (defining “person” for purposes of the Act)), that may serve as agents or that may be asked to accept a power of attorney. Likewise, the Act applies to many subject areas (*see* Subpart 2) over which principals may delegate authority to agents.

Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act. *See, e.g.,* Section 15-14-717 Comment.

## SUBPART 2

### AUTHORITY

#### OFFICIAL GENERAL COMMENT

Subpart 2 is based in part on the predecessor Uniform Statutory Form Power of Attorney Act, approved in 1988. It provides the default statutory construction for authority granted in a power of attorney. Sections 15-14-727 through 15-14-740 describe authority with respect to various subject matters. These descriptions may be incorporated by reference in the optional statutory form (Section 15-14-741) or in an individually drafted power of attorney. Incorporation is accomplished either by referring to the descriptive term for the subject or by providing a citation to the section in which the authority is described (Section 15-14-725). A principal may also modify any authority incorporated by reference (Section 15-14-725(3)). Section 15-14-726 supplements Sections 15-14-727 through 15-14-740 by providing general terms of construction that apply to all grants of authority under those sections unless otherwise indicated in the power of attorney.

Most of the language in Sections 15-14-727 through 15-14-739 of Subpart 2 comes directly

from the Uniform Statutory Form Power of Attorney Act. The language has been revised where necessary to reflect modern custom and practice. Where significant changes have been made, they are noted in a comment to the relevant section. In general, there are two important differences between the statutory treatment of authority in this Act and in the Uniform Statutory Form Power of Attorney Act. First, this Act includes a section that provides a default rule for the parameters of gift making authority (Section 15-14-740). Second, this Act identifies specific acts that may be authorized only by an express grant in the power of attorney (Section 15-14-724(1)). Express authorization for the acts listed in Section 15-14-724(1) is required because of the risk those acts pose to the principal’s property and estate plan. The purpose of Section 15-14-724(1) is to make clear that authority for these acts may not be inferred from a grant of general authority.

#### **15-14-724. Authority that requires specific grant - grant of general authority.**

(1) An agent under a power of attorney may do the following on behalf of the principal or with the principal’s property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

- (a) Create, amend, revoke, or terminate an inter vivos trust;
- (b) Make a gift;
- (c) Create or change rights of survivorship;
- (d) Create or change a beneficiary designation;
- (e) Delegate authority granted under the power of attorney;
- (f) Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- (g) Exercise:
  - (I) A power held by the principal in a fiduciary capacity;
  - (II) A power to nominate, appoint, or remove a fiduciary or to consent, veto, or otherwise participate in the designation or changing of a fiduciary; or
  - (III) A power to direct a fiduciary in the exercise of a power of the fiduciary with respect to property subject to the fiduciary relationship, including, but not limited to, a power to direct investments, or to consent, veto, or otherwise participate in controlling the exercise of such a power.
- (h) Disclaim or release property or a power of appointment;
- (i) Except for the exercise of a general power of appointment for the benefit of the principal, to the extent that the agent is authorized as provided in section 15-14-734, or for



the benefit of persons other than the principal, to the extent that the agent is authorized to make gifts as provided in section 15-14-740, exercise a power of appointment; or

(j) Except with respect to an entity owned solely by the principal, exercise powers, rights, or authority as a partner, member, or manager of a partnership, limited liability company, or other entity that the principal may exercise on behalf of the entity and has authority to delegate.

(2) Notwithstanding a grant of authority to do an act described in subsection (1) of this section, unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(3) Subject to subsections (1), (2), (4), and (5) of this section, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in sections 15-14-727 to 15-14-739.

(4) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to section 15-14-740.

(5) Subject to subsections (1), (2), and (4) of this section, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(6) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(7) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 396, § 1, effective April 9.

### OFFICIAL COMMENT

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 15-14-724(1) enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations. *See, e.g.,* Cal. Prob. Code § 4264 (West Supp. 2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (West 2001); Wash. Rev. Code Ann. § 11.94.050 (West Supp. 2006). The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (1) is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advice before granting authority to an agent.

The Act does not contain statutory construction language for any of the acts enumerated in subsection (1) other than the making of gifts (*see* Section 217). Because a gift of the principal's property reduces the principal's estate, the Act, like a number of state statutes, sets default per-donee limits on gift amounts. *See, e.g.,* N.Y. Gen. Oblig. Law § 5-1502M (McKinney 2001); 20 Pa. Cons. Stat. Ann. § 5603(a)(2)(ii) (West 2005). However, as with any authority incorporated by reference in a power of attorney, the principal may enlarge or restrict the default parameters set by the Act.

With respect to other acts listed in Section 15-14-724(1), the Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted. For example, if a principal grants authority to create or change rights of survivorship (subsection (1)(c)) or beneficiary designations (subsection (1)(d)) the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts. Principals should carefully consider not only whether to authorize any of the acts listed in Section 15-14-724(1), but also whether to limit the scope of such actions.

Subsection (2) contains an additional safeguard for the principal. It establishes as a default rule that an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent or in an individual the agent is legally obligated to support, an interest in the principal's property. For example, a non-relative agent with gift making authority could not make a gift to the agent or a dependent of the agent without the principal's express authority in the power of attorney. In contrast, a spouse-agent with express gift-making authority could implement the principal's expectation that annual family gifts be continued without additional authority in the power of attorney.

Notwithstanding a grant of authority to perform any of the enumerated acts in subsection (1), an agent is bound by the mandatory fiduciary duties set forth in Section 15-14-714(1) as

well as the default duties that the principal has not modified. For a list of these default rules, see Section 15-14-741 Comment. If the principal's expectations for the performance of authorized acts potentially conflict with those duties, then clarification of the principal's expectations, modification of the default duties, or both, may be advisable. See Section 15-14-714 Comment.

Authority for acts and subject matters other than those listed in Section 15-14-724(1) may be granted either through incorporation by reference (see Section 15-14-725) or, if the principal wishes to grant comprehensive general authority, by a grant of authority to do all the acts that a principal could do. A broad grant of general authority is interpreted under the Act as including all of the subject matters and authority described in Sections 15-14-727 through 15-14-739 (see subsection (3)).

**15-14-725. Incorporation of authority - incorporation by reference.** (1) An agent has authority described in this part 7 if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in sections 15-14-727 to 15-14-740 or cites the section in which the authority is described.

(2) A reference in a power of attorney to general authority with respect to the descriptive term for a subject in sections 15-14-727 to 15-14-740 or a citation to a section of sections 15-14-727 to 15-14-740 incorporates the entire section as if it were set out in full in the power of attorney.

(2.5) In addition to the incorporation of authority as provided in subsections (1) and (2) of this section, a writing or other record in existence when a power of attorney is executed may be incorporated by reference if the language of the power of attorney manifests this intent and describes the writing or other record sufficiently to permit its identification. A writing or other record so incorporated by reference is considered as set out in full in the power of attorney.

(3) A principal may modify authority or a writing or other record incorporated by reference.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 397, § 1, effective April 9.

#### OFFICIAL COMMENT

This section provides two methods for incorporating into a power of attorney the Act's statutory construction for authority over various subject matters. A reference in a power of attorney to the descriptive term for a subject in Sections 15-14-727 through 15-14-740, or to the section number, incorporates the entire statutory section as if it were set out in full in the power of attorney. Subsection (3) provides that a prin-

cipal may modify any authority incorporated by reference. The optional statutory form power of attorney provided in Section 15-14-741 uses the descriptive terms in Sections 15-14-727 through 15-14-740 to incorporate statutory construction for authority granted on the form and provides a "Special Instructions" section where the principal may modify any authority incorporated by reference.

**15-14-726. Construction of authority generally.** (1) Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in sections 15-14-727 to 15-14-740 or that grants to an agent authority to do all acts that a principal could do pursuant to section 15-14-724 (3), a principal authorizes the agent, with respect to that subject, to:

(a) Demand, receive, and obtain by litigation or otherwise money or another thing of



value to which the principal is, may become, or claims to be entitled and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(b) Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

(c) Execute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

(d) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(e) Seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

(f) Engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;

(g) Prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

(h) Communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality on behalf of the principal;

(i) Access communications intended for and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means; and

(j) Do any lawful act with respect to the subject and all property related to the subject.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 398, § 1, effective April 9.

#### OFFICIAL COMMENT

This section is based on Section 3 of the Uniform Statutory Form Power of Attorney Act. It describes incidental types of authority that accompany all authority granted to an agent under each of Sections 15-14-727 through 15-14-740, unless this incidental authority is modified in the power of attorney. The actions authorized in Section 15-14-726 are of the type often necessary for the exercise or implementation of authority over the subjects described in Sections 15-14-727 through 15-14-740. *See* Unif. Statutory Form Power of Atty. Act prefatory note (1988). Paragraph (1)(j), which states

that an agent is authorized to "do any lawful act with respect to the subject and all property related to the subject," emphasizes that a grant of general authority is intended to be comprehensive unless otherwise limited by the Act or the power of attorney. Paragraphs (1)(h) and (1)(i) were added to the section to clarify that this comprehensive authority includes authorization to communicate with government employees on behalf of the principal, to access communications intended for the principal, and to communicate on behalf of the principal using all modern means of communication.

**15-14-727. Real property.** (1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

(a) Demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(b) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(c) Pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(d) Release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property that exists or is asserted;

(e) Manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(I) Insuring against liability or casualty or other loss;

(II) Obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

(III) Paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

(IV) Purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(f) Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(g) Participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

(I) Selling or otherwise disposing of them;

(II) Exercising or selling an option, right of conversion, or similar right with respect to them; and

(III) Exercising any voting rights in person or by proxy;

(h) Change the form of title of an interest in or right incident to real property; and

(i) Dedicate to public use, with or without consideration, easements or other real property in which the principal has or claims to have an interest.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 399, § 1, effective April 9.

**15-14-728. Tangible personal property.** (1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

(a) Demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(b) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or otherwise dispose of tangible personal property or an interest in tangible personal property;

(c) Grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(d) Release, assign, satisfy, or enforce by litigation or otherwise a security interest, lien, or other claim on behalf of the principal with respect to tangible personal property or an interest in tangible personal property;

(e) Manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

(I) Insuring against liability or casualty or other loss;

(II) Obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

(III) Paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

(IV) Moving the property from place to place;

(V) Storing the property for hire or on a gratuitous bailment; and



- (VI) Using and making repairs, alterations, or improvements to the property; and
- (f) Change the form of title of an interest in tangible personal property.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 400, § 1, effective April 9.

**15-14-729. Stocks and bonds.** (1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

- (a) Buy, sell, and exchange stocks and bonds;
- (b) Establish, continue, modify, or terminate an account with respect to stocks and bonds;
- (c) Pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;
- (d) Receive certificates and other evidences of ownership with respect to stocks and bonds; and
- (e) Exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 401, § 1, effective April 9.

#### OFFICIAL COMMENT

The substance of this section remains unchanged from Section 6 the Uniform Statutory Form Power of Attorney Act; however, the

wording is revised to reflect that “stocks and bonds” is now a defined term in the Act. *See* Section 15-14-702(14).

**15-14-730. Commodities and options.** (1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

- (a) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and
- (b) Establish, continue, modify, and terminate option accounts.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 401, § 1, effective April 9.

**15-14-731. Banks and other financial institutions.** (1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

- (a) Continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;
- (b) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;
- (c) Contract for services available from a financial institution, including renting a safe deposit box or space in a vault;
- (d) Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;
- (e) Receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;
- (f) Enter a safe deposit box or vault and withdraw or add to the contents;
- (g) Borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(h) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order; transfer money; receive the cash or other proceeds of those transactions; and accept a draft drawn by a person upon the principal and pay it when due;

(i) Receive for the principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic or other negotiable or nonnegotiable instrument;

(j) Apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(k) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 401, § 1, effective April 9.

**15-14-732. Operation of entity or business.** (1) Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

(a) Operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(b) Perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

(c) Enforce the terms of an ownership agreement;

(d) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

(e) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;

(f) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

(g) With respect to an entity or business owned solely by the principal:

(I) Continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

(II) Determine:

(A) The location of its operation;

(B) The nature and extent of its business;

(C) The methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(D) The amount and types of insurance carried; and

(E) The mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

(III) Change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

(IV) Demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

(h) Put additional capital into an entity or business in which the principal has an interest;

(i) Join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

(j) Sell or liquidate all or part of an entity or business;



(k) Establish the value of an entity or business under a buy-out agreement to which the principal is a party;

(l) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and

(m) Pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 402, § 1, effective April 9.

### OFFICIAL COMMENT

The substance of this section remains unchanged from Section 9 of the Uniform Statutory Form Power of Attorney Act; however, the wording is updated to encompass all modern

business and entity forms, including limited liability companies, limited liability partnerships, and entities that may be organized other than for a business purpose.

**15-14-733. Insurance and annuities.** (1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

(a) Continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal that insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(b) Procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, select the amount, type of insurance or annuity, and mode of payment, and designate a beneficiary that will be the estate of the principal;

(c) Pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

(d) Apply for and receive a loan secured by a contract of insurance or annuity;

(e) Surrender and receive the cash surrender value on a contract of insurance or annuity;

(f) Exercise an election;

(g) Exercise investment powers available under a contract of insurance or annuity;

(h) Change the manner of paying premiums on a contract of insurance or annuity;

(i) Change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

(j) Apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

(k) Collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(l) Select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

(m) Pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 404, § 1, effective April 9.

**OFFICIAL COMMENT**

This section contains a significant change from Section 10 of the Uniform Statutory Form Power of Attorney Act. The default language in the Uniform Statutory Form Power of Attorney Act permitted an agent to designate the beneficiary of an insurance contract. *See* Unif. Statutory Form Power of Atty. Act § 10(4) (1988). However, under Section 15-14-733 of this Act, an agent does not have authority to “create or change a beneficiary designation” unless that authority is specifically granted to the agent

pursuant to Section 15-14-724(1). The authority granted under Paragraph (1)(b) of Section 15-14-733 is more limited, allowing an agent to only “procure new, different, and additional contracts of insurance and annuities for the principal and the principal’s spouse, children, and other dependents.” A principal who grants authority to an agent under Section 15-14-733 should therefore carefully consider whether a specific grant of authority to create or change beneficiary designations is also desirable.

**15-14-734. Estates, trusts, and other beneficial interests.** (1) In this section, “estate, trust, or other beneficial interest” means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be, entitled as a beneficiary to a share or payment.

(2) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests authorizes the agent to:

(a) Accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(b) Demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(c) Exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(d) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

(e) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

(f) Conserve, invest, disburse, or use anything received for an authorized purpose; and

(g) Transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor.

(h) (Deleted by amendment, L. 2011, (SB 11-083), ch. 101, p. 306, § 14, effective August 10, 2011.)

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 405, § 1, effective April 9. L. 2011: (2)(f), (2)(g), and (2)(h) amended, (SB 11-083), ch. 101, p. 306, § 14, effective August 10.

**OFFICIAL COMMENT**

This section, which corresponds to Section 11 of the Uniform Statutory Form Power of Attorney Act, has been revised to clarify that an agent’s authority includes authority to exercise, for the benefit of the principal, a presently ex-

ercisable general power of appointment held by the principal (subsection (2)(c)). “Presently exercisable general power of appointment” is defined for purposes of the Act in Section 15-14-702(8).

**15-14-735. Claims and litigation.** (1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

(a) Assert and maintain before a court or administrative agency a claim, claim for relief,



cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(b) Bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(c) Seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(d) Make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

(e) Submit to alternative dispute resolution, settle, and propose or accept a compromise;

(f) Waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(g) Act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee that affects an interest of the principal in property or other thing of value;

(h) Pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

(i) Receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 406, § 1, effective April 9.

**15-14-736. Personal and family maintenance.** (1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

(a) Perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(I) The principal's children;

(II) Other individuals legally entitled to be supported by the principal; and

(III) The individuals whom the principal has customarily supported or indicated the intent to support;

(b) Make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(c) Provide living quarters for the individuals described in paragraph (a) of this subsection (1) by:

(I) Purchase, lease, or other contract; or

(II) Paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

(d) Provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for the individuals described in paragraph (a) of this subsection (1);

(e) Pay expenses for necessary health care and custodial care on behalf of the individuals described in paragraph (a) of this subsection (1);

(f) Act as the principal's personal representative pursuant to the federal "Health Insurance Portability and Accountability Act", sections 1171 to 1179 of the federal "Social Security Act", 42 U.S.C. sec. 1320d, as amended, and applicable regulations, in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;

(g) Continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in paragraph (a) of this subsection (1);

(h) Maintain credit and debit accounts for the convenience of the individuals described in paragraph (a) of this subsection (1) and open new accounts; and

(i) Continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(2) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this part 7.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 407, § 1, effective April 9.

### OFFICIAL COMMENT

This section, based on Section 13 of the Uniform Statutory Form Power of Attorney Act, contains three important changes. The first is clarification in subsection (1) of who qualifies to benefit from payments for personal and family maintenance. Paragraph (1)(a) states that the individuals who may benefit include not only the principal's children and other individuals legally entitled to be supported by the principal, but also "individuals whom the principal has customarily supported or indicated the intent to support," "whether living when the power of attorney is executed or later born." This definition is broad enough to include common recipients of family support such as parents and later-born grandchildren if such support is intended by the principal.

The second important addition to Section 15-14-736 is the inclusion of paragraph (f) in subsection (1) which qualifies the agent to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that the agent can communicate with health care providers in order to pay medical bills. *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for

purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 15-14-736 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 15-14-703 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The third important addition to this section is subsection (2) which provides that authority under Section 15-14-736 is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to making gifts. Although payments made for the benefit of persons under Section 15-14-736 may in fact be subject to gift tax treatment, subsection (2) clarifies that the authority for personal and family maintenance payments by an agent emanates from this section rather than Section 15-14-740. This is an important distinction because the Act requires a grant of specific authority under Section 15-14-724(1) to authorize gift making, and the default provisions of Section 15-14-740 limit the amounts of those gifts. The authority to make payments under Section 15-14-736 is not constrained by either of these provisions.

### ANNOTATION

**Because one of the powers exercised by defendant under father's power of attorney, dealing with personal and family maintenance, required him to maintain father's standard of living, he had a legal duty to exercise that power with due care for father's benefit.** Defendant was convicted of second de-

gree assault and causing serious bodily injury to an at-risk adult by criminal negligence when, despite defendant's medical training, defendant failed to respond to father's worsening condition, left father bedridden for a significant length of time without proper change of clothing, toileting, or hygiene, failed to seek professional



care for father, and verbally abused father, causing him to fear defendant. *People v. Madison*,

176 P.3d 793 (Colo. App. 2007) (decided under former § 15-1-1314).

**15-14-737. Benefits from governmental programs or civil or military service.**

(1) In this section, “benefits from governmental programs or civil or military service” means any benefit, program, or assistance provided under a statute or regulation including social security, medicare, and medicaid.

(2) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

(a) Execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in section 15-14-736 (1) (a), and for shipment of their household effects;

(b) Take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(c) Enroll in, apply for, select, reject, change, amend, or discontinue, on the principal’s behalf, a benefit or program;

(d) Prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

(e) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a statute or regulation; and

(f) Receive the financial proceeds of a claim described in paragraph (d) of this subsection (2) and conserve, invest, disburse, or use for a lawful purpose anything so received.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 408, § 1, effective April 9.

**15-14-738. Retirement plans.** (1) In this section, “retirement plan” means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the federal “Internal Revenue Code of 1986”, as amended:

(a) An individual retirement account under Internal Revenue Code section 408, 26 U.S.C. sec. 408, as amended;

(b) A Roth individual retirement account under Internal Revenue Code section 408A, 26 U.S.C. sec. 408A, as amended;

(c) A deemed individual retirement account under Internal Revenue Code section 408 (q), 26 U.S.C. sec. 408 (q), as amended;

(d) An annuity or mutual fund custodial account under Internal Revenue Code section 403 (b), 26 U.S.C. sec. 403 (b), as amended;

(e) A pension, profit-sharing, stock bonus, or other retirement plan qualified under Internal Revenue Code section 401 (a), 26 U.S.C. sec. 401 (a), as amended;

(f) A plan under Internal Revenue Code section 457 (b), 26 U.S.C. sec. 457 (b), as amended; and

(g) A nonqualified deferred compensation plan under Internal Revenue Code section 409A, 26 U.S.C. sec. 409A, as amended.

(2) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

(a) Select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(b) Make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

- (c) Establish a retirement plan in the principal's name and designate a beneficiary that will be the estate of the principal;
- (d) Make contributions to a retirement plan;
- (e) Exercise investment powers available under a retirement plan; and
- (f) Borrow from, sell assets to, or purchase assets from a retirement plan.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 409, § 1, effective April 9.

#### OFFICIAL COMMENT

This section, based on Section 15 of the Uniform Statutory Form Power of Attorney Act, has been substantially updated to reflect changes in the laws governing retirement plans. A significant departure from the Uniform Statutory Form Power of Attorney Act is the deletion of default authority in the agent to waive the right of the

principal to be a beneficiary of a joint or survivor annuity (*see* Unif. Statutory Form Power of Atty. Act § 15 (1988)). Under this Act, the authority to waive the principal's right to be a beneficiary of a joint and survivor annuity must be given by a specific grant pursuant to Section 15-14-724(1).

**15-14-739. Taxes.** (1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

(a) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, "Federal Insurance Contributions Act", and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Internal Revenue Code section 2032A, 26 U.S.C. sec. 2032A, as amended, closing agreements, and any power of attorney required by the internal revenue service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following twenty-five tax years;

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the internal revenue service or other taxing authority;

(c) Exercise any election available to the principal under federal, state, local, or foreign tax law; and

(d) Act for the principal in all tax matters for all periods before the internal revenue service, or other taxing authority.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 410, § 1, effective April 9.

**15-14-740. Gifts.** (1) In this section, a gift "for the benefit of" a person includes a gift to a trust, an account under the federal "Uniform Transfers to Minors Act", and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code section 529, 26 U.S.C. sec. 529, as amended.

(2) (a) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:

(I) Make outright to, or for the benefit of, a person, a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code section 2503 (b), 26 U.S.C. sec. 2503 (b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code section 2513, 26 U.S.C. sec. 2513, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(II) Consent, pursuant to Internal Revenue Code section 2513, 26 U.S.C. sec. 2513, as amended, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.



(b) Paragraph (a) of this subsection (2) does not apply to, or affect by inference or otherwise, a power of attorney in existence on December 31, 2009, unless, on that date, this part 7 applies to the power of attorney as provided in section 15-14-745 (2).

(3) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

- (a) The value and nature of the principal's property;
- (b) The principal's foreseeable obligations and need for maintenance;
- (c) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;
- (d) Eligibility for a benefit, a program, or assistance under a statute or regulation; and
- (e) The principal's personal history of making or joining in making gifts.

**Source:** L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 410, § 1, effective April 9. L. 2011: (2) amended, (SB 11-083), ch. 101, p. 311, § 23, effective August 10.

### OFFICIAL COMMENT

This section provides default limitations on an agent's authority to make a gift of the principal's property. Authority to make a gift must be made by a specific grant in a power of attorney (*see* Section 15-14-724(1)(b); *see also* Section 15-14-741). The mere granting to an agent of authority to make gifts does not, however, grant an agent unlimited authority. The agent's authority is subject to this section unless enlarged or further limited by an express modification in the power of attorney. Without modification, the authority of an agent under this section is limited to gifts in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion, or twice that amount if the principal and the principal's spouse consent to make a split gift.

Subsection (1) of this section clarifies the fact that a gift includes not only outright gifts, but also gifts for the benefit of a person. Subsection (1) provides examples of gifts made for the

benefit of a person, but these examples are not intended to be exclusive.

Subsection (3) emphasizes that exercise of authority to make a gift, as with exercise of all authority under a power of attorney, must be consistent with the principal's objectives. If these objectives are not known, then gifts must be consistent with the principal's best interest based on all relevant factors. Subsection (3) provides examples of factors relevant to the principal's best interest, but these examples are illustrative rather than exclusive.

To the extent that a principal's objectives with respect to the making of gifts may potentially conflict with an agent's default duties under the Act, the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules to accommodate the objectives, or both. *See* Section 15-14-714 Comment.

### SUBPART 3

### STATUTORY FORMS

### OFFICIAL GENERAL COMMENT

Subpart 3 provides a concise, optional statutory form for creating a power of attorney under this Act (Section 15-14-741). With the proliferation of power of attorney forms in the public domain, the advantage of a statutorily-sanctioned form is the promotion of uniformity in power of attorney practice. In states such as Illinois and New York, where state-sanctioned statutory forms have existed for many years, the statutory form is widely used by both lawyers and lay persons. The familiarity and common understanding achieved with the use of one statutory form also facilitates acceptance of powers

of attorney. In the twenty years preceding this Act, the number of states with statutory forms has increased from only a few to eighteen.

In addition to the statutory form power of attorney, Subpart 3 provides an optional form for agent certification of facts pertaining to a power of attorney (Section 15-14-742). Pursuant to Section 15-14-719, a person may request an agent to certify any factual matter concerning the principal, agent, or power of attorney. The form in Section 15-14-742 is intended to facilitate agent compliance with these requests. The form lists factual matters about which persons

commonly request certification (e.g., the principal is alive and has not revoked the power of attorney or the agent’s authority), and provides a designated space for certification of additional factual statements. Both the statutory form power of attorney and the agent certification form may be tailored to accommodate individual circumstances and objectives.

**15-14-741. Statutory form - power of attorney.** A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by this part 7.

**STATE OF COLORADO STATUTORY FORM  
POWER OF ATTORNEY  
IMPORTANT INFORMATION**

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the “Uniform Power of Attorney Act”, part 7 of article 14 of title 15, Colorado Revised Statutes.

This power of attorney does not authorize the agent to make health care decisions for you. You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent’s authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the special instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the special instructions. Coagents are not required to act together unless you include that requirement in the special instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the special instructions.

**If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.**

**DESIGNATION OF AGENT**

I \_\_\_\_\_ (name of principal) name the following person as my agent:  
Name of agent: \_\_\_\_\_  
Agent’s address: \_\_\_\_\_  
Agent’s telephone number: \_\_\_\_\_

**DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)**

If my agent is unable or unwilling to act for me, I name as my successor agent:  
Name of successor agent: \_\_\_\_\_  
Successor agent’s address: \_\_\_\_\_  
Successor agent’s telephone number: \_\_\_\_\_



If my successor agent is unable or unwilling to act for me, I name as my second successor agent: \_\_\_\_\_

Name of second successor agent: \_\_\_\_\_

Second successor agent's address: \_\_\_\_\_

Second successor agent's telephone number: \_\_\_\_\_

### GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All preceding subjects" instead of initialing each subject.)

- ☐ Real property
- ☐ Tangible personal property
- ☐ Stocks and bonds
- ☐ Commodities and options
- ☐ Banks and other financial institutions
- ☐ Operation of entity or business
- ☐ Insurance and annuities
- ☐ Estates, trusts, and other beneficial interests
- ☐ Claims and litigation
- ☐ Personal and family maintenance
- ☐ Benefits from governmental programs or civil or military service
- ☐ Retirement plans
- ☐ Taxes
- ☐ All preceding subjects

### GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

- ☐ Create, amend, revoke, or terminate an inter vivos trust
- ☐ Make a gift, subject to the limitations of the "Uniform Power of Attorney Act" set forth in section 15-14-740, Colorado Revised Statutes, and any special instructions in this power of attorney
- ☐ Create or change rights of survivorship
- ☐ Create or change a beneficiary designation
- ☐ Authorize another person to exercise the authority granted under this power of attorney
- ☐ Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- ☐ Exercise fiduciary powers that the principal has authority to delegate, including powers to participate in the designation or changing of a fiduciary and powers to participate in the direction of a fiduciary in the exercise of the fiduciary's powers
- ☐ Disclaim, refuse, or release an interest in property or a power of appointment
- ☐ Exercise a power of appointment other than: (1) The exercise of a general power of appointment for the benefit of the principal which may, if the subject

of estates, trusts, and other beneficial interests is authorized above, be exercised as provided under the subject of estates, trusts, and other beneficial interests; or (2) the exercise of a general power of appointment for the benefit of persons other than the principal which may, if the making of a gift is specifically authorized above, be exercised under the specific authorization to make gifts

(     ) Exercise powers, rights, or authority as a partner, member, or manager of a partnership, limited liability company, or other entity that the principal may exercise on behalf of the entity and has authority to delegate excluding the exercise of such powers, rights, and authority with respect to an entity owned solely by the principal which may, if operation of entity or business is authorized above, be exercised as provided under the subject of operation of the entity or business

**LIMITATION ON AGENT’S AUTHORITY**

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the special instructions.

**SPECIAL INSTRUCTIONS (OPTIONAL)**

You may give special instructions on the following lines:

**EFFECTIVE DATE**

This power of attorney is effective immediately unless I have stated otherwise in the special instructions.

**NOMINATION OF CONSERVATOR  
OR GUARDIAN (OPTIONAL)**

If it becomes necessary for a court to appoint a conservator of my estate or guardian of my person, I nominate the following person(s) for appointment:

Name of nominee for conservator of my estate:

Nominee’s address: \_\_\_\_\_

Nominee’s telephone number: \_\_\_\_\_

Name of nominee for guardian of my person:

Nominee’s address: \_\_\_\_\_

Nominee’s telephone number: \_\_\_\_\_

**RELIANCE ON THIS POWER OF ATTORNEY**

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.



**SIGNATURE AND ACKNOWLEDGMENT**

Your signature \_\_\_\_\_

Date \_\_\_\_\_

Your name printed \_\_\_\_\_

Your address \_\_\_\_\_

Your telephone number \_\_\_\_\_

State of \_\_\_\_\_

[County] of \_\_\_\_\_

This document was acknowledged before me on \_\_\_\_\_,

(Date)

by \_\_\_\_\_.

(Name of principal)

(Seal, if any)

Signature of notary \_\_\_\_\_

My commission expires: \_\_\_\_\_

This document prepared by: \_\_\_\_\_

**IMPORTANT INFORMATION FOR AGENT****Agent's duties**

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

- (1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) Act in good faith;
- (3) Do nothing beyond the authority granted in this power of attorney; and
- (4) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's name) by (Your signature) as agent

Unless the special instructions in this power of attorney state otherwise, you must also:

- (1) Act loyally for the principal's benefit;
- (2) Avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) Act with care, competence, and diligence;
- (4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

- (5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
- (6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

### Termination of agent's authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) Death of the principal;
- (2) The principal's revocation of the power of attorney or your authority;
- (3) The occurrence of a termination event stated in the power of attorney;
- (4) The purpose of the power of attorney is fully accomplished; or
- (5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the special instructions in this power of attorney state that such an action will not terminate your authority.

### Liability of agent

The meaning of the authority granted to you is defined in the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes. If you violate the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes, or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 411, § 1, effective April 9. **L. 2011:** Entire section amended, (SB 11-083), ch. 101, p. 311, § 24, effective August 10.

### OFFICIAL COMMENT

This section provides an optional form for creating a power of attorney. Any power of attorney that substantially complies with the form in Section 15-14-741 constitutes a statutory form power of attorney with the meaning and effect prescribed by the Act.

The form begins with an "Important Information" section that contains instructions for the principal and concludes with an "Important Information for Agent" section that contains general information for the agent about agent duties, events that terminate an agent's authority, and agent liability. The form is constructed to guide the principal through designation of an agent, optional designation of one or more successor agents, and selection of subject areas and acts with respect to which the principal wishes to grant the agent authority. The form also contains an option for nomination of a conservator or guardian in the event later court-appointment of a fiduciary becomes necessary (see Section 15-14-708 and Comment).

The grant of authority provisions in the form are divided into two sections: "Grant of General Authority," which corresponds to the subject areas defined in Sections 15-14-727 through

15-14-739 of the Act, and "Grant of Specific Authority," which corresponds to the actions for which Section 15-14-724(1) requires an express grant of authority in a power of attorney. Subpart 2 of the Act provides statutory construction with respect to all of the subject matters in the Grant of General Authority section and for the authority to make a gift listed in the Grant of Specific Authority section. The principal may modify any authority granted in the form by using the "Special Instructions" section of the form. For example, the scope of authority to make a gift is defined by the default provisions of Section 15-14-740 unless the principal expands or narrows that authority in the Special Instructions.

Cautionary language in the Grant of Specific Authority section alerts the principal to the increased risks associated with a grant of authority that could significantly reduce the principal's property or alter the principal's estate plan. The form is constructed to require that the principal initial each action over which the principal grants specific authority. The separate authorization of acts covered by Section 15-14-724(1) is intended to emphasize to the principal the



significance of granting such specific authority and to minimize the risk that those actions might be authorized inadvertently.

Many principals may wish to grant an agent comprehensive authority over their day- to-day affairs. If this is the case, the principal may grant authority over all of the subject areas in the Grant of General Authority section by initialing "All Preceding Subjects." Otherwise, the principal may authorize fewer than all of the subjects listed in the Grant of General Authority section by initialing only those particular subjects.

The statutory form is drafted to follow the Act's default provisions, but it does not preclude alteration of the default rules or the exercise of other options available under the Act. For example, if not altered by the Special Instructions, the default rules embodied in a statutory form power of attorney include:

- (1) the power of attorney is durable (Section 15-14-704);
- (2) the power of attorney is effective when executed (Section 15-14-709);
- (3) a spouse-agent's authority terminates upon the filing of an action for dissolution, annulment, or legal separation (Section 15-14-710(2)(c));
- (4) lapse of time does not affect an agent's authority (Section 15-14-710(3));
- (5) a successor agent has the same authority as the original agent (Section 15-14-711(2));
- (6) a successor agent may not act until all predecessors have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve (Section 15-14-711(2));
- (7) an agent is entitled to reimbursement of expenses reasonably incurred (Section 15-14-712);

(8) an agent is entitled to reasonable compensation (Section 15-14-712);

(9) the agent accepts appointment by exercising authority or performing duties, or by any assertion or conduct indicating acceptance (Section 15-14-713);

(10) an agent has a duty to act loyally for the principal's benefit; to act so as not to create a conflict of interest that impairs the ability to act impartially in the principal's best interest; to act with care, competence, and diligence; to keep a record of receipts, disbursements, and transactions; to cooperate with the principal's health-care agent; to attempt to preserve the principal's estate plan to the extent the plan is known to the agent and if preservation is consistent with the principal's best interest; and to account if ordered by a court or requested by the principal, a fiduciary acting for the principal, a governmental agency with authority to protect the principal, or the personal representative or successor in interest of the principal's estate (Section 15-14-714);

(11) an agent must give notice of resignation as specified in Section 15-14-718; and

(12) an agent that is not the principal's ancestor, spouse, or descendant may not exercise authority to create in the agent, or an individual to whom the agent owes support, an interest in the principal's property (Section 15-14-724(2)). Although the statutory form does not include express prompts for deviating from the foregoing default rules, any statutorily-sanctioned deviation from the statutory form may be indicated in, or on an addendum to, the Special Instructions.

**15-14-742. Certification.** The following optional form may be used by an agent to certify facts concerning a power of attorney.

**AGENT'S CERTIFICATION AS TO THE VALIDITY OF  
POWER OF ATTORNEY AND AGENT'S AUTHORITY**

State of \_\_\_\_\_

County of \_\_\_\_\_

I, \_\_\_\_\_ (Name of agent), certify under penalty of perjury that \_\_\_\_\_ (Name of principal) granted me authority as an agent or successor agent in a power of attorney dated \_\_\_\_\_.

I further certify that to my knowledge:

- (1) The principal is alive and has not revoked the power of attorney or my authority to act under the power of attorney and the power of attorney and my authority to act under the power of attorney have not terminated;
- (2) If the power of attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;
- (3) If I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Insert other relevant statements)

### SIGNATURE AND ACKNOWLEDGMENT

Agent signature \_\_\_\_\_ Date \_\_\_\_\_

Agent's name printed \_\_\_\_\_  
\_\_\_\_\_

Agent's address \_\_\_\_\_  
\_\_\_\_\_

Agent's telephone number \_\_\_\_\_

This document was acknowledged before me on \_\_\_\_\_,

(Date)

by \_\_\_\_\_.

(Name of agent)

\_\_\_\_\_  
(Seal, if any)

Signature of notary

My commission expires: \_\_\_\_\_

This document prepared by: \_\_\_\_\_  
\_\_\_\_\_

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 417, § 1, effective April 9.

### OFFICIAL COMMENT

This section provides an optional form that may be used by an agent to certify facts concerning a power of attorney. Although the form contains statements of fact about which persons

commonly request certification, other factual statements may be added to the form for the purpose of providing an agent certification pursuant to Section 15-14-719.

### SUBPART 4

#### MISCELLANEOUS PROVISIONS

**15-14-743. Uniformity of application and construction.** In applying and construing this part 7, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 418, § 1, effective April 9.

**15-14-744. Relation to “Electronic Signatures in Global and National Commerce Act”.** This part 7, modifies, limits, and supersedes the federal “Electronic Signatures in Global and National Commerce Act”, 15 U.S.C. sec. 7001 et seq., but does not modify,



limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 418, § 1, effective April 9.

**15-14-745. Effect on existing powers of attorney.** (1) Except as otherwise provided in this part 7, on January 1, 2010:

- (a) This part 7 applies to a power of attorney created before, on, or after January 1, 2010;
  - (b) This part 7 applies to a judicial proceeding concerning a power of attorney commenced on or after January 1, 2010;
  - (c) This part 7 applies to a judicial proceeding concerning a power of attorney commenced before January 1, 2010, unless the court finds that application of a provision of this part 7 would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and
  - (d) An act done before January 1, 2010, is not affected by this part 7.
- (2) (a) A power of attorney is durable as determined pursuant to section 15-14-704 (1) and is otherwise construed and applied in accordance with this part 7 prior to January 1, 2010, if the power of attorney:
- (I) Is signed on or after the date this part 7 becomes law and before January 1, 2010;
  - (II) Is either:
    - (A) Substantially in the form set forth in section 15-14-741; or
    - (B) States that it is subject to the “Uniform Power of Attorney Act” or to this part 7.
- (b) To the extent of any conflict between this subsection (2) and either part 13 of article 1 of this title or section 15-14-501, this subsection (2) shall control.

**Source: L. 2009:** Entire part added, (HB 09-1198), ch. 106, p. 418, § 1, effective April 9.

ARTICLE 14.5

Uniform Adult Guardianship and  
Protective Proceedings Jurisdiction Act

PART 1		15-14.5-204.	Special jurisdiction.
GENERAL PROVISIONS		15-14.5-205.	Exclusive and continuing jurisdiction.
		15-14.5-206.	Appropriate forum.
15-14.5-101.	Short title.	15-14.5-207.	Jurisdiction declined by reason of conduct.
15-14.5-102.	Definitions.	15-14.5-208.	Notice of proceeding.
15-14.5-103.	International application of article.	15-14.5-209.	Proceedings in more than one state.
15-14.5-104.	Communication between courts.	PART 3	
15-14.5-105.	Cooperation between courts.		
15-14.5-106.	Taking testimony in another state.		
PART 2		TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP	
JURISDICTION		15-14.5-301.	Transfer of guardianship or conservatorship to another state.
15-14.5-201.	Definitions - significant connection factors.	15-14.5-302.	Accepting guardianship or conservatorship transferred from another state.
15-14.5-202.	Exclusive basis.		
15-14.5-203.	Jurisdiction.		

## PART 4

## PART 5

REGISTRATION AND RECOGNITION OF  
ORDERS FROM OTHER STATES

## MISCELLANEOUS PROVISIONS

15-14.5-401.	Registration of guardianship orders.	15-14.5-501.	Uniformity of application and construction.
15-14.5-402.	Registration of protective orders.	15-14.5-502.	Relation to electronic signatures in global and national commerce act.
15-14.5-403.	Effect of registration.	15-14.5-503.	Transitional provision.

## PART 1

## GENERAL PROVISIONS

**15-14.5-101. Short title.** This article may be cited as the “Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act”.

**Source: L. 2008:** Entire article added, p. 787, § 1, effective May 14.

**15-14.5-102. Definitions.** In this article:

- (1) “Adult” means an individual who has attained eighteen years of age.
- (2) “Conservator” means a person appointed by the court to administer the property of an adult, including a person appointed under section 15-14-401.
- (3) “Guardian” means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under section 15-14-301.
- (4) “Guardianship order” means an order appointing a guardian.
- (5) “Guardianship proceeding” means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.
- (6) “Incapacitated person” means an adult for whom a guardian has been appointed.
- (7) “Party” means the respondent, petitioner, guardian, conservator, or any other person allowed by the court to participate in a guardianship or protective proceeding.
- (8) “Person,” except in the term incapacitated person or protected person, means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.
- (9) “Protected person” means an adult for whom a protective order has been issued.
- (10) “Protective order” means an order appointing a conservator or other order related to management of an adult’s property.
- (11) “Protective proceeding” means a judicial proceeding in which a protective order is sought or has been issued.
- (12) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (13) “Respondent” means an adult for whom a protective order or the appointment of a guardian is sought.
- (14) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

**Source: L. 2008:** Entire article added, p. 787, § 1, effective May 14.

**15-14.5-103. International application of article.** A court of this state may treat a foreign country as if it were a state for the purpose of applying this part 1 and parts 2, 3, and 5 of this article.

**Source: L. 2008:** Entire article added, p. 788, § 1, effective May 14.



**15-14.5-104. Communication between courts.** (1) A court of this state may communicate with a court in another state concerning a proceeding arising under this article. The court may allow the parties to participate in the communication. Except as otherwise provided in subsection (2) of this section, the court shall make a record of the communication. The record may be limited to the fact that the communication occurred.

(2) Courts may communicate concerning schedules, calendars, court records, and other administrative matters without making a record.

**Source: L. 2008:** Entire article added, p. 788, § 1, effective May 14.

**15-14.5-105. Cooperation between courts.** (1) In a guardianship or protective proceeding in this state, a court of this state may request the appropriate court of another state to do any of the following:

- (a) Hold an evidentiary hearing;
- (b) Order a person in that state to produce evidence or give testimony pursuant to procedures of that state;
- (c) Order that an evaluation or assessment be made of the respondent;
- (d) Order any appropriate investigation of a person involved in a proceeding;
- (e) Forward to the court of this state a certified copy of the transcript or other record of a hearing under paragraph (a) of this subsection (1) or any other proceeding, any evidence otherwise produced under paragraph (b) of this subsection (1), and any evaluation or assessment prepared in compliance with an order under paragraph (c) or (d) of this subsection (1);
- (f) Issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the incapacitated or protected person;
- (g) Issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information as defined in 45 CFR 164.504, as amended.

(2) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subsection (1) of this section, a court of this state has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

**Source: L. 2008:** Entire article added, p. 789, § 1, effective May 14.

**15-14.5-106. Taking testimony in another state.** (1) In a guardianship or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(2) In a guardianship or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of this state shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule.

**Source: L. 2008:** Entire article added, p. 789, § 1, effective May 14.

## PART 2

## JURISDICTION

**15-14.5-201. Definitions - significant connection factors.** (1) In this part 2:

(a) “Emergency” means a circumstance that likely will result in substantial harm to a respondent’s health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent’s behalf.

(b) “Home state” means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

(c) “Significant-connection state” means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(2) In determining under sections 15-14.5-203 and 15-14.5-301(5) whether a respondent has a significant connection with a particular state, the court shall consider:

(a) The location of the respondent’s family and other persons required to be notified of the guardianship or protective proceeding;

(b) The length of time the respondent at any time was physically present in the state and the duration of any absence;

(c) The location of the respondent’s property; and

(d) The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver’s license, social relationship, and receipt of services.

**Source: L. 2008:** Entire article added, p. 790, § 1, effective May 14.

**15-14.5-202. Exclusive basis.** This part 2 provides the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a protective order for an adult.

**Source: L. 2008:** Entire article added, p. 790, § 1, effective May 14.

**15-14.5-203. Jurisdiction.** (1) A court of this state has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

(a) This state is the respondent’s home state;

(b) On the date the petition is filed, this state is a significant-connection state and:

(I) The respondent does not have a home state or a court of the respondent’s home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

(II) The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order:

(A) A petition for an appointment or order is not filed in the respondent’s home state;

(B) An objection to the court’s jurisdiction is not filed by a person required to be notified of the proceeding; and

(C) The court in this state concludes that it is an appropriate forum under the factors set forth in section 15-14.5-206;

(c) This state does not have jurisdiction under either paragraph (a) or (b) of this subsection (1), the respondent’s home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the constitutions of this state and the United States; or



(d) The requirements for special jurisdiction under section 15-14.5-204 are met.

**Source: L. 2008:** Entire article added, p. 791, § 1, effective May 14.

**15-14.5-204. Special jurisdiction.** (1) A court of this state lacking jurisdiction under section 15-14.5-203 has special jurisdiction to do any of the following:

(a) Appoint a guardian in an emergency for a term not exceeding sixty days for a respondent who is physically present in this state;

(b) Issue a protective order with respect to real or tangible personal property located in this state;

(c) Appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to section 15-14.5-301.

(2) If a petition for the appointment of a guardian in an emergency is brought in this state and this state was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

**Source: L. 2008:** Entire article added, p. 791, § 1, effective May 14.

**15-14.5-205. Exclusive and continuing jurisdiction.** Except as otherwise provided in section 15-14.5-204, a court that has appointed a guardian or issued a protective order consistent with this article has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.

**Source: L. 2008:** Entire article added, p. 792, § 1, effective May 14.

**15-14.5-206. Appropriate forum.** (1) A court of this state having jurisdiction under section 15-14.5-203 to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(2) If a court of this state declines to exercise its jurisdiction under subsection (1) of this section, it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

(3) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

(a) Any expressed preference of the respondent;

(b) Whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;

(c) The length of time the respondent was physically present in or was a legal resident of this or another state;

(d) The distance of the respondent from the court in each state;

(e) The financial circumstances of the respondent's estate;

(f) The nature and location of the evidence;

(g) The ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;

(h) The familiarity of the court of each state with the facts and issues in the proceeding; and

(i) If an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

**Source: L. 2008:** Entire article added, p. 793, § 1, effective May 14.

**15-14.5-207. Jurisdiction declined by reason of conduct.** (1) If at any time a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may:

- (a) Decline to exercise jurisdiction;
- (b) Exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or
- (c) Continue to exercise jurisdiction after considering:
  - (I) The extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;
  - (II) Whether it is a more appropriate forum than the court of any other state under the factors set forth in section 15-14.5-206 (3); and
  - (III) Whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of section 15-14.5-203.

(2) If a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this article.

**Source: L. 2008:** Entire article added, p. 793, § 1, effective May 14.

**15-14.5-208. Notice of proceeding.** If a petition for the appointment of a guardian or issuance of a protective order is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of this state, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice must be given in the same manner as notice is required to be given in this state.

**Source: L. 2008:** Entire article added, p. 793, § 1, effective May 14.

**15-14.5-209. Proceedings in more than one state.** (1) Except for a petition for the appointment of a guardian in an emergency or issuance of a protective order limited to property located in this state under section 15-14.5-204 (1) (a) or (1) (b), if a petition for the appointment of a guardian or issuance of a protective order is filed in this state and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(a) If the court in this state has jurisdiction under section 15-14.5-203, it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to section 15-14.5-203 before the appointment or issuance of the order.

(b) If the court in this state does not have jurisdiction under section 15-14.5-203, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court in this state shall dismiss the petition unless the court in the other state determines that the court in this state is a more appropriate forum.

**Source: L. 2008:** Entire article added, p. 793, § 1, effective May 14.



## PART 3

## TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

**15-14.5-301. Transfer of guardianship or conservatorship to another state.** (1) A guardian or conservator appointed in this state may petition the court to transfer the guardianship or conservatorship to another state.

(2) Notice of a petition under subsection (1) of this section must be given to the persons that would be entitled to notice of a petition in this state for the appointment of a guardian or conservator.

(3) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to subsection (1) of this section.

(4) The court shall issue an order provisionally granting a petition to transfer a guardianship and shall direct the guardian to petition for guardianship in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and the court finds that:

(a) The incapacitated person is physically present in or is reasonably expected to move permanently to the other state;

(b) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the incapacitated person; and

(c) Plans for care and services for the incapacitated person in the other state are reasonable and sufficient.

(5) The court shall issue a provisional order granting a petition to transfer a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds that:

(a) The protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors in section 15-14.5-201 (2);

(b) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

(c) Adequate arrangements will be made for management of the protected person's property.

(6) The court shall issue a final order confirming the transfer and terminating the guardianship or conservatorship upon its receipt of:

(a) A provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to section 15-14.5-302; and

(b) The documents required to terminate a guardianship or conservatorship in this state.

**Source: L. 2008:** Entire article added, p. 794, § 1, effective May 14.

**15-14.5-302. Accepting guardianship or conservatorship transferred from another state.** (1) To confirm transfer of a guardianship or conservatorship transferred to this state under provisions similar to section 15-14.5-301, the guardian or conservator must petition the court in this state to accept the guardianship or conservatorship. The petition must include a certified copy of the other state's provisional order of transfer.

(2) Notice of a petition under subsection (1) of this section must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state.

(3) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to subsection (1) of this section.

(4) The court shall issue an order provisionally granting a petition filed under subsection (1) of this section unless:

(a) An objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

(b) The guardian or conservator is ineligible for appointment in this state.

(5) The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to section 15-14.5-301 transferring the proceeding to this state.

(6) Not later than ninety days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

(7) In granting a petition under this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator.

(8) The denial by a court of this state of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or conservator to seek appointment as guardian or conservator in this state under article 14 of this title if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

**Source: L. 2008:** Entire article added, p. 795, § 1, effective May 14.

## PART 4

### REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES

**15-14.5-401. Registration of guardianship orders.** If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.

**Source: L. 2008:** Entire article added, p. 796, § 1, effective May 14.

**15-14.5-402. Registration of protective orders.** If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

**Source: L. 2008:** Entire article added, p. 796, § 1, effective May 14.

**15-14.5-403. Effect of registration.** (1) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(2) A court of this state may grant any relief available under this article and other law of this state to enforce a registered order.

**Source: L. 2008:** Entire article added, p. 796, § 1, effective May 14.



PART 5

MISCELLANEOUS PROVISIONS

**15-14.5-501. Uniformity of application and construction.** In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Source: L. 2008:** Entire article added, p. 797, § 1, effective May 14.

**15-14.5-502. Relation to electronic signatures in global and national commerce act.** This article modifies, limits, and supersedes the federal “Electronic Signatures in Global and National Commerce Act”, 15 U.S.C. sec. 7001, et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

**Source: L. 2008:** Entire article added, p. 797, § 1, effective May 14.

**15-14.5-503. Transitional provision.** (1) This article applies to guardianship and protective proceedings begun on or after May 14, 2008.  
(2) Parts 1, 3, and 4 of this article and sections 15-14.5-501 and 15-14.5-502 apply to proceedings begun before May 14, 2008, regardless of whether a guardianship or protective order has been issued.

**Source: L. 2008:** Entire article added, p. 797, § 1, effective May 14.

ARTICLE 15

Nonprobate Transfers on Death

**Editor’s note:** Articles 10 to 17 of this title were repealed and reenacted in 1973, and this article was subsequently repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor’s note immediately preceding article 10 of this title. Former C.R.S. section numbers prior to 1990 are shown in editor’s notes following those sections that were relocated.

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15-15-216.	Community property and tenancy by the entireties.	15-15-308.	Protection of registering entity.
		15-15-309.	Nontestamentary transfer on death.
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15-15-221.	Authority of financial institution.		TRANSFER OF REAL PROPERTY EFFECTIVE ON DEATH
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15-15-224.	Payment to designated agent.	15-15-402.	Real property - beneficiary deed.
15-15-225.	Payment to minor.	15-15-403.	Medicaid eligibility exclusion.
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		15-15-407.	Vesting of ownership in grantee-beneficiary.

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15-15-303.	Registration in beneficiary form; applicable law.	15-15-410.	Purchaser from grantee-beneficiary protected.
15-15-304.	Origination of registration in beneficiary form.	15-15-411.	Limitations on actions and proceedings against grantee-beneficiaries.
15-15-305.	Form of registration in beneficiary form.	15-15-412.	Nontestamentary disposition.
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15-15-307.	Ownership on death of owner.	15-15-414.	Disclaimer.
		15-15-415.	Applicability.

PART 1

PROVISIONS RELATING TO EFFECT OF DEATH

**15-15-101. Nonprobate transfers on death.** (1) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. This subsection (1) includes a written provision that:

(a) Money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(b) Money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(c) Any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(1.5) A conveyance or deed of gift described in subsection (1) of this section that relates to an interest in real property may be created pursuant to part 4 of this article and, if so created, shall be subject to the rights of third parties described in part 4 of this article.



(2) Under the provisions of subsection (1) of this section, it is permissible to designate as a beneficiary, payee, or owner a trustee named in an inter vivos or testamentary trust in existence at the date of such designation. It is not necessary to the validity of any such trust that there be in existence a trust corpus other than the right to receive the benefits or to exercise the rights resulting from such a designation. It is also permissible to designate as a beneficiary, payee, or owner a trustee named in, or ascertainable under, the will of the designator. The benefits or rights resulting from such a designation shall be payable or transferable to the trustee upon admission of the will to probate if a testamentary trustee is the designated payee or transferee, subject to the right of the payor to impose requirements and take actions as may a personal representative acting under section 15-12-913. A trustee shall not be disqualified to receive such benefits or rights merely because the trust under which he was to act or is acting fails to come into existence or has been distributed in part or whole, but such a trustee shall receive and distribute the proceeds in accord with the terms of such trust.

(3) If a trustee is designated pursuant to subsection (2) of this section and no qualified trustee makes claim to the benefits or rights resulting from such a designation within one year after the death of the designator, or if evidence satisfactory to the person obligated to make the payment or transfer is furnished within such one-year period that there is or will be no trustee to receive the proceeds, payment or transfer shall be made to the personal representative of the designator, unless otherwise provided by such designation or other controlling agreement made during the lifetime of the designator.

(4) The payment of the benefits due or a transfer of the rights given under a designation pursuant to subsection (2) or (3) of this section and the receipt for such payment or transfer executed by the trustee or other authorized payee thereof shall constitute a full discharge and acquittance of the person obligated to make the payment or transfer.

(5) Payment of the benefits due or the transfer of the rights given in accordance with a designation under the provisions of subsection (2) of this section shall not cause such benefits or rights to be included in the property administered as part of the designator's estate under this code or to be subject to the claims of his or her creditors, except as provided in sections 15-11-202 and 15-15-103.

(6) Except as otherwise provided in sections 15-11-202 and 15-15-103, the express provisions of the trust agreement, declaration of trust, or testamentary trust shall control and regulate the extent to which the benefits or rights payable or transferable under such a designation shall be subject to the debts of the designator if paid or transferred under the provisions of subsection (2) of this section.

(7) Repealed.

**Source:** L. 90: Entire article R&RE, p. 908, § 1, effective July 1. L. 2004: (1.5) added, p. 734, § 3, effective August 4. L. 2006: (5) and (6) amended and (7) repealed, pp. 390, 391, §§ 18, 19, 20, effective July 1.

**Editor's note:** This section is similar to former § 15-15-201 as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For note on the utility of testamentary and inter vivos life insurance trusts, see 32 Rocky Mt. L. Rev. 382 (1960). For article, "An Aspect of Estate Planning in Colorado: The Revocable Inter Vivos Trust", see 43 Den. L.J. 296 (1966).

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

This section is not intended to expand the means by which a testamentary power of appointment may be exercised, nor does it obviate the requirement that a testamentary in-

strument be probated. The statute merely makes it clear that the exercise of a power of appointment in a will does not make the transfer testamentary, nor does it make the transferred asset a part of the probate estate. In re Estate of Scott, 77 P.3d 906 (Colo. App. 2003).

**When the trust instrument provides that a power of appointment may only be exercised in a will, the instrument exercising the power must satisfy the statutes relating to wills and be probated in order to exercise and implement the power of appointment.** In re Estate of Scott, 77 P.3d 906 (Colo. App. 2003).

**Reservations by settlor of inter vivos trust do not render trust testamentary.** Where the settlor of an inter vivos trust reserves to himself the income of the trust estate and the right to change or revoke the trust and the right to disapprove certain investments, such reservations do not render the trust testamentary. *Denver Nat'l Bank v. Brecht*, 137 Colo. 88, 322 P.2d 667 (1958).

**So that settlor obtains advantages of a will without the necessity of making one.** Where the property involved in a trust is assigned, transferred, and set over to a trustee and remains in the name of the trustee, the interest of a settlor therein passes to the trustee in presenti and while the settlor remains alive the transfer is inter vivos and not testamentary. Hence, if an owner of property can dispose of it inter vivos and thereby render a will unnecessary for accomplishment of his practical purposes, he has a right to do so. The motive in making such a transfer may be to obtain the practical advantages of a will without the necessity of making one, but the motive is immaterial. *Denver Nat'l Bank v. Brecht*, 137 Colo. 88, 322 P.2d 667 (1958).

**An inter vivos trust does not become testamentary when a pour-over is made into it;** therefore, the instrument creating the trust need not be executed with the formality of a will. In *re Estate of Gardner*, 31 Colo. App. 361, 505 P.2d 50 (1972).

**To create a valid "pour-over" provision,** it is only necessary that a trust be evidenced by a written instrument; that a trust be in existence at the time the will is executed; and that a trust be capable of being identified with reasonable certainty. In *re Estate of Allen*, 28 Colo. App. 574, 475 P.2d 629 (1970); In *re Estate of Gardner*, 31 Colo. App. 361, 505 P.2d 50 (1972).

**This section removes certain conceptual difficulties** which arise from the application of either of the doctrines of incorporation by reference or the doctrine of facts of independent significance, and, second, it validates testamentary dispositions of property to existing trusts. In *re Estate of Allen*, 28 Colo. App. 574, 475 P.2d 629 (1970).

**Clear, explicit, definite, unequivocal, and unambiguous language, or conduct is required to establish an express or voluntary trust.** Because the parties to a savings and loan account failed to meet these requirements, they did not establish that a valid inter-vivos testamentary trust was created. *Goemmer v. Hartman*, 791 P.2d 1238 (Colo. App. 1990).

**The essential requirements of a gift inter-vivos are a clear and unmistakable intention to make a gift,** and a complete parting of possession and surrender by the donor of all control and dominion over the same to the donee. *Goemmer v. Hartman*, 791 P.2d 1238 (Colo. App. 1990).

**Applied** in *Ayres v. King*, 643 P.2d 788 (Colo. App. 1981).

**15-15-102. Will not to affect joint tenancy in real property or personalty.** No will or other testamentary disposition or testamentary provision of one of the owners in joint tenancy of real or personal property or of an interest in real or personal property shall destroy or affect the joint tenancy or prevent the entire title and interest owned by the joint tenants from becoming vested upon his death in the joint tenants who shall have survived him. Upon the death of an owner in joint tenancy of real or personal property or of an interest in real or personal property, leaving surviving him coowners under such joint tenancy, all of the interest and title which, immediately before such death was owned by all of the joint tenants under such joint tenancy, shall become vested in the survivors of such joint tenants in spite of and without regard to the provisions of a will of the joint tenant so dying or the admission to probate of such will and without regard to whether such will was executed before or after the creation of the joint tenancy.

**Source: L. 90:** Entire article R&RE, p. 909, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-202 as it existed prior to 1990.

#### ANNOTATION

**Joint tenancy statute had no bearing on wife's obligations under mutual wills executed by her and her husband.** Statute provides that the making of a will does not destroy an existing joint tenancy and the property held

in joint tenancy shall pass to the surviving joint tenant by operation of law, the probated will notwithstanding. *Murphy v. Glenn*, 964 P.2d 581 (Colo. App. 1998).



**15-15-103. Liability of nonprobate transferees for creditor claims and statutory allowances.** (1) (a) Except as otherwise provided in paragraph (b) of this subsection (1), as used in this section, “nonprobate transfer” means a valid transfer effective at death by a transferor whose last domicile was in this state to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.

(b) This section shall not apply to:

(I) A survivorship interest in joint tenancy real estate; and

(II) Property transferred by the exercise or default in the exercise of a power of appointment, including a power of withdrawal, created by a person other than the transferor; and

(III) Proceeds transferred pursuant to a beneficiary designation under a life insurance, accident insurance, or annuity policy contract; and

(IV) Property or funds held in or payable from a pension or retirement plan, individual retirement account, deferred compensation plan, internal revenue code section 529 plan, or other similar arrangement.

(2) Except as otherwise provided by paragraph (b) of subsection (1) of this section, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against the decedent’s probate estate and statutory allowances to the decedent’s spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

(3) Nonprobate transferees are liable for the insufficiency described in subsection (2) of this section in the following order of priority:

(a) A transferee designated in the decedent’s will or any other governing instrument, as provided in the instrument;

(b) The trustee of a trust serving as the principal nonprobate instrument in the decedent’s estate plan as shown by its designation as devisee of the decedent’s residuary estate or by other acts or circumstances, to the extent of the value of the nonprobate transfer received or controlled;

(c) Other nonprobate transferees, in proportion to the values received.

(4) Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devisees under that will.

(5) A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another instrument, the provision of the later instrument shall prevail.

(6) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this state, whether or not the transferee is located in this state.

(7) A proceeding under this section may not be commenced unless the personal representative of the decedent’s estate has received a written demand for the proceeding from the decedent’s surviving spouse or a child of the decedent, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent’s estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(8) A proceeding under this section shall be commenced within one year after the decedent’s death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within sixty-three days after final allowance of the claim.

(9) Unless a written notice asserting that a decedent’s probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent’s personal representative, the following rules apply:

(a) Payment or delivery of assets by a financial institution, registrar, or other obligor to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

(b) A trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's beneficiaries. Each beneficiary, to the extent of the distribution received, becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary.

(10) The receipt of funds derived from nonprobate transferees by a person as provided in this section in satisfaction of such person's claim for a debt or statutory allowances does not constitute the receipt of nonprobate property by such person for purposes of this section or part 2 of article 11 of this title.

(11) In the event of any conflict in the provisions of this section with the provisions of parts 2 and 4 of article 11 of this title, the provisions of this section shall control.

**Source:** L. 2006: Entire section added, p. 388, § 17, effective July 1. L. 2012: (8) amended, (SB 12-175), ch. 208, p. 841, § 55, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (8) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

## PART 2

### MULTIPLE-PERSON ACCOUNTS

#### SUBPART 1

#### DEFINITIONS AND GENERAL PROVISIONS

##### **15-15-201. Definitions.** In this part 2:

(1) "Account" means a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, and share account.

(2) "Agent" means a person authorized to make account transactions for a party.

(3) "Beneficiary" means a person named as one to whom sums on deposit in an account are payable on request after death of all parties or for whom a party is named as trustee.

(4) "Financial institution" means an organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union.

(5) "Multiple-party account" means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned.

(6) "Party" means a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent.

(7) "Payment" of sums on deposit includes withdrawal, payment to a party or third person pursuant to check or other request, and a pledge of sums on deposit by a party, or a set-off, reduction, or other disposition of all or part of an account pursuant to a pledge.

(8) "POD designation" means the designation of (i) a beneficiary in an account payable on request to one party during the party's lifetime and on the party's death to one or more beneficiaries, or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries, or (ii) a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned.



(9) "Receive", as it relates to notice to a financial institution, means receipt in the office or branch office of the financial institution in which the account is established, but if the terms of the account require notice at a particular place, in the place required.

(10) "Request" means a request for payment complying with all terms of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but, for purposes of this part 2, if terms of the account condition payment on advance notice, a request for payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for payment.

(11) "Sums on deposit" means the balance payable on an account, including interest and dividends earned, whether or not included in the current balance, and any deposit life insurance proceeds added to the account by reason of death of a party.

(12) "Terms of the account" includes the deposit agreement and other terms and conditions, including the form, of the contract of deposit.

**Source: L. 90:** Entire article R&RE, p. 910, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-101 as it existed prior to 1990.

#### ANNOTATION

**Decedent was not a "party" to a joint account** with the surviving parties, nor was a joint account created, under this section where the account card did not name the decedent as a

"party". *Goemmer v. Hartman*, 791 P.2d 1238 (Colo. App. 1990) (decided under former § 15-15-101 as it existed prior to the 1990 repeal and reenactment of this article).

**15-15-202. Limitation on scope of part.** This part 2 does not apply to (i) an account established for a partnership, joint venture, or other organization for a business purpose, (ii) an account controlled by one or more persons as an agent or trustee for a corporation, unincorporated association, or charitable or civic organization, or (iii) a fiduciary or trust account in which the relationship is established other than by the terms of the account.

**Source: L. 90:** Entire article R&RE, p. 911, § 1, effective July 1.

**15-15-203. Types of account; existing accounts.** (1) An account may be for a single party or multiple parties. A multiple-party account may be with or without a right of survivorship between the parties. Subject to section 15-15-212 (3), either a single-party account or a multiple-party account may have a POD designation, an agency designation, or both.

(2) An account established before, on, or after July 1, 1990, whether in the form prescribed in section 15-15-204 or in any other form, is either a single-party account or a multiple-party account, with or without right of survivorship, and with or without a POD designation or an agency designation, within the meaning of this part 2, and is governed by this part 2.

**Source: L. 90:** Entire article R&RE, p. 911, § 1, effective July 1.

**15-15-204. Forms.** (1) A contract of deposit that contains provisions in substantially the following form establishes the type of account provided, and the account is governed by the provisions of this part 2 applicable to an account of that type:

#### UNIFORM SINGLE- OR MULTIPLE-PARTY ACCOUNT FORM

PARTIES [Name One Or More Parties]:

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**OWNERSHIP [Select One And Initial]:**

\_\_\_\_\_ SINGLE-PARTY ACCOUNT

\_\_\_\_\_ MULTIPLE-PARTY ACCOUNT

Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent.

**RIGHTS AT DEATH [Select One And Initial]:**

\_\_\_\_\_ SINGLE-PARTY ACCOUNT

At death of party, ownership passes as part of party's estate.

\_\_\_\_\_ SINGLE-PARTY ACCOUNT WITH POD (PAY ON DEATH) DESIGNATION  
[Name One Or More Beneficiaries]:

At death of party, ownership passes to POD beneficiaries and is not part of party's estate.

\_\_\_\_\_ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP

At death of party, ownership passes to surviving parties.

\_\_\_\_\_ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND  
POD (PAY ON DEATH) DESIGNATION  
[Name One Or More Beneficiaries]:

At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

\_\_\_\_\_ MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP

At death of party, deceased party's ownership passes as part of deceased party's estate.

**AGENCY (POWER OF ATTORNEY) DESIGNATION [Optional]**

Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.

[To Add Agency Designation To Account, Name One Or More Agents]:

\_\_\_\_\_ [Select One And Initial]:

\_\_\_\_\_ AGENCY DESIGNATION SURVIVES DISABILITY OR INCAPACITY OF PARTIES

\_\_\_\_\_ AGENCY DESIGNATION TERMINATES ON DISABILITY OR INCAPACITY OF PARTIES

(2) A contract of deposit that does not contain provisions in substantially the form provided in subsection (1) is governed by the provisions of this part 2 applicable to the type of account that most nearly conforms to the depositor's intent.

**Source: L. 90:** Entire article R&RE, p. 911, § 1, effective July 1.

**15-15-205. Designation of agent.** (1) By a writing signed by all parties, the parties may designate as agent of all parties on an account a person other than a party.

(2) Unless the terms of an agency designation provide that the authority of the agent terminates on disability or incapacity of a party, the agent's authority survives disability and incapacity. The agent may act for a disabled or incapacitated party until the authority of the agent is terminated.

(3) Death of the sole party or last surviving party terminates the authority of an agent.

**Source: L. 90:** Entire article R&RE, p. 912, § 1, effective July 1.

**15-15-206. Applicability of part.** The provisions of sections 15-15-211 to 15-15-216 (subpart 2) concerning beneficial ownership as between parties or as between parties and beneficiaries apply only to controversies between those persons and their creditors and other successors, and do not apply to the right of those persons to payment as determined by the



terms of the account. Sections 15-15-221 to 15-15-227 (subpart 3) governs the liability and set-off rights of financial institutions that make payments pursuant to it.

**Source:** L. 90: Entire article R&RE, p. 913, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-102 as it existed prior to 1990.

## SUBPART 2

### OWNERSHIP AS BETWEEN PARTIES AND OTHERS

**15-15-211. Ownership during lifetime.** (1) In this section, "net contribution" of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. The term includes deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.

(2) During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

(3) A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.

(4) An agent in an account with an agency designation has no beneficial right to sums on deposit.

**Source:** L. 90: Entire article R&RE, p. 913, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-103 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provision similar to this section.

**Clear and convincing evidence is required to rebut the presumption** that, as between parties married to each other, the net contribution of each is an equal amount. *Harvey v. Harvey*, 841 P.2d 375 (Colo. App. 1992).

**Changing accounts from multi-party to sole accounts before divorce did not affect the**

**other spouse's rights** since the accounts remained part of the marital estate and either party had a legal right to deplete the joint accounts. *Estate of Westfall v. Westfall*, 942 P.2d 1227 (Colo. App. 1996).

**Applied in** *In re Estate of Beasley*, 40 Colo. App. 347, 578 P.2d 662 (1978).

**15-15-212. Rights at death.** (1) Except as otherwise provided in this section, on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under section 15-15-211 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under section 15-15-211 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under section 15-15-211, and the right of survivorship continues between the surviving parties.

(2) In an account with a POD designation:

(a) On death of one of two or more parties, the rights in sums on deposit are governed by subsection (1).

(b) On death of the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiary or beneficiaries. If two or more beneficiaries survive, sums on deposit belong to them in equal and undivided shares, and there is no right of survivorship in the event of death of a beneficiary thereafter. If no beneficiary survives, sums on deposit belong to the estate of the last surviving party.

(3) Sums on deposit in a single-party account without a POD designation, or in a multiple-party account that, by the terms of the account, is without right of survivorship, are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under section 15-15-211 is transferred as part of the decedent's estate. A POD designation in a multiple-party account without right of survivorship is ineffective. For purposes of this section, designation of an account as a tenancy in common establishes that the account is without right of survivorship.

(4) The ownership right of a surviving party or beneficiary, or of the decedent's estate, in sums on deposit is subject to requests for payment made by a party before the party's death, whether paid by the financial institution before or after death, or unpaid. The surviving party or beneficiary, or the decedent's estate, is liable to the payee of an unpaid request for payment. The liability is limited to a proportionate share of the amount transferred under this section, to the extent necessary to discharge the request for payment.

(5) Sums remaining on deposit at the death of a party to a multiple-party account, which are not subject to a POD designation, belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention.

**Source:** L. 90: Entire article R&RE, p. 913, § 1, effective July 1. L. 91: (5) added, p. 1452, § 18, effective July 1.

**Editor's note:** This section is similar to former § 15-15-104 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provision similar to this section.

**The survivorship provisions of this section were not applicable** since the execution of the power of attorney rendered the decedent the

agent of the surviving parties rather than a party to a joint account. *Goemmer v. Hartman*, 791 P.2d 1238 (Colo. App. 1990).

**Applied** in *In re Estate of Beasley*, 40 Colo. App. 347, 578 P.2d 662 (1978).

**15-15-213. Alteration of rights.** (1) Rights at death under section 15-15-212 are determined by the type of account at the death of a party. The type of account may be altered by written notice given by a party to the financial institution to change the type of account or to stop or vary payment under the terms of the account. The notice must be signed by a party and received by the financial institution during the party's lifetime.

(2) A right of survivorship arising from the express terms of the account, section 15-15-212, or a POD designation, may not be altered by will.

**Source:** L. 90: Entire article R&RE, p. 914, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-105 as it existed prior to 1990.

**15-15-214. Accounts and transfers nontestamentary.** Except as provided in part 2 of article 11 of this title (elective share of surviving spouse), a transfer resulting from the application of section 15-15-212 is effective by reason of the terms of the account involved and this part 2 and is not testamentary or subject to articles 10 to 13 of this title (estate administration).

**Source:** L. 90: Entire article R&RE, p. 914, § 1, effective July 1. L. 2006: Entire section amended, p. 391, § 22, effective July 1.

**Editor's note:** This section is similar to former § 15-15-106 as it existed prior to 1990.



**15-15-215. Rights of creditors and others. (Repealed)**

**Source:** L. 90: Entire article R&RE, p. 914, § 1, effective July 1. L. 2006: Entire section repealed, p. 391, § 21, effective July 1.

**Editor's note:** This section was similar to former § 15-15-107 as it existed prior to 1990.

**15-15-216. Community property and tenancy by the entireties.** (1) A deposit of community property in an account does not alter the community character of the property or community rights in the property, but a right of survivorship between parties married to each other arising from the express terms of the account or section 15-15-212 may not be altered by will.

(2) This part 2 does not affect the law governing tenancy by the entireties.

**Source:** L. 90: Entire article R&RE, p. 915, § 1, effective July 1.

**SUBPART 3****PROTECTION OF FINANCIAL INSTITUTIONS**

**15-15-221. Authority of financial institution.** A financial institution may enter into a contract of deposit for a multiple-party account to the same extent it may enter into a contract of deposit for a single-party account, and may provide for a POD designation and an agency designation in either a single-party account or a multiple-party account. A financial institution need not inquire as to the source of a deposit to an account or as to the proposed application of a payment from an account.

**Source:** L. 90: Entire article R&RE, p. 915, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-108 as it existed prior to 1990.

**ANNOTATION**

**Section does not address circumstances in which the financial institution knows, without need for further inquiry, the source of funds deposited.** When a financial institution has actual knowledge that an account holder is a fiduciary and not a beneficial owner of account

assets, neither this section nor § 15-15-222 relieves the financial institution of duties imposed by the Uniform Probate Code, the Uniform Commercial Code, or the Uniform Fiduciary Law. *Bryant v. Cmty. Choice Credit Union*, 160 P.3d 266 (Colo. App. 2007).

**15-15-222. Payment on multiple-party account.** A financial institution, on request, may pay sums on deposit in a multiple-party account to:

(1) One or more of the parties, whether or not another party is disabled, incapacitated, or deceased when payment is requested and whether or not the party making the request survives another party; or

(2) The personal representative, if any, or, if there is none, the heirs or devisees of a deceased party if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary, unless the account is without right of survivorship under section 15-15-212.

**Source:** L. 90: Entire article R&RE, p. 915, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-109 as it existed prior to 1990.

## ANNOTATION

**Section does not address the duties of a financial institution that obtains a pledge of account funds for security for the personal debt of a person named on the account who it knows has access only as a fiduciary and not as a beneficial owner of account assets.** When a financial institution has actual knowledge that an account holder is a fiduciary and not a ben-

eficial owner of account assets, neither this section nor § 15-15-221 relieves the financial institution of duties imposed by the Uniform Probate Code, the Uniform Commercial Code, or the Uniform Fiduciary Law. *Bryant v. Cmty. Choice Credit Union*, 160 P.3d 266 (Colo. App. 2007).

**15-15-223. Payment on POD designation.** A financial institution, on request, may pay sums on deposit in an account with a POD designation to:

(1) One or more of the parties, whether or not another party is disabled, incapacitated, or deceased when the payment is requested and whether or not a party survives another party;

(2) The beneficiary or beneficiaries, if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as parties; or

(3) The personal representative, if any, or, if there is none, the heirs or devisees of a deceased party, if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary.

**Source: L. 90:** Entire article R&RE, p. 915, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-110 as it existed prior to 1990.

**15-15-224. Payment to designated agent.** A financial institution, on request of an agent under an agency designation for an account, may pay to the agent sums on deposit in the account, whether or not a party is disabled, incapacitated, or deceased when the request is made or received, and whether or not the authority of the agent terminates on the disability or incapacity of a party.

**Source: L. 90:** Entire article R&RE, p. 916, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-111 as it existed prior to 1990.

**15-15-225. Payment to minor.** If a financial institution is required or permitted to make payment pursuant to this part 2 to a minor designated as a beneficiary, payment may be made pursuant to the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.

**Source: L. 90:** Entire article R&RE, p. 916, § 1, effective July 1.

**15-15-226. Discharge.** (1) Payment made pursuant to this part 2 in accordance with the type of account discharges the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries, or their successors. Payment may be made whether or not a party, beneficiary, or agent is disabled, incapacitated, or deceased when payment is requested, received, or made.

(2) Protection under this section does not extend to payments made after a financial institution has received written notice from a party, or from the personal representative, surviving spouse, or heir or devisee of a deceased party, to the effect that payments in accordance with the terms of the account, including one having an agency designation, should not be permitted, and the financial institution has had a reasonable opportunity to act



on it when the payment is made. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in a request for payment if the financial institution is to be protected under this section. Unless a financial institution has been served with process in an action or proceeding, no other notice or other information shown to have been available to the financial institution affects its right to protection under this section.

(3) A financial institution that receives written notice pursuant to this section or otherwise has reason to believe that a dispute exists as to the rights of the parties may refuse, without liability, to make payments in accordance with the terms of the account.

(4) Protection of a financial institution under this section does not affect the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of sums on deposit in accounts or payments made from accounts.

**Source: L. 90:** Entire article R&RE, p. 916, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-112 as it existed prior to 1990.

**15-15-227. Set-off.** Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party is indebted to a financial institution, the financial institution has a right to set-off against the account. The amount of the account subject to set-off is the proportion to which the party is, or immediately before death was, beneficially entitled under section 15-15-211 or, in the absence of proof of that proportion, an equal share with all parties.

**Source: L. 90:** Entire article R&RE, p. 916, § 1, effective July 1.

**Editor's note:** This section is similar to former § 15-15-113 as it existed prior to 1990.

### PART 3

#### UNIFORM TOD SECURITY REGISTRATION ACT

**15-15-301. Definitions.** In this part 3:

(1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) "Register", including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account, including but not limited to an account held on the books of the registering entity, showing ownership of securities.

(3) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker, bank, or trust company maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(4) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.

(5) "Security account" means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, cash equivalents, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death; (ii) an investment management or custody account with a trust company or a trust division of a bank with trust powers, including the securities in the account, a cash balance in the account, and cash, cash equivalents, interest, earnings, or dividends earned or declared on a security in the account, whether or not credited to the account before the owner's death; or (iii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

**Source:** L. 90: Entire article R&RE, p. 917, § 1, effective July 1. L. 2003: (2) and (3) amended, p. 2111, § 5, effective May 22. L. 2004: (5) amended, p. 1535, § 2, effective August 4.

**15-15-302. Registration in beneficiary form; sole or joint tenancy ownership.** Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

**Source:** L. 90: Entire article R&RE, p. 917, § 1, effective July 1.

**15-15-303. Registration in beneficiary form; applicable law.** A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

**Source:** L. 90: Entire article R&RE, p. 917, § 1, effective July 1.

**15-15-304. Origination of registration in beneficiary form.** A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

**Source:** L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

**15-15-305. Form of registration in beneficiary form.** Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD", or by the words "pay on death" or the abbreviation "POD", after the name of the registered owner and before the name of a beneficiary.

**Source:** L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

**15-15-306. Effect of registration in beneficiary form.** The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

**Source:** L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

**15-15-307. Ownership on death of owner.** On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in



common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

**Source:** L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

**15-15-308. Protection of registering entity.** (1) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this part 3.

(2) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this part 3.

(3) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with section 15-15-307 and does so in good faith reliance (i) on the registration, (ii) on this part 3, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part 3 do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this part 3.

(4) The protection provided by this part 3 to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

**Source:** L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

**15-15-309. Nontestamentary transfer on death.** (1) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this part 3 and is not testamentary.

(2) Repealed.

**Source:** L. 90: Entire article R&RE, p. 919, § 1, effective July 1. L. 2006: (2) repealed, p. 391, § 23, effective July 1.

**15-15-310. Terms, conditions, and forms for registration.** (1) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes". This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate

implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(2) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(a) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(b) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

(c) Multiple owners-primary and secondary (substituted) beneficiaries: John S Brown Mary B Brown, JT TEN TOD John S Brown Jr SUB BENE Peter Q Brown or John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS.

**Source: L. 90:** Entire article R&RE, p. 919, § 1, effective July 1. **L. 99:** (1) amended, p. 622, § 18, effective August 4.

**15-15-311. Application of part.** This part 3 applies to registrations of securities in beneficiary form made before or after July 1, 1990, by decedents dying on or after July 1, 1990.

**Source: L. 90:** Entire article R&RE, p. 919, § 1, effective July 1.

## PART 4

### TRANSFER OF REAL PROPERTY EFFECTIVE ON DEATH

**Law reviews:** For article, "Beneficiary Deeds in Colorado Part I: Overview of Legislation", see 34 Colo. Law. 79 (June 2005); for article, "Beneficiary Deeds in Colorado Part II: Practical Applications", see 34 Colo. Law. 103 (June 2005).

**15-15-401. Definitions.** As used in this part 4, unless the context otherwise requires:

(1) "Beneficiary deed" means a deed, subject to revocation by the owner, which conveys an interest in real property and which contains language that the conveyance is to be effective upon the death of the owner and which may be in substantially the form described in section 15-15-404.

(2) "Deed" means any instrument of conveyance of real property.

(3) "Grantee-beneficiary" means one or more persons or entities capable of holding title to real property designated in a beneficiary deed to receive an interest in real property upon the death of the owner. "Grantee-beneficiary" includes, but is not limited to, a successor grantee-beneficiary.

(4) "Owner" means the grantor of a beneficiary deed.

(5) "Successor grantee-beneficiary" means the person or entity designated in a beneficiary deed to receive an interest in the property if the primary grantee-beneficiary does not survive the owner.

(6) (a) "Transfer", when used as a verb, means to convey.

(b) "Transfer", when used as a noun, means a conveyance.

**Source: L. 2004:** Entire part added, p. 727, § 1, effective August 4.

## ANNOTATION

**"Owner" of property and grantor of deed must be a natural person and not an entity.** Beneficiary deeds executed by decedent to

transfer property from trust were invalid as a matter of law. *Fischbach v. Holzberlein*, 215 P.3d 407 (Colo. App. 2009).

**15-15-402. Real property - beneficiary deed.** (1) In addition to any method allowed by law to effect a transfer at death, title to an interest in real property may be transferred on the death of the owner by recording, prior to the owner's death, a beneficiary deed signed by the owner of such interest, as grantor, designating a grantee-beneficiary of the interest.



The transfer by a beneficiary deed shall be effective only upon the death of the owner. A beneficiary deed need not be supported by consideration.

(2) The joinder, signature, consent, or agreement of, or notice to, a grantee-beneficiary of a beneficiary deed prior to the death of the grantor shall not be required. Subject to the right of the grantee-beneficiary to disclaim or refuse to accept the property, the conveyance shall be effective upon the death of the owner.

(3) During the lifetime of the owner, the grantee-beneficiary shall have no right, title, or interest in or to the property, and the owner shall retain the full power and authority with respect to the property without the joinder, signature, consent, or agreement of, or notice to, the grantee-beneficiary for any purpose.

**Source:** L. 2004: Entire part added, p. 728, § 1, effective August 4.

**15-15-403. Medicaid eligibility exclusion.** No person who is an applicant for or recipient of medical assistance for which it would be permissible for the department of health care policy and financing to assert a claim pursuant to section 25.5-4-301 or 25.5-4-302, C.R.S., shall be entitled to such medical assistance if the person has in effect a beneficiary deed. Notwithstanding the provisions of section 15-15-402 (1), the execution of a beneficiary deed by an applicant for or recipient of medical assistance as described in this section shall cause the property to be considered a countable resource in accordance with section 25.5-4-302 (6), C.R.S., and applicable rules.

**Source:** L. 2004: Entire part added, p. 728, § 1, effective August 4. L. 2006: Entire section amended, p. 2004, § 55, effective July 1.

**15-15-404. Form of beneficiary deed - recording.** (1) An owner may transfer an interest in real property effective on the death of the owner by executing a beneficiary deed that contains the words “conveys on death” or “transfers on death” or otherwise indicates the transfer is to be effective on the death of the owner and recording the beneficiary deed prior to the death of the owner in the office of the clerk and recorder in the county where the real property is located. A beneficiary deed may be in substantially the following form:

**BENEFICIARY DEED**

(§§ 15-15-401, et seq., Colorado Revised Statutes)

**CAUTION: THIS DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.**

\_\_\_\_\_, as grantor,  
(Name of grantor)  
designates \_\_\_\_\_ as  
(Name of grantee-beneficiary)  
grantee-beneficiary whose address is \_\_\_\_\_ (Note to Assessor and  
Treasurer: This address is for identification purposes only, all notices and tax state-  
ments should continue to be sent to grantor.)  
(Optional)[or if grantee-beneficiary fails to survive grantor, grantor designates  
\_\_\_\_\_, as  
(Name of successor grantee-beneficiary)  
successor grantee-beneficiary whose address is  
\_\_\_\_\_] and grantor transfers, sells, and conveys on grantor’s death to the grantee-beneficiary,  
the following described real property located in the County of \_\_\_\_\_, State of  
Colorado:  
(insert legal description here)  
Known and numbered as \_\_\_\_\_  
THIS BENEFICIARY DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY

OWNERSHIP UNTIL THE DEATH OF THE GRANTOR. IT REVOKES ALL PRIOR BENEFICIARY DEEDS BY THIS GRANTOR FOR THIS REAL PROPERTY EVEN IF THIS BENEFICIARY DEED FAILS TO CONVEY ALL OF THE GRANTOR’S INTEREST IN THIS REAL PROPERTY.

WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY DISQUALIFY THE GRANTOR FROM BEING DETERMINED ELIGIBLE FOR, OR FROM RECEIVING, MEDICAID UNDER TITLE 26, COLORADO REVISED STATUTES. WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY NOT AVOID PROBATE.

Executed this \_\_\_\_\_.  
(Date)

\_\_\_\_\_  
(Grantor)

(2) Unless the owner designates otherwise in a beneficiary deed, a beneficiary deed shall not be deemed to contain any warranties of title and shall have the same force and effect as a conveyance made using a bargain and sale deed.

Source: L. 2004: Entire part added, p. 728, § 1, effective August 4.

**15-15-405. Revocation - change - revocation by will prohibited.** (1) An owner may revoke a beneficiary deed by executing an instrument that describes the real property affected, that revokes the deed, and that is recorded prior to the death of the owner in the office of the clerk and recorder in the county where the real property is located. The joinder, signature, consent, agreement of, or notice to, the grantee-beneficiary is not required for the revocation to be effective. A revocation may be in substantially the following form:

**REVOCATION OF BENEFICIARY DEED**

(§§ 15-15-401, et seq., Colorado Revised Statutes)

**CAUTION: THIS REVOCATION MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.**

\_\_\_\_\_, as grantor, hereby

(Name of grantor)

REVOKES all beneficiary deeds concerning the following described real property located in the County of

\_\_\_\_\_, State of Colorado:

(insert legal description here)

Known and numbered as \_\_\_\_\_

Executed this \_\_\_\_\_.

(Date)

\_\_\_\_\_  
(Grantor)

(2) A subsequent beneficiary deed revokes all prior grantee-beneficiary designations by the owner for the described real property in their entirety even if the subsequent beneficiary deed fails to convey all of the owner’s interest in the described real property. The joinder, signature, consent, or agreement of, or notice to, either the original or new grantee-beneficiary is not required for the change to be effective.

(3) The most recently executed beneficiary deed or revocation of all beneficiary deeds or revocations that have been recorded prior to the owner’s death shall control regardless of the order of recording.

(4) A beneficiary deed that complies with the requirements of this part 4 may not be revoked, altered, or amended by the provisions of the will of the owner.

Source: L. 2004: Entire part added, p. 729, § 1, effective August 4.



**15-15-406. Acknowledgment.** A beneficiary deed or revocation of a beneficiary deed shall be subject to the requirements of section 38-35-109 (2), C.R.S., and may be acknowledged in accordance with section 38-35-101, C.R.S.

**Source: L. 2004:** Entire part added, p. 730, § 1, effective August 4.

**15-15-407. Vesting of ownership in grantee-beneficiary.** (1) Title to the interest in real property transferred by a beneficiary deed shall vest in the designated grantee-beneficiary only on the death of the owner.

(2) A grantee-beneficiary of a beneficiary deed takes title to the owner's interest in the real property conveyed by the beneficiary deed at the death of the owner subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests, affecting title to the property, whether created before or after the recording of the beneficiary deed, or to which the owner was subject during the owner's lifetime including, but not limited to, any executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust, or other lien. The grantee-beneficiary also takes title subject to any interest in the property of which the grantee-beneficiary has either actual or constructive notice.

(3) (a) A person having an interest described in subsection (2) of this section whose interest is not recorded in the records of the office of the clerk and recorder of the county in which the property is located at the time of the death of the owner, shall record evidence or a notice of the interest in the property not later than four months after the death of the owner. The notice shall name the person asserting the interest, describe the real property, and describe the nature of the interest asserted.

(b) Failure to record evidence or notice of interest in the property described in subsection (2) of this section within four months after the death of the owner shall forever bar the person from asserting an interest in the property as against all persons who do not have notice of the interest. A person who, without notice, obtains an interest in the property acquired by the grantee-beneficiary shall take the interest free from all persons who have not recorded their notice of interest in the property or evidence of their interest prior to the expiration of the four-month period.

(4) The interest of the grantee-beneficiary shall be subject to any claim of the department of health care policy and financing for recovery of medical assistance payments pursuant to section 25.5-4-301 or 25.5-4-302, C.R.S., which shall be enforced in accordance with section 15-15-103.

(5) The provisions of any anti-lapse statute shall not apply to beneficiary deeds. If one of multiple grantee-beneficiaries fails to survive the owner, and no provision for such contingency is made in the beneficiary deed, the share of the deceased grantee-beneficiary shall be proportionately added to, and pass as a part of, the shares of the surviving grantee-beneficiaries.

**Source: L. 2004:** Entire part added, p. 730, § 1, effective August 4. **L. 2006:** (4) amended, p. 2004, § 56, effective July 1. **L. 2007:** (4) amended, p. 2028, § 31, effective June 1.

**15-15-408. Joint tenancy - definitions.** (1) A joint tenant of an interest in real property may use the procedures described in this part 4 to transfer his or her interest effective upon the death of such joint tenant. However, title to the interest shall vest in the designated grantee-beneficiary only if the joint tenant-grantor is the last to die of all of the joint tenants of such interest. If a joint tenant-grantor is not the last joint tenant to die, the beneficiary deed shall not be effective, and the beneficiary deed shall not make the grantee-beneficiary an owner in joint tenancy with the surviving joint tenant or tenants. A beneficiary deed shall not sever a joint tenancy.

(2) As used in this section, "joint tenant" means a person who owns an interest in real property as a joint tenant with right of survivorship.

**Source: L. 2004:** Entire part added, p. 731, § 1, effective August 4.

**15-15-409. Rights of creditors and others. (Repealed)**

**Source:** L. 2004: Entire part added, p. 731, § 1, effective August 4. L. 2006: Entire section repealed, p. 393, § 29, effective July 1.

**15-15-410. Purchaser from grantee-beneficiary protected.** (1) Subject to the rights of claimants under section 15-15-407 (2), if the property acquired by a grantee-beneficiary or a security interest therein is acquired for value and without notice by a purchaser from, or lender to, a grantee-beneficiary, the purchaser or lender shall take title free of rights of an interested person in the deceased owner's estate and shall not incur personal liability to the estate or to any interested person.

(2) For purposes of this section, any recorded instrument evidencing a transfer to a purchaser from, or lender to, a grantee-beneficiary on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that the transfer was made for value. Any such sale or loan by the grantee-beneficiary shall not relieve the grantee-beneficiary of the obligation to the personal representative of the deceased owner's estate under section 15-15-103.

**Source:** L. 2004: Entire part added, p. 732, § 1, effective August 4. L. 2007: (2) amended, p. 2028, § 32, effective June 1.

**15-15-411. Limitations on actions and proceedings against grantee-beneficiaries.**

(1) Unless previously adjudicated or otherwise barred, the claim of a claimant to recover from a grantee-beneficiary who is liable to pay the claim, and the right of an heir or devisee or of a personal representative acting on behalf of an heir or devisee, to recover property from a grantee-beneficiary or the value thereof from a grantee-beneficiary is forever barred as follows:

(a) A claim by a creditor of the owner is forever barred at one year after the owner's death.

(b) Any other claimant or an heir or devisee is forever barred at the earlier of the following:

(I) Three years after the owner's death; or

(II) One year after the time of recording the proof of death of the owner in the office of the clerk and recorder in the county in which the legal property is located.

(2) Nothing in this section shall be construed to bar an action to recover property or value received as the result of fraud.

**Source:** L. 2004: Entire part added, p. 733, § 1, effective August 4.

**15-15-412. Nontestamentary disposition.** A beneficiary deed shall not be construed to be a testamentary disposition and shall not be invalidated due to nonconformity with the provisions of the "Colorado Probate Code" governing wills.

**Source:** L. 2004: Entire part added, p. 733, § 1, effective August 4.

**15-15-413. Proof of death.** Proof of the death of the owner or a grantee-beneficiary shall be established in the same manner as for proving the death of a joint tenant.

**Source:** L. 2004: Entire part added, p. 733, § 1, effective August 4.

**15-15-414. Disclaimer.** A grantee-beneficiary may refuse to accept all or any part of the real property interest described in a beneficiary deed. A grantee-beneficiary may disclaim all or any part of the real property interest described in a beneficiary deed by any method



provided by law. If a grantee-beneficiary refuses to accept or disclaims any real property interest, the grantee-beneficiary shall have no liability by reason of being designated as a grantee-beneficiary under this part 4.

**Source: L. 2004:** Entire part added, p. 733, § 1, effective August 4.

**15-15-415. Applicability.** The provisions of this part 4 shall apply to beneficiary deeds executed by owners who die on or after August 4, 2004.

**Source: L. 2004:** Entire part added, p. 733, § 1, effective August 4.

**ARTICLE 16**  
**Trust Administration**

**Editor’s note:** For historical information concerning the repeal and reenactment of articles 10 to 17 of this title, see the editor’s note immediately preceding article 10.

**PART 1**

**TRUST REGISTRATION**

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**DUTIES AND LIABILITIES OF TRUSTEES**

- 15-16-301. General duties not limited.
- 15-16-302. Trustee’s standard of care and performance.
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- 15-16-307. Limitations on proceedings against trustees after final account.

**PART 4**

**CONSOLIDATION AND DIVISION OF TRUSTS**

- 15-16-401. Authority to consolidate and divide trusts.

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**INSURABLE INTEREST OF TRUSTEE**

- 15-16-501. Insurable interest of trustee - definition.

**PART 1**

**TRUST REGISTRATION**

**15-16-101. Duty to register trusts.** (1) Subject to the provisions of section 15-10-108 and to subsections (2), (3), and (4) of this section, the trustee of a trust having its principal place of administration in this state shall, within thirty days after his acceptance of the trust, register the trust in the court of this state at the principal place of administration.

Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept or at the trustee's residence, if he has no such place of business. In the case of cotrustees, the principal place of administration, if not otherwise designated in the trust instrument, is the usual place of business of the corporate trustee if there is but one corporate cotrustee or the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate cotrustee, and otherwise the usual place of business or residence of any of the cotrustees as agreed upon by them. The duty to register does not apply to the trustee of a trust if registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release.

(2) Registration of a trust which has no asset other than the right to receive property upon the occurrence of some future event or a trust nominally funded with assets having a value of five hundred dollars or less shall not be required until the occurrence of such event or assets having a value in excess of five hundred dollars are deposited therein.

(3) Registration of a fully and presently revocable inter vivos trust shall not be required until such time as the grantor's power to revoke such trust has terminated, nor shall registration be required if all the assets of such a trust become then distributable outright to the beneficiaries.

(4) A trust which is required to be registered and which divides the corpus into multiple trusts or a will which creates multiple trusts shall require only one registration rather than a registration for each separate trust.

(5) The provisions of this part 1 shall not apply to any trust created under sections 15-14-412.5 and 15-14-412.6.

**Source:** L. 73: R&RE, p. 1640, § 1. C.R.S. 1963: § 153-7-101. L. 75: (1) amended and (3) added, p. 605, § 57, effective July 1. L. 77: Entire section amended, p. 836, § 26, effective July 1. L. 91, 2nd Ex. Sess.: (5) added, p. 86, § 3, effective October 16. L. 96: (5) amended, p. 661, § 13, effective July 1. L. 2000: (5) amended, p. 1834, § 11, effective January 1, 2001.

#### ANNOTATION

**Law reviews.** For article, "Navigating Colorado's Trust Registration Statutes", see 31 Colo. Law. 55 (March 2002).

**Applied** in *Ayres v. King*, 643 P.2d 788 (Colo. App. 1981).

**15-16-102. Registration procedures and content of statement.** (1) Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere.

(2) The statement shall identify the trust as follows:

(a) In the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate;

(b) In the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument;

(c) In the case of an oral trust, by information identifying the settlor or other source of funds and describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries, and time of performance.

(2.5) The trust registration statement shall contain language indicating that, because a court will not routinely review or adjudicate matters unless it is specifically requested to do so by a beneficiary, creditor, or other interested person, all interested persons, including beneficiaries and creditors, have the responsibility to protect their own rights and interests in the estate in the manner provided by the provisions of this code by filing an appropriate pleading with the court by which the estate is being administered and serving it on all interested persons pursuant to section 15-10-401.

(3) If a trust has been registered elsewhere, registration in this state is ineffective until



the earlier registration is released by order of the court where prior registration occurred, or an instrument executed by the trustee and all beneficiaries, filed with the registration in this state.

**Source:** L. 73: R&RE, p. 1641, § 1. C.R.S. 1963: § 153-7-102. L. 2008: (2.5) added, p. 485, § 14, effective July 1.

**15-16-103. Effect of registration.** (1) By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the court in any proceeding under section 15-16-201 relating to the trust that may be initiated by any interested person while the trust remains registered. Notice of any proceeding shall be provided pursuant to section 15-10-401.

(2) To the extent of their interests in the trust, all beneficiaries of a trust properly registered in this state are subject to the jurisdiction of the court of registration for the purposes of proceedings under section 15-16-201, provided notice is given pursuant to section 15-10-401.

**Source:** L. 73: R&RE, p. 1641, § 1. C.R.S. 1963: § 153-7-103. L. 2008: (1) amended, p. 485, § 15, effective July 1.

**15-16-104. Effect of failure to register.** A trustee who fails to register a trust in a proper place, for purposes of any proceedings initiated by a beneficiary of the trust prior to registration, is subject to the personal jurisdiction of any court in which the trust could have been registered and otherwise as provided by the Colorado rules of civil procedure. In addition, any trustee who, within thirty days after receipt of a written demand by a settlor or beneficiary of the trust, fails to register a trust as required is subject to removal and denial of compensation or to surcharge as the court may direct. A provision in the terms of the trust purporting to excuse the trustee from the duty to register, or directing that the trust or trustee shall not be subject to the jurisdiction of the court, is ineffective. If any trustee wrongfully and willfully fails to register prior to December 31, 1975, a trust which is in existence on July 1, 1975, and which is required to be registered, or wrongfully and willfully fails to register within thirty days of his acceptance of a trust which comes into existence thereafter and which is required to be registered, the court in which the trust should have been registered shall impose on the trustee a civil penalty of one hundred dollars per day for each day the trustee fails to register the trust, but not more than one thousand dollars. Such civil penalty shall not be paid from the corpus or income of the trust.

**Source:** L. 73: R&RE, p. 1641, § 1. C.R.S. 1963: § 153-7-104. L. 75: Entire section amended, p. 605, § 58, effective July 1.

**15-16-105. Registration, qualification of foreign trustee.** A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state. A foreign cotrustee is not required to qualify in this state solely because its cotrustee maintains the principal place of administration in this state. Unless otherwise doing business in this state, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage, or acquire property located in this state, or maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in this state.

**Source:** L. 73: R&RE, p. 1642, § 1. C.R.S. 1963: § 153-7-105.

## PART 2

### JURISDICTION OF COURT CONCERNING TRUSTS

**15-16-201. Court - exclusive jurisdiction of trusts.** (1) The court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of

trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

- (a) Appoint or remove a trustee;
- (b) Review trustees' fees and to review and settle interim or final accounts;
- (c) Ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, instruct trustees, and determine the existence or nonexistence of any immunity, power, privilege, duty, or right; and
- (d) Release registration of a trust.

(2) Neither registration of a trust nor a proceeding under this section result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval, or other action of any court, subject to the jurisdiction of the court as invoked by interested parties or as otherwise exercised as provided by law.

**Source:** L. 73: R&RE, p. 1642, § 1. C.R.S. 1963: § 153-7-201.

#### ANNOTATION

**Law reviews.** For article, "The Life Beneficiary — Trustee", see 12 Colo. Law. 52 (1983). For article, "The Revocable Living Trust Revisited", see 18 Colo. Law. 225 (1989). For article, "Premature Trust Terminations", see 23 Colo. Law. 573 (1994).

**Subsection (1) does not provide for the award of attorney fees to a prevailing party.** In re Estate of Klarner, 113 P.3d 150 (Colo. 2005).

**The probate court has the authority, in the appropriate circumstances, to instruct trustee to act or not act to carry out the court's goal in the administration of such trust without relying on C.R.C.P. 65.** When a trustee's administration of a trust is challenged, the probate court has the authority to issue an injunction against the trustee without establishing grounds for a preliminary injunction to prevent further depletion of the trust while proper distribution of the trust is determined. In re Estate of Scott, 77 P.3d 906 (Colo. App. 2003).

**Trust instrument providing beneficiary with a standard of living to which he was "accustomed" did not allow trustee to control and dictate that standard.** Rather, such language referenced a non-variable factor, i.e., the beneficiary's and the settlor's past years to-

gether. In re Estate of McCart, 847 P.2d 184 (Colo. App. 1992).

**Irreconcilable conflicts between the trustee's personal interests and the interests of the trust estate and its beneficiaries are legally proper grounds for the removal of a trustee under this section.** In re Estate of Klarner, 98 P.3d 892 (Colo. App. 2003); rev'd on other grounds, 113 P.3d 150 (Colo. 2005).

**In determining proper jurisdiction as between district court and probate court, the court must look at the facts alleged, the claims asserted, and the relief requested.** Here, where the complaints were premised upon defendant's alleged legal malpractice in the drafting of the estate instruments, the estate planning, and the implementation of the estate plan, the complaints were not considered probate claims, and, therefore, jurisdiction lay with the district court not the probate court. Levine v. Katz, 192 P.3d 1008 (Colo. App. 2006).

**Probate court lacks subject matter jurisdiction over claims of legal malpractice where plaintiff does not seek to recover assets of the estate.** Levine v. Katz, 167 P.3d 141 (Colo. App. 2006).

**Applied in Ayres v. King, 643 P.2d 788 (Colo. App. 1981).**

**15-16-202. Trust proceedings - venue.** Venue for proceedings under section 15-16-201 or 15-16-205 involving registered trusts is in the place of registration. Venue for proceedings under section 15-16-201 or 15-16-205 involving trusts not registered in this state is in any place where the trust properly could have been registered and otherwise as provided by the Colorado rules of civil procedure.



**Source:** L. 73: R&RE, p. 1642, § 1. C.R.S. 1963: § 153-7-202. L. 75: Entire section amended, p. 606, § 59, effective July 1.

**Cross references:** For procedure concerning venue, see C.R.C.P. 98.

**15-16-203. Trust proceedings - dismissal of matters relating to foreign trusts.** The court will not, over the objection of a party, entertain proceedings under section 15-16-201 involving a trust registered or having its principal place of administration in another state, except when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration, or when the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order.

**Source:** L. 73: R&RE, p. 1642, § 1. C.R.S. 1963: § 153-7-203.

#### ANNOTATION

**This section is not a jurisdictional statute.** *Luebke v. Luebke*, 143 P.3d 1088 (Colo. App. 2006).

**Unlike the common law doctrine of forum non conveniens, this section creates the presumption that courts in Colorado should dismiss actions against foreign trusts.** To overcome the presumption, the nonmoving party must show that the interests of justice would be strongly impaired by referring the case to the state where the trust is registered. *Luebke v. Luebke*, 143 P.3d 1088 (Colo. App. 2006).

However, when determining whether the interests of justice would be strongly impaired by referring the case to the foreign jurisdiction, it is helpful to consider the same factors courts apply when examining common law forum non con-

veniens, including availability of evidence, availability of an alternative forum, the state's interest in the litigation, the law to be applied, the availability of witnesses, and the cost of obtaining attendance of willing witnesses. *Luebke v. Luebke*, 143 P.3d 1088 (Colo. App. 2006).

**Probate court's referral of case under this section to other state was proper** because trust was principally administered in other state, the witnesses were located there, the relative costs of litigation in either state could not be assumed, and the referral would not strongly impair the interests of justice, especially considering this section's presumption in favor of transfer. *Luebke v. Luebke*, 143 P.3d 1088 (Colo. App. 2006).

**15-16-204. Court - concurrent jurisdiction of litigation involving trusts and third parties.** The court of the place in which the trust is registered has concurrent jurisdiction with other courts of this state of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties. Venue is determined by the rules generally applicable to civil actions.

**Source:** L. 73: R&RE, p. 1643, § 1. C.R.S. 1963: § 153-7-204.

#### ANNOTATION

**Law reviews.** For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

**15-16-205. Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.** On petition of an interested person, after notice to all interested persons, the court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor, or other specialized agent or assistant, and the reasonableness of the compensation of any person so employed,

and the reasonableness of the compensation determined by the trustee for his own services. Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds.

**Source:** L. 73: R&RE, p. 1643, § 1. C.R.S. 1963: § 153-7-205.

**15-16-206. Trust proceedings - initiation by notice - necessary parties.** Proceedings under section 15-16-201 are initiated by filing a petition in the court and giving notice pursuant to section 15-10-401 to interested parties. The court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified.

**Source:** L. 73: R&RE, p. 1643, § 1. C.R.S. 1963: § 153-7-206.

## PART 3

### DUTIES AND LIABILITIES OF TRUSTEES

**15-16-301. General duties not limited.** Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this code.

**Source:** L. 73: R&RE, p. 1643, § 1. C.R.S. 1963: § 153-7-301.

#### ANNOTATION

**Law reviews.** For article, "The Life Beneficiary — Trustee", see 12 Colo. Law. 52 (1983).

**15-16-302. Trustee's standard of care and performance.** Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

**Source:** L. 73: R&RE, p. 1643, § 1. C.R.S. 1963: § 153-7-302.

#### ANNOTATION

**Law reviews.** For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986).

**15-16-303. Duty to inform and account to beneficiaries.** (1) The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration.

(2) Within thirty days after registration, in accordance with the provisions of part 1 of this article, of a trust created on or after July 1, 1975, the trustee shall inform in writing the current beneficiaries and, if possible, one or more persons who, under section 15-10-403, represent beneficiaries with future interests of the court in which the trust is registered and of his name and address.

(3) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(4) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

(5) Not more than thirty days after receiving a request pursuant to this section, the



trustee shall comply with the request or respond in writing as to why additional time is needed to respond or why the requested information will not be provided.

**Source:** L. 73: R&RE, p. 1643, § 1. C.R.S. 1963: § 153-7-303. L. 75: (2) amended, p. 606, § 60, effective July 1. L. 2011: (5) added, (SB 11-083), ch. 101, p. 306, § 13, effective August 10.

#### ANNOTATION

**Law reviews.** For article, "The Trustee's Duty to Inform Under the Colorado Probate Code", see 38 Colo. Law. 69 (November 2009).

**Applied in** *In re Lustig v. First Nat'l Bank*, 42 Colo. App. 333, 596 P.2d 1220 (1979).

**15-16-304. Duty to provide bond.** A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the court of registration or other appropriate court in amounts and with sureties and liabilities as provided in sections 15-12-604 and 15-12-606 relating to bonds of personal representatives.

**Source:** L. 73: R&RE, p. 1644, § 1. C.R.S. 1963: § 153-7-304.

**15-16-305. Trustee's duties - appropriate place of administration - deviation.** A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee, and appointment of a trustee in another state. Trust provisions relating to the place of administration and to changes in the place of administration or of trustee control, unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration.

**Source:** L. 73: R&RE, p. 1644, § 1. C.R.S. 1963: § 153-7-305.

**15-16-306. Personal liability of trustee to third parties.** (1) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(2) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(3) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration, may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

(4) The question of liability as between the trust estate and the trustee individually may be determined:

(a) In a proceeding pursuant to section 15-10-504;

(b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal;  
or

(c) In other appropriate proceedings.

(5) and (6) Repealed.

(7) A trustee is not personally liable for making a distribution of property that does not take into consideration the possible birth of a posthumously conceived child unless, prior to the distribution, the trustee received notice or acquired actual knowledge that:

(a) There is or may be an intention to use an individual's genetic material to create a child; and

(b) The birth of the child could affect the distribution of the trust assets.

(8) If a trustee has reviewed the records of the county clerk and recorder in every county in Colorado in which the trustee has actual knowledge that the decedent was domiciled at any time during the three years prior to the decedent's death and the trustee does not have actual notice or actual knowledge of the existence of a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession, the trustee shall not be individually liable for distributions made to devisees or heirs at law that do not take into consideration the designated beneficiary agreement.

**Source:** L. 73: R&RE, p. 1644, § 1. C.R.S. 1963: § 153-7-306. L. 77: (5) and (6) repealed, p. 837, § 27, effective July 1. L. 2008: (4) amended, p. 486, § 16, effective July 1. L. 2010: (7) added, (SB 10-199), ch. 374, p. 1753, § 17, effective July 1. L. 2011: IP(7) and (7)(a) amended, (SB 11-083), ch. 101, p. 317, § 25, effective August 10; IP(7) amended, (HB 11-1303), ch. 264, p. 1154, § 23, effective August 10. L. 2012: (8) added, (SB 12-131), ch. 114, p. 394, § 3, effective April 13.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act adding subsection (7):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

(2) Amendments to the introductory portion to subsection (7) by Senate Bill 11-083 and House Bill 11-1303 were harmonized.

## COMMENT

The purpose of this section is to make the liability of the trust and trustee the same as that of the decedent's estate and personal representative.

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes of

determining the claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

## ANNOTATION

**Trust is not a legal entity and therefore cannot be sued.** Although this section does not expressly deny a trust's capacity to be sued and no Colorado court has addressed the issue, au-

thority and reason indicate that it cannot be sued. *Colo. Springs Cablevision, Inc. v. Lively*, 579 F. Supp. 252 (D. Colo. 1984).



**15-16-307. Limitations on proceedings against trustees after final account.** Unless previously barred by adjudication, consent, or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within six months after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure, an action for breach of trust against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination shall be brought within the time period prescribed in section 13-80-101, C.R.S. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in section 15-10-403.

**Source:** L. 73: R&RE, p. 1645, § 1. C.R.S. 1963: § 153-7-307. L. 86: Entire section amended, p. 704, § 14, effective May 23.

## PART 4

### CONSOLIDATION AND DIVISION OF TRUSTS

**Law reviews:** For article, "Premature Trust Terminations", see 23 Colo. Law. 573 (1994).

**15-16-401. Authority to consolidate and divide trusts.** (1) Upon petition by a trustee, beneficiary, or any other interested person, the court may, for good cause shown, after a hearing and upon notice pursuant to section 15-10-401 to those interested persons as the court may direct, divide a trust into two or more separate trusts, or may consolidate two or more separate trusts into a single trust, upon such terms and conditions as it deems appropriate, if the court finds that such consolidation or division:

(a) Is not inconsistent with the intent of the settlor or testator with regard to any trust to be consolidated or divided;

(b) Would facilitate administration of each trust; and

(c) Would be in the best interest of all the beneficiaries of each trust and not materially impair their respective interests.

(2) Subsection (1) of this section shall apply to all trusts, whenever created, whether inter vivos or testamentary, whether created by the same or different instruments or by the same or different persons, and regardless of where created or administered.

(3) Subsection (1) of this section shall not limit the right of a trustee acting in accordance with the applicable provisions of the governing instruments to divide or consolidate trusts.

**Source:** L. 93: Entire part added, p. 512, § 1, effective July 1.

## PART 5

### INSURABLE INTEREST OF TRUSTEE

**Editor's note:** Section 3 of chapter 115, Session Laws of Colorado 2011, provides that the act adding this part 5 applies to any trust existing before, on, or after July 1, 2011, regardless of the effective date of the governing instrument under which the trust was created.

**15-16-501. Insurable interest of trustee - definition.** (1) In this part 5, "settlor" means a person that executes a trust instrument. The term includes a person for which a fiduciary or agent is acting.

(2) A trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by the trustee of the trust acting in a fiduciary capacity or that designates the trust itself as the owner if, on the date the policy is issued:

- (a) The insured is:
    - (I) A settlor of the trust; or
    - (II) An individual in whom a settlor of the trust has, or would have had if living at the time the policy was issued, an insurable interest; and
  - (b) The life insurance proceeds are primarily for the benefit of one or more trust beneficiaries that have:
    - (I) An insurable interest in the life of the insured; or
    - (II) A substantial interest engendered by love and affection in the continuation of the life of the insured and, if not already included under subparagraph (I) of this paragraph (b), who are:
      - (A) Related within the fifth degree or closer, as measured by the civil law system of determining degrees of relation, either by blood or law, to the insured;
      - (B) Stepchildren of the insured or their descendants; or
      - (C) Individuals who are designated as beneficiaries of insurance policies for life insurance coverage on the life of the insured under a designated beneficiary agreement executed pursuant to article 22 of this title.
- (3) This section does not limit or abridge any insurable interest or right to insure under the common law or any other statute.

**Source:** L. 2011: Entire part added, (SB 11-175), ch. 115, p. 361, § 1, effective July 1.

#### OFFICIAL COMMENT

Every state requires, either as a matter of statutory or common law, that a purchaser of life insurance on another individual have an insurable interest in the life of the insured. See generally Robert H. Jerry, II & Douglas R. Richmond, *Understanding Insurance Law*, §§ 40, 43 (LexisNexis Publishing, 4 ed., 2007), at 273-77, 293-98. The definition of insurable interest became a matter of widespread concern among trust and estate planners after *Chawla ex rel Giesinger v. Transamerica Occidental Life Insurance Co.*, 2005 WL 405405 (E.D. Va. 2005), *aff'd in part, vac'd in part*, 440 F.3d 639 (4th Cir. 2006), where a Virginia federal district court applying Maryland law held that a trust did not have an insurable interest in the life of the insured who was the settlor and the creator of the trust. This portion of the district court's decision was subsequently vacated by the Fourth Circuit when holding that the district court's decision should be affirmed on other grounds, but the appellate decision did not question or criticize the district court's insurable interest analysis. The Maryland legislature subsequently enacted a statute in the state's insurance code clarifying the circumstances when a trustee or trust has an insurable interest in another's life, and several other states have enacted various forms of statutory clarification designed to address the "*Chawla* problem." During this process, the American College of Trust and Estate Counsel, among others, expressed the opinion that it would be best if a uniform approach could be fashioned in resolving the matter.

Consequently, the Uniform Law Commission, after studying the issue, decided to clarify the

issue with respect to the Uniform Trust Code (UTC) and established a drafting committee for that purpose. The drafting committee, consisting of knowledgeable Conference members, was assisted by representatives from the American Bar Association, the American College of Trust and Estate Counsel, and the American Council of Life Insurers, consumer advocates, and other interested parties. This amendment resulted from their efforts and is designed to be inserted at the end of Article 1 of the UTC as Section 113. In keeping with the charge to the committee, the purpose of the amendment is to clarify when, for purposes of the Code, a trustee has an insurable interest in an individual whose life is to be the subject of an insurance policy to fund the trust. Clarification of this area of law that was subjected to uncertainty by the *Chawla* decision will provide a reliable basis upon which trust and estate planning practitioners may draft trust instruments that involve the eventual payment of expected death benefits.

It should be noted that the entire amendment is placed in brackets to indicate that each state should consider whether it is needed or its adoption would be appropriate. In some states *Chawla* may not present serious problems under pre-existing insurable interest law because it may be clear that a trustee already has an appropriate insurable interest for estate planning purposes. In other states, *Chawla* would present problems but, as indicated above, the state may have already addressed the issue so that the amendment may not be needed. Currently there are at least ten states that have enacted legislation on the subject (Delaware, Florida, Illinois, Georgia, Maine, Maryland, Minnesota, South



Dakota, Virginia, and Washington). In those states that do need to respond to *Chawla* (plus those that may want to revisit the matter) the amendment offers a reasonable solution that has the support of many in the estate planning field, as well as the life insurance industry.

With regard to language of the amendment, subsection (1) provides that the term "settlor" is limited to a person who *executes* the trust instrument. This is narrower than the UTC definition of "settlor," which, in addition to the person who executes the trust instrument, would include a person who merely contributes property to the trust. See UTC Section 103(15). As explained in the comment to Section 103(15), the broader definition serves a useful purpose in connection with the UTC generally; however, none of those situations relates to the issue of whose life should properly be the subject of a life insurance policy that is used to fund a trust. Moreover, to use the broader definition would needlessly complicate the issue of whose life should be the subject of insurance because it would be rare, if ever, that a life insurance policy used to fund a trust for estate planning purposes would be on the life of someone other than the settlor signing the trust or someone in whose life that settlor would have an insurable interest.

Because there are situations in which a trust instrument will be executed by a fiduciary or agent for the creator of the trust, subsection (1) also makes clear that in such circumstances the fiduciary or agent is deemed to be the equivalent of the settlor.

Subsection (2) carries forward the widely approved rule that the time at which insurable interest in a life insurance policy is determined is the date the policy is issued, otherwise understood as the inception of the policy. Thus, if on the date the policy is issued the trustee has an insurable interest in the individual whose life is insured, the policy is not subject to being declared void for lack of such an interest. Under the reasoning that an individual has an unlimited insurable interest in his or her own life, subsection (2) provides that a trustee has an insurable interest in the settlor's own life. If an individual, as settlor, has created a trust to hold a life insurance policy on his or her own life, has funded that trust with the policy or with money to pay its premiums, and has selected the trustee of the trust, it follows that the trustee should have the same insurable interest that the settlor has in his or her own life. Similarly, recognizing that an individual may purchase insurance on the life of anyone in whom that individual has an insurable interest up to, generally speaking, the amount of that interest, subsection (2) provides that the trustee has an insurable interest in an individual in whom the settlor has, or would have had if living at the time the policy was issued, an insurable interest.

Moreover, paragraph (a) of subsection (2) addresses the *Chawla* issue by referring to the jurisdiction's insurance code or other law regarding insurable interest as a separate, independent source of law for determining whether a trustee has an insurable interest in the life of an individual on whose life the trust has purchased insurance. This means that the trustee would be entitled to apply for and purchase an insurance policy not only on the life of a settlor but also on the life of any other individual in whom the settlor has an insurable interest, e.g., the spouse or children of the settlor, in the enacting jurisdiction. Exactly whose lives may be insured depends on the law of the enacting jurisdiction. In short, the amendment does not change the enacting jurisdiction's pre-existing law of insurable interest.

Paragraph (b) of subsection (2) addresses a somewhat different issue, although it also references the insurable interest law of the enacting jurisdiction. It is designed to ensure that irrevocable life insurance trusts (ILITs) are created to serve *bona fide* estate planning purposes by restricting who may be a beneficiary of insurance proceeds from a policy purchased to fund an ILIT. It establishes the requirement that the proceeds of such a life insurance policy used to fund the trust be payable primarily to certain types of trust beneficiaries. As to the latter, paragraph (b) contains bracketed language designed to provide states with a choice with regard to who those beneficiaries might be.

One choice may be exercised by deleting all the brackets, and all the language contained within the brackets, in paragraph (b) of subsection (2). By doing so, the class of beneficiaries for whom the insurance proceeds must primarily benefit is limited to those who, in the enacting state, have an insurable interest in the life of the settlor. Depending on the law of the jurisdiction, this could mean that only those individuals traditionally recognized as having an insurable interest, such as spouses and their children, would qualify, or it could mean that additional family members, such as siblings, grandchildren, grandparents, and perhaps others, have an insurable interest in the life of the settlor. In some other jurisdictions, the law may not be clear on this point. In these jurisdictions, estate planners generally may be concerned that strictly tying the class of beneficiaries to the state's insurable interest law might unduly restrict their ability to provide appropriate legal services to their clients. To help alleviate this concern, an alternative is offered to clarify the law in these jurisdictions. To exercise this choice, the enacting jurisdiction need only remove the brackets while retaining the language contained therein, thereby adopting the language as part of the amendment.

Removing the brackets and retaining the bracketed language in paragraph (b) of subsec-

tion (2) clarifies and broadens to a limited extent the class of individuals for whom the insurance must primarily benefit. By including anyone who is related to the settlor or other insured by blood or law within the third degree, the amendment makes clear that not only parents and their children would fall in the required beneficiary category, but also that siblings, grandparents, grandchildren, great-grandparents, great-grandchildren, aunts, uncles, nephews, and nieces would also qualify. Lineal consanguinity, to use the more technical term for relation by blood, is the relationship between individuals when one directly descends from the other. Each generation in this direct line constitutes a degree. Collateral consanguinity refers to the relationship between individuals who descend from a common ancestor but not from each other. The civil law method of calculating degree of collateral consanguinity, which is used in most states, counts the number of generations from one individual, e.g., the insured, up to the common ancestor and then down to the other individual. See 1 Restatement (Third) of Property (Wills and Other Donative Transfers) § 2.4 cmt. k (1999).

The following table identifies the relatives of an insured within three degrees of lineal and collateral consanguinity using the civil law method, with each row representing a generation.

			Great-Grandparents (3)
		Grandparents (2)	
	Parents (1)	Aunts and Uncles (3)	
IN-SURED	Sisters and Brothers (2)		
Children (1)	Nieces and Nephews (3)		
Grandchildren (2)			

Great-Grandchildren (3)			
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The reference in subsection (2)(b)(II)(A) to relation by “law” if that term is interpreted to have the same legal meaning as the term “affinity” may extend the category of beneficiaries that must be primarily benefited to in-laws. If that is the case, degrees of relationship by law or affinity should be computed in the same manner as degrees of relationship by consanguinity. See *State v. Hooper*, 140 Kan. 481, 37 P.2d 52 (1934)(explaining, for example, that a husband has the same relation, by affinity, to his wife’s blood relatives as she has to them by consanguinity, and vice versa). This would mean that a son- or daughter-in-law of the insured would be related in the first degree and a brother- or sister-in-law of the insured would be related in the second degree. A father- or mother-in-law would be related to the insured in the first degree, whereas an aunt- or uncle-in-law would be related to the insured in the third degree. See *State v. Allen*, 304 N.W.2d 203, at 207 (Iowa 1981)(listing authorities on how to compute degrees of relation).

At the very least, the term “law” should be interpreted to include the relation between spouses and the relation between an adoptive parent and adopted child, if they were not already included under subsection (2)(b)(I). Additionally, in case there is any doubt as to whether an adopted grandchild, i.e., a child adopted by an insured’s child, is sufficiently related to the insured, as a biological grandchild might be, to have an insurable interest under subsection (2)(b)(I), the reference in subsection (2)(b)(II)(A) may ensure that the adopted grandchild falls within the required category of beneficiaries. This is because the adopted grandchild arguably would, at the very least, be related by affinity to the insured in the second degree, just as a biological child of the insured’s child would be related by blood in the second degree to the insured. In other words, the adopted grandchild would be treated in the same manner as a biological grandchild for purposes of the amendment.

Stepchildren, who may not otherwise have an insurable interest in the life of the settlor or other insured under subsection (2)(b)(I) or who may not be included under subsection (2)(b)(II)(A), depending on the interpretation given to the term “law,” are specifically included in subsection (2)(b)(II)(B) to ensure that they occupy the same status as any other child of the settlor, biological or adopted.



The reason for the modifying language “if not already included under subsection (2)(b)(I)” found in the introductory portion to subsection (2)(b)(II) is to make it clear that there is no negative implication with regard to anyone related within the third degree to the insured and who would be included by virtue of the adopting jurisdiction’s insurable interest law referred to in subsection (2)(b)(I). In other words, some of the people, but not all, included under subsection (2)(b)(I) will be related to the person whose life is insured within the third degree and the modifying language is designed to make it clear that subsection (2)(b)(II)(A) merely adds any others so related. The same reasoning applies to stepchildren. The adopting jurisdiction may already include them under its insurable interest law referred to in subsection (2)(b)(I). If not, however, subsection (2)(b)(II)(B) makes sure they are included in the category of people for whom the insurance policy proceeds must primarily benefit.

Although estate planners expressed concern were a jurisdiction to delete subsection (2)(b)(II)(B) because they felt doing so would unduly limit their ability to serve their clients’ needs, there was a general consensus that including those identified in subsection (2)(b)(II)(B) should suffice for the great majority of estate plans. Thus, estate planners strongly support the adoption of the language in subsection (2)(b)(II)(B).

It should also be noted that, regardless of the decision relating to the choices presented by the bracketed language in paragraph (b) of subsection (2), the test concerning whether the beneficiaries designated in paragraph (b) are the primary beneficiaries of the policy proceeds takes place at the inception of the life insurance policy, i.e., when the policy is issued. The fact that there may be contingent trust beneficiaries or that the proceeds would be payable to different beneficiaries based on subsequent events or conditions is not relevant to the determination. One need only identify those trust beneficiaries that would receive the policy proceeds were the insured life to expire immediately after the policy is issued and the trust were to terminate at the same time. Among these beneficiaries, the proceeds must be payable primarily to those spec-

ified in paragraph (b) of subsection (2). If that is so, the condition is satisfied and may not be challenged thereafter or on the basis that subsequent events might change who would receive the proceeds.

As for the term “primarily,” it will often be the case that one is able to calculate that more than fifty percent of the policy proceeds will be payable to the required class of beneficiaries under paragraph (b) of subsection (2), but this may not always be the situation. For example, if the purpose of the trust is to provide a lifetime benefit to a spouse or funds for children to obtain an education, the amount may be indeterminate. This, however, does not mean that the policy proceeds are not primarily for the benefit of these individuals if upon the inception of the policy they are the people who will immediately and mainly benefit from the trust, even though there are others not designated in paragraph (b) of subsection (2) who may also benefit concurrently or benefit subsequently upon the satisfaction of some condition in the future. In short, the term is intended to be applied in a common sense manner rather than in a hyper-technical manner that would require that a precise dollar amount be payable to certain beneficiaries.

Finally, the amendment is drafted as it would appear in the UTC were it to be part of the Code when the latter is enacted or as it would appear as an amendment to a previously enacted version of the Code. In either case, since Section 1106 of the UTC, as originally drafted, already deals with the applicability of the UTC to trusts existing at the time of enactment, there may be no need to address that issue in this amendment. However, if an issue should arise regarding which trusts *and* life insurance policies are subject to the amendment, the following language may be helpful in resolving that issue:

This section applies to any trust existing before, on, or after the effective date of this section, regardless of the effective date of the governing instrument under which the trust was created, but only as to a life insurance policy that is in force and for which an insured is alive on or after the effective date of this section.

## ARTICLE 17

### Effective Date - Transition

**Editor’s note:** For historical information concerning the repeal and reenactment of articles 10 to 17 of this title, see the editor’s note immediately preceding article 10.

15-17-101.	Time of taking effect - provisions for transition.	15-17-103.	Effective date - applicability of repealed and reenacted parts 1 to 4 of article 14 of this title.
15-17-102.	Effective date - applicability for reenactment of article 11.		

**15-17-101. Time of taking effect - provisions for transition.** (1) This code takes effect on July 1, 1974.

(2) Except as provided elsewhere in this code, on the effective date of this code:

(a) The code applies to any wills of decedents dying thereafter;

(b) The code applies to any estates or proceedings, whether in court or not, whether then pending or thereafter commenced, regardless of the time of the death of decedent or the time of creation of any trust, except to the extent that in the opinion of the court in a court proceeding the former law and procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code;

(c) Every personal representative, including a person administering an estate of a minor or an incompetent, holding an appointment on that date continues to hold the appointment but has only the powers conferred by this code and is subject to the duties and liabilities imposed with respect to any act or omission occurring or done thereafter; every trustee of a trust existing on July 1, 1975, is subject to the duties and liabilities imposed by this code with respect to any act or omission occurring or done thereafter;

(d) An act done before July 1, 1974, in any proceeding and any accrued right is not impaired by this code. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before July 1, 1974, the provisions shall remain in force with respect to that right;

(e) Any rule of construction or presumption provided in this code applies to instruments executed and multiple-party accounts opened before July 1, 1974, unless there is a clear indication of a contrary intent.

**Source:** L. 73: R&RE, p. 1645, § 1. C.R.S. 1963: § 153-8-101. L. 75: (2)(b) and (2)(c) amended, p. 606, § 61, effective July 1.

## ANNOTATION

**Legislative intent.** This section evidences the intent of the general assembly to preserve prior existing rights and to preclude disruption of such rights due to the change in the law effected by the Colorado probate code. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

**New probate code inapplicable to will automatically revoked by statute.** Where decedent's will was automatically revoked by operation of statute that was in effect as the time of decedent's marriage, the new probate code did not apply to will of decedent even though he died after 1974. Phillips v. Liechty, 674 P.2d 1001 (Colo. App. 1983).

**Election of the surviving spouse to one-half of the augmented estate was disallowed** insofar as it would affect assets transferred to a

revocable inter vivos trust prior to July 1, 1974, the effective date of the Colorado probate code. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

**The probate court properly refused to apply the augmented estate provisions of § 15-11-202 to joint tenancies** where the joint tenancies vested prior to the effective date of the Colorado probate code. Estate of Barnhart v. Burkhardt, 38 Colo. App. 544, 563 P.2d 972 (1977), aff'd, 194 Colo. 505, 574 P.2d 500 (1978).

**Applied in Price v. Sommermeyer**, 195 Colo. 285, 577 P.2d 752 (1978); In re Estate of Beasley, 40 Colo. App. 347, 578 P.2d 662 (1978); In re Estate of Daigle, 634 P.2d 71 (Colo. 1981); Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

**15-17-102. Effective date - applicability for reenactment of article 11.** (1) Except as provided elsewhere in this code and except as provided otherwise in this section, parts 1 to 9 of article 11, as reenacted effective July 1, 1995, shall apply to the estates, wills, or governing instruments of decedents dying on or after July 1, 1995.

(2) Section 15-11-601 contains special provisions for the applicability of sections 15-11-603 and 15-11-604.



(3) Section 15-11-701 contains special provisions for the applicability of part 7 of article 11.

**Source:** L. 94: Entire section added, p. 1039, § 14, effective July 1, 1995.

ANNOTATION

**General assembly intended § 15-11-804 (2) to apply retroactively.** Death of an insured-decedent on or after July 1, 1995, triggers application of the statute, notwithstanding the fact that the insurance contract may have been entered into, and the divorce may have occurred, before the effective date of the statute. In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002).

**15-17-103. Effective date - applicability of repealed and reenacted parts 1 to 4 of article 14 of this title.** (1) Parts 1 to 4 of article 14 of this title, as repealed and reenacted effective January 1, 2001, shall apply to any and all estates, trusts, or protective proceedings whether created or filed prior to or on or after said date. (2) In circumstances where the terms of an instrument creating an estate or trust created prior to January 1, 2001, or in cases where court orders have been issued prior to January 1, 2001, which are contrary to, or inconsistent with, the law or procedure set forth in parts 1 to 4 of article 14 of this title, as repealed and reenacted effective January 1, 2001, the court orders or terms of the instrument will control unless and until the court issues subsequent orders as authorized under said parts 1 to 4.

**Source:** L. 2001: Entire section added, p. 889, § 10, effective June 1.

DECLARATIONS - FUTURE MEDICAL TREATMENT

ARTICLE 18

Colorado Medical Treatment  
Decision Act

**Editor’s note:** This article was added in 1985. This article was repealed and reenacted in 2010, resulting in some addition, relocation, and elimination of subject matter within existing sections. For amendments to this article prior to 2010, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volumes of C.R.S. 1973 beginning on page vii in the front of this volume.

**Cross references:** For the provisions relating to anatomical gifts and their effect on advance health-care directives, see part 1 of article 34 of title 12; for provisions relating to a medical durable power of attorney, see § 15-14-506; for provisions relating to proxy decision-makers for medical treatment decisions, see article 18.5 of this title; for provisions relating to cardiopulmonary resuscitation directives, see article 18.6 of this title.

**Law reviews:** For article, “The New Colorado Medical Treatment Decision Act”, see 14 Colo. Law. 1190 (1985); for article, “Working With the New Medical Treatment Decision (Living Will) Act”, see 15 Colo. Law. 645 (1986); for article, “The 1989 ”Living Will“ Amendment — Durable Power of Attorney for Health Care”, see 18 Colo. Law. 1321 (1989); for article, “Cruzan: The Right to Die, Parts I and II”, see 19 Colo. Law. 2055 and 2237 (1990); for article, “The Assault on Privacy in Healthcare Decisionmaking”, see 68 Den. U. L. Rev. 1 (1991); for article, “Surrogate Decision-Making for ‘Friendless’ Patients”, see 34 Colo. Law. 71 (April 2005); for article, “Respecting and Responding to End-of-Life Choices”, see 34 Colo. Law. 57 (October 2005); for article, “Revision of Colorado’s Living Will Statutes”, see 40 Colo. Law. 29 (April 2011).

15-18-101.	Short title.	15-18-105.	Inability of declarant to sign.
15-18-102.	Legislative declaration.	15-18-106.	Witnesses.
15-18-103.	Definitions.	15-18-107.	Withdrawal - withholding of life-sustaining procedures.
15-18-104.	Declaration as to medical treatment.	15-18-108.	Determination of validity.

15-18-109.	Revocation of declaration.		tion on insurance.
15-18-110.	Liability.	15-18-112.	Application of article.
15-18-111.	Determination of suicide or homicide - effect of declara-	15-18-113.	Penalties - refusal - transfer.

**15-18-101. Short title.** This article shall be known and may be cited as the “Colorado Medical Treatment Decision Act”.

**Source: L. 2010:** Entire article R&RE, (HB 10-1025), ch. 113, p. 375, § 1, effective August 11.

**15-18-102. Legislative declaration.** (1) The general assembly hereby finds, determines, and declares that:

(a) Colorado law has traditionally recognized the right of an adult to accept or reject medical or surgical treatment;

(b) Recent advances in medical science have made it possible to prolong the dying process through the use of medical or surgical procedures;

(c) The use of such medical or surgical procedures increasingly involves patients who have a terminal condition or are in a persistent vegetative state, and lack decisional capacity to accept or reject medical or surgical treatment;

(d) The traditional right to accept or reject medical or surgical treatment should be available to an adult while he or she has decisional capacity, notwithstanding the fact that such medical or surgical treatment may be offered or applied when he or she has a terminal condition or is in a persistent vegetative state, and lacks decisional capacity to accept or reject medical or surgical treatment;

(e) This article affirms the traditional right to accept or reject medical or surgical treatment, and creates a procedure by which an adult with decisional capacity may make such decisions in advance of medical need;

(f) It is the intent of the general assembly that nothing in this article shall have the effect of modifying or changing currently practiced medical ethics or protocol with respect to any patient in the absence of a declaration as provided for in section 15-18-104;

(g) It is the intent of the general assembly that nothing in this article shall require any adult to execute a declaration.

**Source: L. 2010:** Entire article R&RE, (HB 10-1025), ch. 113, p. 375, § 1, effective August 11.

**15-18-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Adult” means any person eighteen years of age or older.

(2) “Advanced practice nurse” means a nurse who is included in the advanced practice registry pursuant to section 12-38-111.5, C.R.S.

(3) “Artificial nutrition and hydration” means:

(a) Nutrition or hydration supplied through a tube inserted into the stomach or intestines; or

(b) Nutrients or fluids injected intravenously into the bloodstream.

(4) “Attending physician” means the physician, whether selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient.

(5) “Court” means the district court of the county in which a declarant having a terminal condition or in a persistent vegetative state is located at the time of commencement of a proceeding pursuant to this article or, if in the city and county of Denver, the probate court.

(6) “Decisional capacity” means the ability to provide informed consent to or refusal of medical treatment or the ability to make an informed health care benefit decision.

(7) “Declarant” means an adult possessing decisional capacity who executes a declaration.



(8) "Declaration" means a written document voluntarily executed by a declarant in accordance with the requirements of section 15-18-104.

(9) "Hospital" means an institution holding a license or certificate of compliance as a hospital issued by the department of public health and environment and includes hospitals operated by the federal government in Colorado.

(10) "Life-sustaining procedure" means any medical procedure or intervention that, if administered to a qualified patient, would serve only to prolong the dying process, and shall not include any medical procedure or intervention for nourishment of the qualified patient or considered necessary by the attending physician or advanced practice nurse to provide comfort or alleviate pain.

(11) "Persistent vegetative state" is defined by reference to the criteria and definitions employed by prevailing community medical standards of practice.

(12) "Physician" means a person duly licensed under the provisions of article 36 of title 12, C.R.S.

(13) "Qualified patient" means a patient who has executed a declaration in accordance with this article and who has been certified by his or her attending physician and one other physician to have a terminal condition or be in a persistent vegetative state.

(14) "Terminal condition" means an incurable or irreversible condition for which the administration of life-sustaining procedures will serve only to prolong the dying process.

**Source:** L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 376, § 1, effective August 11.

**15-18-104. Declaration as to medical treatment.** (1) Any adult with decisional capacity may execute a declaration directing that life-sustaining procedures be withheld or withdrawn if, at some future time, he or she has a terminal condition or is in a persistent vegetative state, and lacks decisional capacity to accept or reject medical or surgical treatment. It shall be the responsibility of the declarant or someone acting for the declarant to provide the declaration to the attending physician or advanced practice nurse for entry in the declarant's medical record.

(2) In the case of a declaration of a qualified patient known to the attending physician to be pregnant, a medical evaluation shall be made as to whether the fetus is viable. If the fetus is viable, the declaration shall be given no force or effect until the patient is no longer pregnant.

(3) (a) A declaration may contain separate written statements regarding the declarant's preference concerning life-sustaining procedures and artificial nutrition and hydration if the declarant has a terminal condition or is in a persistent vegetative state.

(b) The declarant may provide in his or her declaration one of the following actions:

(I) That artificial nutrition and hydration not be continued;

(II) That artificial nutrition and hydration be continued for a specified period; or

(III) That artificial nutrition and hydration be continued.

(4) Notwithstanding the provisions of subsection (3) of this section and section 15-18-103 (10), when an attending physician or advanced practice nurse has determined that pain results from a discontinuance of artificial nutrition and hydration, the physician or advanced practice nurse may order that artificial nutrition and hydration be continued to the extent necessary to provide comfort and alleviate pain.

(5) A declaration executed before two witnesses by any adult with decisional capacity shall be legally effective for the purposes of this article.

(6) A declaration executed pursuant to this article may include a document with a written statement as provided in section 12-34-105 (a), C.R.S., or a written statement in substantially similar form, indicating a decision regarding organ and tissue donation. Such a document shall be executed in accordance with the provisions of the "Revised Uniform Anatomical Gift Act", part 1 of article 34 of title 12, C.R.S.

(7) A declaration executed pursuant to this article may be combined with a medical power of attorney to create a single document. Such a document shall comply with all requirements of this title and in accordance with the provisions of the "Colorado Patient Autonomy Act", sections 15-14-503 to 15-14-509.

(8) A declaration executed pursuant to this article may include a written statement in which the declarant designates individuals with whom the declarant's attending physician, any other treating physician, or another medical professional may speak concerning the declarant's medical condition prior to a final determination as to the withholding or withdrawal of life-sustaining procedures, including artificial nutrition and hydration. The designation of such individuals in the document shall be considered to be consistent with the privacy requirements of the federal "Health Insurance Portability and Accountability Act of 1996", 42 U.S.C. sec. 1320d to 1320d-8, as amended, referred to in this section as "HIPAA", regarding waiver of confidentiality.

(9) A declaration executed pursuant to this article may include a written statement providing individual medical directives from the declarant to the attending physician or any other treating medical personnel.

**Source:** L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 377, § 1, effective August 11. L. 2011: (7) amended, (SB 11-083), ch. 101, p. 317, § 26, effective August 10.

#### ANNOTATION

**Law reviews.** For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988).

**The state's living will statute requires that two physicians must certify as to a patient's incapacitation for a period of seven consecu-**

**tive days** before such patient's declaration regarding medical treatment can be given effect. *The Living Will Center v. NBC Subsidiary (KCNC-TV), Inc.*, 857 P.2d 514 (Colo. App. 1993) (decided prior to 2010 repeal and reenactment).

**15-18-105. Inability of declarant to sign.** (1) In the event that the declarant is physically unable to sign the declaration, it may be signed by some other person in the declarant's presence and at the declarant's direction. The other person shall not be:

- (a) The attending physician or any other physician;
- (b) An employee of the attending physician or health care facility in which the declarant is a patient;
- (c) A person who has a claim against any portion of the estate of the declarant at his or her death at the time the declaration is signed; or
- (d) A person who knows or believes that he or she is entitled to any portion of the estate of the declarant upon the declarant's death either as a beneficiary of a will in existence at the time the declaration is signed or as an heir at law.

**Source:** L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 379, § 1, effective August 11.

**15-18-106. Witnesses.** (1) Except as otherwise provided in section 15-18-105, a declaration shall be signed by the declarant in the presence of two witnesses. The witnesses shall not include any person specified in section 15-18-105.

(2) A declaration may be notarized. The absence of notarization shall have no impact on the validity of a declaration.

**Source:** L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 379, § 1, effective August 11.

**15-18-107. Withdrawal - withholding of life-sustaining procedures.** In the event that an attending physician is presented with an unrevoked declaration executed by a declarant whom the physician believes has a terminal condition or is in a persistent vegetative state, and lacks decisional capacity to accept or reject medical or surgical treatment, the attending physician shall order the declarant to be examined by one other physician. If both physicians find that the declarant has a terminal condition or is in a persistent vegetative state, and lacks decisional capacity to accept or reject medical or surgical treatment, they



shall certify such fact in writing and enter such in the qualified patient's medical record of the hospital in which the withholding or withdrawal of life-sustaining procedures or artificial nutrition and hydration may occur, together with a copy of the declaration. If the attending physician has actual knowledge of the whereabouts of either the qualified patient's agent under a medical power of attorney or, without regard to order, the patient's spouse, a person designated under the "Colorado Designated Beneficiary Agreement Act", as described in article 22 of this title, any of his or her adult children, a parent, sibling, or any other person designated in writing by the qualified patient, the attending physician shall immediately make a reasonable effort to notify at least one of said persons that a certificate has been signed. If no action to challenge the validity of a declaration has been filed within forty-eight hours after the certification is made by the physicians, the attending physician shall then withdraw or withhold all life-sustaining procedures or artificial nutrition and hydration pursuant to the terms of the declaration.

**Source:** L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 379, § 1, effective August 11.

**15-18-108. Determination of validity.** (1) Any person who is the parent, adult child, spouse, designated beneficiary under the "Colorado Designated Beneficiary Agreement Act", article 22 of this title, or attorney-in-fact under a durable power of attorney of the qualified patient may challenge the validity of a declaration in the appropriate court of the county in which the qualified patient is located. Upon the filing of a petition to challenge the validity of a declaration and notification to the attending physician, a temporary restraining order shall be issued until a final determination as to validity is made.

(2) (a) In proceedings pursuant to this section, the court shall appoint a guardian ad litem for the qualified patient, and the guardian ad litem shall take such actions as he or she deems necessary and prudent in the best interests of the qualified patient and shall present to the court a report of his or her actions, findings, conclusions, and recommendations.

(2) (b) (I) Unless the court, for good cause shown, provides for a different method or time of notice, the petitioner, at least seven days prior to the hearing, shall cause notice of the time and place of hearing to be given as follows:

(A) To the qualified patient's guardian or conservator, if any, and the court-appointed guardian ad litem; and

(B) To the qualified patient's spouse or beneficiary under the "Colorado Designated Beneficiary Agreement Act", article 22 of this title, if the identity and whereabouts of such person is known to the petitioner, or otherwise to an adult child or parent of the qualified patient.

(II) Notice as required in this paragraph (b) shall be made in accordance with the Colorado rules of civil procedure.

(c) The court may require evidence, including independent medical evidence, as it deems necessary.

(3) Upon a determination of the validity of the declaration, the court shall enter any appropriate order.

(4) If the court determines that any proceedings pursuant to this section or any pleadings filed in such proceedings were brought, defended, or filed in bad faith, the court may assess the fees and costs, including reasonable attorney fees, incurred by the affected parties in responding to the proceedings or pleadings, against a party that brought or defended the proceedings or filed the pleadings in bad faith. Nothing in this section is intended to limit any other remedy, sanction, or surcharge provided by law.

(5) Any declaration executed in compliance with the requirements of Colorado law in effect at the time the declaration was made shall continue to be an effective declaration after August 11, 2010.

(6) Any declaration executed in compliance with the laws of the state in which the declaration was executed shall be considered effective for use within the state of Colorado to the extent that such declaration does not violate any laws of the state of Colorado.

**Source:** L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 380, § 1, effective August 11. L. 2012: IP(2)(b)(I) amended, (SB 12-175), ch. 208, p. 842, § 56, effective July 1.

**Editor's note:** Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (2)(b)(I) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

**15-18-109. Revocation of declaration.** A declaration may be revoked by the declarant orally, in writing, or by burning, tearing, cancelling, obliterating, or destroying said declaration.

**Source:** L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 381, § 1, effective August 11.

**15-18-110. Liability.** (1) With respect to any declaration that appears on its face to have been executed in accordance with the requirements of this article:

(a) Any physician or advanced practice nurse may act in compliance with such declaration in the absence of actual notice of revocation, fraud, misrepresentation, or improper execution;

(b) A physician who signs a certificate withholding or withdrawing life-sustaining procedures in compliance with a declaration shall not be subject to civil liability, criminal penalty, or licensing sanctions therefor;

(c) A hospital or person acting under the direction of a physician and participating in the withholding or withdrawal of life-sustaining procedures in compliance with a declaration shall not be subject to civil liability, criminal penalty, or licensing sanctions therefor; and

(d) An advanced practice nurse who withholds or withdraws life-sustaining procedures in compliance with a declaration shall not be subject to civil liability, criminal penalty, or licensing sanctions therefor.

**Source:** L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 381, § 1, effective August 11.

**Cross references:** For other circumstances under which physicians are not subject to civil or criminal liability, see §§ 13-21-108 and 13-22-106.

**15-18-111. Determination of suicide or homicide - effect of declaration on insurance.** The withholding or withdrawal of life-sustaining procedures from a qualified patient pursuant to this article shall not, for any purpose, constitute a suicide or a homicide. The existence of a declaration shall not affect, impair, or modify any contract of life insurance or annuity or be the basis for any delay in issuing or refusing to issue an annuity or policy of life insurance or any increase of the premium therefor. No insurer or provider of health care shall require any person to execute a declaration as a condition of being insured for or receiving health care services, nor shall the failure to execute a declaration be the basis for any increased or additional premium for a contract or policy for medical or health insurance.

**Source:** L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 381, § 1, effective August 11.

**15-18-112. Application of article.** (1) Nothing in this article shall be construed as altering or amending the standards of the practice of medicine or nursing or establishing any presumption, absent a valid declaration, nor as condoning, authorizing, or approving euthanasia or mercy killing, nor as permitting any affirmative or deliberate act or omission to end life, except to permit natural death as provided in this article. Nothing in this article



shall require the provision or continuation of medical treatment contrary to the standards of the practice of medicine.

(2) A diagnosis of persistent vegetative state shall be performed by a qualified medical professional according to standards of the practice of medicine. Nothing in this article shall be interpreted to define “persistent vegetative state” in contradiction of standards of the practice of medicine.

(3) In the event of any conflict between the provisions of this article, or a declaration executed under this article, and the provisions of section 15-14-501, the provisions of this article and the declaration shall prevail.

(4) Notwithstanding the provisions of subsection (3) of this section, a declarant may include within the declaration or within any power of attorney executed by the declarant a written statement to the effect that the agent under power of attorney may override the provisions of the declaration.

**Source: L. 2010:** Entire article R&RE, (HB 10-1025), ch. 113, p. 381, § 1, effective August 11.

**15-18-113. Penalties - refusal - transfer.** (1) A person who willfully conceals, defaces, damages, or destroys a declaration of another person, without the knowledge and consent of the declarant, commits a class 1 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S.

(2) A person who falsifies or forges a declaration of another person commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

(3) If a person falsifies or forges a declaration of another person and the terms of the declaration are carried out, resulting in the death of the purported declarant, the person commits a class 2 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

(4) A person who willfully withholds information concerning the revocation of a declaration of another person commits a class 1 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S.

(5) An attending physician or advanced practice nurse who refuses to comply with the terms of a declaration valid on its face shall transfer the care of the declarant to another physician or advanced practice nurse who is willing to comply with the declaration. Refusal of an attending physician or advanced practice nurse to comply with a declaration and failure to transfer the care of the declarant to another physician or advanced practice nurse shall constitute unprofessional conduct as defined in section 12-36-117, C.R.S., or grounds for discipline pursuant to section 12-38-117, C.R.S.

**Source: L. 2010:** Entire article R&RE, (HB 10-1025), ch. 113, p. 382, § 1, effective August 11; (5) amended, (HB 10-1422), ch. 419, p. 2126, § 189, effective August 11.

## ARTICLE 18.5

### Proxy Decision-makers for Medical Treatment and Surrogate Decision-makers for Health Care Benefit Decisions

**Cross references:** For the provisions relating to anatomical gifts and their effect on advance health-care directives, see part 1 of article 34 of title 12; for provisions relating to a medical durable power of attorney, see § 15-14-506; for provisions relating to declarations concerning medical treatment, see article 18 of this title; for provisions relating to cardiopulmonary resuscitation directives, see article 18.6 of this title.

**Law reviews:** For article, “The Colorado Patient Autonomy Act: Opportunities and Challenges — Parts I and II”, see 21 Colo. Law. 1901 and 2203 (1992); for article, “Surrogate Decision-Making for ‘Friendless’ Patients”, see 34 Colo. Law. 71 (April 2005); for article, “Respecting and Responding to End-of-Life Choices”, see 34 Colo. Law. 57 (October 2005).

15-18.5-101.	Legislative declaration - construction of statute.	15-18.5-104.	Surrogate decision-makers for health care benefits.
15-18.5-102.	Definitions applicable to medical durable power of attorney - applicability.	15-18.5-105.	Statutory form for certificate of appointment of surrogate decision-makers for health care benefits.
15-18.5-103.	Proxy decision-makers for medical treatment authorized.		

**15-18.5-101. Legislative declaration - construction of statute.** (1) The general assembly hereby finds, determines, and declares that:

(a) All adult persons have a fundamental right to make their own medical treatment and health care benefit decisions, including decisions regarding medical treatment, artificial nourishment and hydration, and private or public health care benefits;

(b) The lack of decisional capacity to provide informed consent to or refusal of medical treatment should not preclude such decisions from being made on behalf of a person who lacks such decisional capacity and who has no known advance medical directive, or whose wishes are not otherwise known; and

(c) The enactment of legislation to authorize proxy decision-makers to make medical treatment decisions and surrogate decision-makers to make health care benefit decisions on behalf of persons lacking the decisional capacity to provide informed consent to or refusal of medical treatment is appropriate.

(2) The general assembly does not intend to encourage or discourage any particular medical treatment or to interfere with or affect any method of religious or spiritual healing otherwise permitted by law.

(3) Nothing in this article shall be construed as condoning, authorizing, or approving euthanasia or mercy killing. In addition, the general assembly does not intend that this article be construed as permitting any affirmative or deliberate act to end a person's life, except to permit natural death as provided by this article.

**Source:** L. 92: Entire article added, p. 1984, § 3, effective June 4. L. 2006: (1)(a) and (1)(c) amended, p. 841, § 3, effective May 4.

**15-18.5-102. Definitions applicable to medical durable power of attorney - applicability.** (1) The definitions set forth in section 15-14-505 shall apply to the provisions of this article.

(2) The provisions of sections 15-14-506 to 15-14-509 shall apply to this article. In addition, proxy decision-makers, surrogate decision-makers for health care benefits, health care providers, and health care facilities shall be subject to the provisions of this article.

**Source:** L. 92: Entire article added, p. 1985, § 3, effective June 4. L. 2006: (2) amended, p. 841, § 4, effective May 4.

**15-18.5-103. Proxy decision-makers for medical treatment authorized.** (1) A health care provider or health care facility may rely, in good faith, upon the medical treatment decision of a proxy decision-maker selected in accordance with subsection (4) of this section if an adult patient's attending physician determines that such patient lacks the decisional capacity to provide informed consent to or refusal of medical treatment and no guardian with medical decision-making authority, agent appointed in a medical durable power of attorney, person with the right to act as a proxy decision-maker in a designated beneficiary agreement made pursuant to article 22 of this title, or other known person has the legal authority to provide such consent or refusal on the patient's behalf.

(2) The determination that an adult patient lacks decisional capacity to provide informed consent to or refusal of medical treatment may be made by a court or the attending physician, and the determination shall be documented in such patient's medical record. The determination may also be made by an advanced practice nurse who has collaborated about the patient with a licensed physician either in person, by telephone, or electronically. The advanced practice nurse shall document in the patient's record the name of the physician



with whom the advanced practice nurse collaborated. The attending physician shall make specific findings regarding the cause, nature, and projected duration of the patient's lack of decisional capacity, which findings shall be included in the patient's medical record.

(3) Upon a determination that an adult patient lacks decisional capacity to provide informed consent to or refusal of medical treatment, the attending physician, the advanced practice nurse, or such physician's or nurse's designee, shall make reasonable efforts to notify the patient of the patient's lack of decisional capacity. In addition, the attending physician, or such physician's designee, shall make reasonable efforts to locate as many interested persons as defined in this subsection (3) as practicable and the attending physician or advanced practice nurse may rely on such individuals to notify other family members or interested persons. For the purposes of this section, "interested persons" means the patient's spouse, either parent of the patient, any adult child, sibling, or grandchild of the patient, or any close friend of the patient. Upon locating an interested person, the attending physician, advanced practice nurse, or such physician's or nurse's designee, shall inform such person of the patient's lack of decisional capacity and that a proxy decision-maker should be selected for the patient.

(4) (a) It shall be the responsibility of the interested persons specified in subsection (3) of this section to make reasonable efforts to reach a consensus as to whom among them shall make medical treatment decisions on behalf of the patient. The person selected to act as the patient's proxy decision-maker should be the person who has a close relationship with the patient and who is most likely to be currently informed of the patient's wishes regarding medical treatment decisions. If any of the interested persons specified in subsection (3) of this section disagrees with the selection or the decision of the proxy decision-maker or, if, after reasonable efforts, the interested persons specified in subsection (3) of this section are unable to reach a consensus as to who should act as the proxy decision-maker, then any of the interested persons specified in subsection (3) of this section may seek guardianship of the patient by initiating guardianship proceedings pursuant to part 3 of article 14 of this title. Only said persons may initiate such proceedings with regard to the patient.

(b) Nothing in this section shall be construed to preclude any interested person described in subsection (3) of this section from initiating a guardianship proceeding pursuant to part 3 of article 14 of this title for any reason any time after said persons have conformed with paragraph (a) of this subsection (4).

(5) When an attending physician determines that an adult patient lacks decisional capacity, the attending physician or another health care provider shall make reasonable efforts to advise the patient of such determination, of the identity of the proxy decision-maker, and of the patient's right to object, pursuant to section 15-14-506 (4) (a).

(6) Artificial nourishment and hydration may be withheld or withdrawn from a patient upon a decision of a proxy only when the attending physician and a second independent physician trained in neurology or neurosurgery certify in the patient's medical record that the provision or continuation of artificial nourishment or hydration is merely prolonging the act of dying and is unlikely to result in the restoration of the patient to independent neurological functioning.

(6.5) The assistance of a health care facility's medical ethics committee shall be provided upon the request of a proxy decision-maker or any other interested person specified in subsection (3) of this section whenever the proxy decision-maker is considering or has made a decision to withhold or withdraw medical treatment. If there is no medical ethics committee for a health care facility, such facility may provide an outside referral for such assistance or consultation.

(7) If any of the interested persons specified in subsection (3) of this section or the guardian or the attending physician believes the patient has regained decisional capacity, then the attending physician shall reexamine the patient and determine whether or not the patient has regained such decisional capacity and shall enter the decision and the basis therefore into the patient's medical record and shall notify the patient, the proxy decision-maker, and the person who initiated the redetermination of decisional capacity.

(8) Except for a court acting on its own motion, no governmental entity, including the state department of human services and the county departments of social services, may petition the court as an interested person pursuant to part 3 of article 14 of this title. In

addition, nothing in this article shall be construed to authorize the county director of any county department of social services, or designee of such director, to petition the court pursuant to section 26-3.1-104, C.R.S., in regard to any patient subject to the provisions of this article.

(9) Any attending physician, health care provider, or health care facility that makes reasonable attempts to locate and communicate with a proxy decision-maker shall not be subject to civil or criminal liability or regulatory sanction therefor.

**Source:** L. 92: Entire article added, p. 1985, § 3, effective June 4. L. 94: (8) amended, p. 2647, § 115, effective July 1. L. 2008: (2) and (3) amended, p. 125, § 5, effective January 1, 2009. L. 2009: (1) amended, (HB 09-1260), ch. 107, p. 446, § 13, effective July 1. L. 2010: (1) amended, (SB 10-199), ch. 374, p. 1753, § 20, effective July 1.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (1):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (8), see section 1 of chapter 345, Session Laws of Colorado 1994.

## ANNOTATION

**Decision to agree to arbitrate is not a "medical treatment decision"** and as such not within the authority of a health care proxy. There exists a distinction between an agreement to provide medical services, including an agreement to admit a patient to a health care facility, and an agreement to arbitrate a health care dis-

pute. *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970 (Colo. App. 2009).

**Subsection (8) does not preclude a governmental entity acting as a guardian from executing a cardiopulmonary resuscitation directive.** *People ex rel. Yeager*, 93 P.3d 589 (Colo. App. 2004).

**15-18.5-104. Surrogate decision-makers for health care benefits.** (1) A proxy decision-maker for medical treatment selected in accordance with section 15-18.5-103 or a person with the right to act as a surrogate decision-maker in a designated beneficiary agreement made pursuant to article 22 of this title shall have authority to make health care benefit decisions on behalf of an adult patient and may be known additionally as a surrogate decision-maker for health care benefits.

(2) A court or the attending physician may make the determination that a person lacks the decisional capacity to make health care benefit decisions. The determination shall be documented in such patient's medical record. The determination may also be made by an advanced practice nurse who has collaborated about the patient with a licensed physician either in person, by telephone, or electronically. The advanced practice nurse shall document in the patient's record the name of the physician with whom the advanced practice nurse collaborated. The attending physician or nurse shall make specific findings regarding the cause, nature, and projected duration of the person's lack of decisional capacity regarding health care benefit decisions. Such determination and findings shall be documented in the person's medical record.

(3) Upon a determination that an adult patient lacks decisional capacity to make health care benefit decisions, the attending physician, advanced practice nurse, or the physician's or nurse's designee shall make reasonable efforts to notify the patient of the patient's lack of decisional capacity. In addition, the attending physician or advanced practice nurse or the



physician's or nurse's designee shall make reasonable efforts to locate as many interested persons as defined in this subsection (3) as practicable, and the attending physician or advanced practice nurse may rely on such individuals to notify other family members or interested persons. For the purposes of this section, "interested persons" means the patient's spouse; either parent of the patient; any adult child, sibling, or grandchild of the patient; or any close friend of the patient. Upon locating an interested person, the attending physician or advanced practice nurse or the physician's or nurse's designee shall inform such person of the patient's lack of decisional capacity and determine whether such interested person is available, willing, and has the capability to act as a surrogate decision-maker for health care benefits for the patient.

(4) If a proxy decision-maker for medical treatment or an interested person, as defined in subsection (3) of this section, is unavailable, unwilling, or does not have the capability to make a health care benefit decision on behalf of a person lacking the decisional capacity to make a health care benefit decision pursuant to this section, then the attending physician or his or her designee may appoint a surrogate decision-maker for health care benefits as described in subsection (5) of this section.

(5) The surrogate decision-maker for health care benefits appointed by an attending physician or his or her designee may be a private individual or an individual acting on behalf of an organization, including an employee of the organization, willing to voluntarily assume the fiduciary responsibility to make health care benefit decisions in the best interests of the person who lacks the decisional capacity to make health care benefit decisions. The appointed surrogate decision-maker for health care benefits shall be free of conflicts specified in subsection (9) of this section.

(6) Community and charitable organizations may provide volunteers or employees to serve as surrogate decision-makers for health care benefits. The division of insurance, established in section 10-1-103, C.R.S., shall be available to provide assistance to surrogate decision-makers for health care benefits regarding medicare benefits. A physician or his or her designee may contact nonprofit entities that serve the elderly or disability communities for assistance in locating an appropriate surrogate decision-maker for health care benefits.

(7) After a physician or his or her designee locates an individual willing to act as the surrogate decision-maker for health care benefits pursuant to subsection (3) of this section, the physician shall certify the appointment in writing on the form set forth in section 15-18.5-105.

(8) If the surrogate decision-maker for health care benefits, a proxy decision-maker for medical treatment, an interested person, the person's guardian, or the attending physician believes the patient has regained decisional capacity, then the attending physician shall reexamine the patient and determine whether or not the patient has regained such decisional capacity and shall enter the decision and the basis therefor into the patient's medical record and shall notify the patient, the surrogate decision-maker for health care benefits, and the person who initiated the redetermination of decisional capacity.

(9) A surrogate decision-maker for health care benefits may not be an employee, a contractor, or an official representative of, or receive any remuneration of any kind from, a health care provider, medical benefit provider, pharmaceutical company, pharmacy benefit management company, pharmacy, or any person or entity engaged in the sale of insurance.

(10) A surrogate decision-maker for health care benefits shall have access to all necessary information, including but not limited to:

(a) Personal health information as defined by the federal "Health Insurance Portability and Accountability Act of 1996", 42 U.S.C. sec. 1320d-7 (a) (2); and

(b) Financial information needed to make appropriate health care benefit decisions; except that any bank, trust company, savings and loan association, credit union, or insurance company regulated under any laws of this state or the United States and any officer, employee, agent, or affiliate of any of the foregoing entities shall be exempt from any requirement to provide financial information to a surrogate decision-maker under the provisions of this section.

(11) A surrogate decision-maker for health care benefits shall make decisions that are in the best interests of the person on whose behalf the decisions are made.

(12) Any entity, including a financial entity, that relies in good faith on a certificate of appointment of a surrogate decision-maker for health care benefits received directly from the attending physician or his or her designee shall be immune from liability for actions taken on the basis of said certificate.

(13) A surrogate decision-maker for health care benefits shall be immune from liability for decisions made in good faith.

(14) An attending physician, health care provider, or health care facility that acts in substantial compliance with this section shall not be subject to civil or criminal liability or regulatory sanction relating to the selection or actions of a surrogate decision-maker for health care benefits.

(15) Nothing in this section shall be construed as requiring a surrogate decision-maker for health care benefits to make a decision or from prohibiting an individual from consulting another person or entity to obtain assistance in making a health care benefit decision.

**Source:** **L. 2006:** Entire section added, p. 841, § 5, effective May 4. **L. 2008:** (2) and (3) amended, p. 125, § 6, effective January 1, 2009. **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 446, § 14, effective July 1. **L. 2010:** (1) amended, (SB 10-199), ch. 374, p. 1754, § 21, effective July 1.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (1):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

#### ANNOTATION

**Decision to agree to arbitrate is not a "medical treatment decision"** and as such not within the authority of a health care proxy. There exists a distinction between an agreement to provide medical services, including an agree-

ment to admit a patient to a health care facility, and an agreement to arbitrate a health care dispute. *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970 (Colo. App. 2009).

**15-18.5-105. Statutory form for certificate of appointment of surrogate decision-makers for health care benefits.** The following statutory form for certificate of appointment of surrogate decision-maker for health care benefits is legally sufficient:

#### CERTIFICATE OF APPOINTMENT OF A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS

(1) I, (name of attending physician), the attending physician, certify that (name of person for whom decisions are being made) lacks the decisional capacity to make health care benefit decisions. I further certify that I have made the necessary documentation to the medical record.

(2) I, (name of attending physician), the attending physician or designee, hereby appoint (name of surrogate), (driver's license number or state ID number) as the surrogate decision-maker for health care benefits on behalf of (name of person for whom decisions are being made), (address, city, state) pursuant to section 15-18.5-104, C.R.S.

(3) (Name of surrogate) shall have access to all necessary personal health information as defined by the federal Health Insurance Portability and Accountability Act and any financial information necessary to make appropriate health care benefit decisions on behalf



of (name of person for whom decisions are being made), as provided for in section 15-18.5-104, C.R.S. (Name of surrogate) shall make such decisions in the best interests of (name of person for whom decisions are being made).

Executed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
(Attending physician)  
(Business address)  
(Business phone)  
(Business fax)

**Source: L. 2006:** Entire section added, p. 841, § 5, effective May 4.

**ARTICLE 18.6**  
**Directive Relating to**  
**Cardiopulmonary Resuscitation**

**Cross references:** For the provisions relating to anatomical gifts and their effect on advance health-care directives, see part 1 of article 34 of title 12; for provisions relating to a medical durable power of attorney, see § 15-14-506; for provisions relating to declarations concerning medical treatment, see article 18 of this title; for provisions relating to proxy decision-makers for medical treatment decisions, see article 18.5 of this title.

**Law reviews:** For article, “The Colorado Patient Autonomy Act: Opportunities and Challenges”, see 21 Colo. Law. 1901 (1992); for article, “CPR Directives in Colorado”, see 23 Colo. Law. 845 (1994); for article, “Surrogate Decision-Making for ‘Friendless’ Patients”, see 34 Colo. Law. 71 (April 2005).

15-18.6-101.	Definitions.	15-18.6-105.	Effect of declaration after inpatient admission.
15-18.6-102.	CPR directives for CPR - who may execute.	15-18.6-106.	Effect of CPR directive - absence - on life or health insurance.
15-18.6-103.	CPR directive forms - duties of state board of health.	15-18.6-107.	Revocation of CPR directive.
15-18.6-104.	Duty to comply with CPR directive - immunity - effect on criminal charges against another person.	15-18.6-108.	Effect of article on euthanasia - mercy killing - construction of statute.

**15-18.6-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Cardiopulmonary resuscitation” or “CPR” means measures to restore cardiac function or to support breathing in the event of cardiac or respiratory arrest or malfunction. “CPR” includes, but is not limited to, chest compression, delivering electric shock to the chest, or placing tubes in the airway to assist breathing.

(2) “CPR directive” means an advance medical directive pertaining to the administration of cardiopulmonary resuscitation.

(3) “Emergency medical service personnel” means an emergency medical service provider at any level who is certified or licensed by the department of public health and environment. “Emergency medical service personnel” includes a first responder certified by the department of public health and environment or the division of fire prevention and control in the department of public safety, in accordance with section 24-33.5-1205 (2) (c), C.R.S.

**Source: L. 92:** Entire article added, p. 1988, § 3, effective June 4. **L. 94:** (3) amended, p. 2731, § 350, effective July 1. **L. 2002:** (3) amended, p. 1211, § 7, effective June 3. **L. 2012:** (3) amended, (HB 12-1059), ch. 271, p. 1433, § 9, effective July 1; (3) amended, (HB 12-1283), ch. 240, p. 1131, § 37, effective July 1.

**Editor’s note:** (1) Amendments to subsection (3) by House Bill 12-1059 and House Bill 12-1283 were harmonized.

(2) Section 26 of chapter 271, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to acts committed on or after July 1, 2012.

**Cross references:** For the legislative declaration contained in the 1994 act amending subsection (3), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration in the 2012 act amending subsection (3), see section 1 of chapter 240, Session Laws of Colorado 2012.

**15-18.6-102. CPR directives for CPR - who may execute.** Any adult over age eighteen who has the decisional capacity to provide informed consent to or refusal of medical treatment or any other person who is, pursuant to the laws of this state or any other state, authorized to make medical treatment decisions on behalf of an adult who lacks such decisional capacity, may execute a CPR directive. After a physician issues a “do not resuscitate” order for a minor child, and only then, may the parents of the minor, if married and living together, the custodial parent or parent with decision-making responsibility for such a decision, or the legal guardian execute a CPR directive.

**Source:** **L. 92:** Entire article added, p. 1988, § 3, effective June 4. **L. 94:** Entire section amended, p. 1058, § 1, effective May 4. **L. 98:** Entire section amended, p. 1402, § 54, effective February 1, 1999.

#### ANNOTATION

**Morgan county department of human services, acting as guardian, is a “person” authorized to execute a “do not resuscitate”**

**order on behalf of an incapacitated person.** People ex rel. Yeager, 93 P.3d 589 (Colo. App. 2004).

**15-18.6-103. CPR directive forms - duties of state board of health.** (1) On or before January 1, 1993, the state board of health shall promulgate rules and protocols for the implementation of CPR directives by emergency medical service personnel. The protocols adopted by the board of health shall include uniform methods of identifying persons who have executed a CPR directive. Protocols adopted by the board of health shall include methods for rapid identification of persons who have executed a CPR directive, controlled distribution of the methods of identifying persons who have executed a CPR directive, and the information described in subsection (2) of this section. Nothing in this subsection (1) shall be construed to restrict any other manner in which a person may make a CPR directive.

(2) CPR directive protocols to be adopted by the state board shall require the following information concerning the person who is the subject of the CPR directive:

- (a) The person’s name, date of birth, and sex;
- (b) The person’s eye and hair color;
- (c) The person’s race or ethnic background;
- (d) If applicable, the name of a hospice program in which the person is enrolled;
- (e) The name, address, and telephone number of the person’s attending physician;
- (f) The person’s signature or mark or, if applicable, the signature of a person authorized by this article to execute a CPR directive;
- (g) The date on which the CPR directive form was signed;
- (h) The person’s directive concerning the administration of CPR, countersigned by the person’s attending physician;
- (i) The person’s directive in the form of a document with a written statement as provided in section 12-34-105 (b), C.R.S., or a statement in substantially similar form, indicating a decision regarding tissue donation. Such a document shall be executed in accordance with the provisions of the “Revised Uniform Anatomical Gift Act”, part 1 of article 34 of title 12, C.R.S. Such a written statement may be in the following form:

I hereby make an anatomical gift, to be effective upon my death, of:

A. \_\_\_ Any needed tissues

B. \_\_\_ The following tissues:



\_\_\_ Skin

\_\_\_ Cornea

\_\_\_ Bone, related tissues, and tendons

Donor signature: \_\_\_\_\_

**Source:** L. 92: Entire article added, p. 1988, § 3, effective June 4. L. 98: (2) (i) added, p. 1172, § 8, effective June 1. L. 2007: (2)(i) amended, p. 797, § 6, effective July 1.

**15-18.6-104. Duty to comply with CPR directive - immunity - effect on criminal charges against another person.** (1) Emergency medical service personnel, health care providers, and health care facilities shall comply with a person's CPR directive that is apparent and immediately available. Any emergency medical service personnel, health care provider, health care facility, or any other person who, in good faith, complies with a CPR directive shall not be subject to civil or criminal liability or regulatory sanction for such compliance.

(2) Compliance by emergency medical service personnel, health care providers, or health care facilities with a CPR directive shall not affect the criminal prosecution of any person otherwise charged with the commission of a criminal act.

(3) In the absence of a CPR directive, a person's consent to CPR shall be presumed.

**Source:** L. 92: Entire article added, p. 1989, § 3, effective June 4.

**15-18.6-105. Effect of declaration after inpatient admission.** A CPR directive for any person who is admitted to a health care facility shall be implemented as a physician's order concerning resuscitation as directed by the person in the CPR directive, pending further physicians' orders.

**Source:** L. 92: Entire article added, p. 1990, § 3, effective June 4.

**15-18.6-106. Effect of CPR directive - absence - on life or health insurance.** Neither a CPR directive nor the failure of a person to execute one shall affect, impair, or modify any contract of life or health insurance or annuity or be the basis for any delay in issuing or refusing to issue an annuity or policy of life or health insurance or any increase of a premium therefor.

**Source:** L. 92: Entire article added, p. 1990, § 3, effective June 4.

**15-18.6-107. Revocation of CPR directive.** A CPR directive may be revoked at any time by a person who is the subject of such directive or by the agent or proxy decision-maker for such person. However, only those CPR directives executed originally by a guardian, agent, or proxy decision-maker may be revoked by a guardian, agent, or proxy decision-maker.

**Source:** L. 92: Entire article added, p. 1990, § 3, effective June 4. L. 94: Entire section amended, p. 1058, § 2, effective May 4.

**15-18.6-108. Effect of article on euthanasia - mercy killing - construction of statute.** Nothing in this article shall be construed as condoning, authorizing, or approving euthanasia or mercy killing. In addition, the general assembly does not intend that this article be construed as permitting any affirmative or deliberate act to end a person's life, except to permit natural death as provided by this article.

**Source:** L. 92: Entire article added, p. 1990, § 3, effective June 4.

ARTICLE 18.7

Directives Concerning Medical Orders  
for Scope of Treatment

15-18.7-101.	Legislative declaration.	15-18.7-106.	Medical orders for scope of treatment form - who may consent.
15-18.7-102.	Definitions.	15-18.7-107.	Revision and revocation of a medical orders for scope of treatment form - duty to inform.
15-18.7-103.	Medical orders for scope of treatment forms - form contents.	15-18.7-108.	Medical orders for scope of treatment form not required for treatment.
15-18.7-104.	Duty to comply with medical orders for scope of treatment form - immunity - effect on criminal charges against another person - transferability.	15-18.7-109.	Effect of a medical orders for scope of treatment form on life or health insurance.
15-18.7-105.	Moral convictions and religious beliefs - notice required - transfer of a patient.	15-18.7-110.	Effect of article on existing advance medical directives.

- 15-18.7-101. Legislative declaration.** (1) The general assembly hereby finds that:
- (a) Colorado law has traditionally recognized the right of an adult or his or her authorized surrogate decision-maker to accept or reject medical treatment and artificial nutrition or hydration;
- (b) Each adult has the right to establish, in advance of the need for medical treatment, directives and instructions for the administration of medical treatment in the event the adult later lacks the decisional capacity to provide informed consent to, withdraw from, or refuse medical treatment;
- (c) Current instruments for making advance medical directives are often underutilized, hampered by certain institutional barriers, and inconsistently interpreted and implemented; and
- (d) The frail elderly, chronically or terminally ill, and nursing home resident population is in particular need of a consistent method for identifying and communicating critical treatment preferences that each sector of the health care community will recognize and follow.
- (2) The general assembly therefore concludes that it is in the best interests of the people of Colorado to adopt statutes providing for medical orders for scope of treatment. Consistent with the goal of enhancing patient-centered, compassionate care through methods to enhance continuity across health care settings, medical orders for scope of treatment will provide a process for timely discussion between individuals and their health care providers about choices to accept, withdraw, or refuse life-sustaining treatment and, through the use of standardized forms, will ensure those preferences are clearly and unequivocally documented.

**Source: L. 2010:** Entire article added, (HB 10-1122), ch. 279, p. 1275, § 1, effective August 11.

- 15-18.7-102. Definitions.** As used in this article, unless the context otherwise requires:
- (1) “Adult” means a person eighteen years of age or older.
- (2) “Advance medical directive” means a written instruction concerning medical treatment decisions to be made on behalf of the adult who provided the instruction in the event that he or she becomes incapacitated. An advance medical directive includes, but need not be limited to:
- (a) A medical durable power of attorney executed pursuant to section 15-14-506;
- (b) A declaration executed pursuant to the “Colorado Medical Treatment Decision Act”, article 18 of this title;



(c) A power of attorney granting medical treatment authority executed prior to July 1, 1992, pursuant to section 15-14-501, as it existed prior to that date; or

(d) A CPR directive or declaration executed pursuant to article 18.6 of this title.

(3) “Artificial nutrition or hydration” means:

(a) Nutrition or hydration supplied through a tube inserted into the stomach or intestines; or

(b) Nutrients or fluids injected intravenously into the bloodstream.

(4) “Authorized surrogate decision-maker” means a guardian appointed pursuant to article 14 of this title, an agent appointed pursuant to a medical durable power of attorney, a proxy decision-maker for medical treatment decisions appointed pursuant to article 18.5 of this title, or a similarly authorized surrogate, as defined by the laws of another state, who is authorized to make medical decisions for an individual who lacks decisional capacity.

(5) “Cardiopulmonary resuscitation” or “CPR” shall have the same meaning as set forth in section 15-18.6-101 (1).

(6) “CPR directive” shall have the same meaning as set forth in section 15-18.6-101 (2).

(7) “Decisional capacity” means the ability to provide informed consent to or refusal of medical treatment or the ability to make an informed health care benefit decision.

(8) “Emergency medical service personnel” means an emergency medical service provider who is certified or licensed by the department of public health and environment, created and existing under section 25-1-102, C.R.S., or a first responder certified by the department of public health and environment or the division of fire prevention and control in the department of public safety, in accordance with part 12 of article 33.5 of title 24, C.R.S.

(9) “Health care facility” means a hospital, a hospice inpatient residence, a nursing facility, a dialysis treatment facility, an assisted living residence, an entity that provides home- and community-based services, a hospice or home health care agency, or another facility that provides or contracts to provide health care services, which facility is licensed, certified, or otherwise authorized or permitted by law to provide medical treatment.

(10) “Health care provider” means:

(a) A physician or other individual who provides medical treatment to an adult and who is licensed, certified, or otherwise authorized or permitted by law to provide medical treatment or who is employed by or acting for such an authorized person; or

(b) A health maintenance organization licensed and conducting business in this state.

(11) “Medical treatment” means the provision, withholding, or withdrawal of any:

(a) Health care;

(b) Medical procedure, including but not limited to surgery, CPR, and artificial nutrition or hydration; or

(c) Service to maintain, diagnose, treat, or provide for a patient’s physical or mental health care.

**Source:** L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1276, § 1, effective August 11. L. 2012: (8) amended, (HB 12-1059), ch. 271, p. 1433, § 10, effective July 1; (8) amended, (HB 12-1283), ch. 240, p. 1131, § 38, effective July 1.

**Editor’s note:** (1) Amendments to subsection (8) by House Bill 12-1059 and House Bill 12-1283 were harmonized.

(2) Section 26 of chapter 271, Session Laws of Colorado 2012, provides that the act amending subsection (8) applies to acts committed on or after July 1, 2012.

**Cross references:** For the legislative declaration in the 2012 act amending subsection (8), see section 1 of chapter 240, Session Laws of Colorado 2012.

**15-18.7-103. Medical orders for scope of treatment forms - form contents.** (1) A medical orders for scope of treatment form shall include the following information concerning the adult whose medical treatment is the subject of the medical orders for scope of treatment form:

- (a) The adult's name, date of birth, and sex;
- (b) The adult's eye and hair color;
- (c) The adult's race or ethnic background;
- (d) If applicable, the name of the hospice program in which the adult is enrolled;
- (e) The name, address, and telephone number of the adult's physician, advanced practice nurse, or physician's assistant;
- (f) The adult's signature or mark or, if applicable, the signature of the adult's authorized surrogate decision-maker;
- (g) The date upon which the medical orders for scope of treatment form was signed;
- (h) The adult's instructions concerning:
  - (I) The administration of CPR;
  - (II) Other medical interventions, including but not limited to consent to comfort measures only, transfer to a hospital, limited intervention, or full treatment; and
  - (III) Other treatment options;
- (i) The signature of the adult's physician, advanced practice nurse, or, if under the supervision or authority of the physician, physician's assistant.

**Source:** L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1278, § 1, effective August 11.

**15-18.7-104. Duty to comply with medical orders for scope of treatment form - immunity - effect on criminal charges against another person - transferability.**

(1) (a) Except as provided in sections 15-18.7-105 and 15-18.7-107 (1), emergency medical service personnel, a health care provider, or a health care facility shall comply with an adult's executed medical orders for scope of treatment form that:

- (I) Has been executed in this state or another state;
- (II) Is apparent and immediately available; and
- (III) Reasonably satisfies the requirements of a medical orders for scope of treatment form specified in section 15-18.7-103.

(b) The fact that the physician, advanced practice nurse, or physician's assistant who signed an adult's medical orders for scope of treatment form does not have admitting privileges at the hospital or health care facility where the adult is being treated does not remove the duty of emergency medical service personnel, a health care provider, or a health care facility to comply with the medical orders for scope of treatment form as required by paragraph (a) of this subsection (1).

(2) Emergency medical service personnel, a health care provider, a health care facility, or any other person who complies with a legally executed medical orders for scope of treatment form that is apparent and immediately available and that he or she believes to be the most current version of the form shall not be subject to civil or criminal liability or regulatory sanction for such compliance.

(3) Compliance by emergency medical service personnel, a health care provider, or a health care facility with an executed medical orders for scope of treatment form shall not affect the criminal prosecution of a person otherwise charged with the commission of a criminal act.

(4) In the absence of an executed medical orders for scope of treatment form declining CPR or a CPR directive, an adult's consent to CPR shall be presumed.

(5) An adult's physician, advanced practice nurse, or, if under the supervision of the physician, physician's assistant may provide a verbal confirmation to a health care provider who shall annotate on the medical orders for scope of treatment form the time and date of the verbal confirmation and the name and license number of the physician, advanced practice nurse, or physician's assistant. The physician, advanced practice nurse, or physician's assistant shall countersign the annotation of the verbal confirmation on the medical orders for scope of treatment form within a time period that satisfies any applicable state law or within thirty days, whichever period is less, after providing the verbal confirmation. The signature of the physician, advanced practice nurse, or physician's assistant may be provided by photocopy, fax, or electronic means. A medical orders for scope of treatment form with annotated verbal confirmation, and a photocopy, fax, or other electronic repro-



duction thereof, shall be given the same force and effect as the original form signed by the physician, advanced practice nurse, or physician's assistant.

(6) (a) Nothing in this article shall be construed to modify or alter any generally accepted ethics, standards, protocols, or laws for the practice of medicine or nursing, including the provisions in section 15-18.6-108 concerning euthanasia and mercy killing.

(b) A medical orders for scope of treatment form shall not be construed to compel or authorize a health care provider or health care facility to administer medical treatment that is medically inappropriate or prohibited by state or federal law.

(7) If an adult who is known to have properly executed and signed a medical orders for scope of treatment form is transferred from one health care facility or health care provider to another, the transferring health care facility or health care provider shall communicate the existence of the form to the receiving health care facility or health care provider before the transfer. The transferring health care facility or health care provider shall ensure that the form or a copy of the form accompanies the adult upon admission to or discharge from a health care facility.

**Source: L. 2010:** Entire article added, (HB 10-1122), ch. 279, p. 1278, § 1, effective August 11.

**15-18.7-105. Moral convictions and religious beliefs - notice required - transfer of a patient.** (1) A health care provider or health care facility that provides care to an adult whom the health care provider or health care facility knows to have executed a medical orders for scope of treatment form shall provide notice to the adult or, if appropriate, to the authorized surrogate decision-maker of the adult, of any policies based on moral convictions or religious beliefs of the health care provider or health care facility relative to the withholding or withdrawal of medical treatment. The health care provider or health care facility shall provide the notice, when reasonably possible, prior to providing medical treatment or prior to or upon the admission of the adult to the health care facility, or as soon as possible thereafter.

(2) A health care provider or health care facility shall provide for the prompt transfer of an adult who has executed a medical orders for scope of treatment form to another health care provider or health care facility if the transferring health care provider or health care facility chooses not to comply with the provisions of the form on the basis of policies based on moral convictions or religious beliefs.

(3) Nothing in this section shall relieve or exonerate an attending physician or health care facility from the duty to provide for the care and comfort of an adult pending transfer pursuant to this section.

**Source: L. 2010:** Entire article added, (HB 10-1122), ch. 279, p. 1280, § 1, effective August 11.

**15-18.7-106. Medical orders for scope of treatment form - who may consent.** (1) An adult who has decisional capacity may execute a medical orders for scope of treatment form.

(2) Except as provided in section 15-18.7-110 (3), the authorized surrogate decision-maker for an adult who lacks decisional capacity may execute a medical orders for scope of treatment form for said adult.

**Source: L. 2010:** Entire article added, (HB 10-1122), ch. 279, p. 1280, § 1, effective August 11.

**15-18.7-107. Revision and revocation of a medical orders for scope of treatment form - duty to inform.** (1) (a) A health care provider may revise the provisions of an adult's executed medical orders for scope of treatment form only if:

(I) (A) The adult's medical condition has changed since the adult or the adult's authorized surrogate decision-maker executed the form; or

(B) The provisions of the form are not, in the provider's independent medical judgment, medically appropriate;

(II) The provider consults with the adult or, if the adult lacks decisional capacity, the adult's authorized surrogate decision-maker concerning the revision of the form; and

(III) The adult or, if the adult lacks decisional capacity, the adult's authorized surrogate decision-maker consents to the revision of the provisions of the form.

(b) If a health care provider revises an adult's executed medical orders for scope of treatment form pursuant to paragraph (a) of this subsection (1):

(I) The provider shall record the revisions on the form; and

(II) The provider and the adult or, if the adult lacks decisional capacity, the adult's authorized surrogate decision-maker, shall sign and date the form.

(2) An adult who has decisional capacity and has executed a medical orders for scope of treatment form may revoke his or her consent to all or part of the form at any time and in any manner that clearly communicates an intent to revoke all or part of the form.

(3) Except as provided in section 15-18.7-110 (3), the authorized surrogate decision-maker for an adult who lacks decisional capacity may revoke the adult's previously executed medical orders for scope of treatment form.

(4) Emergency medical service personnel, a health care provider, or an authorized surrogate decision-maker who becomes aware of the revocation of a medical orders for scope of treatment form shall promptly communicate the fact of the revocation to a physician, advanced practice nurse, or physician's assistant who is providing care to the adult who is the subject of the form.

**Source: L. 2010:** Entire article added, (HB 10-1122), ch. 279, p. 1280, § 1, effective August 11.

**15-18.7-108. Medical orders for scope of treatment form not required for treatment.** A health care facility shall not require a person to have executed a medical orders for scope of treatment form as a condition of being admitted to, or receiving medical treatment from, the health care facility.

**Source: L. 2010:** Entire article added, (HB 10-1122), ch. 279, p. 1281, § 1, effective August 11.

**15-18.7-109. Effect of a medical orders for scope of treatment form on life or health insurance.** Neither a medical orders for scope of treatment form nor the failure of an adult to execute a medical orders for scope of treatment form shall affect, impair, or modify a contract of life or health insurance or an annuity or be the basis for a delay in issuing or refusal to issue an annuity or policy of life or health insurance or for any increase of a premium therefor.

**Source: L. 2010:** Entire article added, (HB 10-1122), ch. 279, p. 1281, § 1, effective August 11.

**15-18.7-110. Effect of article on existing advance medical directives.** (1) In executing a medical orders for scope of treatment form, an adult, or the adult's authorized surrogate decision-maker, and the physician, advanced practice nurse, or physician's assistant who signs the form shall make a good faith effort to locate and incorporate, as appropriate and desired, treatment preferences documented in the adult's previously executed advance medical directives, if any.

(2) Except as otherwise provided in paragraph (a) of subsection (3) of this section, in case of a conflict between a medical orders for scope of treatment form and an adult's advance medical directives, the document most recently executed shall take precedence for the medical decision or treatment preference at issue. Medical decisions and treatment preferences documented in an adult's advance medical directives or asserted by an authorized surrogate decision-maker on the adult's behalf, but not specifically addressed in



a more recently executed medical orders for scope of treatment form, shall not be affected by the medical orders for scope of treatment form.

(3) Notwithstanding the provisions of subsection (1) of this section:

(a) An authorized surrogate decision-maker or a physician, advanced practice nurse, or physician's assistant may not revoke or alter an adult's previously executed advance medical directive regarding provision of artificial nutrition or hydration if the directive is documented in a declaration executed by the adult pursuant to the "Colorado Medical Treatment Decision Act", article 18 of this title.

(b) An authorized surrogate decision-maker may not revoke a preexisting CPR directive unless it was originally executed by an authorized surrogate decision-maker.

(c) An authorized surrogate decision-maker who is a proxy decision-maker pursuant to article 18.5 of this title may authorize the withdrawal of artificial nutrition or hydration only in accordance with section 15-18.5-103 (6).

**Source: L. 2010:** Entire article added, (HB 10-1122), ch. 279, p. 1282, § 1, effective August 11.

## LAST REMAINS

### ARTICLE 19

#### Disposition of Last Remains

15-19-101.	Short title.	15-19-106.	Right to dispose of remains.
15-19-102.	Legislative declaration - construction.	15-19-107.	Declaration of disposition of last remains.
15-19-103.	Definitions.	15-19-108.	Interstate effect of declaration.
15-19-104.	Declaration of disposition of last remains.	15-19-109.	Effect of criminal charges.
15-19-105.	Reliance - declarations.		

**15-19-101. Short title.** This article shall be known and may be cited as the "Disposition of Last Remains Act".

**Source: L. 2003:** Entire article added, p. 1348, § 1, effective August 6.

**15-19-102. Legislative declaration - construction.** (1) The general assembly finds and declares that:

(a) A competent adult individual has the right and power to direct the disposition of his or her remains after death and should be protected from interested persons who may try to impose their wishes regarding such disposition contrary to the deceased's desires.

(b) A statute that determines priority of individuals to direct the disposition of a decedent's remains is necessary if the decedent fails to direct such disposition or fails to provide the resources necessary to carry out such disposition or if a dispute arises between interested persons regarding such disposition.

(c) The right to direct the disposition of one's remains must be stated in writing to better protect a third party who relies in good faith on such decisions.

(2) This article shall be interpreted liberally to carry out a decedent's intent when not conflicting with this article.

(3) This article shall not be construed to:

(a) Subject to section 15-19-104 (3), invalidate a declaration or a will, codicil, trust, power of appointment, or power of attorney;

(b) Invalidate any act of an agent, guardian, or conservator;

(c) Affect any claim, right, or remedy that accrued prior to August 6, 2003;

(d) Authorize or encourage acts that violate the constitution, statutes, rules, case law, or public policy of Colorado or the United States;

(e) Abridge contracts;

- (f) Modify the standards, ethics, or protocols of the practice of medicine;
- (g) Compel or authorize a health care provider or health care facility, as defined in section 15-14-505, to administer medical treatment that is medically inappropriate or contrary to federal or other Colorado law; or
- (h) Permit or authorize euthanasia or an affirmative or deliberate act to end a person's life.

**Source:** **L. 2003:** Entire article added, p. 1348, § 1, effective August 6. **L. 2006:** (1)(b), (1)(c), and (3)(a) amended, p. 897, § 1, effective August 7.

**15-19-103. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Adult" means a natural person eighteen years of age or older.
- (2) "Declarant" means a competent adult who signs a declaration pursuant to the provisions of this article.
- (3) "Declaration" means a written instrument directing the lawful disposition of the declarant's last remains and the ceremonies planned after a declarant's death, in accordance with this article. A declaration may be made within a will; prepaid funeral, burial, or cremation contract; durable or medical power of attorney; a designated beneficiary agreement as described in article 22 of this title; a federal record of emergency data; or any other written document, including, but not limited to, a document governing the disposition of last remains under part 7 of article 11 of this title.
- (3.5) "Federal record of emergency data" means the United States department of defense record of emergency data, DD form 93, or any successor form.
- (4) "Interested person" means the deceased's spouse, parent, designated beneficiary, adult child, sibling, grandchild, and other person designated in a declaration.
- (5) "Last remains" means the deceased's body or cremains after death.
- (6) (Deleted by amendment, L. 2006, p. 897, § 2, effective August 7, 2006.)
- (7) (a) "Third party" means a person:
  - (I) Who is requested by a declaration to act in good faith in reliance upon the declaration;
  - (II) Who is asked to dispose of last remains by the person with priority to dispose of the decedent's last remains under section 15-19-106; or
  - (III) Who is delegated discretion over ceremonial or dispositional arrangements in a declaration.
- (b) "Third party" includes, but is not limited to, a funeral director, mortuary science practitioner, mortuary, crematorium, or cemetery.
- (8) (Deleted by amendment, L. 2006, p. 897, § 2, effective August 7, 2006.)

**Source:** **L. 2003:** Entire article added, p. 1349, § 1, effective August 6. **L. 2006:** (3), (4), (6), (7)(a)(I), (7)(a)(III), and (8) amended, p. 897, § 2, effective August 7. **L. 2009:** (3) and (4) amended, (HB 09-1260), ch. 107, p. 446, § 15, effective July 1; (7)(b) amended, (HB 09-1202), ch. 422, p. 2343, § 6, effective July 1. **L. 2010:** (3) amended and (3.5) added, (SB 10-047), ch. 166, p. 585, § 2, effective August 11.

**Cross references:** For the legislative declaration in the 2010 act amending subsection (3) and adding subsection (3.5), see section 1 of chapter 166, Session Laws of Colorado 2010.

**15-19-104. Declaration of disposition of last remains.** (1) The declarant may specify, in a declaration, any one or more of the following:

- (a) The disposition to be made of the declarant's last remains;
- (b) The person appointed to direct the disposition of the declarant's last remains;
- (c) The ceremonial arrangements to be performed after the declarant's death;
- (d) The person appointed to direct the ceremonial arrangements after the declarant's death;
- (e) The rights, limitations, immunities, and other terms of third parties dealing with the declaration.



(2) (Deleted by amendment, L. 2006, p. 898, § 3, effective August 7, 2006.)

(3) (a) (I) The provisions of the most recent declaration shall control over any other document regarding the disposition of the declarant's last remains.

(II) (A) Notwithstanding the provisions of subparagraph (I) of this paragraph (a), if the declarant is a member of the United States armed forces or the United States reserve forces or a member of a state National Guard called into federal service and the declarant has executed a federal record of emergency data that is valid and enforceable at the time of the declarant's death, then the federal record of emergency data shall control over any other declaration concerning the person authorized to direct the disposition of the declarant's last remains, even if the federal record of emergency data was executed prior to the execution of the most recent declaration pursuant to this article. The person authorized to direct disposition of the decedent's last remains pursuant to the federal record of emergency data shall do so in accordance with the provisions for the disposition of the remains and the ceremonial arrangements made by the declarant in his or her most recent declaration concerning such disposition and ceremonial arrangements.

(B) For purposes of sub-subparagraph (A) of this subparagraph (II), a federal record of emergency data is valid and enforceable for any declarant who is a covered decedent at the time of his or her death, pursuant to 10 U.S.C. sec. 1481, or any successor section concerning recovery, care, and disposition of remains.

(b) This article shall govern all current and prior declarations.

(c) If article 54 of title 12, C.R.S., conflicts with this article, this article shall govern.

(4) (Deleted by amendment, L. 2006, p. 898, § 3, effective August 7, 2006.)

(5) A declaration shall be signed and dated by the declarant and may be notarized or witnessed in writing by at least one adult who confirms that he or she was present when the declarant signed the declaration.

**Source:** L. 2003: Entire article added, p. 1350, § 1, effective August 6. L. 2006: Entire section amended, p. 898, § 3, effective August 7. L. 2010: (3)(a) amended, (SB 10-047), ch. 166, p. 585, § 3, effective August 11.

**Cross references:** For the legislative declaration in the 2010 act amending subsection (3)(a), see section 1 of chapter 166, Session Laws of Colorado 2010.

**15-19-105. Reliance - declarations.** (1) (a) A third party who provides for the lawful disposition of a declarant's remains in reliance on a declaration that appears to be legally executed shall not be subject to civil liability or administrative discipline for such reliance.

(b) (I) A third party, when presented with a declaration, may presume in the absence of actual knowledge to the contrary:

(A) That the declaration was validly executed;

(B) That the declarant was competent when the instrument was executed; and

(C) That the declaration has not been revoked.

(II) A third party who provides for the lawful disposition of a declarant's remains in reliance on a declaration shall not be civilly or criminally liable for the proper application of property delivered or surrendered to comply with the declarant's instructions in the declaration.

(2) A declaration shall be binding on all persons with an interest in the disposition of the declarant's remains. Section 15-19-106 (1) shall not vest a right to control disposition or ceremonial arrangements that conflict with those made by a declaration. If the declaration conflicts with the directions of any other person, the declaration shall control, and a third party shall provide for the lawful disposition according to the declaration so long as:

(a) No challenge to the validity of the declaration exists under subsection (3) of this section; and

(b) The deceased provided the resources necessary to carry out the disposition.

(3) A challenge to the validity of the declaration or the competency of the declarant when the declaration was executed shall be resolved by the probate court. A third party who knows a declaration has been challenged shall not be liable for refusing to accept, inter,

cremate, or otherwise dispose of a declarant's remains until the third party receives a court order or other reasonable confirmation that the challenge has been resolved or settled.

**Source: L. 2003:** Entire article added, p. 1351, § 1, effective August 6. **L. 2006:** Entire section amended, p. 899, § 4, effective August 7.

**15-19-106. Right to dispose of remains.** (1) Subject to section 15-19-105 (2), the right to control disposition of the last remains or ceremonial arrangements of a decedent vests in and devolves upon the following persons, at the time of the decedent's death, in the following order:

(a) The decedent if acting through a declaration pursuant to section 15-19-104, subject to the provisions of section 15-19-104 (3) (a) (II);

(b) (I) Either the appointed personal representative or special administrator of the decedent's estate if such person has been appointed; or

(II) The nominee for appointment as personal representative under the decedent's will if a personal representative or special administrator has not been appointed;

(c) The surviving spouse of the decedent, if not legally separated from the decedent;

(c.5) A person with the right to direct the disposition of the decedent's last remains in a designated beneficiary agreement made pursuant to article 22 of this title;

(d) A majority of the surviving adult children of the decedent;

(e) A majority of the surviving parents or legal guardians of the decedent, who shall act in writing;

(f) A majority of the surviving adult siblings of the decedent;

(g) (Deleted by amendment, L. 2006, p. 900, 5, effective August 7, 2006.)

(h) Any person who is willing to assume legal and financial responsibility for the final disposition of the decedent's last remains.

(2) (Deleted by amendment, L. 2006, p. 900, § 5, effective August 7, 2006.)

(3) Disputes among the persons listed under subsection (1) of this section shall be resolved by the probate court. A third party shall not be liable for refusing to accept the decedent's remains or dispose of the decedent's remains until the party receives a court order or other reasonable confirmation that the dispute has been resolved or settled.

(4) (a) If the person with the right to control disposition is unable or unwilling to make such disposition, or if the person's whereabouts cannot be reasonably ascertained, then that person's rights shall terminate and pass to the following, in the following order:

(I) The rest of the persons in the class with the same degree of relationship granting the same priority of control over the disposition pursuant to subsection (1) of this section;

(II) The next class of persons in the order listed in subsection (1) of this section if no one else with the same degree of relationship granting the same priority of control over the disposition of this section exists or possesses the right of final disposition pursuant to subsection (1) of this section.

(b) (I) The person with the right to control disposition shall be presumed to be unable or unwilling to provide for such disposition, or the person's whereabouts shall be presumed unknown, if the person has failed to make or appoint another person to make final arrangements for the disposition of the decedent within five days after receiving notice of the decedent's death or within ten days after the decedent's death, whichever is earlier.

(II) Any member or veteran of the armed forces of the United States or of an organization supporting members or veterans of the armed forces of the United States shall have the right to access the human remains and records thereof in order to identify the remains if no person with the right of final disposition has provided for final disposition for at least one hundred eighty days after death. If the remains are those of a veteran of the armed forces of the United States, the person who possesses the remains shall make arrangements for the remains to be transferred to the closest United States military cemetery. This subparagraph (II) shall not be construed to authorize the exhumation of dead human bodies nor the possession of dead human bodies by any person seeking to identify the identity of the remains.

(c) If a person is unable or unwilling to make a disposition under this subsection (4), such person shall not be counted as a member of the class with the same degree of



relationship granting the same priority of control over the disposition pursuant to subsection (1) of this section when determining the number that makes a majority of such class.

(5) If the persons enumerated in subsection (1) of this section are not willing or able to provide for the final disposition of a decedent's remains, or if the persons' whereabouts cannot be reasonably ascertained, then the public administrator responsible for the decedent's estate or the person who controls indigent burials in the county in which the death occurred shall make arrangements for the final disposition of the decedent's remains.

(6) A third party who provides for the final disposition of a decedent's remains upon authorization from a person who claimed to have the right to control the final disposition shall be immune from civil liability and administrative discipline.

**Source:** **L. 2003:** Entire article added, p. 1351, § 1, effective August 6. **L. 2006:** Entire section amended, p. 900, § 5, effective August 7. **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 447, § 16, effective July 1; (4)(b) amended, (HB 09-1058), ch. 241, p. 1093, § 1, effective August 5. **L. 2010:** (1)(c.5) amended, (SB10-199), ch. 374, p. 1754, § 22, effective July 1; (1)(a) amended, (SB 10-047), ch. 166, p. 586, § 4, effective August 11.

**Editor's note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending subsection (1)(c.5):

(a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and

(b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**Cross references:** For the legislative declaration in the 2010 act amending subsection (1)(a), see section 1 of chapter 166, Session Laws of Colorado 2010.

**15-19-107. Declaration of disposition of last remains.** (1) **Form.** The following statutory declaration of disposition of last remains is legally sufficient:

#### DECLARATION OF DISPOSITION OF LAST REMAINS

I, (name of declarant), being of sound mind and lawful age, hereby revoke all prior declarations concerning the disposition of my last remains and those provisions concerning disposition of my last remains found in a will, codicil, or power of attorney, and I declare and direct that after my death the following provisions be taken:

1. If permitted by law, my body shall be (initial ONE choice):

\_\_\_\_\_ Buried. I direct that my body be buried at \_\_\_\_\_.

\_\_\_\_\_ Cremated. I direct that my cremated remains be disposed of as follows:

\_\_\_\_\_ Entombed. I direct that my body be entombed at \_\_\_\_\_.

\_\_\_\_\_ Other. I direct that my body be disposed of as follows:

\_\_\_\_\_ Disposed of as (name of designee) shall decide in writing. If \_\_\_\_\_ is unwilling or unable to act, I nominate \_\_\_\_\_ as my alternate designee.

2. I request that the following ceremonial arrangements be made (initial desired choice or choices):

\_\_\_\_\_ I request \_\_\_\_\_ (name of designee) make all arrangements for any ceremonies, consistent with my directions set forth in this declaration. If \_\_\_\_\_ is unwilling or unable to act, I nominate \_\_\_\_\_ as my alternate designee.

\_\_\_\_\_ Funeral. I request the following arrangements for my funeral:  
\_\_\_\_\_  
\_\_\_\_\_.

\_\_\_\_\_ Memorial Service. I request the following arrangements for my memorial service:  
\_\_\_\_\_  
\_\_\_\_\_.

3. Special instructions. In addition to the instructions above, I request (on the following lines you may make special requests regarding ceremonies or lack of ceremonies):  
\_\_\_\_\_  
\_\_\_\_\_.

I may revoke or amend this declaration in writing at any time. I agree that a third party who receives a copy of this declaration may act according to it. Revocation of this declaration is not effective as to a third party until the third party learns of my revocation. My estate shall indemnify any third party for costs incurred as a result of claims that arise against the third party because of good-faith reliance on this declaration.

I execute this declaration as my free and voluntary act, on \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
(Declarant)

THE FOLLOWING SECTION REGARDING ORGAN AND TISSUE DONATION IS OPTIONAL. To make a donation, initial the option you select and sign below.

In the hope that I might help others, I hereby make an anatomical gift, to be effective upon my death, of:

- A. \_\_\_\_\_ Any needed organs/tissues
- B. \_\_\_\_\_ The following organs/tissues:  
\_\_\_\_\_  
\_\_\_\_\_.

Donor signature: \_\_\_\_\_

Notarization optional:

Notarization optional:

STATE OF COLORADO )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

Acknowledged before me by \_\_\_\_\_, Declarant, on \_\_\_\_\_, \_\_\_\_.

My commission expires: \_\_\_\_\_

[seal]

\_\_\_\_\_  
Notary Public



(2) **Requirements.** The form set forth in subsection (1) of this section is not exclusive, and a person may use another form of declaration if the wording of the form complies substantially with subsection (1) of this section, the form is properly completed, and the form is in writing, dated, and signed by the declarant. A declaration may be witnessed or notarized by at least one person who attests that he or she was present when the document was signed by the declarant.

(3) A declaration may be revoked by the declarant in writing or by burning, tearing, canceling, obliterating, or destroying the declaration with the intent to revoke such declaration.

(4) (a) Unless otherwise expressly provided in a declaration, a subsequent divorce, dissolution of marriage, annulment of marriage, or legal separation between the declarant and spouse automatically revokes a delegation to the declarant's spouse to direct the disposition of the declarant's last remains or ceremonies after the declarant's death. This paragraph (a) shall not be construed to revoke the remaining provisions of the declaration.

(b) Unless otherwise specified in the declaration, if a declarant revokes a delegation to a person to direct the disposition of the declarant's last remains or ceremonies after the declarant's death, or if such person is unable or unwilling to serve, the nomination of such person shall be ineffective as to such person. If an alternate designee is not nominated by the declarant, section 15-19-106 shall govern. This paragraph (b) shall not be construed to revoke the remaining provisions of the declaration.

**Source:** L. 2003: Entire article added, p. 1352, § 1, effective August 6. L. 2006: Entire section amended, p. 902, § 6, effective August 7.

**15-19-108. Interstate effect of declaration.** (1) Unless otherwise stated in a declaration, it shall be presumed that the declarant intends to have his or her declaration executed pursuant to this article and recognized to the fullest extent possible by other states.

(2) Unless otherwise provided in the declaration, a declaration or similar instrument executed in another state that complies with the requirements of this article may, in good faith, be relied upon by a third party in this state if an action requested by such declarant does not violate any law of the federal government, Colorado, or a political subdivision.

**Source:** L. 2003: Entire article added, p. 1355, § 1, effective August 6. L. 2006: Entire section amended, p. 904, § 7, effective August 7.

**15-19-109. Effect of criminal charges.** A person who has been arrested on suspicion of having committed, is charged with, or has been convicted of, any felony offense specified in part 1 of article 3 of title 18, C.R.S., involving the death of the deceased person, shall not direct the final disposition of the deceased person or arrange the ceremonies for the deceased person. If charges are not brought, charges are brought but dismissed, or the person charged is acquitted of the alleged crime before final disposition of the deceased person's body, this section shall not apply.

**Source:** L. 2009: Entire section added with relocations, (HB 09-1202), ch. 422, p. 2344, § 7, effective July 1.

**Editor's note:** This section is similar to former § 12-54-109 as it existed prior to 2009.

**COMMUNITY PROPERTY RIGHTS****ARTICLE 20****Disposition of Community Property Rights  
at Death**

15-20-101.	Short title.		see.
15-20-102.	Application.	15-20-107.	Purchaser for value or lender.
15-20-103.	Rebuttable presumptions.	15-20-108.	Creditor's rights.
15-20-104.	Disposition upon death.	15-20-109.	Acts of married persons.
15-20-105.	Perfection of title of surviving spouse.	15-20-110.	Limitations on testamentary disposition.
15-20-106.	Perfection of title of personal representative, heir, or devi-	15-20-111.	Uniformity of application and construction.

**15-20-101. Short title.** This article shall be known and may be cited as the "Uniform Disposition of Community Property Rights at Death Act".

**Source:** L. 73: p. 1655, § 1. C.R.S. 1963: § 153-22-11.

**ANNOTATION**

**Law reviews.** For article, "Uniform State Laws of Interest to Colorado Probate Lawyers", see 14 Colo. Law. 1961 (1985). For article, "Planning for Community Property in Colo-

rado", see 31 Colo. Law. 79 (June 2002). For article, "Joint Revocable Living Trusts: The Good, the Bad, and the Ugly", see 39 Colo. Law. 53 (January 2010).

**15-20-102. Application.** (1) This article applies to the disposition at death of the following property acquired by a married person:

- (a) All personal property, wherever situated:
- (I) Which was acquired as or became, and remained, community property under the laws of another jurisdiction; or
- (II) All or the proportionate part of that property acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, that community property; or
- (III) Traceable to that community property.
- (b) All or the proportionate part of any real property situated in this state which was acquired with the rents, issues, or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property.

**Source:** L. 73: p. 1653, § 1. C.R.S. 1963: § 153-22-1.

**15-20-103. Rebuttable presumptions.** (1) In determining whether this article applies to specific property, the following rebuttable presumptions apply:

- (a) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or to have become, and remained, property to which this article applies; and
- (b) Real property situated in this state and personal property wherever situated acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which this article applies.

**Source:** L. 73: p. 1653, § 1. C.R.S. 1963: § 153-22-2.

**15-20-104. Disposition upon death.** Upon death of a married person, one-half of the property to which this article applies is the property of the surviving spouse and is not



subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this state.

**Source:** L. 73: pp. 1651, 1654, §§ 1, 22. C.R.S. 1963: § 153-22-3.

**15-20-105. Perfection of title of surviving spouse.** If the title to any property to which this article applies was held at the time of the decedent's death by the decedent or by a trustee of an inter vivos trust created by the decedent, title of the surviving spouse may be perfected by an order of the court or by execution of an instrument by the personal representative or the heirs or devisees of the decedent with the approval of the court. The personal representative shall have no duty to discover or attempt to discover whether property held by the decedent is property to which this article applies, unless a written demand is made by the surviving spouse or the spouse's successor in interest.

**Source:** L. 73: p. 1654, § 1. C.R.S. 1963: § 153-22-4.

**15-20-106. Perfection of title of personal representative, heir, or devisee.** (1) If the title to any property to which this article applies is held by the surviving spouse at the time of the decedent's death, the personal representative or an heir or devisee of the decedent may institute an action to perfect title to the property. The personal representative has no fiduciary duty to discover or attempt to discover whether any property held by the surviving spouse is property to which this article applies, unless a written demand is made by an heir, devisee, or creditor of the decedent.

(2) Written demand in this section and in section 15-20-105 shall be made by a surviving spouse, the spouse's successor in interest, or the decedent's heirs or devisees not later than six months after the decedent's will has been admitted to probate, or not later than six months after the appointment of an administrator if there is no will, or not later than six months after the decedent's death if the property to which this article applies is held in an inter vivos trust created by the decedent; and written demand by a creditor of the decedent shall be made not later than six months from the decedent's date of death.

(3) Written demand in this section and in section 15-20-105 shall be delivered in person or by registered mail to the personal representative. As used in this article, the personal representative may also mean the trustee of an inter vivos trust created by the decedent who has legal title to, or possession of, the property to which this article applies.

**Source:** L. 73: p. 1654, § 1. C.R.S. 1963: § 153-22-5.

**15-20-107. Purchaser for value or lender.** (1) If a surviving spouse has apparent title to property to which this article applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the personal representative or an heir or devisee of the decedent.

(2) If a personal representative or an heir or devisee of the decedent has apparent title to property to which this article applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the surviving spouse.

(3) A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

(4) The proceeds of a sale or creation of a security interest shall be treated in the same manner as the property transferred to the purchaser for value or a lender.

**Source:** L. 73: p. 1655, § 1. C.R.S. 1963: § 153-22-6.

**15-20-108. Creditor's rights.** This article does not affect rights of creditors with respect to property to which this article applies.

**Source:** L. 73: p. 1655, § 1. C.R.S. 1963: § 153-22-7.

**15-20-109. Acts of married persons.** This article does not prevent married persons from severing or altering their interests in property to which this article applies.

**Source:** L. 73: p. 1655, § 1. C.R.S. 1963: § 153-22-8.

**15-20-110. Limitations on testamentary disposition.** This article does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.

**Source:** L. 73: p. 1655, § 1. C.R.S. 1963: § 153-22-9.

**15-20-111. Uniformity of application and construction.** This article shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact it.

**Source:** L. 73: p. 1655, § 1. C.R.S. 1963: § 153-22-10.

DESIGNATED BENEFICIARY AGREEMENTS

ARTICLE 22

Designated Beneficiary Agreements

**Law reviews:** For article, “Changes to Colorado’s Uniform Probate Code”, see 39 Colo. Law. 41 (December 2010).

15-22-101.	Short title.		fee.
15-22-102.	Legislative declaration.	15-22-108.	Designated beneficiary agree-
15-22-103.	Definitions.		ment - effect on other legal
15-22-104.	Requirements for a valid des-	15-22-109.	documents.
	ignated beneficiary agree-		Affirmation of validity of des-
	ment.		ignated beneficiary agree-
15-22-105.	Effects and applicability of a	15-22-110.	ment.
	designated beneficiary	15-22-111.	Reliance - immunity.
	agreement.		Revocation of a designated
15-22-106.	Statutory form of a desig-		beneficiary agreement.
	nated beneficiary agreement.	15-22-112.	Death of a designated benefi-
15-22-107.	Recording - duties of the		ciary - effect on designated
	county clerk and recorder -		beneficiary agreement.

**15-22-101. Short title.** This article shall be known and may be cited as the “Colorado Designated Beneficiary Agreement Act”.

**Source:** L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 428, § 1, effective July 1.

**15-22-102. Legislative declaration.** (1) The general assembly finds and determines that:

(a) Not all Coloradans are adequately protected by the provisions of the “Colorado Probate Code”, articles 10 to 17 of this title, and other provisions of Colorado law. Current state and federal laws present impediments and disincentives for people wishing to avail themselves of the protections of this title.

(b) Beyond legal impediments, people often fail to plan for their own mortality. Studies have found that significant numbers of Americans do not have a valid will, and even fewer have executed powers of attorney or other estate planning documents.



(c) A body of law has been enacted to operate by default in situations in which individuals do not prepare estate plans. However, failure to plan for disability, incapacity, or death places people at the mercy of state laws that may vest the power to act in such situations in persons other than those they would wish to have exercise those powers. Many lack access to legal services due to the expense of drafting legal instruments and the necessity to keep these documents current.

(d) The power of individuals to care for one another and take action to be personally responsible for themselves and their loved-ones is of tremendous societal benefit, enabling self-determination and reducing reliance on public programs and services.

(2) Therefore, the general assembly declares that:

(a) The public policy of the state should encourage residents to execute appropriate legal documents to effectuate their wishes;

(b) The purposes of this article are to:

(I) Make existing laws relating to health care, medical emergencies, incapacity, death, and administration of decedent's estates available to more persons through a process of documenting designated beneficiary agreements; and

(II) Allow individuals to elect to have certain default provisions in state statutes provide rights, benefits, and protections to a designated beneficiary in situations in which no valid and enforceable estate planning documents exist.

(c) It is the intent of the general assembly that this article be liberally construed to give effect to the purposes stated in this article.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 428, § 1, effective July 1.

**15-22-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Designated beneficiary" means a person who has entered into a designated beneficiary agreement pursuant to this article.

(2) "Designated beneficiary agreement" means an agreement that is entered into pursuant to this article by two people for the purpose of designating each person as the beneficiary of the other person and for the purpose of ensuring that each person has certain rights and financial protections based upon the designation.

(3) "Superseding legal document" means a legal document, regardless of the date of execution, that is valid and enforceable and conflicts with all or a portion of a designated beneficiary agreement and, therefore, causes the designated beneficiary agreement in whole or in part to be replaced or set aside. To the extent there is a conflict between a superseding legal document and a designated beneficiary agreement, the superseding legal document controls. A superseding legal document may include, but need not be limited to, any of the following:

(a) A will;

(b) A codicil;

(c) A power of attorney;

(d) A medical durable power of attorney;

(e) A trust instrument;

(f) A beneficiary designation in an insurance policy or policy of health care coverage;

(g) A beneficiary designation in a retirement or pension plan;

(h) A beneficiary designation for a deposit or account, including but not limited to demand, savings, and time deposit accounts;

(i) A declaration as to medical treatment executed pursuant to article 18 of this title;

(j) A declaration as to disposition of last remains executed pursuant to article 19 of this title; or

(k) A marriage license.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 429, § 1, effective July 1.

**15-22-104. Requirements for a valid designated beneficiary agreement.** (1) A designated beneficiary agreement shall be legally recognized if:

(a) The parties to the designated beneficiary agreement satisfy all of the following criteria:

- (I) Both are at least eighteen years of age;
- (II) Both are competent to enter into a contract;
- (III) Neither party is married to another person;
- (IV) Neither party is a party to another designated beneficiary agreement; and
- (V) Both parties enter into the designated beneficiary agreement without force, fraud, or duress; and

(b) The agreement is in substantial compliance with the requirements set forth in this article. For purposes of this article, "substantial compliance" shall mean that the agreement includes the disclaimer contained in section 15-22-106, the instructions and headings about how to grant or withhold a right or protection, the statements about the effective date of the agreement and how to record the agreement, the signatures for the two parties, and the acknowledgments for the notary public.

(2) A designated beneficiary agreement is legally sufficient under this article if:

- (a) The wording of the designated beneficiary agreement complies substantially with the standard form set forth in section 15-22-106 (1) and the form is in compliance with the requirements of section 30-10-406 (3), C.R.S.;
- (b) The designated beneficiary agreement is properly completed and signed;
- (c) The designated beneficiary agreement is acknowledged; and
- (d) The designated beneficiary agreement is recorded with a county clerk and recorder as provided in section 15-22-107.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 430, § 1, effective July 1.

**15-22-105. Effects and applicability of a designated beneficiary agreement.** (1) A person named as a designated beneficiary in a designated beneficiary agreement shall be entitled to exercise the rights and protections specified in the agreement by virtue of having been so named.

(2) A designated beneficiary agreement that is properly executed and recorded as provided in section 15-22-104 (2) shall be valid and legally enforceable in the absence of a superseding legal document that conflicts with the provisions specified in the designated beneficiary agreement.

(3) A designated beneficiary agreement shall entitle the parties to exercise the following rights and enjoy the following protections, unless specifically excluded from the designated beneficiary agreement:

- (a) The right to acquire, hold title to, own jointly, or transfer inter vivos or at death real or personal property as joint tenants with right of survivorship or as tenants in common;
- (b) The right to be designated as a beneficiary, payee, or owner as a trustee named in an inter vivos or testamentary trust for the purposes of a nonprobate transfer on death;
- (c) For purposes of the following benefits, the right to be designated as a beneficiary and recognized as a dependent so long as notice is given in accordance with any applicable statute, rule, contract, policy, procedure, or other government document of the following benefits:

- (I) Public employees' retirement systems pursuant to articles 51 to 54.6 of title 24, C.R.S.;
- (II) Local government firefighter and police pensions;
- (III) Insurance policies for life insurance coverage; and
- (IV) Health insurance policies or health coverage if the employer of the designated beneficiary elects to provide coverage for designated beneficiaries as dependents;



(d) The right to petition for and have priority for appointment as a conservator, guardian, or personal representative for the other designated beneficiary;

(e) The right to visitation by the other designated beneficiary in a hospital, nursing home, hospice, or similar health care facility in which a party to a designated beneficiary resides or is receiving care, including the right to initiate a formal complaint alleging a violation of the rights of nursing home patients specified in section 25-1-120, C.R.S.;

(f) The right to act as a proxy decision-maker or surrogate decision-maker to make medical treatment decisions for the other designated beneficiary as if selected pursuant to section 15-18.5-103 or 15-18.5-104;

(g) The right to receive notice of the withholding or withdrawal of life-sustaining procedures for the other designated beneficiary pursuant to section 15-18-107 and the right to challenge the validity of a declaration as to medical or surgical treatment of the other designated beneficiary pursuant to section 15-18-107;

(h) The right, with respect to the other designated beneficiary, to act as an agent and to make, revoke, or object to anatomical gifts pursuant to the "Revised Uniform Anatomical Gift Act", part 1 of article 34 of title 12, C.R.S.;

(i) The right to inherit real or personal property from the other designated beneficiary through intestate succession;

(j) The right to have standing to receive benefits pursuant to the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, C.R.S., made on behalf of the other designated beneficiary;

(k) The right to have standing to sue for wrongful death on behalf of the other designated beneficiary; and

(l) The right to direct the disposition of the other designated beneficiary's last remains pursuant to article 19 of this title.

(4) This article shall not be construed to create any rights, protections, or responsibilities for designated beneficiaries that are not specifically enumerated in the designated beneficiary agreement as authorized in this article.

(5) Nothing in this article shall be construed to create evidence of a party's intent to form a common law marriage.

(6) Execution of a designated beneficiary agreement shall in no way impede the ability of individuals to make specific determinations as to any or all of the matters specified in this article by acting through superseding legal documents or other contracts or instruments.

(7) In the event that a superseding legal document is found to be invalid or unenforceable, the designated beneficiary agreement shall control despite the attempt to supersede its provisions.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 431, § 1, effective July 1.

**Cross references:** For provisions relating to coverage of a state employee's domestic partner as a dependent under a state employee group benefit plan, see § 24-50-603.

**15-22-106. Statutory form of a designated beneficiary agreement.** (1) The following statutory form shall be the standard form for a designated beneficiary agreement:

DESIGNATED BENEFICIARY AGREEMENT

DISCLAIMER

**Warning:** While this document may indicate your wishes, certain additional documents may be needed to protect these rights.

This designated beneficiary agreement is operative in the absence of other estate planning documents and will be superseded and set aside to the extent it conflicts with valid instruments such as a will, power of attorney, or beneficiary designation on an insurance policy or pension plan. This designated beneficiary agreement is superseded by such other documents and does not cause any changes to be made to those documents or designations. The parties understand that executing and signing this agreement is not sufficient to designate the other party for purposes of any insurance policy, pension plan, payable upon death designation or manner in which title to property is held and that additional action will be required to make or change such designations. The parties understand that this designated beneficiary agreement may be one component of estate planning instructions and that they are encouraged to consult an attorney to ensure their estate planning wishes are accomplished.

We, \_\_\_\_\_, (insert full name and address) referred to as party A, and \_\_\_\_\_, (insert full name and address) referred to as party B, hereby designate each other as the other's designated beneficiary with the following rights and protections, granted or withheld as indicated by our initials:

TO GRANT ONE OR MORE OF THE RIGHTS OR PROTECTIONS SPECIFIED IN THIS FORM, INITIAL THE LINE TO THE LEFT OF EACH RIGHT OR PROTECTION YOU ARE GRANTING. TO WITHHOLD A RIGHT OR PROTECTION, INITIAL THE LINE TO THE RIGHT OF EACH RIGHT OR PROTECTION YOU ARE WITHHOLDING.

A DESIGNATED BENEFICIARY AGREEMENT SHALL BE PRESUMED TO GRANT ALL OF THE RIGHTS AND PROTECTIONS LISTED IN THIS FORM UNLESS THE PARTIES WITHHOLD A RIGHT OR PROTECTION IN THE MANNER SET FORTH IMMEDIATELY ABOVE.

TO GRANT A RIGHT TO WITHHOLD A RIGHT OR PROTECTION OR PROTECTION	
INITIAL	INITIAL

TO GRANT A RIGHT		TO WITHHOLD A RIGHT
OR PROTECTION		OR PROTECTION
INITIAL		INITIAL
Party A	Party B	Party A
		Party B

—	—	The right to acquire, hold title to, own jointly, or transfer inter vivos or at death real or personal property as a joint tenant with me with right of survivorship or as a tenant in common with me;	—	—
—	—	The right to be designated by me as a beneficiary, payee, or owner as a trustee named in an inter vivos or testamentary trust for the purposes of a nonprobate transfer on death;	—	—
—	—	The right to be designated by me as a beneficiary and recognized as a dependent in an insurance policy for life insurance;	—	—



TO GRANT A RIGHT OR PROTECTION			TO WITHHOLD A RIGHT OR PROTECTION	
INITIAL			INITIAL	
Party A	Party B		Party A	Party B
—	—	The right to be designated by me as a beneficiary and recognized as a dependent in a health insurance policy if my employer elects to provide health insurance coverage for designated beneficiaries;	—	—
—	—	The right to be designated by me as a beneficiary in a retirement or pension plan;	—	—
—	—	The right to petition for and have priority for appointment as a conservator, guardian, or personal representative for me;	—	—
—	—	The right to visit me in a hospital, nursing home, hospice, or similar health care facility in which a party to a designated beneficiary agreement resides or is receiving care;	—	—
—	—	The right to initiate a formal complaint regarding alleged violations of my rights as a nursing home patient as provided in section 25-1-120, Colorado Revised Statutes;	—	—
—	—	The right to act as a proxy decision-maker or surrogate decision-maker to make medical care decisions for me pursuant to section 15-18.5-103 or 15-18.5-104, Colorado Revised Statutes;	—	—
—	—	The right to notice of the withholding or withdrawal of life-sustaining procedures for me pursuant to section 15-18-107, Colorado Revised Statutes;	—	—
—	—	The right to challenge the validity of a declaration as to medical or surgical treatment of me pursuant to section 15-18-108, Colorado Revised Statutes;	—	—
—	—	The right to act as my agent to make, revoke, or object to anatomical gifts involving my person pursuant to the “Revised Uniform Anatomical Gift Act”, part 1 of article 34 of title 12, Colorado Revised Statutes;	—	—
—	—	The right to inherit real or personal property from me through intestate succession;	—	—
—	—	The right to have standing to receive benefits pursuant to the “Workers’ Compensation Act of Colorado”, article 40 of title 8, Colorado Revised Statutes, in the event of my death on the job;	—	—
—	—	The right to have standing to sue for wrongful death in the event of my death; and	—	—
—	—	The right to direct the disposition of my last remains pursuant to article 19 of title 15, Colorado Revised Statutes.	—	—

THIS DESIGNATED BENEFICIARY AGREEMENT IS EFFECTIVE WHEN RECEIVED FOR RECORDING BY THE COUNTY CLERK AND RECORDER OF THE

COUNTY IN WHICH ONE OF THE DESIGNATED BENEFICIARIES RESIDES. THIS DESIGNATED BENEFICIARY AGREEMENT WILL CONTINUE IN EFFECT UNTIL ONE OF THE DESIGNATED BENEFICIARIES REVOKES THIS AGREEMENT BY RECORDING A REVOCATION OF DESIGNATED BENEFICIARY FORM WITH THE COUNTY CLERK AND RECORDER OF THE COUNTY IN WHICH THIS AGREEMENT WAS RECORDED OR UNTIL THIS AGREEMENT IS SUPERSEDED IN PART OR IN WHOLE BY A SUPERSEDING LEGAL DOCUMENT.

Signature of designated beneficiary

Signature of designated beneficiary

STATE OF COLORADO

County of \_\_\_\_\_

This document was acknowledged before me on \_\_\_\_\_ date  
by \_\_\_\_\_

My commission expires \_\_\_\_\_

[Seal]

\_\_\_\_\_  
Notary Public

(2) The instructions to each party regarding how to grant or withhold a right or protection by initialing and the words “Party A” and “Party B” shall appear at the top of each page of the statutory form above the columns for the initials of the designated beneficiaries.

(3) A designated beneficiary agreement shall be presumed to extend all of the rights and protections listed in the statutory form unless the parties to the agreement explicitly exclude a right or protection.

(4) A party to a designated beneficiary agreement may limit the scope of a designated beneficiary agreement by the terms of the agreement or by executing a superseding legal document that controls and supersedes part or all of the designated beneficiary agreement.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 433, § 1, effective July 1. **L. 2010:** Entire section amended, (SB 10-199), ch. 374, p. 1754 § 23, effective July 1.

**Editor’s note:** (1) Section 25 of chapter 374, Session Laws of Colorado 2010, provides that the act amending this section:

- (a) Applies to governing instruments executed by decedents who die on or after July 1, 2010; and any proceeding in court then pending or thereafter commenced regardless of the time of death of the decedent except to the extent that, in the opinion of the court, the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of a provision of the act; and
- (b) Does not apply to an action performed before July 1, 2010, in any proceeding; an accrued right; a right that is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before July 1, 2010; or a provision of a governing instrument that was executed before July 1, 2010, and includes a clear indication of a contrary intent.

**15-22-107. Recording - duties of the county clerk and recorder - fee.** (1) A signed and acknowledged designated beneficiary agreement shall be recorded with the county clerk and recorder in the county in which one of the parties resides. The designated beneficiary agreement shall be effective as of the date and time as received for recording by the county clerk and recorder. The county clerk and recorder shall assess a recording fee for recording the designated beneficiary agreement in that county, a fee for issuing two certified copies of the designated beneficiary agreement that indicate the date and time of recording with the county, and a fee for taking acknowledgments, if applicable, as provided in section



30-1-103, C.R.S. All fees collected by the county clerk and recorder shall be deposited in the county clerk's fee fund maintained as required in section 30-1-119, C.R.S. The county clerk and recorder may require the person recording the designated beneficiary agreement to indicate the mailing address to which the original document should be returned after recording.

(2) The clerk and recorder of the county is encouraged to make available copies of the statutory forms as prescribed in sections 15-22-106 and 15-22-111.

(3) The clerk and recorder of the county shall have the following duties:

(a) To indicate on the designated beneficiary agreement or a revocation of a designated beneficiary agreement the date and time that it is recorded with the clerk and recorder;

(b) To issue two certified copies of the recorded designated beneficiary agreement that indicate the date and time of the recording;

(c) To issue replacement certified copies of a designated beneficiary agreement or a revocation of a designated beneficiary agreement upon payment of a replacement fee.

(4) Designated beneficiary agreements and revocations of designated beneficiary agreements shall be considered open records for purposes of part 2 of article 72 of title 24, C.R.S.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 436, § 1, effective July 1.

**15-22-108. Designated beneficiary agreement - effect on other legal documents.** Execution of a designated beneficiary agreement shall not constitute evidence of an intent to revoke a prior will or codicil nor shall it affect any beneficiary designation, transfer, or bequest contained in any other legal documents.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 437, § 1, effective July 1.

**15-22-109. Affirmation of validity of designated beneficiary agreement.** A person exercising rights or protections pursuant to a designated beneficiary agreement shall affirm the validity of a designated beneficiary agreement and disclose any knowledge of any superseding legal documents.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 437, § 1, effective July 1.

**15-22-110. Reliance - immunity.** A third party who acts in good faith reliance on the affirmation of the existence of a valid designated beneficiary agreement shall not be subject to civil liability or administrative discipline for such reliance.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 437, § 1, effective July 1.

**15-22-111. Revocation of a designated beneficiary agreement.** (1) A designated beneficiary agreement that has been recorded with a county clerk and recorder may be unilaterally revoked by either party to the agreement by recording a revocation with the clerk and recorder of the county in which the agreement was recorded. A revocation shall be dated, signed, and acknowledged. The revocation shall be effective on the date and time the revocation is received for recording by the county clerk and recorder. The clerk and recorder shall issue a certified copy to the party recording the revocation and shall mail a certified copy of the revocation to the last-known address of the other party to the designated beneficiary agreement.

(2) The county clerk and recorder shall assess fees, as provided in section 30-1-103, C.R.S., for recording a revocation agreement and issuing two certified copies of the revocation agreement, plus an additional amount to cover the cost of first class postage for mailing a certified copy of the revoked designated beneficiary agreement to the other party.

The fees collected by the clerk and recorder shall be deposited in the county clerk’s fee fund maintained as required in section 30-1-119, C.R.S.

(3) A designated beneficiary agreement shall be deemed revoked upon the marriage of either party. In the case of a common law marriage, a designated beneficiary agreement shall be deemed revoked as of the date the court determines that a valid common law marriage exists.

(4) The following statutory form shall be the standard form for a revocation of a designated beneficiary agreement:

**REVOCATION  
OF DESIGNATED BENEFICIARY AGREEMENT**

I \_\_\_\_\_ (insert your full name), reside at \_\_\_\_\_ (insert your current address) and I entered into a designated beneficiary agreement on \_\_\_\_\_ (insert the date) with the following person \_\_\_\_\_ (insert the other person’s name) whose last-known address is \_\_\_\_\_ in which I designated such person as a designated beneficiary. This designated beneficiary agreement was recorded on \_\_\_\_\_ (insert the date) in the county of \_\_\_\_\_. The indexing file number of the designated beneficiary agreement is \_\_\_\_\_. I hereby revoke that designated beneficiary agreement, effective on the date and time that this revocation is received for recording by the clerk and recorder of \_\_\_\_\_ county.

\_\_\_\_\_  
Name Date

STATE OF COLORADO

County of \_\_\_\_\_  
This document was subscribed, sworn to, and acknowledged before me on \_\_\_\_\_ date by \_\_\_\_\_

My commission expires \_\_\_\_\_

[Seal]

\_\_\_\_\_  
Notary Public

This revocation of beneficiary agreement was recorded in my office on \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ o’clock, and, pursuant to section 15-22-111, Colorado Revised Statutes, I mailed a copy of this revocation of beneficiary agreement to \_\_\_\_\_ at the address contained in this revocation of beneficiary agreement.

Clerk and Recorder of  
\_\_\_\_\_ County  
By: \_\_\_\_\_

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 437, § 1, effective July 1.

**15-22-112. Death of a designated beneficiary - effect on designated beneficiary agreement.** (1) A designated beneficiary agreement is terminated upon the death of either of the parties to the designated beneficiary agreement; however, a right or power which a designated beneficiary agreement conferred upon a designated beneficiary survives the death of the other designated beneficiary.  
(2) A party to a designated beneficiary agreement who survives a designated beneficiary may enter into a designated beneficiary agreement with a different person so long as it meets the requirements of this article.

**Source: L. 2009:** Entire article added, (HB 09-1260), ch. 107, p. 438, § 1, effective July 1.





















